

The Rise of the Guilty Plea in Australian Supreme Courts: A History

Author

Durnian, Lisa

Published

2018-05

Thesis Type

Thesis (PhD Doctorate)

School

School of Crim & Crim Justice

DOI

<https://doi.org/10.25904/1912/1915>

Copyright Statement

The author owns the copyright in this thesis, unless stated otherwise.

Downloaded from

<http://hdl.handle.net/10072/380293>

Griffith Research Online

<https://research-repository.griffith.edu.au>

The Rise of the Guilty Plea in Australian Supreme Courts: A History

Lisa Durnian

BA (Hons), GDipEd (Sec) UQ

School of Criminology and Criminal Justice

Arts, Education & Law Group

Griffith University

Submitted in fulfilment of the requirements of the degree of Doctor of Philosophy

May 2018

Abstract

The contemporary Australian criminal prosecution process functions as a guilty plea system. The guilty plea is critical to the efficient running of criminal courts and the criminal justice system. Statutory provisions and case law almost guarantee that defendants prosecuted for serious criminal offences receive sentence reductions in exchange for guilty pleas. Whilst guilty pleas are arguably the most important mitigating factor that contemporary judges consider in their sentencing deliberations, this was not always the case. Historically, most defendants pleaded ‘not guilty’ and jury trials were the dominant mode of case disposition. Yet defendants began pleading guilty in increasingly greater proportions in some US and English courts from around the mid-nineteenth century. The ‘rise of the guilty plea’ triggered system transformation from jury trial to a guilty plea system of prosecution.

This thesis is the first research to examine the rise of the guilty plea in the Australian context. It departs from previous scholarship by arguing a theoretical framework that positions the ‘guilty plea’ rather than ‘plea bargaining’ as the focus of study. The historical plea bargaining scholarship hypothesises that the guilty plea phenomenon was the outcome of emerging plea bargaining practices between prosecuting and defence counsel. However the precursors to bargaining, including public prosecution and centralised policing, were extant in the Australian criminal justice system long before guilty pleas began accelerating. This thesis argues that a plea bargaining framework is unsuited to explaining system transformation in Australian courts.

This thesis employs a mixed methods research methodology to investigate guilty pleas at both a macro and micro-level of analysis. The quantitative study employs large

scale data from the Australian Research Council Laureate Fellowship project, 'The Prosecution Project'. It tracks the acceleration of defendants' guilty pleas in more than 10,000 cases prosecuted in the Queensland, Western Australian and Victorian Supreme Courts between 1901 and 1961. It identifies the mid-twentieth century as the period when system transformation occurred in Australian courts, significantly later than hypothesised in the current scholarship. The significant mechanism driving this acceleration was the rapid increase in guilty pleas to property theft prosecutions, specifically burglary and stealing.

The qualitative component of the study provides micro-level, in-depth analysis of the practices of police, lawyers, and the judiciary that influenced defendants' guilty pleas. The analysis focuses on 60 property theft cases prosecuted in the Queensland Supreme Court, but also synthesises a range of archival sources including reported decisions, administrative records, and newspapers. This analysis identifies the key role of police practices in the pre-trial stage of the prosecution process. These practices focused on convictions obtained through confessional material, rather than investigation, but increasingly included problematic practices such as inducing confessions and guilty pleas. However, crown prosecutors and the judiciary failed to acknowledge the extent of these practices until the transformation to a guilty plea system was complete. Police practices were thus the central cog in a series of linked gears of practice involving lawyers and the judiciary that influenced defendants' decisions to plead guilty and established the origins of the contemporary guilty plea system.

Statement of Originality

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Lisa Durnian

Acknowledgements

My deepest thanks go to my wonderful supervisors, Mark Finnane, Andy Kaladelfos and Rachel Dioso-Villa. Their knowledge, advice and criticism, and encouragement have been invaluable. I have learnt an enormous amount from the ‘The Prosecution Project’ team, Mark, Andy, Alana, Yorick, Robyn, and Melanie and am very grateful for the opportunity to work with them. I am also grateful to the archivists and librarians at Griffith University, the Queensland State Archives, the Queensland Police Museum, and the Supreme Court Library for their assistance. I acknowledge the financial support provided by the Australian Government Research Training Program Scholarship, the Australian Research Council Laureate Fellowship, and Griffith University.

Supportive friends and colleagues have provided diversion and encouragement when needed. I owe special thanks to Robyn, a truly gold-standard ‘PhD buddy’, for sharing the frustrations and successes on this journey. Colleagues Jillian, James, Jo, Gina, Renee, and Sue have inspired and encouraged me to see myself as a scholar. Andi offered sage advice from both sides of the experience. Thanks to the ‘Alex Hills’ crew for providing much needed support during the final stretch, and the lovely folk at ‘Can You Keep A Secret’, who always provided a welcome writing retreat away from the demands of family life in a tiny house.

Finally, this thesis was completed with, and occasionally despite, my sons Keller, Quinn, and Morgan. Thank you, always, for holding true and supporting my dream to become ‘Dr Durnian’. I love you to the moon and back.

List of abbreviations

ABS	Australian Bureau of Statistics
CCA	Queensland Court of Criminal Appeal
CIB	Criminal Investigation Branch
CJ	Chief Justice
CJC	Criminal Justice Commission
DA	District Attorney
DC	District Court
DPP	Director of Public Prosecutions
HCA	High Court of Australia
NSW	New South Wales
PD	Public Defender
QJPR	Queensland Justice of the Peace and Local Authorities Journal
QLD	Queensland
QSR/Qd R	Queensland State Reports
QWN	Queensland Weekly Notes
US	United States
VIC	Victoria
WA	Western Australia

Contents

ABSTRACT.....	II
STATEMENT OF ORIGINALITY	IV
ACKNOWLEDGEMENTS	V
LIST OF ABBREVIATIONS	VI
CONTENTS	VII
PART ONE: INTRODUCTION AND LITERATURE REVIEW	XII
CHAPTER 1. INTRODUCTION.....	1
ADA SELMAN’S GUILTY PLEA	3
THE CONTEMPORARY RELEVANCE OF THE GUILTY PLEA	12
RESEARCH AIMS AND QUESTIONS	15
<i>Research design</i>	15
THE STRUCTURE OF THE THESIS.....	18
<i>Part 1: Introduction and Literature</i>	18
<i>Part 2: The Quantitative Study</i>	19
<i>Part 3: The Qualitative Study</i>	20
<i>Part 4: Conclusions and Further research</i>	21
THE SIGNIFICANCE OF THE RESEARCH	22
CHAPTER 2. LITERATURE REVIEW	24
GUILTY PLEAS AND THE DISCOUNT PRINCIPLE	26
THE RISE OF GUILTY PLEAS.....	32

Contents

PLEA BARGAINING IN THE HISTORICAL RECORD	34
THE PROFESSIONALISATION HYPOTHESIS	38
<i>Lawyers</i>	39
<i>Policing</i>	41
<i>Case complexity and caseload pressure</i>	44
<i>Summary</i>	46
THE CONTEXTUALIST CRITIQUE	47
<i>Summary</i>	51
APPLYING THEORY TO THE AUSTRALIAN CONTEXT	52
<i>The committal hearing</i>	53
<i>Public prosecution</i>	54
<i>Police process corruption</i>	57
<i>Summary</i>	60
CONCLUSION	60
PART TWO: THE QUANTITATIVE STUDY	62
CHAPTER 3. THE GUILTY PLEA PHENOMENON	63
METHODOLOGY	66
<i>The quantitative sample</i>	67
<i>Data coding and analyses</i>	68
THE RISE OF THE GUILTY PLEA	71
<i>Accelerating guilty pleas in Australian prosecutions</i>	72
<i>Guilty pleas and offences</i>	75
QUEENSLAND AND VICTORIA: LATE PLEAS AND LAWYERS	82
<i>Queensland: Timing of guilty pleas</i>	84
<i>Victoria: Lawyers and pleas</i>	89
CONCLUSION	97
PART THREE: THE QUALITATIVE STUDY	101
CHAPTER 4. THE POLICE AND THE GUILTY PLEA	102

METHODOLOGY.....	Contents	106
<i>The qualitative sample</i>		108
<i>The depositions</i>		109
<i>Analytical approach</i>		112
THE EVIDENCE FROM THE POLICE COURTS.....		113
<i>The police investigation</i>		114
<i>The police evidence</i>		119
<i>Confessions</i>		135
<i>Inducements: The ‘third degree’</i>		146
<i>Inducements: Promises</i>		152
<i>The Judges’ Rules</i>		160
CONCLUSION		164
CHAPTER 5. THE LAWYERS AND THE GUILTY PLEA		167
THE 1941 MACKAY ROYAL COMMISSION.....		169
LATE PLEAS AND PLEA BARGAINING		176
<i>No concessions</i>		177
<i>Withdrawal of subsequent charges</i>		180
<i>Jury convictions</i>		182
<i>Lesser offences</i>		183
GUILTY PLEAS TO <i>EX OFFICIO</i> INDICTMENTS.....		185
DEFENCE LAWYERS’ PRACTICES IN THE POLICE COURT		195
<i>Legal representation</i>		196
<i>Defence counsel</i>		197
<i>Cross-examination</i>		203
CONCLUSION		216
CHAPTER 6. THE JUDICIARY AND THE GUILTY PLEA		220
POLICE MAGISTRATES.....		223
<i>a. Assessing a prima facie case</i>		225

<i>b. Allegations against police</i>	Contents	231
<i>c. Police inducements and guilty pleas</i>		238
SUPREME COURT JUDGES		241
<i>Sentencing</i>		243
<i>Sentence outcomes in the 60 prosecutions sample</i>		246
<i>Sentencing factors, 1926-1961</i>		250
<i>Conclusion</i>		273
PART FOUR: CONCLUSIONS AND FURTHER RESEARCH		276
CHAPTER 7. CONCLUSION		277
THE RESEARCH STRATEGY		278
QUANTITATIVE FINDINGS		279
QUALITATIVE FINDINGS		283
SYSTEM TRANSFORMATION		285
CONTRIBUTION AND FURTHER RESEARCH.....		287
APPENDIX 1. QUEENSLAND SUPREME COURT REGISTER PAGE, 1915		290
APPENDIX 2. THE QUANTITATIVE STUDY VARIABLES		291
APPENDIX 3. DEPOSITION EXAMPLES		293
APPENDIX 4. RESEARCH METHODS		295
THE QUANTITATIVE STUDY		295
<i>Identifying guilty pleas in the historical record</i>		295
<i>Coding the offence data</i>		296
<i>Quantitative analyses</i>		297
THE QUALITATIVE STUDY		298
<i>Criminal justice system sources</i>		298
<i>Data collection and analysis</i>		302

<i>Defendant characteristics</i>	Contents	305
<i>Research strategy</i>		305
APPENDIX 5. OFFENCE CATEGORIES		308
APPENDIX 6. THE QUALITATIVE STUDY SAMPLE CHARACTERISTICS		310
APPENDIX 7. THE QUANTITATIVE STUDY: ACCELERATING GUILTY PLEAS		318
APPENDIX 8. THE QUANTITATIVE STUDY: GUILTY PLEA TIMING		321
APPENDIX 9. THE QUANTITATIVE STUDY: LEGAL REPRESENTATION		323
APPENDIX 10. THE QUALITATIVE STUDY: CRIMINAL/CIVIL CASELOAD, 1946-1951		325
BIBLIOGRAPHY		326

Part One: Introduction and Literature Review

Chapter 1. Introduction

The common law criminal justice processes in Australia, England, and the US share common attributes. One of these attributes is the system transformation of the prosecution process, from the adversarial jury trial to a guilty plea system.¹ This transformation was triggered by the acceleration over time in the proportion of defendants pleading guilty. This ‘rise of the guilty plea’ is generally attributed to the emergence of plea bargaining.² But although contemporary Australian criminal courts operate in a guilty plea system driven by state-mandated plea bargaining, it is a “functional fallacy” to infer that current practices of plea bargaining necessarily explain the historical origins of the guilty plea system.³

This thesis is the first research examining the origins and development of the guilty plea system in the Australian context. The historical plea bargaining scholarship posits that the rise of the guilty plea in nineteenth century US courts was the outcome of emergent plea bargaining practices. However, the mechanisms hypothesised to explain the development of plea bargaining, including public prosecution and centralised policing,⁴ were established decades before the Australian phenomenon occurred. This suggests that plea bargaining may be the outcome, rather than the precursor, of system transformation in Australian courts. This thesis therefore employs a theoretical framework that positions guilty pleas, rather than plea bargaining, as the unit of

¹ Asher Flynn, "Plea-Negotiations, Prosecutors and Discretion: An Argument for Legal Reform," *Australian & New Zealand Journal of Criminology* 49, no. 4 (2016): 2.

² Mike McConville and Chester Mirsky, "The Rise of Guilty Pleas: New York, 1800-1865," *Journal of Law and Society* 22, no. 4 (1995): 444.

³ Malcolm M. Feeley, "Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining," *Israel Law Review* 31 (1997): 184.

⁴ Mike McConville and Chester Mirsky, *Jury Trials and Plea Bargaining: A True History* (Portland, OR: Hart Publishing, 2005), 332.

Chapter 1 - Introduction

analysis. By doing so, this research provides a new theoretical explanation for the rise of the guilty plea.

This thesis employs a mixed methods research methodology to examine guilty pleas at both the macro and micro level of analysis. The quantitative element of the research identifies the time when guilty pleas first came to dominate criminal proceedings in more than 10,000 cases prosecuted in the Australian Supreme Court between 1901 and 1961. It shows that the transition periods in the Queensland, Western Australian and Victoria supreme courts - between the late 1940s and mid-1950s - occurred significantly later than the period hypothesised in the historical plea bargaining scholarship. This scholarship attributes the rise of the guilty plea to the emergence of plea bargaining. Current theory hypothesises a relationship between 'late' guilty pleas and plea bargaining; i.e. guilty pleas entered at the arraignment stage of the trial as evidence of bargaining between prosecutors and defence counsel. However, this thesis presents new evidence that 'early' guilty pleas, entered during the lower court committal proceedings, were more instrumental to the rise of guilty pleas. This evidence presents an alternative explanation requiring further investigation through in-depth qualitative study.

Micro-level analysis of archival criminal justice documents is critical to understanding the key processes influencing defendants' guilty pleas during the shift to a guilty plea system.⁵ The foundation of the qualitative study focuses on analysis of 60 guilty plea cases prosecuted in the Queensland Supreme Court between 1926 and 1961, the key transition period to a guilty plea system. This analysis investigates the practices

⁵Tim Hitchcock and William J. Turkel, "The Old Bailey Proceedings, 1674–1913: Text Mining for Evidence of Court Behavior," *Law and History Review* 34, no. 4 (2016): 953.

of key criminal justice actors- police, lawyers, and the judiciary- that appear to have influenced defendants' guilty pleas. This thesis argues that police practices were the central cog in a series of linked gears of practice involving lawyers and the judiciary. In the Australian context it is the police, not the lawyers, who play the central role in the rise of the guilty plea.

Ada Selman's guilty plea

The 1951 case of defendant Ada Selman captures many of the key practices of police, lawyers, and the judiciary that this thesis argues influenced defendants' guilty pleas during system transformation.⁶ Selman pleaded guilty in the Brisbane Police Court on December 12, 1950, to a charge of breaking and entering a house the week before. She was not legally represented during her interrogation or her committal hearing and no lawyer attended her sentencing hearing in the Supreme Court to submit any mitigating circumstances on her behalf. There was no plea bargain between defence and prosecuting counsel; Ada pleaded guilty at her committal hearing in the police court, prior to any contact with the crown prosecutor.

The police prosecution evidence against Ada relied heavily on confessional material. Detective Constable Denis Bodenham testified that the defendant made a verbal confession admitting the offence as soon as Bodenham and colleague Detective Mahony began questioning her at the watch house. It is not clear from Bodenham's testimony why Selman was already in custody when her interrogation began. The

⁶ Queensland State Archives Item ID96173, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #36691, QLDSC, Anon., 1951. "Ada Selman" is a pseudonym. This thesis anonymises defendants' names from 1937 onward but includes defendants' actual names in cases prosecuted between 1901 and 1936.

Chapter 1 - Introduction

detective simply stated he had “certain information” which led him to believe she had committed the offence. His testimony does reveal that, during their investigations, the detectives committed multiple breaches of the Judges’ Rules, the only rules of practice guiding police investigations during this period.

The Judges’ Rules were initially formulated to ensure that confessions were voluntary, and that defendants’ rights were protected during police interrogations.⁷ The Rules stipulated that defendants in custody should not be interrogated. Bodenham claimed that he did caution Ada Selman twice during the investigation and interrogation. The first caution was appropriately issued, as soon as she made her verbal confession. The second was the final and formal caution issued to defendants during their formal arrest and charge, the final stage of the police investigation. However, Bodenham had not cautioned Selman before his questioning began, even though she was in custody in the watch house or cautioned her again when she later ‘accompanied’ police to identify the house in question. These failures to caution Selman whilst she was in custody was problematic when considering that the police prosecution case rested solely on her confession.

There was no evidence presented by police that tied the defendant to the offence other than the alleged verbal confession. Bodenham testified that the defendant pointed to the house and told police how she gained entry through an unlocked window accessible from the veranda. A close reading of the transcript indicates Bodenham did not admit that they went into the house or that they even left the police vehicle, typical

⁷ John Carter Wood, “‘The Third Degree’: Press Reporting, Crime Fiction and Police Powers in 1920s Britain,” *Twentieth Century British History* 21, no. 4 (2010): 473-74.

Chapter 1 - Introduction

practice in burglary investigations.⁸ Furthermore, Bodenham claimed he told Selman they had found a fingerprint on a pane of glass and that she allegedly replied, “It will probably be mine”. He told the court he later went to the fingerprint section of the Criminal Investigation Branch (CIB) and “ascertained that the fingerprint had been classified”. Yet this point was struck out of the deposition record without any additional explanation. The fingerprint was not entered into evidence, and no-one from the fingerprint section testified to the alleged classification. The only evidence tying Selman to the crime, other than Bodenham’s uncorroborated and unrecorded recollection of events, was a very short, handwritten confession:

I seen [sic] a woman in the house. I asked her if she wanted any work done and she said no. I then went outside and waited for a few minutes. I seen [sic] her leave the house. I then went into the house. I went to a window on the veranda, pushed it up. I went inside the house and pulled a drawer out in the room. I went to the kitchen and I went back to the window and got out.⁹

It is likely that this confession influenced Ada Selman’s guilty plea. Confessions are the “gold standard” in evidence.¹⁰ It was very difficult for defence counsel or defendants to argue at trial against a confession. As one Queensland judge acknowledged “the defence cannot get anywhere unless it can escape from that confession”.¹¹

Ada Selman subsequently pleaded guilty to two other offences in the Supreme Court, but these charges did not proceed through the Police Court. Rather, she pleaded guilty on *ex officio* indictment. The *ex officio* indictment process was generally the

⁸ Queensland State Archives Item ID96173, Depositions and indictments.

⁹ Queensland State Archives Item ID96173, Depositions and indictments

¹⁰ Saul M Kassin et al., "Police-Induced Confessions: Risk Factors and Recommendations," *Law and Human Behavior* 34, no. 1 (2010): 4.

¹¹ *R v Willie* [1960] Qd R 525.

Chapter 1 - Introduction

province of the attorney general to prosecute defendants in the Supreme Court without the requirement of a committal hearing.¹² Yet Ada's case reveals that police and crown prosecutors employed this process to obtain guilty pleas without the oversight of the police magistrate to determine whether the evidence constituted a *prima facie* case. In a letter dated December 13, 1950, Bodenham informed the Brisbane CIB Chief that Selman pleaded guilty at the committal hearing to one charge of breaking and entering and that "she desired to plead guilty" to two further charges by way of *ex officio indictment*.¹³ Bodenham's letter and attached facts relating to the charges were subsequently forwarded to the crown solicitor's office for the crown prosecutor's approval.

The evidence for the *ex officio* indictment charges included two verbal confessions, one typed unsigned statement, a length of linen material and some handkerchiefs allegedly taken from one house, and 1/5 in silver and copper coins allegedly taken from the other. There was no forensic evidence or identification evidence that tied her to the offences. There was no explanation why these multiple charges were not dealt with through the usual committal process, at either of Selman's two court appearances. Considering both the weakness of the evidence and the failure to appropriately follow the correct procedure for cautioning defendants in custody, Selman arguably had a defence. Some Queensland trial judges refused to admit confessions as evidence when detectives failed to caution defendants before their questioning.¹⁴ In Ada's case, however, neither the police magistrate nor the Supreme Court judge inquired into the police practices that obtained her confession, and her plea.

¹² Gareth Griffith, "The Office of Attorney General in New South Wales," *Legal History* 11 (2007): 91.

¹³ Queensland State Archives Item ID96173, Depositions and indictments

¹⁴ *R v Fitzpatrick* [1934] QWN 25.

Chapter 1 - Introduction

On February 12, 1951, Selman herself presented a handwritten, two-sentence letter to Acting Justice O'Hagan in the Brisbane Supreme Court, saying she was sorry and promising "to go straight".¹⁵ The crown prosecutor Mr Carter told the court that Selman had prior convictions for child abandonment and stealing. In 1947, a Brisbane newspaper reported that Ada was charged in the police court after abandoning her 11-day old baby.¹⁶ Between 1948 and 1950, she was summarily convicted of three offences of stealing from men she was acquainted with, but the offences were not burglary-related. Carter communicated the police report to the court, including her prior offences, and commented that Ada was "mentally retarded".¹⁷ Justice O'Hagan said that he found it "difficult" to know how to deal with her; she had not had "a chance in life that other people have had" and was "apparently sub normal".¹⁸ For those reasons, he sentenced her to nine months imprisonment on each charge, to be served concurrently. O'Hagan did not make any reference to the fact she pleaded guilty. There was no recognition that by giving up her right to a trial she had saved both the witnesses and the court time and expense. In early 1951, guilty pleas were not yet mitigating factors considered in judges' sentencing deliberations.

The historical scholarship provides a theoretical basis for explaining the guilty plea phenomenon in relation to plea bargaining. These studies involve research in a handful of US court jurisdictions and London's Old Bailey criminal court during the

¹⁵ Queensland State Archives Item ID96163, Depositions and indictments.

¹⁶ "Abandoned Baby," *Maryborough Chronicle*, August 1, 1947, <http://nla.gov.au/nla.news-article147457131>.

¹⁷ "Woman Burglar Jailed," *Brisbane Telegraph*, February 12, 1951, <http://nla.gov.au/nla.news-article212598270>

¹⁸ Queensland State Archives Item ID96173, Depositions and indictments.

Chapter 1 - Introduction

nineteenth century. Two schools of thought explain the emergence of plea bargaining, and hence the rise of the guilty plea: the professionalisation hypothesis and the contextualist critiques.¹⁹ These two theories argue that 1) key developments in the professionalisation of lawyers and police created the modern adversarial trial system that was complex and time-consuming, and that required alternative modes of resolving cases quickly and efficiently,²⁰ or 2) broader socio-political responses to social disorder during the mid-nineteenth century resulted in significant change to the criminal justice system, including the shift from private to public prosecution, and the politicisation of the office of the district attorney (DA).²¹ Yet there was little evidence in Ada Selman's case that plea bargaining elicited her plea. Although the historical plea bargaining scholarship posits that the acceleration in guilty pleas was the consequence of negotiations between prosecuting and defence counsel in the higher courts, Selman's plea like most others in Queensland during the 1950s, appears to have been influenced more by police practices rather than bargaining practices between lawyers.

There are several reasons why the historical plea bargaining hypothesis does not explain the rise of the guilty plea in the Australian context. There are important differences between the development of the Australian criminal justice system and those

¹⁹ McConville and Mirsky, *A True History*, 1-2.

²⁰ John H. Langbein, "The Criminal Trial before the Lawyers," *The University of Chicago Law Review* 45, no. 2 (1978); "Understanding the Short History of Plea Bargaining," *Law & Society Review* 13, no. 2 (1979); Feeley, "Legal Complexity."; Lawrence M. Friedman, "Plea Bargaining in Historical Perspective," *Law & Society Review* 13, no. 2 (1979); Lawrence M. Friedman and Robert V. Percival, *The Roots of Justice: Crime and Punishment in Alameda County California, 1870-1910* (Chapel Hill, NC: University of North Carolina Press 1981).

²¹ McConville and Mirsky, *A True History*; "Rise of Guilty Pleas."; Theodore N. Ferdinand, *Boston's Lower Criminal Courts, 1814-1850* (Newark, NJ: University of Delaware Press, 1992); Mary E Vogel, *Coercion to Compromise: Plea Bargaining, the Courts and the Making of Political Authority*. (Oxford: Oxford University Press, 2007); "The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860," *Law & Society Review* 33, no. 1 (1999); Allen Steinberg, *The Transformation of Criminal Justice, Philadelphia, 1800-1880* (Chapel Hill, NC: University of North Carolina Press, 1989); "From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History," *Crime & Delinquency* 30, no. 4 (1984).

Chapter 1 - Introduction

in the US and England. Australia's system developed much later in conditions that impacted the development of criminal prosecution in the Australian context differently. Colonial administration fostered public prosecution very early in the history of white settlement;²² yet Australian courts did not consider plea bargaining or sentence reduction for guilty pleas until the 1970s and 1980s.²³ Additionally, contextualist theories based on state responses to mass social disorder, characterised by intense industrial protest and rioting in Europe and the US during the nineteenth century, are not generalisable to Australian socio-political conditions in the mid-twentieth century.²⁴

This thesis argues that the plea bargaining framework does not explain the rise of the guilty plea in Australian courts. The factors hypothesised to trigger system transformation in nineteenth century US courts were established in the Australian setting long before the proportion of guilty pleas first began to increase. This research therefore employs a more expansive examination of the criminal justice system by focusing on the individual practices of key actors like police and judges. This research also examines the ways that these practices overlapped or influenced the practices of other criminal justice actors, and ultimately, the defendant and their plea. By focusing on the guilty plea as the unit of analysis, this thesis explores practices that induced defendants' guilty pleas unrelated to bargaining. This thesis argues that plea bargaining was the outcome, not the cause, of the shift to a guilty plea system.

²² R.R. Kidston, "The Office of Crown Prosecutor (More Particularly in New South Wales)," *Australian Law Journal* 32 (1958): 149.

²³ *R v Shannon* (1979) 21 SASR 442.

²⁴ McConville and Mirsky, *A True History*, 333. McConville and Mirsky argue that "there is no reason to conclude that one form of government is more capable of responding to the needs of the population than another simply because of the passage of time or the growth in population". I suggest that the 'culture of local government' relied on by McConville and Mirsky is context-specific and that plea bargaining was not a driving factor influencing the rise of the guilty plea in the Australian context.

Chapter 1 - Introduction

Ada Selman's prosecution is a case in point. There is little evidence that her guilty plea was the outcome of a bargain. Her experience exemplifies many of the practices that this thesis identifies that influenced guilty pleas but were unrelated to plea bargaining. For example, detectives' testimony during the committal hearing focused on the guilt of the defendant rather than providing evidence through substantive investigation, and confessional material dominated the police prosecution case. These outcomes are problematized by the historical context of Australian policing practices. Prior to the 1980s and 1990s and the institutional reforms emerging from official inquiries like the Queensland Fitzgerald Report, police operated in an environment with little oversight or statutory provisions that regulated their behaviour. What guidance existed, such as the Judges' Rules, were regarded somewhat ambivalently by the courts, and often breached by the police. Instead, detectives held a "conviction at all costs" mentality.²⁵ Almost from the beginning of Australian policing, writes policing historian Mark Finnane, "there were concerns and anxieties over the way convictions were obtained".²⁶ Defendants and defence lawyers frequently made allegations that police used threats, promises, and inducements to obtain not only confessions, but also defendants' guilty pleas.

Selman's case also highlights the vulnerability of defendants without defence counsel. This thesis finds that, through cross-examination, defence lawyers provided a degree of protection to defendants, by challenging the police evidence and raising allegations of problematic police practices relating to that evidence. Lawyers also challenged the appropriateness of police charges. As we will see later, these challenges

²⁵ Mark Finnane, *Police and Government: Histories of Policing in Australia* (Melbourne: Oxford University Press, 1994), 77.

²⁶ *Ibid.*, 84.

Chapter 1 - Introduction

appear to have influenced late guilty plea bargains with crown prosecutors. In Ada Selman's case, there was no legal representation and, considering her intellectual impairment, she arguably did not have the ability to challenge troubling aspects of the police prosecution case by herself. Selman's case also highlights a previously unrecognised practice that elicited extra-judicial guilty pleas through the *ex officio* indictment process. This research reveals that from 1950 on, defendants charged with burglary pleaded guilty to multiple offences on *ex officio* indictment, traditionally the province of the attorneys general and crown prosecutors. This process appeared to involve both the police and crown prosecutors, avoided the formal protection offered by the committal hearing, and was unchecked by the judiciary until the early 1960s.

Ada Selman's prosecution highlights aspects of the judiciary's practices in guilty plea cases. These include the failure of police magistrates to regulate police practices or investigate allegations against police regarding inadmissible evidence. Some in the judiciary failed to fully investigate the *prima facie* nature of the police evidence or check the police evidence in *ex officio* indictment cases. Although legal rhetoric positions both crown prosecutors and members of the judiciary as potentially protective of defendants' interests,²⁷ there is little evidence of it in this research.

In the early years of the guilty plea system there appeared to be little benefit in pleading guilty in terms of sentencing. Ada Selman's guilty plea was not considered as a mitigating factor in her sentencing. This thesis finds no evidence that supports an hypothesis that the rise of the guilty plea was associated with the development of what legal scholars John Baldwin and Mike McConville refer to as the 'discount principle';

²⁷ *R v Webb* [1960] Qd R 443.

that is, where guilty pleas are rewarded with a reduction in sentence.²⁸ Historically, judges mitigated sentences based on defendants' age, criminality, and sometimes their alcoholism, but not because of their guilty plea. In fact, this research finds that the Queensland Criminal Court expressly denied that there was any benefit to pleading guilty in terms of sentencing leniency. Yet the discount principle is central to the operation of the contemporary guilty plea system and, in some jurisdictions, judges are statutorily required to consider the mitigating circumstances of defendants' guilty pleas in their sentencing deliberations. It is critical to understand the contemporary role of the guilty plea in Australian criminal prosecutions to understand that the current system of state-sponsored plea bargaining is a relatively recent development.

The contemporary relevance of the guilty plea

The Australian criminal justice system is a guilty plea system. Between 2012 and 2013, 70 percent of all Australian criminal defendants pleaded guilty.²⁹ The guilty plea system is so effective that inquiries and legislative reforms focus on mechanisms that can elicit greater proportions of defendants pleading guilty at the earliest possible stage of the prosecution process.³⁰ The consensus is that the criminal justice system would grind to a halt if defendants proceeded to trial.

²⁸ John Baldwin and Mike McConville, *Negotiated Justice: Pressures to Plead Guilty* (London, UK: Martin Robertson, 1977), 106.

²⁹ Australian Bureau of Statistics, "Criminal Courts, Australia, 2012-13: Method of Finalisation," Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2012-13~Main%20Features~Method%20of%20finalisation~13>. More recent prosecution data from the ABS collapses guilty pleas with convictions. "Criminal Courts, Australia, 2016-17: Higher Courts," Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2016-17~Main%20Features~Higher%20Courts~6>.

³⁰ Hon Martin Moynihan, "Review of the Civil and Criminal Justice System in Queensland," ed. Department of Justice and Attorney-General (Brisbane: Queensland Government, 2008); Elizabeth Wren

Chapter 1 - Introduction

Contemporary legal and criminological research focuses on several issues and considerations relating to guilty pleas in Australian courts. Much of this focus involves sentencing, reflecting the centrality of the discount principle in guilty plea cases.³¹ Other scholarship examines the processes involved in - and the predictors of - obtaining guilty pleas; for example, defendants are less likely to plead guilty to some offences than others.³² Some of this research focuses on the perspectives of specific criminal justice actors, including prosecutors and defence counsel,³³ and the judiciary towards plea bargaining,³⁴ and the effects of bargaining on defendants,³⁵ and victims.³⁶ Most research

and Lorana Bartels, "Guilty, Your Honour: Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on Its Operation," *Adelaide Law Review* 35, no. 1 (2014).; NSW Government (2017). *Early guilty plea reform*. <http://www.justice.nsw.gov.au/Pages/Reforms/early-guilty-pleas.aspx>. Last updated 18 Oct 2017.

³¹ John E. Willis, "Sentencing Discount for Guilty Pleas," *Australian & New Zealand Journal of Criminology* 18, no. 3 (1985); Kathy Mack and Sharyn Roach Anleu, "Sentence Discount for a Guilty Plea: Time for a New Look," *Flinders Journal of Law Reform* 1 (1997); Andrew Torre and Darren Wraith, "The Demand for Sentence Discounts: Some Empirical Evidence," *Criminal Law Journal* 37, no. 3 (2013); Kate Warner, "Sentencing Review 2003-2004: Part II," *ibid.* 29, no. 1 (2005); Geraldine Mackenzie, "The Guilty Plea Discount: Does Pragmatism Win over Proportionality and Principle," *Southern Cross University Law Review* 11 (2007); Asher Flynn, "Sentence Indications for Indictable Offences: Increasing Court Efficiency at the Expense of Justice? A Response to the Victorian Legislation," *Australian & New Zealand Journal of Criminology* 42, no. 2 (2009); Wren and Bartels, "Guilty, Your Honour. "; Felicity Stewart and Dennis Byles, "Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts," (Melbourne 2015).

³² For example, defendants are less likely to plead guilty to sexual offences than property offences. See Sharyn Roach Anleu and Kathy Mack, "Intersections between in-Court Procedures and the Production of Guilty Pleas," *Australian & New Zealand Journal of Criminology* 42, no. 1 (2009); Clare Ringland and Lucy Snowball, "Predictors of Guilty Pleas in the NSW District Court," (Sydney: NSW Bureau of Crime Statistics, 2014).

³³ Robert D Seifman and Arie Freiberg, "Plea Bargaining in Victoria: The Role of Counsel," *Criminal Law Journal* 25, no. 2 (2001); Flynn, "Plea-Negotiations. "; Sharyn Roach Anleu and Kathy Mack, "Pleading Guilty and Professional Relations in Australia," *The Justice System Journal* 22, no. 2 (2001).

³⁴ Robert D Seifman, "Plea Bargaining in Victoria-Getting the Judges' Views," *Criminal Law Journal* 6, no. 2 (1982); Asher Flynn, "Secret Deals & Bargained Justice: Lifting the Veil of Secrecy Surrounding Plea Bargaining in Victoria" (PhD thesis, Monash University, 2009); Sharyn Roach Anleu and Kathy Mack, "Magistrates, Magistrates Courts, and Social Change," *Law & Policy* 29, no. 2 (2007).

³⁵ Joy Wundersitz, Ngaire Naffine, and Fay Gale, "The Production of Guilt in the Juvenile Justice System: The Pressures to 'Plead'," *The Howard Journal of Criminal Justice* 30, no. 3 (1991); Kathy Mack and Sharyn Roach Anleu, "Choice, Consent and Autonomy in a Guilty Plea System," in *Criminal Justice in Diverse Communities*, ed. Andrew Goldsmith and Mark Israel (Annandale, NSW: The Federation Press, 2000).

³⁶ Kathy Mack and Sharyn Roach Anleu, "Resolution without Trial, Evidence Law and the Construction of the Sexual Assault Victim," in *Feminist Perspectives on Evidence*, ed. Mary Childs and Louise Ellison (London: Cavendish Publishing, 2000); Asher Flynn, "Bargaining with Justice: Victims, Plea Bargaining and the Victims' Charter Act 2006 (Vic)," *Monash University Law Review* 37, no. 3 (2011).

focuses on guilty pleas as the consequence of plea bargaining.³⁷ Yet despite the central role of the guilty plea in contemporary prosecutions, contemporary criminological and legal scholarship overlooks the historical origins and development of the guilty plea system in Australian courts.

The current research provides empirical evidence that jury trials were the preferred mode of resolving criminal prosecutions in Australian courts until relatively recently. When Ada Selman pleaded guilty in the Brisbane Police Court in 1950, she could not have known that only five years before, most Queensland defendants facing indictable offence charges pleaded 'not guilty' and proceeded to trial. This development occurred almost a hundred years later than the transition periods identified by the historical plea bargaining scholarship in US courts. This constitutes a substantial gap in understanding the origins of the guilty plea system in the Australian higher courts. Until now, no criminal justice or legal history scholarship traced the development of the guilty plea system in Australian courts.³⁸

³⁷ "Plea-Negotiations."; "Carl Williams: Secret Deals and Bargained Justice: The Underworld of Victoria's Plea Bargaining System," *Current Issues in Criminal Justice* 19, no. 1 (2007); Sharyn Roach Anleu and Kathy Mack, "The Social Construction of Ethical Plea Negotiations," in *Sociological Sites/Sights, The Australian Sociological Association (TASA)* (Flinders University, Adelaide: Flinders University, 2000); Roger Douglas, "Pre-Trial Withdrawals: Trial, Bargain, or Pseudo-Bargain?," *Australian & New Zealand Journal of Criminology* 16, no. 4 (1983); F.M. McGuire, "Plea Bargaining: Its Significance in the Australian Criminal Justice System. Part 1," *The Queensland Lawyer* 6, no. 1 (1981); "Plea Bargaining: Its Significance in the Australian Criminal Justice System. Part 2," *The Queensland Lawyer* 6, no. 2 (1981); "Plea Bargaining: Its Significance in the Australian Criminal Justice System. Part 3," *The Queensland Lawyer* 6, no. 3 (1981); Wayne T Westling, "Plea Bargaining: A Forecast for the Future," *Sydney Law Review* 7 (1973); Seifman and Freiberg, "Plea Bargaining in Victoria: The Role of Counsel."

³⁸ A 2001 unpublished thesis by Karl Alderson provides examples of police practices that resulted in guilty pleas in his study of criminal law reforms to NSW police, however, guilty pleas were not the focus of that research; see "Powers and Responsibilities: Reforming NSW Criminal Investigation Law" (PhD thesis, University of New South Wales, 2001).

Research aims and questions

The current research aims to identify the origins of the Australian guilty plea phenomenon and provide some suggestions for how the criminal prosecution process transformed from the traditional ‘trial by jury’ to the current guilty plea system. This investigation addresses the lack of historical research investigating the guilty plea phenomenon, and in doing so, contributes to the wider historical and criminological research in Australia. It asks:

1. *When* did the rise of the guilty plea occur in the Australian Supreme Courts,
2. *What* factors were associated with the acceleration of guilty pleas over time, and
3. *How* did the practices of police, lawyers, and the judiciary, influence defendants’ guilty pleas?

Research design

This research employs a mixed methods research design that draws on a range of data sources to examine the guilty plea phenomenon in the Australian context. The quantitative study answers research questions one and two by analysing large-scale samples of criminal cases prosecuted in the Queensland, Western Australian, and Victorian Supreme Courts between 1901 and 1961. Descriptive statistics analyse the acceleration in the proportions of guilty pleas over time. The quantitative analysis also examines the patterns between defendants’ guilty pleas and other key variables including offence type, plea timing and legal representation.

Chapter 1 - Introduction

The quantitative data is collected from the Prosecution Project database.³⁹ The Australian Research Council Laureate Fellowship project, ‘The Prosecution Project’ (PP) is a “collaborative digital initiative” that has created an authoritative database of Australian criminal cases prosecuted between 1830 and 1966.⁴⁰ The Project’s aim is to provide “new ways of exploring the context and impact of changes in the criminal trial during the nineteenth and twentieth centuries” by focusing on the prosecution process from arrest through to sentencing.⁴¹ The database contains the digitised records of handwritten court register books and court calendars. The Project team members, research assistant staff and a large body of volunteers manually entered these records through the Project’s secure web portal into pre-designed attributes.⁴² The data includes a range of variables such as the defendant’s name, the offence or offences, the defendant’s plea, and the verdict and sentence. Appendix One (pg. 290) includes an example from the 1915 Queensland Supreme Court register book. Appendix Two lists the PP database variables and the recoded variables that are analysed in the quantitative study (pg. 291).

Key findings from the quantitative study framed the research design of the qualitative in-depth study. First, the findings showed that the rise of the guilty plea in the Queensland Supreme Court was associated with the acceleration in defendants’ early guilty pleas, i.e. guilty pleas entered in the police courts. This finding challenges the historical plea bargaining hypothesis that ‘late guilty pleas’ (i.e. pleas entered in the

³⁹ Mark Finnane, Andy Kaladelfos, Alana Piper, Yorick Smaal, Robyn Blewer, and Lisa Durnian, et al. "The Prosecution Project Database." version 1, 17 July 2016, <https://prosecutionproject.griffith.edu.au/prosecutions>.

⁴⁰ Mark Finnane and Alana Piper, "The Prosecution Project: Understanding the Changing Criminal Trial through Digital Tools," *Law and History Review* 34, no. 4 (2016): 874. Australian Research Council Laureate Fellowship Program (FL130100050, 2013-18)

⁴¹ *Ibid.*, 873.

⁴² *Ibid.*, 880.

higher court at arraignment) were instrumental in the guilty plea phenomenon. The Queensland Supreme Court was therefore selected as the site for further in-depth qualitative study. The quantitative study findings also showed that some offences were more likely to attract guilty pleas than others. Guilty pleas to property theft offences, specifically burglary and stealing, were driving the acceleration in defendants' guilty pleas over time. This finding justifies the further qualitative analysis of burglary and stealing guilty plea cases to investigate the practices and processes influencing defendants' guilty pleas.

The qualitative study focuses on the micro level practices of key criminal justice actors – police, lawyers, and the judiciary – that influenced defendants' guilty pleas. The qualitative data analysis focuses primarily on 60 Queensland Supreme Court criminal deposition files accessed through the Queensland State Archives.⁴³ The qualitative study also draws on analysis of a range of other historical sources including key criminal justice administration records, legal and professional texts and manuals, reported decisions and historical newspaper articles. Appendix Three (pg. 293) includes excerpts from one handwritten deposition and one typed deposition as examples of this data. Appendix Four provides an outline of the research methodology employed in this study that includes a detailed description of the historical sources synthesised in this thesis (pg. 295).

A mixed methods approach best suits the topic and the research aims of this project.⁴⁴ A mixed methodology provides a better understanding of the research

⁴³ Access to restricted Supreme Court files was authorised by the Department of Justice and Attorney General in accordance with the *Public Records Act 2002 (Qld)* s.18(2).

⁴⁴ John W Cresswell and Vicki L Plano Clark, *Understanding Mixed Methods Research, Designing and*

Chapter 1 - Introduction

problem.⁴⁵ Large scale quantitative studies focus on structural processes but cannot provide the same deep understanding of processes and practices underpinning social life that qualitative research can.⁴⁶ Combining both methods draws on the strengths of each approach while counteracting the weaknesses inherent in each.⁴⁷ Furthermore, the addition of qualitative data and methods answers the recent call from historians Tim Hitchcock and William J. Turkel who argue that guilty plea scholarship should be extended by pairing large scale data analysis with “close reading and archival research”.⁴⁸

The structure of the thesis

The thesis is divided into four parts.

Part 1: Introduction and Literature

Part One provides the background to the research project. **Chapter two** discusses the historical plea bargaining literature and the theories explaining the guilty plea phenomenon. The professionalisation hypothesis and the contextualist critique identify different factors behind the emergence of plea bargaining in US courts, but their arguments may not be sufficient to explain the rise of the guilty plea in the Australian context. **Chapter two** discusses key elements in terms of the committal process and public prosecution that developed differently in the Australian context from those in the

Conducting Mixed Methods Research (Thousand Oaks, CA: Sage, 2006), 5.

⁴⁵ Keith Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches*, 2nd ed. (London: Sage Publications, 2005), 64.

⁴⁶ Alan Bryman, "Quantitative and Qualitative Research: Further Reflections on Their Integration," in *Mixing Methods: Qualitative and Quantitative Research*, ed. Julia Brannen (London: Routledge, 1995).

⁴⁷ Punch, *Introduction to Social Research: Quantitative and Qualitative Approaches*, 64.

⁴⁸ Hitchcock and Turkel, "Old Bailey Proceedings," 953.

US and English criminal justice systems. It suggests that the drivers of plea bargaining in the latter contexts might not capture the key mechanisms underpinning the guilty plea acceleration in Australian courts.

Part 2: The Quantitative Study

Part Two outlines the quantitative component of the current research. **Chapter three** presents the findings from the quantitative study and is structured in three sections. The first section outlines the research methodology employed in the quantitative study and details the sample and selection of large scale prosecution data from the Queensland, Western Australian, and Victorian supreme courts. The chapter then discusses the empirical evidence of the acceleration in guilty pleas between 1901 and 1961. It also explores the relationship between guilty pleas and different offence categories, which are under-researched in contemporary guilty plea research.⁴⁹ The final section of the chapter analyses quantitative data specific to individual courts. This analysis includes evidence from the Queensland Supreme Court showing that early guilty pleas were critical to the acceleration of guilty pleas. Analysis of Victorian Supreme Court register data assesses the hypothesised relationship between legal representation and pleading guilty. These findings challenge existing theories about historical plea bargaining.

⁴⁹ Flynn, "Plea-Negotiations," 9. For recent research in the Victorian courts, see Asher Flynn and Arie Freiberg, "Plea Negotiations: An Empirical Analysis," in *Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology, 2018); Stewart and Byles, "Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts."

Part 3: The Qualitative Study

Part three presents the analysis, discussions and findings emerging from the qualitative study. This study draws on a range of rich qualitative data, including 60 Queensland Supreme Court deposition files, historical newspaper reports, case law, particularly Court of Criminal Appeal cases, Crown solicitor circular letters, and professional texts accessed by police and lawyers for the years 1926 to 1962.⁵⁰ **Chapter four** begins by outlining the methodology for the in-depth archival research that underpins chapters four, five, and six. It then turns to an examination of police practices that appeared to influence defendants' guilty pleas. Professionalisation hypothesis scholars suggest that advances and modernisation in policing practices generated improvements in the quality of evidence, leading to plea bargaining and an increase in the numbers of defendants pleading guilty. The police cases in this sample, however, provided little forensic evidence tying the defendant to the crime and were heavily reliant on confessional material to substantiate the charge. This conclusion is problematized by the history of police process corruption including fabrication of false confessions and police verbals.

Chapter five explores the relationship between lawyers' practices and guilty pleas, including bargained-for guilty pleas. The chapter is divided into four sections. The first section describes a little known 1941 Queensland Royal Commission inquiry

⁵⁰ Queensland State Archives Series ID 15536, Information, Depositions and Associated Papers in Criminal Cases Heard in Sittings in Brisbane; Queensland State Archives Series ID 18038, Criminal Depositions – Supreme Court, Brisbane; Queensland State Archives Series ID 18034, Indictments (Supreme Court, Brisbane); Queensland State Archives Series ID 5521, Indictments, Depositions and Related Papers in Criminal Sittings; Queensland State Archives Series ID 9264, Criminal Case Files; Queensland State Archives Series ID 17863, Criminal Files; Queensland State Archives Series ID 7132, Circulars Books; Queensland State Archives Series ID 10797, General Correspondence. See Appendix Four for a detailed discussion of the historical sources utilised in this thesis.

Chapter 1 - Introduction

into the crown prosecutor's plea bargaining practices in a controversial sexual offence case. The second section continues the investigation into lawyers' involvement in late guilty plea cases by examining evidence of this practice in the 60 prosecutions sample. The chapter then discusses a practice involving prosecutors and police in obtaining guilty pleas to *ex officio* indictments. Finally, the discussion shifts to an examination of defence lawyers' practices that challenged police evidence in the lower courts, implying that police practices were problematic particularly in terms of confessional evidence.

Chapter six explores the role of the judiciary in relation to the acceleration of guilty pleas between 1926 and 1961. The first section explores the role and practices of police magistrates in relation to guilty pleas, including their responsibilities to ensure the police prosecution evidence sustained a *prima facie* case against the defendant, and their attitudes towards addressing allegations made against the police. The second section explores sentence outcomes in the 60 prosecutions sample. It analyses Queensland judges' sentencing remarks and finds there was no evidence that guilty pleas were rewarded with sentencing discounts. This research is the first to investigate the mitigating effect of guilty pleas to serious criminal offences in the Queensland Supreme Court before 1962.

Part 4: Conclusions and Further research

Chapter seven is the final chapter in this thesis. It concludes the research by summarising the main findings from both studies, drawing conclusions about the possible reasons for the rise of the guilty plea in the mid twentieth century. It acknowledges the limitations in the documented evidence of the association between the guilty plea phenomenon and actors within the criminal justice system. Nonetheless, the chapter draws some inferences about the key practices that are prominent in guilty plea

Chapter 1 - Introduction

cases prior to and following the rise of the guilty plea, and the implications these practices had for defendants and their decisions to plead guilty. The chapter also examines how this research expands the current historical plea bargaining scholarship on the relationship between the professionalisation of lawyers and police. This research substantively expands current understandings of the association between police professionalisation in the context of twentieth century policing, and the rise of the guilty plea.

The significance of the research

This thesis provides the first comprehensive and comparative empirical evidence of the point in time when guilty pleas first dominated case outcomes in prosecutions for serious indictable offences across multiple jurisdictions. These large-scale data samples provide the opportunity to analyse new relationships between guilty pleas and other key variables that have not previously been examined. For example, whereas the historical plea bargaining research generally examines the relationship between guilty pleas and serious offence types categorised in broad terms like ‘crimes against property’, this research disaggregates offences into more specific categories. This included burglary and stealing offences that were the dominant prosecutions in these samples.

Furthermore, this research tests the hypothesis posited by the historical plea bargaining scholarship that late guilty pleas were instrumental to the guilty plea phenomenon.

This research makes important contributions to histories of policing and law, focusing on prosecution practices and processes in the lower courts. Twentieth century

Chapter 1 - Introduction

prosecution research is an under researched area in criminal justice history,⁵¹ particularly the investigation and prosecution practices of police. This analysis of police court testimonies provides new evidence about the committal process beyond the implications for the guilty plea phenomenon. This examination of police practices integrates previous research into police corruption and subsequently qualifies existing theory about the association between policing practices and guilty plea outcomes. Previous theory rests on the argument that technological advances in professional policing were instrumental in obtaining guilty pleas yet ignores the systemic nature of police corruption as a contributing factor. This thesis finds support for the suggestion that police misconduct in the prosecution process corruption had a role in the acceleration in guilty pleas and the system transformation of the prosecution process. Beyond its Australian context, this contribution extends the current historical plea bargaining scholarship and suggests more generally for other jurisdictions, a reformulation of the role of policing in the rise of the guilty plea.

⁵¹ Clive Emsley, *Crime and Society in Twentieth Century England* (Harlow, UK: Pearson, 2011), 1.

Chapter 2. Literature Review

Contemporary Australian criminal courts function as a guilty plea system; this system requires that most defendants convict themselves through their own guilty pleas.¹ Statutory reforms support state-sponsored plea bargaining with provisions for sentence discounts in consideration of the timing of defendants' pleas.² Legal rhetoric continues to posit that defendants charged with serious criminal offences are 'innocent until proven guilty' and are protected by their right to trial by jury. This rhetoric is a historical legacy of the early modern adversarial jury trial, once considered "the palladium of liberty".³ The system transformation from jury trial to self-conviction is attributed to the guilty plea phenomenon; that is, the rapid acceleration in defendants' guilty pleas whereby guilty pleas became the dominant mode of criminal case disposition.⁴

Until now, no research has examined the origins of the guilty plea phenomenon in the Australian context. Contemporary Australian socio-legal and criminological scholarship attribute the current guilty plea system to plea bargaining practices.⁵ There is a general silence on the historical origins of the guilty plea system in the contemporary literature, although some scholars refer to the historical plea bargaining scholarship that traces the origins of the phenomenon in US jurisdictions and in

¹ Australian Bureau of Statistics, 4513.0 - Criminal Courts, Australia, 2006-07 at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Latestproducts/597451D3883AA2F3CA2573DA0016C35E?opendocument>; Wren and Bartels, "Guilty, Your Honour," 361..

² Section 13 Penalties and Sentences Act 1992 (QLD).

³ William Blackstone, *Commentaries on the Laws of England: In Four Books*, vol. 2 (JB Lippincott & Company, 1875), 413; *ibid*.

⁴ McConville and Mirsky, "Rise of Guilty Pleas," 468.

⁵ Flynn and Freiberg, "Plea Negotiations: An Empirical Analysis."; Flynn, "Sentence Indications."; "Bargaining with Justice."; Roach Anleu and Mack, "Pleading Guilty and Professional Relations in Australia."; Mack and Roach Anleu, "Choice, Consent and Autonomy in a Guilty Plea System."; *Pleading Guilty: Issues and Practices* (Melbourne: Australian Institute of Judicial Administration., 1995).

Chapter 2 – Literature Review

London's Old Bailey criminal court in the mid-nineteenth century.⁶ This scholarship associates the rise of the guilty plea with the emergence of plea bargaining practices.⁷ There are important historical differences in the development of the Australian court system that suggests that the plea bargaining hypothesis might not fully explain the rise of the guilty plea in Australian courts. For example, US appeal courts were considering plea bargaining as early as 1827,⁸ yet Australian and English courts were reluctant to acknowledging sentence discounts for guilty pleas until the 1970s.⁹

This thesis argues that other practices influenced the acceleration in defendants' guilty pleas in the Australian context. Rather than focusing on plea bargaining, this thesis positions the guilty plea as the unit of analysis, following the advice offered by historical plea bargaining scholars Mike McConville and Chester Mirsky that:

Theory should not precede but be dependent upon and arise out of an empirical method of data collection which can be defended not by pointing to disparate end points but because it sheds light on the reasons for continuity and change at all times proximate to the system transformation itself.¹⁰

This chapter outlines the central role of guilty pleas in contemporary prosecutions by tracing the development of the 'discount principle' and statutory developments that guide judges' sentencing reductions for guilty pleas. This discussion highlights the mitigating power of guilty pleas and the current state-sponsored plea bargaining system. The chapter then critiques the historical plea bargaining scholarship that associates the

⁶ Sharyn Roach Anleu, *Law and Social Change*, 2nd ed. (London: Sage Publications, 2009), 156.

⁷ McConville and Mirsky, *A True History*, 1-2.

⁸ *People v. Whipple*, 9 Cow. 707, 711, N.Y. Ct. of Oyer & Terminer, 1827 cited in Albert W. Alschuler, "Plea Bargaining and Its History," *Law & Society Review* 13, no. 2 (1979): 220.

⁹ Seifman, "Plea Bargaining in Victoria-Getting the Judges' Views," 70.

¹⁰ McConville and Mirsky, *A True History*, 332.

acceleration of guilty pleas with plea bargaining although there is little documented evidence of bargaining practices in the historical record. It then includes a comparative analysis of the developmental variation in the US, English and Australian jurisdictions over time. These discussions reveal key gaps in the literature, and a degree of difference in the development of the Australian criminal prosecution process that justifies guilty pleas, rather than plea bargaining, as the unit of analysis to understand the origins of the phenomenon in Australian courts.

Guilty pleas and the discount principle

The current Australian process prosecution is a guilty plea system supported by state-sponsored plea bargaining. The state provides statutory incentives that are designed to maximise the number of defendants pleading guilty.¹¹ It does not follow, however, that current practices explain the historical origins of the Australian guilty plea system. Rather, state-sponsored plea bargaining emerged from the legal development of the ‘discount principle’ that guilty pleas deserved some consideration in sentencing.

The association between guilty pleas and judges’ sentencing is the key mechanism underpinning the contemporary Australian guilty plea system. Sentencing is a complex task that requires balancing competing claims including statutory provisions, principles of sentencing derived from case law, and the interests of the victim, the defendant, and the community.¹² Judges must also consider aggravating and mitigating

¹¹ Heather Douglas and Suzanne Davina Harbidge, *Criminal Process in Queensland* (Pymont, NSW: Lawbook Co, 2008), 140.

¹² Geraldine Mackenzie, *How Judges Sentence* (Sydney: Federation Press, 2005), 14.

Chapter 2 – Literature Review

circumstances related to the offender and the offence that increase or reduce the sentence. A defendant's guilty plea is arguably the most important mitigating factor considered in judges' sentence deliberations.¹³ This is a relatively recent development.

English and Australian courts developed 'the discount principle' during the late 1960s that stipulates that guilty pleas are deserving of a reduction in sentencing.¹⁴ The principle emphasised different motivations as justification for sentence reduction at various times in its development. By the early 1970s, a guilty plea merited a lesser sentence only when it "proceeded from contrition, repentance, or remorse" on the part of the defendant.¹⁵ A guilty plea on its own was not enough to justify the reduction.¹⁶ During the 1980s and 1990s, the judiciary developed a pragmatic utilitarian view that justified sentence discount on the basis that it saved the courts time and expense, and witnesses the ordeal of testimony and cross-examination.¹⁷ It was not until 1994 that a Queensland Court of Criminal Appeal (CCA) case provided authority that mitigation was warranted in guilty plea cases even in the absence of remorse.¹⁸ This utilitarianism was approved by the High Court of Australia (HCA) in 1998, although its pragmatism focused on defendants' "willingness to facilitate the course of justice" rather than reductions in administrative expense.¹⁹ Irrespective of the semantics, the outcome was

¹³ Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Melbourne: Cambridge University Press, 2007), 203. Also the *Penalties and Sentences Act 1992* (QLD), s13.

¹⁴ Baldwin and McConville, *Negotiated Justice*, 106.

¹⁵ Desmond Lane, "Case Notes R V Shannon: What Every Defendant Should Know," *Monash University Law Review* 7 (1980): 52.; *R v Cox* [1972] QWN 54; *R v Perry* [1969] QWN 17.

¹⁶ *R v Shannon* [1979] 21 SASR 442.

¹⁷ Willis, "The Sentencing Discount," 131. Early Queensland judicial directions failed to provide adequate guidance whether mitigation was warranted simply because of the cost-saving benefits.

¹⁸ *R v Corrigan* [1994] 2 Qd R 415.

¹⁹ *Signanto v R* (1998) 194 CLR 656, 663-664. The High Court acknowledged that a guilty plea should be taken into account in mitigation because it saved the community "the expense of a contested trial". *Cameron v R* (2002) 209 CLR 339 provided further support for guilty pleas that were motivated by the "willingness to cooperate in the administration of justice" saving the time and expense demanded of both the justice system and crown witnesses Mackenzie, "Guilty Plea Discount," 208..

the same; a guilty plea was likely, although not always guaranteed, to reduce the defendant's sentence.²⁰

Concurrent with the development of the discount principle, courts and later the legislature also considered the appropriate proportion for reduction in sentencing.²¹ To date, in Australian law there is no consistent national approach. Discounts vary “from jurisdiction to jurisdiction and case to case”.²² In Queensland, section 13 of the *Penalties and Sentences Act 1992* stipulates that judges must consider the guilty plea in mitigation. Guilty pleas *can* reduce the sentence that would have otherwise been imposed if the prisoner was convicted at trial,²³ but the legislation does not mandate that a guilty plea necessarily reduces the sentence.²⁴ Victorian legislation similarly avoids a mandatory discount. Nevertheless, a recent Victorian Sentencing Advisory Council report indicates that sentences were discounted by 20 to 30 percent in most cases, although some discounts were as high as 40 percent.²⁵ This disparity in sentence reductions might be attributed to the timing of a defendant's guilty plea.

Both case law and statute require judges to consider the “timeliness” of guilty pleas.²⁶ Generally, the discount is greater when the guilty plea is entered early at the committal hearing rather than the day of the trial. Legal scholars Elizabeth Wren and Lorana Bartels note that “timing is more complicated than simply considering a

²⁰ David Field, "Plead Guilty Early and Convincingly to Avoid Disappointment," *Bond Law Review* 14, no. 2 (2002): 12.

²¹ *Cameron v R* [2002] HCA 6; 209 CLR 339

²² Mackenzie, "Guilty Plea Discount," 206.

²³ However, a judge may decide the circumstances do not warrant a reduction in sentence but they must state this in open court and give reasons for the decision (s4).

²⁴ M. J. Shanahan et al., *Carter's Criminal Law of Queensland*, 21st ed. (Chatswood, NSW: LexisNexis Butterworths, 2016), 1742.

²⁵ Stewart and Byles, "Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts," 59.

²⁶ *Penalties and Sentences Act 1992* (QLD), s13.

Chapter 2 – Literature Review

chronology of when the offender entered a guilty plea”.²⁷ In *Cameron*, the HCA considered when it would be “reasonably practicable to expect the offender to have entered a plea”.²⁸ In response to *Cameron*, Western Australian legislation prescribed that a guilty plea entered at “the first reasonable opportunity” would attract a 25 percent discount.²⁹ Since the *Cameron* decision, state inquiries and reforms have focused on mechanisms designed to encourage guilty pleas as well as mandated sentence discounts.³⁰

Recent legislation prescribes distinct sentencing discounts for early and late guilty pleas.³¹ In 2017, the New South Wales (NSW) State Government introduced reforms that mandate compulsory case conferences between defendants and prosecutors prior to the committal hearing, to narrow the issues at contest and “maximise” opportunities for early guilty pleas.³² Defendants only receive the maximum sentence discount of 25 percent if they plead guilty at the case conference. These reforms prescribe timeliness and arguably limit judges’ discretion to determine “reasonable opportunity”. This practice of state-sponsored plea bargaining is central to the contemporary guilty plea system.

²⁷ Wren and Bartels, "Guilty, Your Honour," 366.

²⁸ Ibid. *Cameron v R* (2002) was a drug-related prosecution where the defendant’s guilty plea was only entered once the original charge was amended to identify the correct drug involved in the offence. The court rules this was reasonable.

²⁹ Ibid., 365.; *The Sentencing Act 1995* (WA). However, *Verschuren v R* [1996] WAR 467 provides some evidence that according to the CJ, some early guilty pleas during the 1990s attracted reductions of between 20 and 35 percent.

³⁰ Moynihan, "Review.;" New South Wales Law Reform Commission, "Encouraging Appropriate Early Guilty Pleas," (Sydney: New South Wales Law Reform Commission, 2014)..

³¹ The *Criminal Case Conferencing Trial Act* (NSW), s17 prescribes a 25 percent reduction for an early plea compared with 12/5 percent for a late guilty plea.

³² NSW Government (2017). *Early Guilty Plea Reform*.

<http://www.justice.nsw.gov.au/Pages/Reforms/early-guilty-pleas.aspx>. Last updated 18 Oct 2017.

Chapter 2 – Literature Review

‘Plea bargaining’ refers to the practice where defendants plead guilty in exchange for some type of concession, including sentence reductions. Other concessions include reduction in the charges or seriousness of charges. Political scientist John F. Padgett identifies four dominant types of bargaining:

1. implicit plea bargaining, when the defendant pleads guilty to the original charge in the expectation of a more lenient sentence;
2. charge bargaining, in which the prosecutor either downgrades or eliminates charges in exchange for a guilty plea to the reduced charge;
3. judicial bargaining, where the judge confers with prosecution and defence counsel then offers the defendant a specific guilty plea sentence; and
4. sentence recommendation bargaining, where the prosecutor recommends a sentence in exchange for a guilty plea.³³

Queensland District Court judge Fred McGuire identified fourteen kinds of bargaining in the US context during the 1980s.³⁴ These include negotiating guilty pleas in exchange for promises not to charge the defendants’ friends or family members also involved in the offence and promise not to institute other possible charges or proceedings. However, there is minimal documented evidence of plea bargaining practices. Contemporary plea bargaining research is hampered by the lack of transparency around plea bargaining in

³³ John F Padgett, "The Emergent Organization of Plea Bargaining," *American Journal of Sociology* 90, no. 4 (1985): 75-78.

³⁴ McGuire, "Plea Bargaining: Part 1," 2-3. Justice F.M. McGuire’s investigation of the US system of plea bargaining and the implications for its application in Australia identified ten further forms of bargaining, including promises by police not to lay further charges against the accused, or charges against others known to the accused; agreements not to appeal the sentence or to oppose bail conditions etc. The bargain whereby the accused pleads guilty to a summary offence rather than an indictable one when the crown has a choice may also prove to be of interest in the current study.

Chapter 2 – Literature Review

the Australian context,³⁵ despite most guilty pleas resulting from bargains and negotiations.³⁶

Contemporary legal and criminological scholarship is largely silent on the historical antecedents of plea bargaining in the Australian context.³⁷ Although some scholarship references the historical plea bargaining literature that centres on a handful of nineteenth century US jurisdictions, the focus is on the practical, rather than historical, antecedents of plea bargaining.³⁸ This implies an assumption that the processes underpinning contemporary plea bargaining practices are the same processes that precipitated their development.³⁹ Legal scholar and historian Malcolm Feeley criticises this “functional fallacy” and argues against theory-building that “implies a causal historical process from a functional analysis of contemporary processes”.⁴⁰ Any reliance on the historical plea bargaining scholarship to explain the origins of the Australian guilty plea system is further problematized by the lack of documented bargaining practices in the historical record.⁴¹ This thesis suggests that the Australian guilty plea phenomenon is better investigated beyond the restrictions of a plea bargaining framework.

³⁵ Flynn, "Plea-Negotiations," 5-6.

³⁶ Flynn and Freiberg, "Plea Negotiations: An Empirical Analysis," 4.

³⁷ See Mack and Anleu, "Sentence Discount for a Guilty Plea: Time for a New Look."; Roach Anleu and Mack, "The Social Construction of Ethical Plea Negotiations."; Flynn, "Secret Deals."; "Sentence Indications."

³⁸ Roach Anleu and Mack, "Pleading Guilty and Professional Relations in Australia," 156; Roach Anleu, *Law and Social Change*, 156.

³⁹ Feeley, "Legal Complexity," 184.

⁴⁰ *Ibid.*

⁴¹ McConville and Mirsky, *A True History*.

The rise of guilty pleas

Legal historians first examined the historical origins of the guilty plea phenomenon during the late 1970s in response to “a fairly blank chapter” in criminal justice history.⁴² The historical plea bargaining scholarship involves a handful of samples from lower and middle-level courts in different jurisdictions at different periods during the nineteenth century. During the 1970s, evidence of any acceleration in guilty pleas (or lack of evidence) emerged from scholars’ broader investigations of criminal justice systems.⁴³ From the 1990s, focus shifted to investigating the origins of plea bargaining as an explanation for the accelerating proportion of defendants’ guilty pleas.⁴⁴ Initial studies employing samples from the *Old Bailey Proceedings 1674-1913* identified low rates of guilty pleas prior to the middle of the nineteenth century. Legal historian John Langbein found few instances where defendants pleaded guilty in prosecutions in between 1670 and 1730.⁴⁵ Guilty pleas did not begin to accelerate until around 1850.⁴⁶ In US jurisdictions, most defendants also pleaded ‘not guilty’ in the early decades of the nineteenth century. Both the Massachusetts and New York criminal courts transitioned to a guilty plea system around the mid-nineteenth century. Less than

⁴² Friedman, "Historical Perspective," 247.

⁴³ The 1970s criminal justice system histories include John H. Langbein, "Torture and Plea Bargaining," *University of Chicago Law Review* 46, no. 1 (1978); "Before the Lawyers."; "Short History of Plea Bargaining."; Friedman and Percival, *Roots of Justice*; Steinberg, *The Transformation of Criminal Justice*; Theodore N. Ferdinand, "Criminality, the Courts, and the Constabulary in Boston," *Journal of Research in Crime and Delinquency* 17, no. 2 (1980).

⁴⁴ McConville and Mirsky, *A True History*; "Rise of Guilty Pleas."; Mike McConville, "The Origins of the Institutionalised Guilty Plea in the United States: Some Lessons from History," *Derecho PUCP*, no. 49 (1995); George Fisher, *Plea Bargaining's Triumph: A History of Plea Bargaining in America* (Stanford: Stanford University Press, 2003); "Plea Bargaining's Triumph," *The Yale Law Journal* 109, no. 5 (2000); Vogel, *Coercion to Compromise*; "Social Origins."

⁴⁵ Langbein, "Before the Lawyers," 278. For evidence of guilty pleas in the sixteenth and seventeenth centuries, see James S. Cockburn, "Trial by the Book? Fact and Theory in the Criminal Process, 1558–1625," ed. J.H. Baker (Cambridge: Royal Historical Society, 1978), 73; Hitchcock and Turkel, "Old Bailey Proceedings," 951.

⁴⁶ Feeley, "Legal Complexity," 199.

Chapter 2 – Literature Review

20 percent of defendants pleaded guilty in the New York Court of General Sessions between 1805 and 1840 but proportions accelerated to more than 70 percent by 1879.⁴⁷ In Boston's Police Court, guilty pleas rates doubled between 1834 and 1836, and then again between 1838 and 1844.⁴⁸ Guilty pleas constituted less than 15 percent of all pleas in the 1830s, but rapidly accelerated to 88 percent by 1880.⁴⁹ The acceleration in guilty pleas occurred much earlier in some jurisdictions than in others. Some jurisdictions did not complete system transformation until the twentieth century. At the Old Bailey court, guilty pleas began increasing in the 1830s and accelerating from 1850, yet just under half of all defendants pleaded guilty when records ceased in 1912.⁵⁰ In California's Alameda County Superior court, guilty pleas only increased to 32 percent of defendants' pleas between 1900 and 1910.⁵¹ Transition occurred at some point between 1930 and 1949.⁵² This evidence shows that system transformation occurred more quickly in some jurisdictions than others.

The scholarship suggests that initial accelerations in guilty pleas were dependant on offence type.⁵³ There was some jurisdictional variation in the proportion of guilty pleas entered for different offences. Guilty pleas were more prevalent in the lower and mid-level courts for regulatory offences than for property and personal offences. The guilty plea rate in Philadelphia between 1800 and 1836 was 33 percent and 35 percent respectively for liquor offence prosecutions in the Quarter Sessions and Mayor's

⁴⁷ McConville and Mirsky, *A True History*, 200-01.

⁴⁸ Ferdinand, *Boston's Lower Courts*, 77. This sample was composed of 1200 cases.

⁴⁹ Vogel, "Social Origins," 175.

⁵⁰ Malcolm M. Feeley, "Plea Bargaining and the Structure of the Criminal Process," *The Justice System Journal* 7, no. 3 (1982): 344; Hitchcock and Turkel, "Old Bailey Proceedings," 951-52.

⁵¹ Friedman and Percival, *Roots of Justice*, 174.

⁵² Friedman, "Historical Perspective," 249. 68 percent of defendants pleaded guilty during this period.

⁵³ Vogel, *Coercion to Compromise*, 95.

Court.⁵⁴ This was much higher than the proportion of guilty pleas to larceny offences in the same period; 10 percent and 19 percent in the respective courts. In Boston's lower police courts, guilty pleas constituted 13 percent of prostitution offences, 9 percent of 'larceny' and 6 percent of 'assault and battery' cases in 1830. By 1850, these proportions increased to 47 percent, 22 percent, and 16 percent for 'prostitution', 'larceny' and 'assault and battery' respectively.⁵⁵ The historical plea bargaining scholarship argues that these increasing proportions in pleas resulted from negotiations between defendants and prosecutors, yet there is little documented evidence of such bargains.

Plea bargaining in the historical record

Examples of explicit plea bargaining are so rare, the historical scholarship relies on "less rigid evidentiary markers" to identify plea bargaining.⁵⁶ Legal historian Bruce P. Smith acknowledges that the historical plea bargaining scholarship employs "recondite" evidence to justify the association between plea bargaining and the guilty plea phenomenon.⁵⁷ The scholarship that employs large scale data assumes that the increasing proportion of defendants' guilty pleas over time correlates with the emergence of plea bargaining.⁵⁸ Other studies focus on patterns in these guilty pleas. Feeley's study of guilty pleas in the Old Bailey criminal court cases referred to a small number of guilty pleas to lesser offences that he argues constituted a plea bargain.⁵⁹ This

⁵⁴ Steinberg, *The Transformation of Criminal Justice*, 242-43.

⁵⁵ Ferdinand, *Boston's Lower Courts*, 62-63.

⁵⁶ Bruce P. Smith, "Plea Bargaining and the Eclipse of the Jury," *Annual Review of Law and Social Science* 1 (2005): 137.

⁵⁷ *Ibid.*

⁵⁸ Feeley, "Legal Complexity," 199; Langbein, "Before the Lawyers," 278.

⁵⁹ Feeley, "Legal Complexity," 197-98.

Chapter 2 – Literature Review

pattern of guilty pleas to lesser offences is the most widely employed indicator of plea bargaining in this scholarship.⁶⁰ Late guilty plea patterns trace back to the sixteenth century. James Cockburn provides evidence that in almost half of every Sussex assizes sittings between 1587 and 1590, defendants pleaded guilty at trial to a lesser offence; for example, a ‘not guilty’ plea to burglary became a late ‘guilty’ plea to larceny.⁶¹ Nevertheless, this practice appears to be an anomaly in English prosecution process and the court reverted to the dominant mode of jury trial.

The pattern of late guilty pleas to lesser offences is also evident in US court records. In New York’s Court of General Sessions during the first half of the nineteenth century, 80 percent of guilty pleas were to the original charge and only 20 percent to a lesser (or attempted) offence.⁶² By 1865, 70 percent of all guilty pleas involved late pleas to lesser offences. Guilty pleas to property theft prosecutions appear to have influenced the overall acceleration in defendants’ guilty pleas. Property offences increased to 80 percent of all prosecutions between 1850 and 1865, the same period that guilty pleas accelerated from 35 to 50 percent of all defendants’ pleas.⁶³ In a sample of DA files for property offences across the same period, McConville and Mirsky found that 73 percent of the 152 defendants pleaded guilty to lesser, or attempted, property offences, even though the evidence was sufficient to sustain the prosecution.⁶⁴ This is the strongest evidence of plea bargaining put forward by the historical plea bargaining scholarship.

⁶⁰ Friedman, "Historical Perspective," 249; Ferdinand, *Boston's Lower Courts*, 81; McConville and Mirsky, *A True History*, 287-90.

⁶¹ Cockburn, "Trial by the Book? Fact and Theory in the Criminal Process, 1558–1625," 72-73.

⁶² McConville and Mirsky, *A True History*, 288.

⁶³ *Ibid.*, 204-05.

⁶⁴ *Ibid.*, 290, 99-303.

Chapter 2 – Literature Review

However, the relationship between late pleas and offences did not hold across all jurisdictions. Reduced pleas were less likely to be entered in jurisdictions where the transition to a guilty plea system occurred more slowly. Legal historians Lawrence Friedman and Robert Percival found that in Alameda County's Superior Court in California, 32 percent of 185 sampled defendants pleaded guilty to the original charge between 1900 and 1910 but only 14 percent of defendants entered late guilty pleas.⁶⁵ Interestingly, half of all late guilty pleas did not involve a lesser offence. It is possible that these late guilty pleas were the consequence of implicit bargaining. These findings suggest that context matters and late guilty pleas (as evidence of plea bargaining) might not to be the instrumental factor driving the acceleration in guilty pleas.

Some scholars argue for more tangible evidence of a bargain. Legal historians Thomas Ferdinand and Mary Vogel argue that some form of concession must exist to constitute evidence of a bargained guilty plea.⁶⁶ They posit that guilty pleas without concessions might not necessarily constitute plea bargaining.⁶⁷ Ferdinand and Vogel operationalised concessions as sentence and penalty reductions, and provided evidence that these reductions were dependant on offence type. The Boston Municipal Court dockets record defendants who pleaded guilty to city ordinance offences and received relatively smaller fines compared with defendants convicted at trial.⁶⁸ Similar patterns were evidenced for public drunkenness offences by 1840 and prostitution offences by 1844. More than 80 percent of defendants pleading guilty to prostitution offences received sentences between zero and three months duration, yet those defendants

⁶⁵ Friedman and Percival, *Roots of Justice*, 173.

⁶⁶ Ferdinand, *Boston's Lower Courts*; Vogel, "Social Origins."; *Coercion to Compromise*.

⁶⁷ "Social Origins," 180, 82.

⁶⁸ Ferdinand, *Boston's Lower Courts*, 77.

Chapter 2 – Literature Review

convicted at trial received more lengthy terms of imprisonment.⁶⁹ A greater proportion of property offence defendants pleaded guilty than defendants prosecuted for personal or regulatory offences. However, guilty pleas for property offences were more likely to receive sentencing leniency than guilty pleas to offences against the person, supporting the New York findings that property offences were critical to the guilty plea phenomenon.⁷⁰

Regardless, there is some evidence that complicates this relationship between guilty pleas and sentencing leniency and suggests that the plea bargaining hypothesis does not explain sentencing patterns across different contexts. Vogel found that sentencing discounts were not always applied consistently, and that judges' sentencing discounts were often disparate. Some guilty pleas were not rewarded with lesser sentences. Prior to 1840, defendants pleading guilty to larceny offences in Boston were more likely to be sentenced to a period of imprisonment than defendants convicted by a jury.⁷¹ Judges increased sentencing penalties for defendants pleading guilty to common drunkard and nightwalking charges. For example, in Philadelphia, some defendants received a harsher sentence compared with those convicted at trial, whilst others received no benefit. In 1840, defendant Charles Lee was convicted and sentenced to eighteen months for stealing a dress valued at 28 dollars. On the same day, Henry Miller pleaded guilty to a property offence equalling six dollars yet received the same sentence.⁷² There was some recognition by nineteenth century criminal justice

⁶⁹ *Ibid.*, 77-78.

⁷⁰ Vogel, "Social Origins," 204.

⁷¹ *Ibid.*, 190.

⁷² Steinberg, *The Transformation of Criminal Justice*, 76.

administrators that there was “too much” variation in sentencing across like cases.⁷³ Defendants with political influence were sentenced more leniently and, “to soothe their consciences”, judges subsequently inflicted more severe sentences on lower class defendants.⁷⁴ The inconsistencies in sentencing outcomes across different jurisdictions and offences suggests a theoretical framework for plea bargaining explains some, but not all, patterns in guilty pleas.

The professionalisation hypothesis

The historical scholarship that associates the acceleration in guilty pleas with the emergence of plea bargaining falls within two camps: the professionalisation hypothesis and the contextualist critiques.⁷⁵ The professionalisation theory posits that the antecedents for plea bargaining trace back to nineteenth century developments in criminal trial procedure and practice tied to the professionalisation of lawyers and the police.⁷⁶ Lawyers’ increasing participation in the criminal prosecution over time shaped the modern adversarial trial process that subsequently became complex and time consuming. Some scholars argue that the development of the adversarial prosecution process created caseload pressure on prosecutors and the courts.⁷⁷ Additionally, the professionalisation of lawyers and police influenced new rules of evidence and improvements in the quality of evidence that created stronger cases making acquittals less likely.⁷⁸ These developments arguably provided incentive for prosecutors and

⁷³ In 1885, the California State Penological Commission identified ‘unsettling’ variations in sentencing. Friedman and Percival, *Roots of Justice*, 210.

⁷⁴ *Ibid.*

⁷⁵ McConville and Mirsky, *A True History*, 1.

⁷⁶ Langbein, "Short History of Plea Bargaining," 264-66.

⁷⁷ Fisher, "Bargaining's Triumph," 898.

⁷⁸ Feeley, "Legal Complexity," 192.

defendants to engage in plea bargaining, avoiding lengthy trials and guaranteeing convictions. Lawyers are thus central to the professionalisation argument.

Lawyers

The modern adversarial criminal trial developed relatively recently. In the early modern court, judges were generally the only legally trained actors in the courtroom; the complainant acted as private prosecutor, engaged in cross-examination of witnesses and answered questions directly from the jury.⁷⁹ Individual complainants, prosecution societies, banks, and occasionally the state, sometimes engaged lawyers to advise them or prosecute on their behalf.⁸⁰ Still, the contest between prosecuting and defence counsel did not emerge in English courts until the early to mid-nineteenth century, when legislative changes extended rights to defence counsel at trial. Prior to the enactment of the English *Prisoner's Defence Counsel Act* 1836, the common law forbade defendants legal representation, even when prosecuted for capital offences like murder.⁸¹ Defence counsel could advise a defendant how best to present their case but were unable to speak directly to the jury until the Act permitted defendants full legal representation at trial.⁸² US jurisdictions allowed defence counsel much earlier than in England.⁸³ After 1734, Virginia permitted defence counsel to appear in capital cases.⁸⁴ By 1820, most US

⁷⁹ J.M. Beattie, "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries," *Law and History Review* 9, no. 2 (1991): 221; Clive Emsley, *Crime and Society in England: 1750-1900*, 2nd ed. (London: Longman, 1996), 197.

⁸⁰ John H. Langbein, *The Origins of Adversary Criminal Trial* (Oxford: Oxford University Press, 2003), 109; Randall McGowen, "The Bank of England and the Policing of Forgery, 1797–1821," *Past & Present* 186, no. 1 (2005): 90.

⁸¹ Beattie, "Scales of Justice," 221.

⁸² Cerian Charlotte Griffith, "The Prisoner's Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial," *Law, Crime and History* 4, no. 2 (2014): 28.

⁸³ R.N. Jonakait, *The American Jury System* (New York: Yale University Press, 2006), 175.

⁸⁴ E. Moglen, "Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege against Self-Incrimination," *Michigan Law Review* 92, no. 5 (1994): 1092.

Chapter 2 – Literature Review

defendants accused of felony offences had representation.⁸⁵ However, counsel was not provided to poor defendants in New York, for example, until 1938.⁸⁶

The proliferation and subsequent professionalisation of lawyers increased their sphere of influence in the trial process.⁸⁷ Lawyers steadily displaced the judges' dominant role in the proceedings, for example, taking control of the fact-finding process that had been the judiciary's province.⁸⁸ Professionalisation involved establishing new responsibilities for evidence and cross-examination.⁸⁹ James Rice argues that trials became marked by "increasingly well-defined extra-statutory rules of evidence".⁹⁰ At the same time, improvements in police investigation techniques produced strong evidential material that strengthened the prosecution's case, identifying the 'truly' guilty.⁹¹ This opened the way to plea bargaining by public prosecutors. Faced with certain conviction, a guilty plea was the best outcome for the defendant when exchanged for some concession.⁹²

Only a handful of nineteenth century cases record prosecutors' plea bargaining practices. One of the limitations of the professionalisation scholarship is the lack of analyses of lawyers' bargaining. There is little documented evidence of plea bargaining in the historical record. Legal historian George Fisher discovered one bargain documented in the margins of the Middlesex County court book that recorded that three

⁸⁵ James D. Rice, "The Criminal Trial before and after the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681-1837," *The American Journal of Legal History* 40, no. 4 (1996): 457.

⁸⁶ Mike McConville and Chester Mirsky, "Lawyering for the Poor in New York City's Criminal Courts," *Holdsworth Law Review* 12 (1987): 24.

⁸⁷ Peter King, *Crime, Justice, and Discretion in England, 1740-1820* (Oxford: Oxford University Press Oxford, 2000), 227.

⁸⁸ Langbein, *Adversary Criminal Trial*, 312-13.

⁸⁹ Emsley, *Crime and Society*, 178. In the US context, see Rice, "Before and after the Lawyers," 459.

⁹⁰ "Before and after the Lawyers," 459.

⁹¹ Friedman and Percival, *Roots of Justice*, 194.

⁹² McConville and Mirsky, *A True History*, 4-5.

of the defendant's four liquor-related offences were exchanged for a guilty plea.⁹³ McConville and Mirsky analysed 172 DA case files of defendants prosecuted between 1850 and 1865 but found only five cases that documented an explicit negotiation between New York prosecutors, arresting officers, and trial judges.⁹⁴ The most explicit evidence of lawyers' bargaining practices, frequently-cited in the scholarship, was initially identified by legal scholar Thomas Ferdinand.⁹⁵ In 1844, a Massachusetts legislative committee inquired into the bargaining practices of DA Asahel Huntington who provided a detailed account of his plea bargaining practices.⁹⁶ He developed a procedure where defendants were charged with multiple counts for liquor offences and the prosecutor then negotiated a guilty plea of *nolo contendere*. Otherwise, the lack of evidence of bargaining by lawyers is a serious but understandable limitation of the current research. Equally, there is limited empirical evidence supporting the association between professionalising police and plea bargaining.

Policing

The professionalisation hypothesis suggests that the modernisation of police during the nineteenth century also contributed to the guilty plea phenomenon.⁹⁷ Police took control of the investigation and arrest processes once undertaken by private prosecutors following the establishment of centralised police forces.⁹⁸ The hypothesis associates professionalisation with technological improvements in detection and

⁹³ Fisher, "Bargaining's Triumph," 870.

⁹⁴ This was from a sample of 172 guilty plea case files. McConville and Mirsky, *A True History*, 297.

⁹⁵ Ferdinand, *Boston's Lower Courts*, 69-70.

⁹⁶ See also Fisher, *Triumph: A History*, 29-32. The Committee apparently approved of the practice, although a few years later the state legislated the removal of the district attorneys power to employ the *nolle prosequi* or *nolo contendere* as a bargaining tool.

⁹⁷ Alschuler, "Plea Bargaining," 241.

⁹⁸ Mark H. Haller, "Plea Bargaining: The Nineteenth Century Context," *ibid.*: 275.

Chapter 2 – Literature Review

evidence, including forensic techniques like fingerprinting and photography, the use of telecommunications, and other evidence testing including ballistics.⁹⁹ Police created a strong evidential case that provided the foundation for subsequent bargaining between prosecuting and defence counsel.¹⁰⁰ However, little research examines policing practices in terms of the accelerating guilty plea. This thesis addresses this limitation, providing empirical evidence of the association between police practices and defendants' guilty pleas.

Beyond hypothesis, there is little evidence of the effect of police professionalisation on accelerating guilty pleas. Ferdinand provides the strongest account in terms of police prosecution, presenting evidence that some police prosecutors in the Boston police courts appear to have bargained with defendants, using their discretion to reduce charges or leave cases 'on file' in exchange for guilty pleas.¹⁰¹ One of the five New York cases documenting plea bargaining involved an arresting police officer.¹⁰² In 1865, George Sloan was indicted for threatening the arresting officer with a gun, although the weapon was never produced in court. Sloan initially disputed the police officer's testimony but entered a late guilty plea to a lesser charge. The sentence was suspended following a discussion between the police officer and the judge.

Some scholars question the hypothetical association between police professionalisation and plea bargaining. Mike McConville argues that developments in technology and police practice were either yet to emerge, or did not impact greatly on investigative outcomes, when guilty pleas first dominated case outcomes in the mid

⁹⁹ McConville, "Institutionalised Guilty Pleas," 95.

¹⁰⁰ Alschuler, "Plea Bargaining," 241.

¹⁰¹ Ferdinand, *Boston's Lower Courts*, 95-96.

¹⁰² McConville and Mirsky, *A True History*, 298.

Chapter 2 – Literature Review

nineteenth century.¹⁰³ Although police took control of pre-trial processes including organising witnesses, subsequently providing more witnesses per trial than private prosecutors, McConville argues that these practices made little difference to the overall outcome of a case, suggesting that developments in police evidential material might not be as influential as hypothesis scholars suggested.¹⁰⁴ Policing historian Clive Emsley notes that lawyers often expressed concern that police were not legally trained and focused on “partial evidence” to secure convictions.¹⁰⁵ Furthermore, lawyers were aware that in the US, police sometimes acted as ‘plea getters’, negotiating directly with remanded defendants to obtain guilty pleas.¹⁰⁶ Even early twentieth century legal textbooks referred to police process corruption involved in obtaining guilty pleas.¹⁰⁷ Police made false promises to defendants in exchange for their guilty pleas so as to claim payment for transporting prisoners to the local jail. This suggests that other police practices beyond investigation and evidence influenced defendants’ guilty pleas.

In spite of these leads, there is little research on the association between police corruption and guilty pleas. Mark Haller argues that during the nineteenth century the US criminal justice system was characterised by a culture of bribery and bargaining involving politicians, court officials, and police.¹⁰⁸ He argues that it is “reasonable to expect” that plea bargaining practices during the nineteenth century involved police and a “variety of threats and promises” to pressure defendants to plead guilty.¹⁰⁹ But

¹⁰³ McConville, "Institutionalised Guilty Pleas," 95.

¹⁰⁴ McConville and Mirsky, *A True History*, 232.

¹⁰⁵ Emsley, *Crime and Society*, 193.

¹⁰⁶ Arthur Cheney Train, *The Prisoner at the Bar: Sidelights on the Administration of Criminal Justice*, 3rd ed. (New York: Scribner, 1924), 223-24.

¹⁰⁷ Francis Wharton, *Evidence in Criminal Issues*, 10th ed. (Philadelphia: May and Brother, 1912), 1326 ft 22.

¹⁰⁸ Haller, "The Nineteenth Century Context," 277.

¹⁰⁹ *Ibid.*, 278.

although McConville and Mirsky's New York plea bargaining study did consider whether corrupt practices influenced defendants' guilty pleas, they found little recorded evidence of allegations of induced confessions or police violence in DA case files between 1850 and 1865, the period when guilty pleas accelerated.¹¹⁰ Like the absence of documented plea bargaining, the lack of documented evidence of police misconduct in one type of source material does not necessarily mean that these practices did not occur. This is an important aspect of the professionalisation thesis that requires further research.

Case complexity and caseload pressure

Aspects of the hypothesis that have received ample research include the case complexity and caseload pressure arguments. Some professionalisation scholars argue that the presence of prosecuting and defence counsel in the modern trial increased case complexity and subsequently caseload pressure. Langbein argues that prior to the entry of the lawyers, trials were rapid affairs; the Old Bailey court averaged twelve to twenty trials per session day between 1670 and 1730.¹¹¹ He found little evidence in the court record of prosecuting lawyers, in-depth cross-examinations, procedural motions or presentation of evidence itself.¹¹² In contrast, Californian courts heard six trials a day in 1890.¹¹³ Plea bargaining practices emerged as a means of avoiding protracted, time-consuming trials.¹¹⁴ Criminal justice administrators required an alternative means of disposing of criminal cases quickly and efficiently, and so began negotiating guilty

¹¹⁰ McConville and Mirsky, "Rise of Guilty Pleas," 463.

¹¹¹ Langbein, "Before the Lawyers," 277.

¹¹² Ibid., 282. Alternately, court reporters might simply have refrained from noting their presence in the Old Bailey Special Papers.

¹¹³ Friedman and Percival, *Roots of Justice*, 257 fn 16.

¹¹⁴ Feeley, "Legal Complexity," 192.

pleas for concessions.¹¹⁵ However, there is limited and conflicting evidence for this argument.

The case complexity argument adopts a ‘correlation is causation’ position. It posits that guilty pleas accelerated in proportion with the increasingly complex nature of criminal trials. Malcolm Feeley operationalised complexity as an aggregated measure of seven variables.¹¹⁶ Employing a sample of cases from the Old Bailey between 1795 and 1912, he argued that the measure of adversariness increased in direct proportion to the acceleration in guilty pleas.¹¹⁷ Yet the empirical evidence for the case complexity hypothesis is weak.¹¹⁸ McConville and Mirsky found no relationship between case complexity and rising guilty pleas in their examination of litigation practices between 1805 and 1860 in the New York Court of General Sessions.¹¹⁹ There was little variation in the number of lawyers or witnesses present in the courtroom prior to and following the guilty plea transition. There is also little evidence that a related aspect of case complexity, caseload pressure, was a driving mechanism behind the guilty pleas acceleration.¹²⁰

The caseload pressure hypothesis suggests that courts became increasingly overloaded with work as cases became more complex and trials more protracted. Prosecutors bargained to avoid trials. Fisher argues that a dramatic increase in

¹¹⁵ Langbein, "Short History of Plea Bargaining," 262.

¹¹⁶ Feeley, "Legal Complexity," 217. These variables included the presence of 1) prosecution attorneys, or 2) defence counsel, 3) the vigour of prosecution and defence, 4) defence, 5) use of expert witnesses, 6) whether either party raised questions of law, or 7) questions of evidence or procedure.

¹¹⁷ *Ibid.*, 186.

¹¹⁸ Alschuler, "Plea Bargaining," 211; Milton Heumann, "A Note on Plea Bargaining and Case Pressure," *ibid.* (1975): 517, 22.

¹¹⁹ McConville and Mirsky, *A True History*, 260. Single defendants and single-counts constituted more than 90 percent of all defence lawyer cases between 1810 and 1870.

¹²⁰ Feeley, "Legal Complexity," 184.

Chapter 2 – Literature Review

prosecutions for liquor offences in Massachusetts' Middlesex County court during the first few decades of the nineteenth century congested the court system. The DA subsequently developed a system of bargaining guilty pleas to lesser offences.¹²¹ Sociologist Milton Heumann refutes Fisher's argument, claiming that three decades of social science research debunks the caseload hypothesis.¹²² More recent research supports this critique. An analysis of New York court dockets provides no evidence of a correlation between caseload pressure and accelerating guilty pleas.¹²³ Although caseloads increased by 230 percent between 1840 and 1865, a corresponding increase in the guilty plea rate was far greater (610 percent). Further, court administration practices responded to the increases in prosecutions by expanding the number of sitting days and prosecutorial resources as the court's caseload increased. Caseload pressure did not appear to have exceeded the court's capacity to deal with an increasing number of prosecutions.

Summary

This discussion reveals the inconsistencies in some aspects of the professionalisation argument, and the gaps in others. The hypothesis rests on the emerging nature of the modern adversarial trial and the developing roles of major actors in that trial process. It suggests that lawyers became central to the trial process, influencing the rise of guilty pleas in two ways. First, lawyers' adversarial practices, like arguing over increasingly complex rules of evidence, created complexity that meant

¹²¹ Fisher, "Bargaining's Triumph." Alternately, Fisher suggests that an explosion in civil cases created caseload pressure so that judges increasingly approved of and facilitated bargaining in criminal cases to allow time for civil caseload, see *Triumph: A History*, 121-22.

¹²² Milton Heumann, "Back to the Future: The Centrality of Plea Bargaining in the Criminal Justice System," *Canadian Journal of Law and Society* 18, no. 2 (2003): 136.

¹²³ McConville and Mirsky, *A True History*, 220.

trials took more time and resources. Court work consequently became backlogged and required alternative methods for disposing of cases; hence, plea bargaining.

Improvements in detection and the quality of evidence also meant that prosecution cases were difficult to challenge, providing prosecuting lawyers with leverage to engage in bargaining with defence lawyers and defendants. Yet the evidence is not conclusive, and, by nature of the difficulties inherent in the primary sources, the professionalisation argument relies on hypothesised rather than demonstrated associations between key actors, processes, and pleas.

The contextualist critique

In contrast, the contextual scholars argue that the rise of the guilty plea was influenced by factors beyond the courtroom actors. Mike McConville argues that police and lawyers are “interrelated entities” that reflect “wider social transformations” beyond courtroom developments.¹²⁴ The contextualist scholarship considers these broader social transformations, focusing on the socio-political processes underpinning the acceleration in guilty pleas.¹²⁵ The professionalisation school positions legal actors as exogenous to social influences, but the contextualists argue that plea bargaining reflected the interests of emerging states in periods of intense social disorder.¹²⁶ These accounts focus on three cities - Philadelphia, Boston and New York – and the responses of social elites and political officials to the social unrest that characterised many US jurisdictions during the

¹²⁴ McConville, "Institutionalised Guilty Pleas," 97.

¹²⁵ McConville and Mirsky, "Rise of Guilty Pleas," 331.

¹²⁶ McConville, "Institutionalised Guilty Pleas," 97.

Chapter 2 – Literature Review

nineteenth century.¹²⁷ A key response, common to all three case studies, involved system transformation from private to public prosecution.

During the early to mid-nineteenth century, the US experienced widespread social and industrial upheaval and unrest.¹²⁸ In Boston, city officials faced workers' strikes and general unrest.¹²⁹ An "epidemic of violence and disorder" occurred in Philadelphia, a consequence of labour conflict heightened by racial and religious tensions.¹³⁰ New York's social conflict derived from economic and social pressures including increasing urbanisation and poverty, high rates of immigration, and social problems including alcoholism and increased crime.¹³¹ Social elites and state officials across these jurisdictions focused increasingly on social control and law and order. The subsequent changes to their respective criminal justice systems included the introduction of formalised policing and public prosecution practices that provided DAs with wide discretionary powers.

In Boston, so Mary Vogel argues, plea bargaining emerged as a social control mechanism to extend what she terms 'episodic leniency'. Episodic leniency was a tradition of the English and US common law that the state employed to win the support of a newly enfranchised citizenry.¹³² The legislature responded to social disorder by enacting regulations and prosecuting new offences including 'offences against religion'; that is, selling and drinking illegal spirits on Sundays. Because these 'victimless' crimes

¹²⁷ McConville and Mirsky, *A True History*; Vogel, "Social Origins."; Ferdinand, *Boston's Lower Courts*; Steinberg, *The Transformation of Criminal Justice*.

¹²⁸ Vogel, "Social Origins," 164.

¹²⁹ *Ibid.*, 199.

¹³⁰ Steinberg, *The Transformation of Criminal Justice*, 135.

¹³¹ McConville, "Institutionalised Guilty Pleas," 94.

¹³² Vogel, *Coercion to Compromise*, 169.

Chapter 2 – Literature Review

were generally outside the province - or indeed the interests - of private prosecutors, the state established public prosecution to prosecute regulatory offences. A centralised police force was established in 1838, which prosecuted city ordinance, minor crime, and liquor offences in the Police Court.¹³³ Prosecuting police may have bargained with defendants as an extension of their negotiations with informants. Plea bargains extended leniency that enhanced the legitimacy of the political elites' authority at a time when emerging political parties jostled for influence.

In New York, there was a similar shift in political attitudes towards crime and social control and negotiation as an act of appeasement. The mid-nineteenth century unrest in New York coincided with a “transformation in the attitude towards justice” and an increasing focus on the criminal class and foreign criminals.¹³⁴ Criminal statistics informed new sensibilities amongst both elites and the newly enfranchised middling classes regarding the outcomes of justice. McConville and Mirsky argue that this influenced a shift in the criminal justice system from individual justice to an aggregate focus on “the pattern of crime and the control of the dangerous classes”.¹³⁵ The key figure in this shift was the DA who became an elected official “openly aligned with the interests of the state”.¹³⁶

The rise in guilty plea rates occurred around the same time as the DAs role became highly politicised. Yet the case files show no indication why bargaining occurred. McConville and Mirsky stress that a guilty verdict was the most likely outcome in most cases. They suggest an alternative reason; the politics of “ward-

¹³³ Ferdinand, *Boston's Lower Courts*, 27-28.

¹³⁴ McConville, "Institutionalised Guilty Pleas," 94.

¹³⁵ Ibid.

¹³⁶ McConville and Mirsky, "Rise of Guilty Pleas," 464.

Chapter 2 – Literature Review

heeling” at play.¹³⁷ Bargained guilty pleas, combined with voters’ interest in crime and prosecution statistics, ensured the DA high conviction rates whilst providing concessions that satisfied his electoral constituents. This overlap of the political and social environments is critical in contextual accounts of the origins of plea bargaining.

Similarly, in Philadelphia, discretionary prosecutorial power shifted from citizens and city aldermen, to police and the DA role. Philadelphia transitioned to a public prosecution system much later than other US jurisdictions.¹³⁸ Prior to the 1870s, aldermen or justices of the peace disposed of private prosecutions through their own neighbourhood offices, often using their discretion to filter out cases without reference to grand juries.¹³⁹ Many of the cases that did proceed to grand juries were often dismissed for lack of evidence, with grand juries complaining of prosecutors’ petty complaints.¹⁴⁰ Although DAs prosecuted serious indictable crimes and capital charges, very few cases reached a jury trial because private prosecutors either failed to appear or ended the proceedings.

The system functioned until mass social disorder undermined the system of private prosecution that could not respond to the riots and group violence in Philadelphia. There was little interest in privately prosecuting riots, and grand juries struggled to find witnesses. In response, reformers pushed for the development of a centralised state-run administration. This required a new centralised policing force, and diligent public prosecution that created a “structural separation of law enforcement and

¹³⁷ *A True History*, 307.

¹³⁸ Steinberg, "From Private Prosecution."; *The Transformation of Criminal Justice*.

¹³⁹ "From Private Prosecution," 573.

¹⁴⁰ *Ibid.*, 575.

judicial activity".¹⁴¹ Historian Allen Steinberg argues that this separation increased the discretionary powers of both police and public prosecutor.¹⁴² Prosecutors quickly began to use this wide discretion to dispose of most cases through either a guilty plea or a *nolle prosequi*.¹⁴³ However, there was no evidence of plea bargaining practices in Steinberg's sample years, despite the development of public prosecution. This suggests that, in some contexts, a shift to public prosecution was not a precursor to plea bargaining.

Summary

Contextualist arguments focus on the political contexts that influenced the emergence of plea bargaining. These accounts focus on the factors that effected change in the administration of criminal justice more broadly, including emerging voter concerns with the 'criminal class', and an emerging interest in crime statistics and social control in the face of unrest. This led to a shift from individual, private justice to a system of aggregate justice.¹⁴⁴ This involved a shift in judicial power from judges and courts as adjudicators of law, to public officials like DAs and police prosecutors using prosecution to shape public policy. Negotiated guilty pleas, included with conviction at trial statistics, enabled politicians and public prosecutors to take responsibility for high prosecution rates, whilst offering leniency through sentencing or charge concessions to the newly enfranchised local voters, many of whom were most likely to see the inside of a courtroom.¹⁴⁵ However, an explanation for the rise of the guilty plea based on

¹⁴¹ Ibid., 584.

¹⁴² Ibid.

¹⁴³ Ibid., 585.

¹⁴⁴ McConville and Mirsky, *A True History*, 336.

¹⁴⁵ Vogel, "Social Origins," 203.

“emergent states” and the “rapidly changing political economy of the nineteenth century”¹⁴⁶ might not provide a suitable theoretical framework for examining system transformation in Australian courts during the twentieth century.

Applying theory to the Australian context

Although the English, US and Australian jurisdictions share a common law heritage,¹⁴⁷ there were substantive differences in key nineteenth century developments in criminal prosecution process and practice that contests the applicability of plea bargaining theory to the twentieth century Australian context. The introduction of English law occurred much later in the Australian colonies than in the US colonies, and Australian law developed in very different colonial conditions.¹⁴⁸ The *New South Wales Act 1787* established a court system that prescribed “major variations from the English methods of trial and indictment”.¹⁴⁹ These early penal military-style courts were replaced in 1823 by a three level court hierarchy similar to English courts but which avoided the overlapping complexity inherent in English courts.¹⁵⁰ There were other critical variations between the jurisdictions that suggest that the antecedents of plea bargaining, including the professionalisation of lawyers, rules of evidence, and the professionalisation of police, developed differently in this less complex environment.

¹⁴⁶ McConville and Mirsky, *A True History*, 9.

¹⁴⁷ Patrick Parkinson, *Tradition and Change in Australian Law*, 4th ed. (Sydney: Thomson Reuters, 2010), 4. Under common law, the court did not act to intervene to investigate a specific criminal or civil matter but relied on a complainant or prosecutor to request it resolve a civil dispute or criminal victimisation. The court does not focus on determining the truth of the matter itself but on the determination of the “preferred truths” advanced by the parties.

¹⁴⁸ Bruce Kercher, “Why the History of Australian Law Is Not English: Second Alex Castles Lecture in Legal History, October 2000,” *Flinders Journal of Law Reform* 7 (2004): 200.

¹⁴⁹ Alex C. Castles, *An Australian Legal History* (Sydney: Law Book Company, 1982), 47.

¹⁵⁰ *New South Wales Act (1823)* 4 Geo. IV c.96; B. Kercher, *An Unruly Child: A History of Law in Australia* (St. Leonards, NSW: Allen & Unwin, 1995), 72.

These variations include differences in pre-trial processes and the early institution of public prosecution.

The committal hearing

The pre-trial committal procedures for serious indictable offences varied jurisdictionally although these procedures share common origins. In 1555, the *Marian Act* transformed the English committal process.¹⁵¹ Private prosecutors initiated proceedings by making a complaint to a local justice of the peace who interviewed and recorded testimony from the complainant, the defendant, and any witnesses; these written depositions were later produced in court.¹⁵² For indictable offences, the justice passed this information to the grand jury to determine whether there was a case to answer.¹⁵³ The indictment was marked a ‘true bill’ when the grand jury found there was sufficient evidence to maintain a prosecution.¹⁵⁴ The grand jury acted, in theory, as a screening mechanism that filtered out “groundless or insubstantial” prosecutions.¹⁵⁵ However, legal historian John Beattie found that grand juries generally delivered a true bill. The Surrey grand jury, for example, indicted more than 80 percent of defendants between the late 1660s and 1800.¹⁵⁶ Both the English and US court systems utilised the grand jury mechanism well into the twentieth century. Australian courts did not.

¹⁵¹ Langbein, "Before the Lawyers," 281.

¹⁵² J.A. Sharpe, *Crime in Early Modern England 1550-1750*, 2nd ed. (London: Longman, 1999), 52-53.

¹⁵³ Emsley, *Crime and Society*, 184.

¹⁵⁴ Sharpe, *Crime in Early Modern England*, 54.

¹⁵⁵ John H. Langbein, Renee Lettow Lerner, and Bruce P. Smith, *History of the Common Law: The Development of Anglo-American Legal Institutions* (New York: Aspen, 2009), 589.

¹⁵⁶ J.M. Beattie, *Crime and the Courts in England, 1660-1800* (Princeton: Princeton University Press 1986), 320.

Chapter 2 – Literature Review

The grand jury found little purchase in Australian conditions. Grand juries were only utilised in NSW for four years, were rarely utilised in Victoria, and were never established in either Queensland or Tasmania.¹⁵⁷ The free settler colonies of South Australia and Western Australia abolished their grand jury systems by the 1850s, long before England did so in 1933.¹⁵⁸ The functions of the grand jury instead passed in part to magistrates and in part to the attorney general.¹⁵⁹ Magistrates determined whether police prosecution evidence sustained a *prima face* case that could proceed to a jury, and took on the filtering process of the grand jury.¹⁶⁰ The attorney general had the common law discretion to withdraw any prosecution using the *nolle prosequi*.¹⁶¹ This discretionary power was soon extended to crown prosecutors in a system of public prosecution. The Australian committal process was therefore less complex and time consuming than the US and English court systems, suggesting that there was less need to develop alternative adjudication processes like plea bargaining.

Public prosecution

The historical plea bargaining scholarship relies on the shift to public prosecution as a precursor of plea bargaining and hence the rise of the guilty plea. The development of public prosecution in the Australian colonial context was a departure from both the English and the US prosecution practices. The English system involved

¹⁵⁷ Greg Taylor, "The Grand Jury of South Australia," *The American Journal of Legal History* 45, no. 4 (2001): 468-69.

¹⁵⁸ *Ibid.*, 507 fn 298.

¹⁵⁹ Section 4 of the 1823 New South Wales Courts Act stipulated that prosecutions be brought in the name of the new attorney general. New South Wales Act 1823 4 Geo. IV c.96. Castles, *An Australian Legal History*, 275.

¹⁶⁰ Francine Feld, Andrew Hemming, and Thalia Anthony, *Criminal Procedure in Australia* (Chatswood, NSW: LexisNexis Butterworths, 2015), 397.

¹⁶¹ J. Crawford and B.R. Opeskin, *Australian Courts of Law* (Oxford: Oxford University Press, 2004), 79.

primarily private prosecutions up until the late nineteenth century.¹⁶² In 1800, one fifth of all London court prosecutors were represented by a lawyer.¹⁶³ By the 1830s, 19 out of 20 cases were privately prosecuted at the Old Bailey.¹⁶⁴ When public prosecutions were initially introduced in English courts, they generally involved large groups of defendants prosecuted for rioting, rape and murder, and criminal enterprises.¹⁶⁵ There was a much slower shift to public prosecution in English courts compared to the Australian context. By the mid-twentieth century only eight percent of indictable offences were dealt with by English public prosecutors.¹⁶⁶

Similarly to the Australian system, public prosecution developed much earlier in US jurisdictions, during the early nineteenth century.¹⁶⁷ A significant variation between the US and Australian jurisdictions was the politicisation of the DAs position. Unlike the DA, crown prosecutors were not elected officials aligned with political parties. By the mid-1800s, the DA was a politicised, elected position.¹⁶⁸ McConville and Mirsky argue that party politics and an emerging emphasis on aggregate justice and crime statistics meant DAs negotiated guilty pleas for lesser offences to lift their conviction

¹⁶² Bruce P. Smith, "The Emergence of Public Prosecution in London, 1790-1850," *Yale Journal of Law & the Humanities* 18, no. 1 (2013): 30.

¹⁶³ King, *Crime, Justice, and Discretion in England, 1740-1820*, 228.

¹⁶⁴ Langbein, *Adversary Criminal Trial*, 285.

¹⁶⁵ Beattie, "Scales of Justice," 229. For further discussion on private prosecutions including the differences between English and US prosecution societies, see Ann-Marie Szymanski, "Stop, Thief! Private Protective Societies in Nineteenth-Century New England," *New England Quarterly* (2005); Craig B Little and Christopher P Sheffield, "Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries," *American Sociological Review* 48, no. 6 (1983).

¹⁶⁶ Patrick Baron Devlin, *The Criminal Prosecution in England* (New Haven: Yale University Press, 1958). However, Barry Godfrey's examination of prosecutions in Crewe magistrates' court between 1880 and 1940 reveals that most prosecutions were undertaken by police, see "Changing Prosecution Practices and Their Impact on Crime Figures, 1857-1940," *The British Journal of Criminology* 48, no. 2 (2008): 179.

¹⁶⁷ Steinberg, "From Private Prosecution," 579; Carolyn B Ramsey, "The Discretionary Power of Public Prosecutors in Historical Perspective," *The American Criminal Law Review* 39, no. 4 (2002): 1323. However, private prosecutors continued to initiate cases into the twentieth century in some US jurisdictions.

¹⁶⁸ McConville and Mirsky, "Rise of Guilty Pleas," 460.

Chapter 2 – Literature Review

rates, and their chances at re-election.¹⁶⁹ The DAs discretionary power was substantive. In 1940, Supreme Court judge Robert M. Jackson commented that the public prosecutor had more control over “life, liberty and reputation” than any other public figure.¹⁷⁰ In contrast, Australian public prosecutors were expected to act as ‘ministers of justice’ rather than as partisan advocates.¹⁷¹

Australian criminal justice administration established a public prosecution system relatively early in white settlement history. Public prosecution was firmly entrenched from 1828.¹⁷² Initially, the attorney general appointed and directed crown prosecutors. During the late nineteenth and early twentieth centuries, statutes expanded the discretionary powers of crown prosecutors, similar to those of the attorney general.¹⁷³ Like DAs, crown prosecutors could withdraw or suspend charges using the *nolle prosequi*; unlike US prosecutors, crown prosecutors were employed in government departments and were not elected. While US public prosecutors sought conviction rates to guarantee re-election and meet the expectations of party politics, crown prosecutors, generally free from such political obligations, were expected to put all the facts before the jury and to see that the case for the crown was properly presented.¹⁷⁴ This variation in the interests of prosecutors conceivably affected any pressure placed on prosecutors to attain convictions in a context conducive to the development of plea bargaining practices. Defendants in Australian courts continued to

¹⁶⁹ *A True History*, 310.

¹⁷⁰ Steinberg, "From Private Prosecution," 568.

¹⁷¹ David Plater, "The Development of the Prosecutor's Role in England and Australia with Respect to Disclosure: Partisan Advocate or Minister of Justice?," *University of Tasmania Law Review* 25, no. 2 (2006): 111.

¹⁷² Kidston, "Office of Crown Prosecutor," 149. *Australian Courts Act* (1828) 9 Geo. IV c. 83, s5.

¹⁷³ Elise Histed, "The Introduction and Use of the Grand Jury in Victoria," *The Journal of Legal History* 8, no. 2 (1987): 171.

¹⁷⁴ "Crown Prosecutor's Action In Mackay Case Was Justified," *The Telegraph*, December 31, 1941, <http://nla.gov.au/nla.news-article172349091>.

Chapter 2 – Literature Review

proceed to trial in greater numbers into the twentieth century because crown prosecutors were not under the same pressures to obtain high conviction rates.

Australian pre-trial and prosecutors' practices may have delayed the shift to a guilty plea system compared with the US and English jurisdictions. However, other pre-conditions favourable to the emergence of plea bargaining were evident in the Australian context decades before guilty pleas first accelerated. These included the presence of defence lawyers, the adversarial nature of the criminal trial, rules of evidence, and the professionalisation of police. This suggests that other factors influenced the late onset of the guilty plea phenomenon in Australian courts. Alternately, actors and practices hypothetically associated with the guilty plea influenced the phenomenon in ways that were either unique to twentieth century conditions or that have not been fully considered in the extant scholarship, for example, the role of professionalised policing.

Police process corruption

The historical plea bargaining hypothesis suggests that the emergence of professionalised modern police agencies in the early nineteenth century, influenced the development of plea bargaining. The professionalisation thesis relies on assumptions that centralised policing and technological advances led to improved quality of evidential material, yet there is no empirical evidence to support that claim.¹⁷⁵ Furthermore, the literature is relatively silent on other police practices associated with criminal prosecution including process corruption.

¹⁷⁵ McConville and Mirsky, *A True History*, 4-5.

Chapter 2 – Literature Review

Australian police were responsible for critical pre-trial processes, traditionally the province of English magistrates. Police assumed the investigation of complaints of crime, identification and apprehension of suspects, interrogation of witnesses and suspects, and collecting evidence for the prosecution case.¹⁷⁶ There is little historical research on the practices of Australian police in criminal prosecutions.¹⁷⁷ However, policing historian Mark Finnane documents the long history of government inquiries, especially in the twentieth century, that investigated problematic police practices including violence, that Finnane argues were driven by a “conviction at all costs” mentality.¹⁷⁸ These inquiries reveal a history of police process corruption involving prosecution evidence. These practices included assaults and threats to gain confessions, planting evidence, perjury during witness testimony, and the use of verbals involving unsigned records of interview and notebook confessions. The outcome was that “innocent people were convicted of crimes”.¹⁷⁹

Corrupt practices were also “conducive to the production of guilty pleas” particularly when the defendant had prior convictions.¹⁸⁰ Testimony laws meant that defendants who gave evidence alleging process corruption were subsequently exposed to cross-examination on the basis of character.¹⁸¹ Process corruption limited the

¹⁷⁶ Jacqueline Tombs, "Prosecution: In the Public Interest?" (paper presented at the Prosecutorial Discretion Seminar: Australian Institute of Criminology, Canberra, 1984), 13.

¹⁷⁷ Christopher Corns, "Police Summary Prosecutions in Australia and New Zealand: Some Comparisons," *University of Tasmania Law Review* 19, no. 2 (2000): 281. For an historical examination of policing and prosecution see Mark Finnane and Stephen Garton, "The Work of Policing: Social Relations and the Criminal Justice System in Queensland 1880-1914: Part 1," *Labour History*, no. 62 (1992); Peter N. Grabosky, *Sydney in Ferment: Crime, Dissent and Official Reaction, 1788 to 1973* (Canberra: Australian National University Press, 1977).

¹⁷⁸ Finnane, *Police & Government*, 77.

¹⁷⁹ David Brown, "The Royal Commission into the NSW Police Service: Process Corruption and the Limits of Judicial Reflexivity," *Current Issues in Criminal Justice* 9, no. 3 (1998): 230.

¹⁸⁰ David Brown et al., *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW* (Sydney: Federation Press, 1990), 301.

¹⁸¹ *Ibid.*, 300; J.V. Barry, G.W. Paton, and G. Sawyer, *An Introduction to the Criminal Law in Australia*

Chapter 2 – Literature Review

defendant's ability to question police evidence, particularly if they were recidivist offenders, with little risk of police being held accountable.¹⁸² For most of the twentieth century, the judiciary generally minimised allegations of police process corruption or dismissed these allegations as a form of defence strategy.¹⁸³ The judiciary was often hostile to allegations of police corruption by the accused.¹⁸⁴

Karl Alderson's unpublished thesis traces NSW police reforms from the 1940s that sought to address "credible complaints" of problematic police practices, particularly police verbals and false confessions.¹⁸⁵ Calls for tape-recorded records of interviews were issued as early as the 1950s to combat complaints of police brutality and fabricated confessions.¹⁸⁶ One ex-police prosecutor who worked in the NSW lower courts between 1956 and 1965 detailed the widespread nature of fabricated confessions.¹⁸⁷ According to the ex-prosecutor, the judiciary were largely responsible for "the survival of a system of institutionalised verballing" because judges "accepted police evidence in almost all cases" rather than upholding the rights of defendants.¹⁸⁸ Despite these longstanding concerns, reform was slow and the Australia judiciary refused to acknowledge that police practices included fabricated confessions until the *Driscoll* case in 1977.¹⁸⁹ The implication is that police process corruption was systemic throughout the twentieth century and is an important variable to consider in terms of rising guilty pleas during the twentieth century. In this context, the current research expands current police research

(London: Macmillan, 1948), 7-79.

¹⁸² Baldwin and McConville, *Negotiated Justice*, 68-69.

¹⁸³ Brown et al., *Criminal Laws*, 301.

¹⁸⁴ Brown, "Royal Commission," 237.

¹⁸⁵ Alderson, "Powers and Responsibilities," 258-60.

¹⁸⁶ *Ibid.*, 264. "Tape Recorder Suggested at Police Interviews," *South Coast Times and Wollongong Argus*, June 28, 1954, <http://nla.gov.au/nla.news-article142732305>.

¹⁸⁷ *Ibid.*, 260.

¹⁸⁸ *Ibid.*, 261.

¹⁸⁹ *Driscoll v R* (1977) 137 CLR 517, cited in *ibid.*, 267.

by identifying police practices associated with the guilty plea phenomenon in Australian courts.

Summary

The professionalisation and contextualist theories explain the rise of the guilty plea in nineteenth century conditions primarily in the US context. However, these theories attribute the development of plea bargaining to specific socio-legal contexts that are arguably far removed from the twentieth century context of Australian social life, including widespread social disorder and violence. Conversely, the theories attribute the development to practices and processes, such as the shift from private to public prosecution, that were already extant in the Australian criminal prosecution process and yet did not trigger the guilty plea phenomenon. This thesis argues for a fresh empirical approach that centres on the specific practices and patterns that influenced defendants' guilty pleas rather than applying a theoretical framework that positions plea bargaining as the primary focus of the research.

Conclusion

This chapter outlined the two competing theoretical frameworks that dominate the historical guilty plea literature. The professionalisation hypothesis explains the development of plea bargaining by examining developments within the prosecution process in the roles and practices of key actors. The increasing presence of lawyers during the nineteenth century, arising from defendants' new legal rights to defence counsel are key elements in this hypothesis. Their increasing presence extended the lawyers influence and role in the trial process traditionally dominated by the private prosecutor, the judge, and the jury. Complex rules of evidence, some covering improved

Chapter 2 – Literature Review

evidential material resulting from professionalised policing, heightened adversariness and complexity that overloaded court resources. But although the hypothesis argues that plea bargaining developed as a mechanism to avoid costly trials and a backload of criminal cases, there is little evidence for either complexity or caseload pressure. The professionalisation hypothesis is based on theory but there is a lack of systemic empirical evidence for its argument.

Conversely, the contextualist critique argues that broader socio-political developments influenced plea bargaining practices. A shift in judicial responsibility from judges to public officials like DAs, the expansion of police prosecution, and the court's role as shaper of public policy influenced the emergence of plea bargaining as a legitimate legal practice. There is an implication that the contextualist argument is generalisable across contexts, yet the drivers of plea bargaining emerging from industrial-era social disorder do not appear to explain the much later shift to the guilty plea in the Australian context. The antipodean post-convict court system was founded on public prosecution, and its pre-trial processes were more flexible and streamlined than either the English or US systems. Furthermore, the scholarship's empirical evidence reveals guilty pleas that were not bargained-for. The plea bargaining hypothesis cannot explain guilty pleas outside the plea bargaining parameters. This thesis argues that an appropriate examination of the guilty plea phenomenon in Australia should instead focus on guilty pleas as the unit of analysis, rather than plea bargaining.

Part Two: The Quantitative Study

Chapter 3. The Guilty Plea Phenomenon

On December 31, 1927, Washington D.C newspaper *Evening Star* published an article titled ‘Passing of the Jury System Forecast’. It reported on the annual meeting of the US Political Science Association, held the afternoon before.¹ Professor Raymond Moley told the meeting that in some states, 90 percent of cases were disposed of without a trial. The jury system, he stated, was “passing out of existence in the administration of criminal law and hardly is worth the effort to save it”. Moley was referring to the rise of the guilty plea in disposing of criminal prosecutions and the evidence revealed by crime surveys across multiple US jurisdictions.² The surveys found that more than 85 percent of all convictions in Cleveland, Minneapolis, New York and Chicago were obtained through defendants’ guilty pleas. In some cities, the proportion was as high as 95 percent evidence that, according to Moley, jury trials were “vanishing”.³ Defendants’ guilty pleas were the dominant mode of case disposition.

Local Australian newspapers did not follow the story, although Professor Moley’s name was familiar to Australian readers in other capacities. A “noted sociologist”, his view on crime in the US was often reported during the 1920s.⁴ In the 1930s, Australians read about his role as “intimate adviser” and later Assistant Secretary of State, to President Roosevelt.⁵ Yet his insights concerning the centrality of guilty pleas in criminal justice administration went unnoticed in the Australian press. A quick glance at Australian historical newspapers during the first half of the twentieth century

¹ “Passing of Jury System Forecast,” *Evening Star*, December 31, 1927, <https://chroniclingamerica.loc.gov/lccn/sn83045462/1927-12-31/ed-1/seq-5/>.

² Raymond Moley, “The Vanishing Jury,” *Southern California Law Review* 2 (1928): 105 fn25.

³ *Ibid.*, 105.

⁴ “Crime in USA,” *Queensland Times*, March 10, 1927, <http://nla.gov.au/nla.news-article116911175>.

⁵ “First Break,” *Daily Mercury*, August 29, 1933, <http://nla.gov.au/nla.news-article172953701>.

reveal little recognition that jury trials might be disappearing from state criminal courts. In February 1927, the Brisbane paper the *Daily Standard* noted that “no fewer than 11 prisoners” pleaded guilty to a variety of property offences before the Chief Justice (CJ).⁶ The reporting suggests that the number of guilty pleas was worthy of some comment. A 1931 Brisbane *Telegraph* headline implied that guilty pleas were not the normative means of case disposition: “Criminal Court. Long List of Cases. Several Pleas of Guilty”.⁷ Three years later, the *Cairns Post* noted a record number of guilty pleas in the February sittings of the Cairns Circuit Court, when ten of the eleven criminal defendants in Justice Douglas’ court pleaded guilty.⁸

These reports singled out guilty pleas in individual courts as anomaly, but they offer no insight whether these pleas reflected a wider pattern of practice in the Supreme Courts at that time. This might in some part be due to the limitations in official court statistics that journalists could call upon. The Australian Year Books, for instance, provide no information pertaining to guilty pleas.⁹ Their statistics record the numbers and rates of committals and convictions in the state Supreme Courts, but do not differentiate jury convictions from convictions obtained through guilty pleas. Unlike the US, there were no crime surveys that collected data on criminal prosecutions.

The historical plea bargaining literature identifies the early to mid-nineteenth century as the period when guilty pleas rapidly accelerated. Yet the anecdotal evidence

⁶“Sentence Day,” *Daily Standard*, February 15, 1927, <http://nla.gov.au/nla.news-article185447418>.

⁷“Criminal Court,” *The Telegraph*, November 16, 1931, <http://nla.gov.au/nla.news-article181925408>.

⁸“Ten Plead Guilty”. *The Northern Herald*, February 17, 1934, <http://nla.gov.au/nla.news-article15024729>.

⁹ Australian Bureau of Statistics, "1301.0 - Year Book Australia: Past and Future Releases," Australian Bureau of Statistics, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/second+level+view?ReadForm&prodno=1301.0&viewtitle=Year%20Book%20Australia~2012~Latest~24/05/2012&&tabname=Past%20Future%20Issues&prodno=1301.0&issue=2012&num=&view=&>.

reported here suggests a much later transition in Australian courts. From the late 1920s onward, court reports appear to regard clusters of guilty pleas to serious criminal offences as unusual. This suggests that guilty pleas were not dominating case outcomes in Australian courts. If guilty pleas were the dominant mode of case disposition there was no awareness of the phenomenon, at least amongst court reporters.

This chapter provides empirically-robust evidence of the origins of the guilty plea phenomenon in Australian Supreme Courts, identifying the period when guilty pleas first dominated case outcomes, and some of the critical mechanisms driving this development. The chapter begins with an outline of the quantitative study research methodology. After discussing the evidence of the guilty plea transition from the current historical scholarship, the chapter presents the results identifying the turning point when guilty pleas first dominated prosecution outcomes across three Australian courts during the mid-twentieth century. The chapter then analyses patterns in offence data across all three courts, providing further evidence that guilty pleas to property theft prosecutions were instrumental factors driving the acceleration in guilty pleas over time.

This quantitative study also employs jurisdiction-specific variables to test two premises from the historical literature. The first analysis uses Queensland data to test whether ‘late guilty pleas’ (as a proxy for plea bargains with crown prosecutors) were significant drivers of the phenomenon in that court. This analysis shows that ‘early’ guilty pleas were the critical factor underpinning the acceleration in the Queensland jurisdiction. The second analysis employs the Victorian sample data that records the presence of defence lawyers to test the hypothesised relationship between defence counsel and guilty pleas and whether this relationship between counsel and plea was

mediated over time. The results show that, rather than encouraging guilty pleas, the presence of defence counsel provided a protection against pleading guilty although this protection declined as the prosecution process shifted to a guilty plea system.

Methodology

This thesis employs a mixed methods research methodology consisting of two studies. The studies are stand-alone projects but the combined results provide new ways of understanding “the complexities and contexts” relating to the guilty plea phenomenon in Australian courts.¹⁰ The first component of the research design is the quantitative study that traces the rise of the guilty plea in Australian supreme courts. The quantitative study asks two questions:

1. *When* did the rise of the guilty plea occur in the Australian Supreme Courts, and
2. *What* factors were associated with the acceleration of guilty pleas over time?

This study employs large-scale datasets of Supreme Court registers digitised in the Prosecution Project (PP) database.¹¹ The information recorded in the registers usually includes the defendant and co-defendants names, offences, date of committal and trial, verdicts, sentences and any administrative remarks (e.g. history of appeals). There is some variation between jurisdictions. For example, the Western Australian register book includes the defendant’s ‘plea’ at arraignment, but pleas are imputed from verdict information in the Victorian books, and from committal details and verdicts in the

¹⁰ Jennifer Mason, "Mixing Methods in a Qualitatively Driven Way," *Qualitative Research* 6, no. 1 (2006): 10.

¹¹ Mark Finnane et al., "The Prosecution Project Database." version 1, 17 July 2016.

Queensland registers. This data provides opportunities for large scale multi-jurisdictional analysis of patterns in police prosecutions, jury verdicts, sentencing and, critically for this thesis, the ability to track changes in defendants' pleas over time.

Appendix Two (pg. 291) lists the PP variables employed in this study.

The quantitative sample

The quantitative study expands current historical plea bargaining scholarship by undertaking a multi-jurisdictional comparison of the guilty plea phenomenon across three courts. The samples are drawn from the Queensland, Western Australian, and Victorian Supreme Courts register between 1901 and 1961 (see table 3.1). I selected the Western Australian and Victorian courts because these datasets matched samples used in other associated projects relating to the prosecution of property offences and the role of defence lawyers.¹² I selected the Queensland jurisdiction to meet the broader aims of the Project, expanding the number of jurisdictions under analysis. The quantitative sampling strategy collected every trial in every year at five yearly intervals, for both Queensland and Western Australia from 1901 to 1961.¹³ The Victorian data was collected for the same years, but in the months of February, July and October. The total sample included 10,963 prosecutions between 1901 and 1961. The data was loaded into SPSS software for analysis.

¹² Alana Piper and Mark Finnane, "Defending the Accused: The Impact of Legal Representation on Criminal Trial Outcomes in Victoria, Australia 1861–1961," *The Journal of Legal History* 38, no. 1 (2017); Alana Piper and Lisa Durnian, "Theft on Trial: Prosecution, Conviction and Sentencing Patterns in Colonial Victoria and Western Australia," *Australian & New Zealand Journal of Criminology* 50, no. 1 (2017); Alana Piper, "To Judge a Thief: How the Background of Thieves Became Central to Dispensing Justice, Western Australia, 1921-1951," *law&history* 4, no. 1 (2017).

¹³ The exception is the Queensland sample in 1961. It includes every prosecution in February, April, July and October because the number of prosecutions accelerated in 1961 and this skewed the data.

TABLE 3.1. Total number of cases and defendants’ pleas 1901-1961

Jurisdiction	Guilty plea	Not guilty plea	Missing data	Total cases	% Guilty plea
Western Australia	807	1152	249	2208	37
Victoria	1518	2059	177	3754	40
Queensland	1857	3055	89	5001	37

Note: The WA sample includes every trial in every year at five yearly intervals. The QLD sample is similar except for 1961 that samples every trial in the months of February, April, July and October. The VIC data was collected for the same years, but only for the months of February, July and October.

Data coding and analyses

Plea variables

The quantitative study primarily employed descriptive statistics and cross-tabulations to investigate the quantitative data. This involved cross-tabulations of the sample years and defendants’ guilty pleas in each court to track the acceleration of guilty pleas over time. I created a ‘plea’ variable that captured any guilty plea entered to any one of the defendant’s offences. In cases that were disposed of through a *nolle prosequi* I crosschecked against historical newspaper reports of committal hearings to identify the defendant’s plea at the committal hearing.

I also created a second plea variable to differentiate ‘early’ guilty pleas entered at the committal stage from ‘late’ guilty pleas entered at the trial. The Queensland register books contain data to impute the timing of defendants’ pleas. From around 1911, court clerks began to record information indicating if the accused was committed

for trial or sentence. The ‘Courts’ column often contained the handwritten terms ‘trial’ and ‘sentence’ beneath the ‘Supreme’ or the ‘Circuit’ court entries. The former entry indicated that the defendant had pleaded ‘not guilty’ and was committed for trial; the latter, that the defendant pleaded ‘guilty’ and was committed for sentence. This constituted an ‘early plea’. Combined with the ‘verdict’ outcome, this information allowed me to impute defendants’ late guilty pleas when the register recorded that the defendant was committed for trial, but the verdict entry was ‘plea guilty’. The deposition page provided in Appendix One presents an example of this (pg. 290). In case number 14, defendant Malcolm Cornish was committed for trial for ‘stealing from the person’ at the Charleville District Court (DC), then recommitted for sentence at the Brisbane DC. These plea variables support the descriptive analysis of change over time in defendants’ guilty pleas.

Offence variables

The quantitative study examines the patterns in the relationship between guilty pleas and variables including offence type to identify factors driving the acceleration in guilty pleas. It was necessary to standardise the offences across the three court jurisdictions because of differences in their criminal laws. Queensland and Western Australia codified their statutes and common law in 1899 and 1913 respectively.¹⁴ Victoria relies on the common law and statutes pertaining to specific offences.¹⁵ I categorised the offence data for all three jurisdictions based on the 1899 Queensland Criminal Code (the Code) to provide the greatest consistency across the jurisdictions,

¹⁴ *Criminal Code Act 1899* 63 Victoria, No. 9; *Criminal Code Act 1902* (WA).

¹⁵ A. Cadoppi, "Towards a European Criminal Code," *European Journal of Crime, Criminal Law and Criminal Justice* 4, no. 1 (1996): 3.

and also because both Codes are “essentially the same”.¹⁶ I coded this data at two levels of categorisation: broad and narrow offences. These narrow and broad categorisations align with the structure of the Criminal Code. Broad offences refer to general offence categories, such as ‘property offence’. Narrow offences describe specific categories of these broader offence types; for example, ‘burglary’ and ‘stealing’ are both narrow offences within the broad ‘property offences’ category. In total, there were five broad offences and eight narrow offences. Appendix Five presents the offence categorisations for ‘broad’ and ‘narrow’ categories of offences aligned with the respective sections of the Queensland Code (see pg. 308).

Legal representation

The quantitative study also tests the theory that the presence of defence counsel was more likely to lead to the defendant’s guilty plea. The Victorian register books often recorded the presence of defence counsel. In many cases, court clerks entered the lawyer’s name when they appeared at the Supreme Court for trial or sentencing. However, this information was not recorded for a substantial portion of the Victorian sample of 3,754 cases. Although this missing data was reduced by cross-checking historical newspapers through the Trove database,¹⁷ there was still a considerable amount of missing defence counsel data remaining in the Victorian sample (17 percent). I therefore removed all the cases with missing data from the sample, leaving a subsample of 3,113 defendants where legal representation status was confirmed. Cross-tabulations of the legal representation and guilty plea variables tested the relationship

¹⁶ Eric Colvin, Suzie Linden, and John McKechnie, *Criminal Law in Queensland and Western Australia*, 4th ed. (Chatswood, NSW: LexisNexis Butterworths, 2005), 7.

¹⁷ I gratefully acknowledge Dr Alana Piper’s contribution in cleaning the Prosecution Project Victorian data file, and particularly her own data collection from Trove that identified much of the missing defence lawyer data from the original register book entries.

between guilty pleas and legal representation, discussed below. Appendix Nine tables the frequencies of defence counsel and the proportion of guilty pleas dependant on whether the defendant was represented or unrepresented (see pg. 323).

The rise of the guilty plea

Most historical plea bargaining literature points to the nineteenth century as the period when the criminal prosecution process transitioned to a guilty plea system. In US courts, most defendants pleaded ‘not guilty’ until at least the 1820s. In the New York Court of General Sessions, less than a fifth of defendants pleaded guilty between 1805 and 1840 but this increased to more than 70 percent by 1879.¹⁸ Guilty pleas constituted less than 15 percent of the 1200 sampled defendants prosecuted in the Boston Police Court during the 1830s.¹⁹ Just over half of all defendants entered guilty pleas in 1850, accelerating to almost 90 percent by 1880. Conversely, Philadelphia’s Quarter Sessions and superior courts were still dominated by jury trials until at least 1880.²⁰

The trend of rising guilty pleas was more gradual in some US jurisdictions where guilty plea systems were not in place until the early twentieth century. For example, in California’s Alameda County court only 12 percent of defendants pleaded guilty in 1880, slowly rising to just a third of all pleas by 1910.²¹ The English plea bargaining literature focuses on the Old Bailey court where guilty plea cases were relatively rare prior to 1730.²² However, the acceleration in guilty pleas was slow. Malcolm Feeley found that the proportion of guilty pleas did not reach 40 percent of

¹⁸ McConville and Mirsky, *A True History*, 200.

¹⁹ Vogel, "Social Origins," 175.

²⁰ Steinberg, *The Transformation of Criminal Justice*, 243.

²¹ Friedman and Percival, *Roots of Justice*, 173-4.

²² Langbein, "Before the Lawyers," 278.

cases until the turn of the twentieth century.²³ Recent research by Tim Hitchcock and William J. Turkel employing a sample of more than 32,000 cases from the Old Bailey Online database supports this assertion that the Old Bailey's transition to the guilty plea occurred during the twentieth century.²⁴

Recent scholarship investigating criminal prosecution also suggests that guilty pleas first accelerated in Australian courts during the twentieth century. Criminal justice historians Alana Piper and Mark Finnane analysed 5,572 sample cases prosecuted in the Victorian Supreme Court between 1861 and 1961, showing that guilty pleas increased from 17 percent of defendants' pleas in the nineteenth century to 40 percent in the twentieth century.²⁵ There appeared to be a dramatic acceleration in guilty pleas as late as the 1950s.²⁶ This is significantly later than system transformation in the US and English historical contexts.

Accelerating guilty pleas in Australian prosecutions

The analysis of 10,963 sample cases prosecuted between 1901 and 1961 show that the guilty plea phenomenon was a mid-twentieth century development in Australian courts. The proportion of guilty pleas was relatively stable during the first few decades of the twentieth century, with guilty pleas fluctuating between 22 and 45 percent of all defendants' pleas. Proportions of guilty pleas were not consistently above 50 percent of all pleas until 1951; when guilty pleas first consistently dominated prosecution outcomes in both the Western Australian and Queensland samples (fig.3.1). Guilty pleas

²³ Feeley, "Legal Complexity," 199.

²⁴ Hitchcock and Turkel, "Old Bailey Proceedings," 953.

²⁵ Piper and Finnane, "Defending the Accused," 36. This sample used the same sampling strategy as the VIC sample employed in this thesis.

²⁶ Finnane and Piper, "Prosecution Project," 888.

initially accelerated more quickly in Victoria than in the other jurisdictions, but this trend plateaued by the late 1940s. Subsequently the transition to a guilty plea system occurred in 1956, slightly later than the other jurisdictions. The acceleration in guilty pleas continued across all three courts into 1961, the final year in the sample. This provides convincing evidence that guilty pleas came to dominate criminal prosecutions at some point between 1947 and 1950 in Queensland and Western Australian Supreme Courts, and between 1952 and 1955 in the Victorian Supreme Court. Appendix Seven provides the full report of the frequencies of prosecutions and guilty pleas from 1901 to 1961, and the proportion of guilty pleas in each sample year (pg. 318).

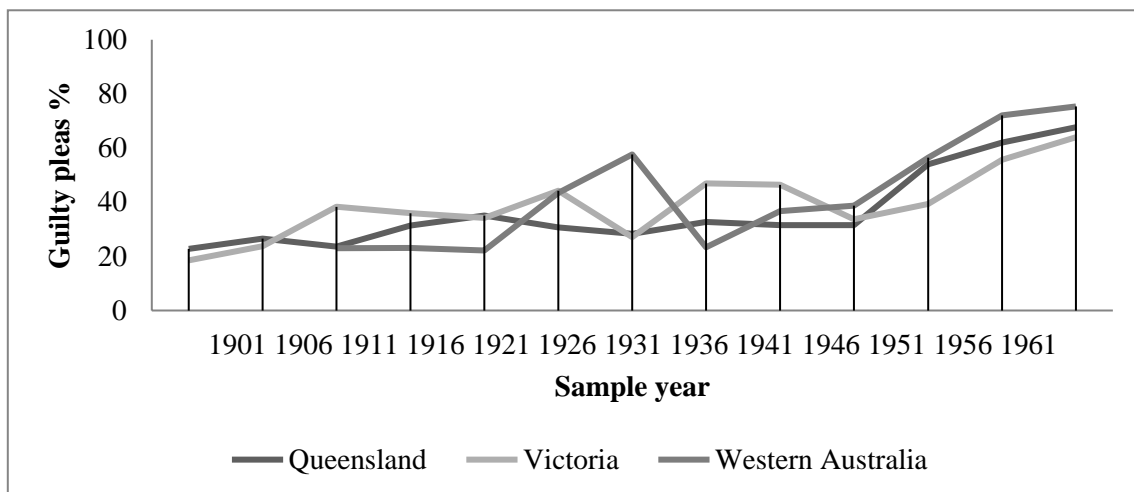


FIGURE 3.1. Percentage of guilty pleas in Supreme Courts, 1901-1961.

The Western Australian Supreme Court experienced the greatest trend in the acceleration in guilty pleas. The spike in guilty pleas in 1931 requires comment, because at first glance it appears that guilty pleas dominated case outcomes during this period 1927-1931. 57 percent of defendants pleaded guilty in 1931, but this high proportion was an anomaly, the consequence of an unusual increase in the proportion of guilty pleas in property offences. When averaged across the three years 1930-1932, the

Chapter 3 – The Guilty Plea Phenomenon

proportion of guilty pleas was 48 percent. By 1936, the proportion of guilty pleas dropped considerably to 23 percent of defendants' pleas. The spike does not therefore signify a general shift to a guilty plea system. However, after 1946, guilty pleas accelerated quickly; three-quarter of all Western Australian defendants pleaded guilty by 1961.

As we have discussed in Chapter Two, one hypothesis explaining the emergence of plea bargaining practices posits that the practice emerged as a response to increasing caseload pressure. Although some scholars posit that the entry of defence lawyers into the adversarial process meant that trials became more complex and increased the workloads for lawyers and courts, there is limited empirical evidence to justify that argument.²⁷ The evidence of the rise of the guilty plea in Australian courts also refutes the caseload hypothesis. The Victorian Supreme Court had the greatest workload servicing the largest population of the three jurisdictions, yet it was the last court to transition to a guilty plea system. Furthermore, Western Australia experienced the lightest amount of court work, yet transitioned more quickly and at a higher rate than either the Queensland or Victorian courts.²⁸ In Western Australia, defendants' guilty pleas accelerated in prosecutions for every category of offences; this was not replicated to the same degree in the other courts.

²⁷ Alschuler, "Plea Bargaining," 230; Milton Heumann, "A Note on Plea Bargaining and Case Pressure," *ibid.* (1975): 517; "Back to the Future," 136.

²⁸ See Appendix Ten for a breakdown of civil and criminal cases sourced from the Australian Year Books (see pg. 325).

Guilty pleas and offences

Criminal trial histories show that property theft offences have dominated criminal prosecutions in the lower and higher courts since the eighteenth century.²⁹ The plea bargaining literature provides evidence that categories of property offences were integral to the emergence of plea bargaining practices in the nineteenth century English courts. Randall McGowen found that privately retained prosecutors for the Bank of England developed a technique to overcome the difficulties associated with obtaining convictions for forgery, at that time a capital offence.³⁰ Defendants were indicted on two counts: forgery, and the non-capital offence of “possession of forged bank notes”.³¹ The Bank’s prosecutors offered to file no evidence on the capital offence in return for guilty pleas to the lesser charge. However, the plea bargaining literature otherwise pays little attention to the systemic relationship between different offence categories and guilty pleas.

In the large scale quantitative plea bargaining studies, offences are generally categorised as ‘broad’ categories of crime.³² These include ‘crimes against property’ or ‘crime against the person’. Little research examines the association between accelerating guilty pleas and more specific offence categories in the higher courts, like ‘stealing’ as opposed to ‘breaking, entering and stealing’. The exceptions are the studies

²⁹ John H. Langbein, "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources," *The University of Chicago Law Review* 50, no. 1 (1983): 47; Smith, "Eclipse of Jury," 136; McConville and Mirsky, "Rise of Guilty Pleas," 450; Emsley, *Crime and Society*, 32; Piper and Durmian, "Theft on Trial," 9.

³⁰ Randall McGowen, "Managing the Gallows: The Bank of England and the Death Penalty, 1797–1821," *Law and History Review* 25, no. 2 (2007): 254.

³¹ *Ibid.*, 252; Tim Hitchcock and William J. Turkel, "The Old Bailey Proceedings, 1674–1913: Text Mining for Evidence of Court Behavior," *ibid.* 34, no. 4 (2016): 950. Hitchcock and Turkel suggest that there is some evidence that this practice “formed a component of a much wider and more fundamental transformation in the practice of criminal prosecution”.

³² McConville and Mirsky, "Rise of Guilty Pleas," 450; Friedman and Percival, *Roots of Justice*, 135.

of the nineteenth century Boston lower courts which focus on ‘narrow’ offences including: drunkenness, prostitution, assault and battery, and property thefts including larceny, burglary, and fraud.³³ Most case examples provided by the plea bargaining literature discuss individual prosecutions rather than analyse patterns of guilty pleas to various offences that might explain the phenomenon of accelerating guilty pleas. There is no systemic examination of these offences that shows whether defendants were more likely to plead guilty to some serious indictable offences than others, in greater enough proportions to transform the prosecution system.

Considering that prosecutions were dominated by property offences, a substantial shift in the proportion of defendants pleading guilty to these offences alone might constitute a significant trend in the acceleration of guilty pleas. The following analysis tests this hypothesis and extends current knowledge regarding the association between guilty pleas and offence categories. The analysis identifies trends in the accelerating proportion of guilty pleas at two levels of offence categories and shows how this relationship changed over time, from the pre-transition to the post-transition period; that is, before and after the shift to a guilty plea system.³⁴ This shows that guilty pleas to particular property offences were critical factors driving the guilty plea phenomenon in Australian courts, specifically burglary and stealing offences.

³³ Ferdinand, *Boston's Lower Courts*, 61; Vogel, *Coercion to Compromise*, 31.

³⁴ In Queensland and Western Australia, the pre-transition period was 1901-1946, and the post-transition period was 1951-1961. In Victoria, the pre-transition period was 1901-1951 and the post-transition period was 1956-1961.

Broad offences

The PP database offence variables often record the defendant’s charges as they were written in the register book.³⁵ The raw data therefore required recoding to support consistent analysis across the three court jurisdictions. The PP offence data was coded into two categories: broad and narrow offence types.³⁶ As expected, property offences dominated prosecutions across all three courts. This is a consistent pattern across the three jurisdictions although the proportion was slightly higher in Victoria. This affirms the predominant nature of property theft offences in the historical record (fig.3.2).

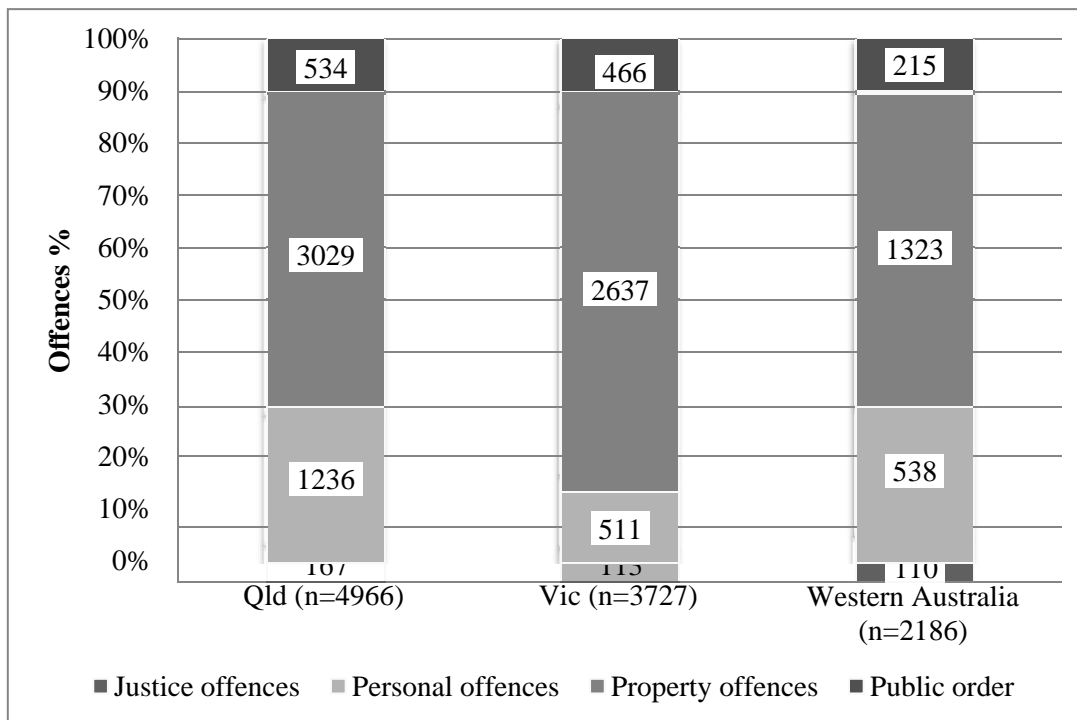


FIGURE 3.2. Frequencies. Broad offence categories 1901-1961.

³⁵ For example, in the Western Australia Supreme Court in 1908, one defendant was charged “that he on the 7th day of November 1908 at Geraldton stole a horse and cart and harness the property of one Sam Been and further that he on the 7th November 1908 at Geraldton received the said horse, cart & harness which then had then [sic] lately been stolen knowing them to have been stolen”; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #740, Abdul, 1908.

Chapter 3 – The Guilty Plea Phenomenon

³⁶ See Appendix Five for coding classifications of broad and narrow offence categories (p. 308).

A greater percentage of defendants pleaded guilty to property offences compared with all other offences, and this trend was consistent across all three jurisdictions. However, a comparably high proportion of defendants pleaded guilty to public order offences. ‘Public order’ included sexual offences (other than rape), and offences like ‘keeping a brothel’. There were substantively greater proportions pleading guilty to these offences than to personal offences, like “assault” and “wounding with intent”. This evidence from the historical record presents a very different pattern compared to the contemporary prosecution context, where a higher proportion of Australian defendants plead ‘not guilty’ for sexual offences, than defendants prosecuted for other offences.³⁷ In fact, accelerating guilty pleas to public order and property offences were critical factors driving the guilty plea phenomenon over time (see fig.3.3).

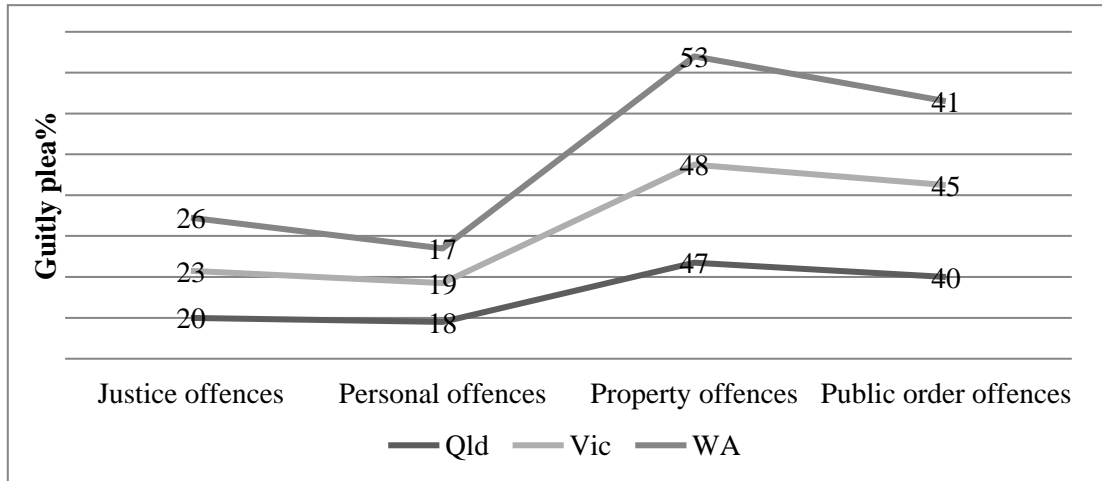


FIGURE 3.3. Percentages. Broad offences and guilty pleas, 1901-1961.

³⁷ Ringland and Snowball, "Predictors Guilty Pleas," 3.

Chapter 3 – The Guilty Plea Phenomenon

Figure 3.4 presents the proportion of guilty pleas to broad offences in the pre- and post-transition periods. Comparatively, there are significant patterns in the trends of accelerating guilty pleas within, and across, the three courts. The obvious trend is the dramatic increase in guilty pleas to property and public order offences across all jurisdictions. The greatest increase occurred in Western Australia where guilty pleas accelerated from a very low proportion in the pre-transition period, across every broad offence category. Property offences accelerated from 13 percent to 84 percent of all pleas over the period. Yet the greatest increase in the proportion of guilty pleas in the Western Australian sample involved public order offences.

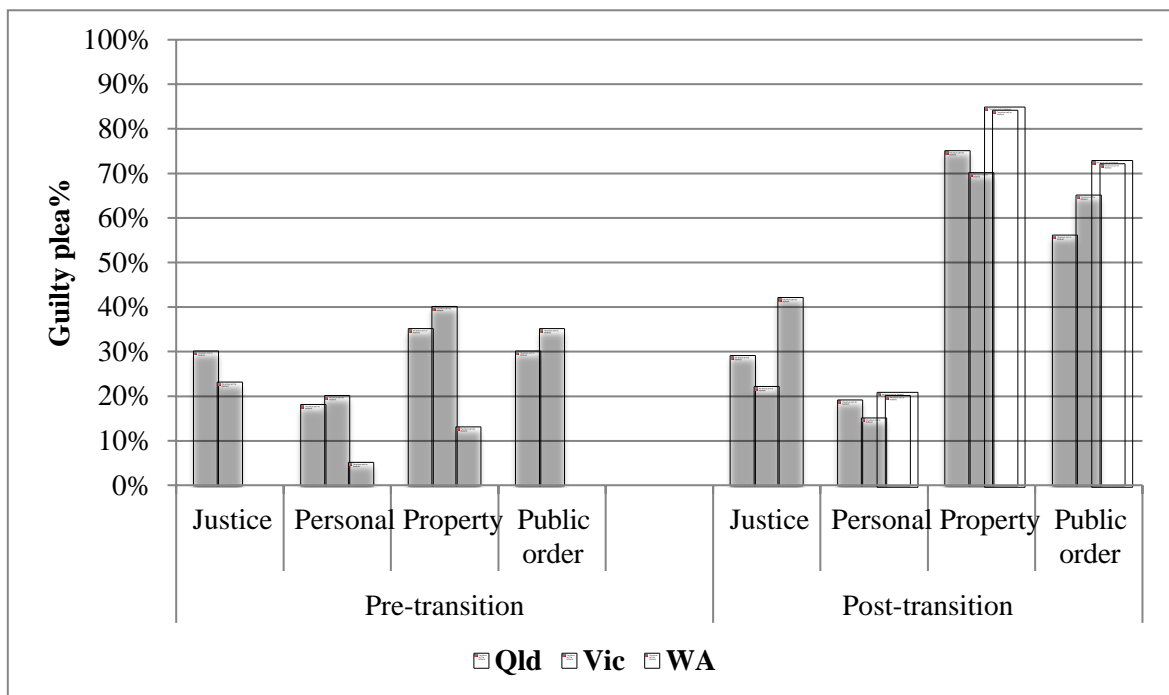


FIGURE 3.4. Percentages. Guilty pleas and broad offences, pre/post-transition periods. Pre-transition Qld/WA (1901-1946). Post-transition (1951-1961) Pre-transition Vic (1901-1951). Post-transition (1956-1961)

Although none of the defendants pleaded guilty to these offences prior to the guilty plea transition, guilty pleas constituted almost three quarters of defendants' pleas post-1950. The acceleration of guilty pleas to public order offences illustrates an important

Chapter 3 – The Guilty Plea Phenomenon

development in the history of the guilty plea in Australian courts; nevertheless, the frequencies of prosecutions for these offences were too low in number to be a significant factor driving the guilty plea phenomenon. Public order offences constituted only 10 percent of cases in the Western Australia sample compared to the predominance of property offences constituting 60 percent of prosecutions in that court.

Narrow offences

The next step in the analysis involved disaggregating the broad property offence category to identify the specific property offences associated with the rise of the guilty plea. Property offences were critical to the acceleration of the guilty plea in the Queensland, Victorian and Western Australian Supreme Courts. Between 1901 and 1961, most prosecutions involved the narrow offences of burglary and stealing. Stealing offences were the most prosecuted offence, and the least prosecuted offences were regulatory and property damage offences. These patterns were consistent across all three courts. Guilty pleas to burglary and stealing charges were critical to the guilty plea phenomenon. High frequencies of burglary and stealing prosecutions coincided with rapid acceleration in the proportions of defendants pleading guilty to these offences.

The most striking pattern across all jurisdictions is the substantial proportion of defendants pleading guilty to burglary prior to the guilty plea shift. This was particularly evident in the Western Australian sample, with more than 70 percent of defendants in burglary cases pleading guilty prior to 1950. By the late 1950s, the proportion of guilty pleas was so high that a prosecution for burglary almost guaranteed a defendant's conviction in both Queensland and Western Australia. There were also substantial post-transition increases in guilty pleas to other offences. The proportion of

guilty pleas in stealing, sexual offence, and property damage prosecutions almost doubled in the post-transition period (see fig.3.5).

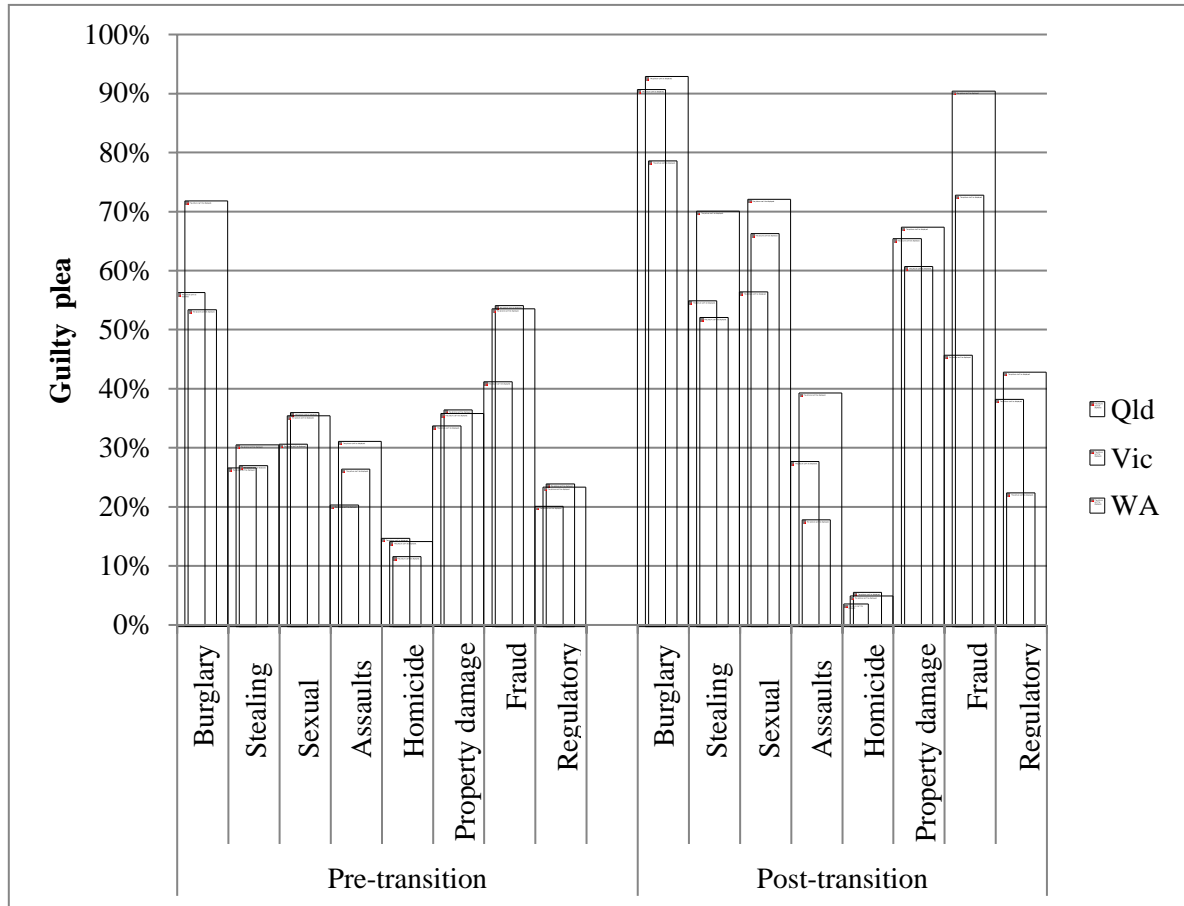


FIGURE 3.5. Percentages. Narrow offences and guilty pleas. Pre-transition Qld/WA (1901-1946). Post-transition (1951-1961) Pre-transition Vic (1901-1951); Post-transition (1956-1961).

Between 1950 and 1961, less than a third of Western Australian sexual offence defendants were prosecuted by jury trial. Although the proportion of guilty pleas increased for sexual offences more than for stealing, the sheer number of stealing prosecutions meant that stealing and burglary offences were critical to the acceleration of guilty pleas over time. It is unclear why the proportion of guilty pleas was significantly less for stealing than for burglary, particularly in the Queensland court. Both offences were property related; some burglary prosecutions were even disposed of

by late guilty pleas to stealing.³⁸ The research in this thesis does not find any reason for the slower uptake of guilty pleas for stealing offences.

The analysis of the relationship between guilty pleas to narrow offences provides further evidence that the Western Australian Supreme Court embraced system transformation more quickly and completely than either the Queensland or Victorian courts. In the pre-transition period, a greater proportion of Western Australian defendants pleaded guilty to burglary, stealing, and personal offences. During the rise of the guilty plea, sample defendants pleaded guilty at higher proportions across seven of the eight narrow offence categories; the exception was homicide offences. According to the historical literature, these accelerating guilty pleas are the outcome of plea bargaining between court prosecutors and defence lawyers, or defendants, particularly through the medium of “late” guilty pleas entered once the defendant reached the Supreme Court. While there is no data to test this hypothesis in the Western Australian court, the Queensland and Victoria registers recorded information that supports such an analysis. The following section explores the relationship between crown prosecutors and guilty pleas in the Queensland court, and between accelerating guilty pleas and legal representation in Victorian prosecutions.

Queensland and Victoria: Late pleas and Lawyers

The dominant theme in the historical guilty plea scholarship is that the professionalisation of lawyers during the nineteenth century significantly changed the

³⁸ Queensland State Archives Item ID96073, Depositions and indictments. The defendant appeared in the Brisbane Supreme Court before Justice Philp, committed for trial on a charge of ‘entering a dwelling house with intent to commit a crime’ but entered a late guilty plea to stealing.

traditional trial process. The introduction of prisoner's defence legislation in the 1830s extended the right to defence counsel for those accused of criminal offences and subsequently increased the numbers of lawyers present in the courtroom.³⁹ The competing interests of prosecuting and defence counsel significantly affected the development of rules of evidence and of procedure.⁴⁰ Trials became more complex as legal practitioners "jealously preserved and advanced their boasted expertise".⁴¹ The system was transformed from the quick efficiency characteristic of seventeenth- and eighteenth century justice, to a state of complexity that drained the courts time and resources.⁴² The professionalisation theory argues that plea bargaining practices emerged as a means of disposing of criminal cases more economically.⁴³ This bargaining typically occurred between prosecuting and defence counsel, to obtain defendants' (late) guilty pleas.

The plea bargaining literature conceptualises 'late' guilty pleas as evidence of a plea bargain despite the lack of documented evidence of bargaining. Scholars have inferred plea bargains in cases where defendants changed their pleas from 'not guilty' to 'guilty' to a lesser offence. Alternatively, in multiple offence cases, a negotiated guilty plea is considered to have occurred when the prosecutor withdrew other charges, after the late guilty plea.⁴⁴ However, the empirical evidence supporting this hypothesis is dependent on the jurisdiction in question. In the New York court, for example, late guilty pleas to lesser offences increased from around a third of all guilty pleas in 1850

³⁹ *Prisoners' Counsel Act* 6 & 7 Will. 4, ch.14 (1836); [NSW] An Act for enabling persons prosecuted for Felony to make their Defence by Counsel or Attorney (4 Vict. c. 27 1840), ss. 1, 2.

⁴⁰ Langbein, "Short History of Plea Bargaining," 264.

⁴¹ Emsley, *Crime and Society*, 194.

⁴² Langbein, "Short History of Plea Bargaining," 265.

⁴³ Feeley, "Legal Complexity," 186.

⁴⁴ Smith, "Eclipse of Jury," 137; Friedman, "Historical Perspective," 249.

to 70 percent of guilty pleas in 1865.⁴⁵ These pleas were therefore critical to the guilty plea phenomenon even if they were not actual plea bargains. Yet in the Alameda County court, the proportion of guilty pleas to lesser offences dropped between 1880 and 1910.⁴⁶ Further, almost half of the defendants pleading guilty did so to the original indictment.⁴⁷

The Queensland Supreme Court registers record information that can impute the timing of defendants' guilty pleas to reveal whether late guilty pleas were instrumental in driving the guilty plea phenomenon in the Australian context. The following analysis tests the theory that late guilty pleas accelerated during the twentieth century. This premise is based on Queensland statutory provisions introduced in the 1920s that were designed to increase the numbers of defendants pleading guilty to serious indictable offence in the police courts and that possibly effected some change in the rates of late guilty pleas in the Queensland Supreme Court.

Queensland: Timing of guilty pleas

On September 22, 1926 in the Caboolture Police Court, a young Queensland pineapple farmer entered an early guilty plea to breaking, entering and stealing clothes worth £35. Charles Levy had been driving his truck home one evening whilst heavily intoxicated and stopped to commit the offence in the Beerburrum Lands Department depot.⁴⁸ The police magistrate committed Levy for sentence at the October sittings of the Brisbane Supreme Court and released him on a bail of £100- with additional

⁴⁵ McConville and Mirsky, *A True History*, 288.

⁴⁶ Friedman and Percival, *Roots of Justice*, 179.

⁴⁷ *Ibid.*, 176.

⁴⁸ "North Coast," *The Daily Mail*, September 28, 1926, <http://nla.gov.au/nla.news-article220603074>; "Farmer's Lapse," *Queensland Times*, October 12, 1926, <http://nla.gov.au/nla.news-article115643006>.

sureties- that were paid for, on his behalf, by another local farmer.⁴⁹ Levy was subsequently punished with a suspended sentence of 15 months imprisonment. It was his first conviction.

Charles Levy would have faced a serious dilemma regarding the timing of his guilty plea had the offence occurred two years earlier. Prior to the enactment of the *Justices Amendment Act 1924*, defendants were refused bail if they pleaded guilty to serious indictable offences at their committal hearing.⁵⁰ Levy would have spent the following few weeks away from his farm, imprisoned in Brisbane's Boggo Road jail awaiting sentencing. He would likely have spent more time in remand than his eventual sentence would require. Discussing the proposed amendment in August 1924, then attorney general John Mullan acknowledged that it was common sense for solicitors to advise defendants to wait until their arraignment to plead 'guilty', particularly in cases involving first offenders like Charles Levy who were very likely to receive either a suspended sentence or benefit of the *First Offender's Probation Act*.⁵¹ Mullan acknowledged that pleading guilty at committal meant some defendants spent more time in jail than their eventual sentence warranted.

The 1924 bail amendment is an example of criminal justice administrative policy designed to influence the timing of defendants' pleas and encourage more "early" guilty pleas. Mullan argued that the bail restrictions effectively reduced the number of defendants pleading guilty in the police courts. He stressed that guilty pleas entered at arraignment were a drain on court resources. The time of:

⁴⁹ PP, Trial ID 81126, QLDSC, Charles Levy, 1926. One surety of £100 pound, or two sureties of £50 each.

⁵⁰ 15 Geo V No. 6.

⁵¹ Queensland, *Parliamentary Debates*, Legislative Council, 7 August 1924 (Hon John Mullan), 177.

Chapter 3 – The Guilty Plea Phenomenon

the judge and jury and the court to some extent is wasted in impanelling of a jury, and then the man probably pleads guilty...the country is put in that way to unnecessary expense.⁵²

The Queensland historical court registers provide information recorded by court clerks that enables an analysis of the timing of guilty pleas to test whether the 1924 legislation increased the proportion of early guilty pleas in the police courts. The evidence presented earlier in this chapter provides evidence that the bail reforms did not significantly increase the overall proportion of guilty pleas, which remained relatively stable at around 32 percent between 1926 and 1946 (see fig. 3.1). However, the reforms may have encouraged more defendants to plead guilty earlier rather than later. This has ramifications for the hypothesis that late guilty pleas were the primary mechanism driving the shift to a guilty plea system. It would show that, in the Queensland court at least, bargaining with crown prosecutors (evidenced by late guilty pleas) was not a critical factor in the shift to a guilty plea system.

Early and late guilty pleas

The historical plea bargaining literature argues that, despite the lack of documented examples of official plea bargaining in the historical record, plea bargaining was recognisable when the defendant entered a late guilty plea.⁵³ The Queensland sample provides overwhelming evidence that late pleas were not significant factors explaining the origins of the guilty plea system in the Queensland court.⁵⁴ Between 1900 and 1961, only 10 percent of Queensland defendants changed their pleas

⁵² Ibid.

⁵³ Friedman, "Historical Perspective," 249.

⁵⁴ This is based on the data as it is recorded in the Supreme Court register books. It is possible that some patterns in late pleas, including guilty pleas to lesser offences, might not have been recorded by court clerks.

Chapter 3 – The Guilty Plea Phenomenon

after being committed for trial. There were almost equal proportions of late and early guilty pleas in 1921 and 1936 but the proportion of late guilty pleas declined significantly from 1941. After the guilty plea shift - sometime between 1947 and 1950 - late guilty pleas continued to decline to just 10 percent of defendants' pleas in 1956. Figure 3.6 and table 3.2 show that the acceleration of the overall proportion of guilty pleas in this sample coincided with a decline in late pleas and acceleration in early guilty pleas.

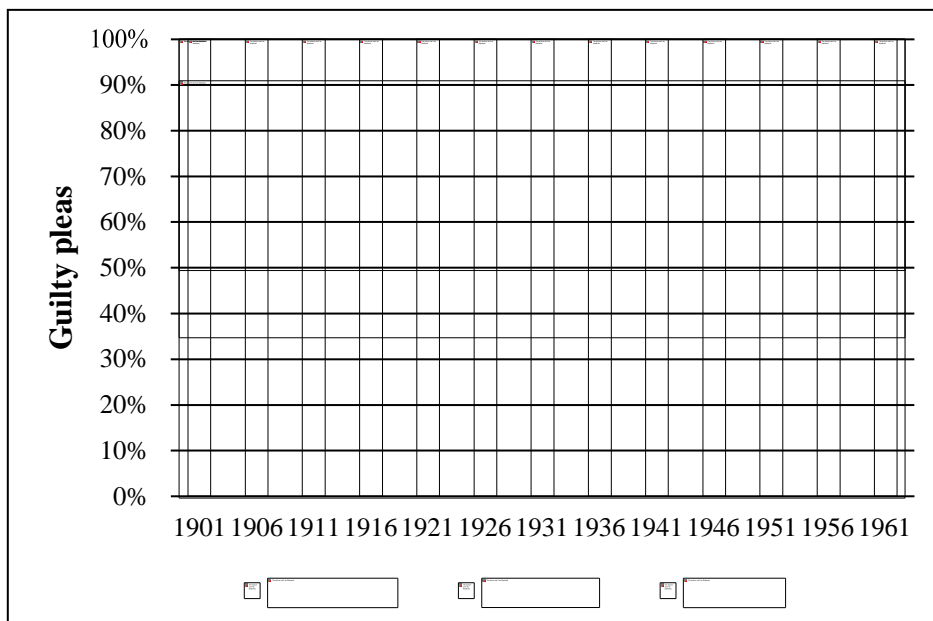


FIGURE 3.6. Percentages. Early and late guilty pleas, Queensland 1901-1961.

TABLE 3.2. Frequency. Number of prosecutions, Qld Supreme Court 1901-1961

Year of trial	#trials	Year of trial	#trials
1901	427	1936	300
1906	369	1941	248
1911	452	1946	412
1916	223	1951	390
1921	438	1956	643
1926	403	1961	298
1931	398		

Chapter 3 – The Guilty Plea Phenomenon

Previous plea bargaining research argues that a bargain occurs when defendants enter late guilty pleas to lesser offences.⁵⁵ Alternately a bargain was imputed in prosecutions for multiple charges when the defendant pleaded guilty to one (or some) of their charges, and the prosecutor subsequently withdrew the remaining charges through a *nolle prosequi* or *nolo contendere*.⁵⁶ There is clear evidence of these patterns in late guilty pleas in the Queensland sample but the evidence suggests the practice was not systemic. For example, the register records that only 58 of the 5,000 defendants in this sample entered a guilty plea to a lesser offence than the one they were indicted upon. In a further 31 cases, defendants pleaded guilty to some charges and the remaining charges were withdrawn from prosecution through a *nolle prosequi*.

The most consistent pattern in the Queensland sample cases involved defendants changing their plea without receiving any obvious concession in return. For example, one defendant was committed for trial on multiple counts of burglary-related offences and subsequently changed his ‘not guilty’ plea to all eight charges.⁵⁷ None of the charges were reduced in terms of either seriousness or number. Lynn Mather refers to these kinds of late guilty pleas as ‘on-the-nose’ pleas; that is, the defendant changes their plea, but nothing changes on the indictment in terms of the severity or the number of the charges.⁵⁸ There was no obvious benefit to the defendant for the change in their plea. These findings show that the late guilty plea hypothesis posited by the plea bargaining scholarship is not generalisable to the Australian context. Early guilty pleas,

⁵⁵ Feeley, "Legal Complexity," 197-98; Ferdinand, *Boston's Lower Courts*, 81; McConville and Mirsky, *A True History*, 287-90.

⁵⁶ Fisher, *Triumph: A History*, 65-67. This was a common practice in the Middlesex County court.

⁵⁷ The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #36992, QLDSC, Anon, 1951.

⁵⁸ Lynn M Mather, "Comments on the History of Plea Bargaining," *Law & Society Review* 13, no. 2 (1979): 284.

rather than plea bargaining between crown prosecutors and defence lawyers, were pivotal to the guilty plea phenomenon in Australia.

The historical plea bargaining theory hypothesises that the influx of defence lawyers into the criminal courtroom with an increased court workload that required an alternative means of case disposition; hence the emergence of plea bargaining. The evidence from the Queensland sample challenges that hypothesis. By demonstrating the significance of early pleas, this analysis provides evidence that prosecutors' bargaining was not an instrumental factor in the guilty plea phenomenon. The Queensland data does not provide direct evidence of the relationship between defence lawyers and guilty pleas because the register books do not include information that records whether defendants were legally represented. The Victorian Supreme Court register books do not record guilty plea timing but do record the presence of defence counsel. The following analysis tests the relationship between defence counsel and guilty pleas.

Victoria: Lawyers and pleas

On August 19, 1948, Melbourne paper *The Age* published its weekly instalment of "Lawyer's Diary".⁵⁹ This syndicated column featured amusing anecdotes penned by an anonymous lawyer, based presumably on their own experience. "Pleading Guilty to a Lesser Crime" describes an encounter with a client who suggested pleading guilty to 'assault and battery' rather than face trial for 'attempted murder'. He asks if his lawyer can "speak to the prosecutor and get him to take a plea of guilty" to the lesser charge. The lawyer warns him that the "facts are powerful. It may be the judge will refuse to

⁵⁹ "Lawyer's Diary," *The Age*, August 19, 1948, <http://nla.gov.au/nla.news-article206905253>.

Chapter 3 – The Guilty Plea Phenomenon

accept a guilty plea on the lesser charge”, and that the client should not “expect too much out of it”. The narrator explains that the evidence contained in the depositions might sustain a reduction in charge but, if the judge disagreed, it would be left for the jury to “bring in the lesser verdict”.

This exchange provides a unique example of plea bargain discussions between defence counsel and lawyer from the period just prior to the guilty plea acceleration in Victoria that occurred sometime between 1952 and 1955. The article provides some insight into the processes associated with guilty pleas to lesser offences. First, it suggests that defence counsel and prosecutors did negotiate charges and pleas by at least the late 1940s. It shows that overtures to bargain came from defendants and defence lawyers and were not always initiated by prosecutors. More importantly, it highlights the critical role of the judiciary in relation to lesser pleas. Judges could and, the article implies, did use their discretion to dismiss bargained-for pleas and insist that cases proceed to trial. The judicial oversight of crown prosecutors’ discretionary power suggests possible restraints to the development of systemic bargaining in the Victoria court during this period.

The plea bargaining literature posits that lawyers’ bargaining was integral to the acceleration in guilty pleas over time and that prosecuting and defence counsel negotiated guilty pleas in return for concessions. Recent Australian historical prosecution research questions these assumptions that defence lawyers were more likely to encourage defendants to plead guilty. In 2016, Piper and Finnane analysed almost 2,000 guilty plea cases prosecuted in the Victorian Supreme Court between 1861 and

Chapter 3 – The Guilty Plea Phenomenon

1961.⁶⁰ Defence lawyers appeared in just over a third of guilty plea cases, but there was no statistical association between legal representation and guilty pleas. Furthermore, legally represented defendants in their sample received more favourable outcomes. Those who proceeded to trial were more likely to be acquitted and, regardless of their plea, legally represented defendants were more likely to receive lenient sentences.⁶¹ These findings contradict the implication inherent in the “Lawyer’s Diary” article that defence lawyers regularly bargained with crown prosecutors.

Legal representation in Victoria

The remainder of this chapter focuses on the possible relationship between legal representation and the rise of the guilty plea in the Victorian Supreme Court. It tests two hypotheses to explore that relationship. The first hypothesis surmises that the acceleration in guilty pleas coincided with a decline in the proportion of legally represented defendants.⁶² This hypothesis presumes that defence lawyers were more likely to encourage clients to plead ‘not guilty’, and so the acceleration in guilty pleas can possibly be explained by a reduction in the numbers of lawyers providing such advice. However, defence lawyers’ practices might have changed in the face of system transformation, so it may have become more commonplace for lawyers to advise clients to plead guilty as guilty pleas accelerated. Alternatively, it may be possible that the change in the proportion of represented defendants pleading guilty was a critical factor in this acceleration. The second hypothesis therefore posits that the acceleration in

⁶⁰ “Defending the Accused,” 36. The authors’ sample for 1901 to 1961 is the same sample employed in this research.

⁶¹ *Ibid.*

⁶² Feeley, “Legal Complexity,” 187.

guilty pleas coincided with an increase in the proportions of legally represented defendants who pleaded guilty.

Appendix Nine (pg. 323) tables the frequencies of defence counsel and the proportion of guilty pleas dependant on whether the defendant was represented or unrepresented. Most defendants in the subsample benefited from legal representation over the sample period. 60 percent of defendants were legally represented at either their trial or sentence hearing (n=1876). Levels of legal representation were highest in 1916 when 77 percent of defendants had legal counsel. The proportion of legally represented defendants began to decline after that period although the variation between the proportions of represented and unrepresented defendants fluctuated between 1916 and 1951. However, there was a dramatic 20 percent decrease in the proportion of represented defendants between 1951 and 1956. This is the period when guilty pleas first dominated case outcomes in Victoria (fig.3.7).

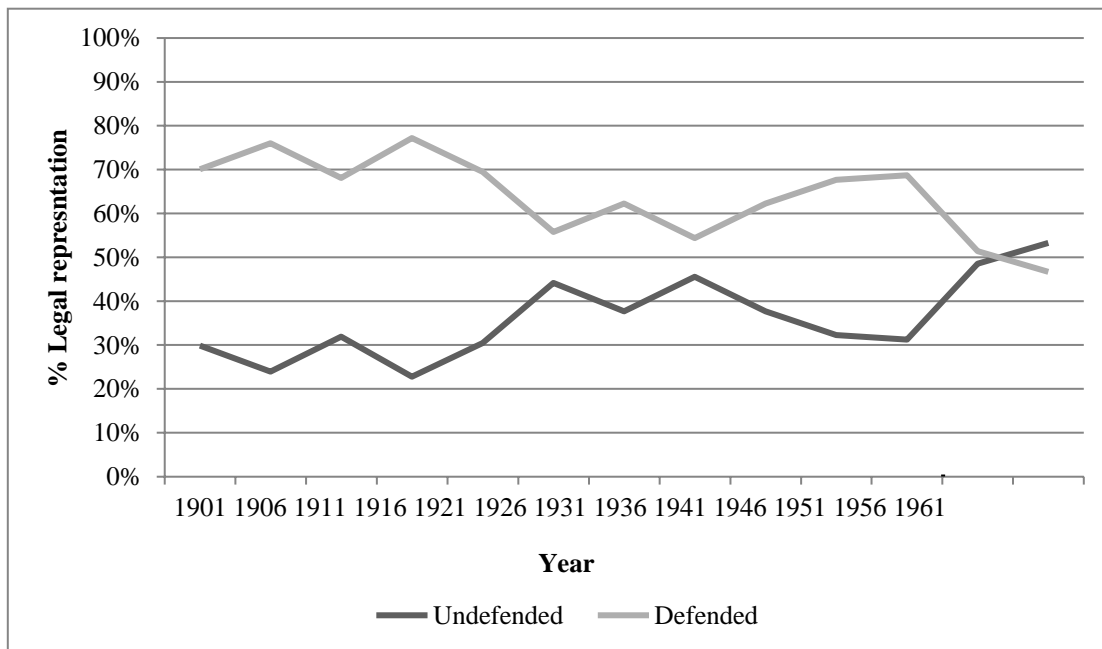


FIGURE 3.7. Proportion of legal representation by subsample year in the Victorian Supreme Court. The vertical line indicates the transition period in 1955 when guilty pleas first dominated case outcomes.

Chapter 3 – The Guilty Plea Phenomenon

The trends reveal that the levels of legal representation declined as guilty pleas accelerated in the post-transition period. This resulted in the lowest proportion of representation in 1961, when only 47 percent of defendants were represented. This evidence suggests that a possible factor related to the acceleration of guilty pleas in the Victorian court was the absence, rather than the presence, of defence lawyers.

This finding challenges the historical plea bargaining hypothesis that the presence of defence lawyers correlated with the rise in guilty pleas. The significant decline in defence counsel representation after 1951 is possibly associated with the rise of the guilty plea in the Victorian court. This was a period when solicitors and barristers were overworked, and it is possible that there were fewer lawyers available for defendants. Simon Smith notes that lawyers were very much in demand after the Second World War.⁶³ This was in large part due to the increased demand for civil work, particularly for divorce applications.⁶⁴ The *Divorce and Matrimonial Causes Act 1861* (Vic) meant that the Supreme Court had jurisdiction over divorce related issues until 1959.⁶⁵ However, statistics from the Australian Year Book reveal a general increase across all civil cases in the first half of the 1950s (table 3.3).

⁶³ Simon Smith, "The Shaping of the Legal Profession," in *Judging for the People*, ed. Simon Smith (Crows Nest, NSW: Allen & Unwin, 2016), 87.

⁶⁴ Mark Finnane, "All Very Civil," *ibid.*, 174.

⁶⁵ *Ibid.*, 172.

TABLE 3.3. Number of criminal and civil cases, Victorian higher courts (1952-1956)

	1951	1952	1953	1954	1955	1956
Criminal cases	1650	1,671	2,071	2,082	2,198	2,629
Civil cases	6630	8533	12013	13183	4571	3996

Source: Australian Year Books.⁶⁶ Appendix Ten presents a detailed table of criminal and civil caseload in the Queensland, Victorian, and Western Australian Supreme Courts between 1946 and 1951.

There was a dramatic increase in civil court work in the lead up to the guilty plea shift in Victoria. In 1951, there were 1,650 committals for serious indictable offences, yet four times as many ‘civil causes’ and ‘divorces granted’ combined. There were almost six times as many civil cases by 1954. Whilst the criminal caseload remained relatively stable across that period, the amount of civil work escalated. It is possible that, in a time of high demand, solicitors and barristers preferred the “better paid and better respected” civil work.⁶⁷

The demand on legal counsel to meet the demands of civil litigation was exacerbated by the low numbers of lawyers entering the profession. The Victorian universities and the Board of Examiners held a monopoly on the entry into the profession, and resisted calls to expand the profession during this period.⁶⁸ Consequently, the professions numbers remained low until 1962, when the Council of Legal Education created its own professional accreditation course for Articled Clerks.⁶⁹ These factors possibly impacted the provision of legal counsel for criminal defendants during the 1950s. The unavailability of defence lawyers likely meant more

⁶⁶ Australian Bureau of Statistics, "1301.0 - Year Book Australia: Past and Future Releases".

⁶⁷ Griffith, "Prisoner's Counsel Act," 43.

⁶⁸ Smith, "The Legal Profession," 87-88.

⁶⁹ *Ibid.*, 87.

unrepresented defendants, who were more likely to plead guilty than proceed to trial. However, the Victoria subsample evidence also suggests that the reduction in the numbers of defence counsel coincided with a possible change in defence lawyers' practices. Over time, Victorian defendants were more likely to plead 'not guilty' when they were represented.⁷⁰ It is possible that plea bargaining practices became more typical over time.

Defence lawyers and guilty pleas

The article in "Lawyer's Diary" suggests that it was normal practice for defence lawyers to negotiate with crown prosecutors for a reduction in charges. The following hypothesis posits that a greater proportion of represented defendants pleaded guilty after the guilty plea shift, compared with the period before the shift. This might signify a shift in the practices of defence lawyers' that is possibly related to the guilty plea phenomenon. It is suggested that legal representation significantly affected defendants' pleas, although this relationship changed over time.

Between 1901 and 1955, only a quarter of all represented defendants in the Victorian subsample pleaded guilty. This was a significantly smaller proportion than the proportion of guilty pleas entered by unrepresented defendants during the same period (54 percent). Prior to the acceleration in guilty pleas, most defendants with legal counsel proceeded to a jury trial. This changed significantly after the system transformation occurred between 1952 and 1955. Guilty pleas increased significantly amongst both represented and unrepresented defendants during the guilty plea acceleration. The

⁷⁰ Alana Piper and Mark Finnane, "Access to Legal Representation by Criminal Defendants in Victoria, 1861-1961," *UNSW Law Journal* 40, no. 2 (2017): 643.

proportion of unrepresented defendants pleading guilty increased by 20 percent during the guilty plea transition period so that almost three quarters of all unrepresented defendants pleaded guilty after 1955. This is a substantive shift over time.

Guilty pleas amongst represented defendants increased at almost the same rate. By 1956, the proportion of legally represented defendants pleading guilty almost doubled. Across the sample years 1956 and 1961, 48 percent of represented defendants pleaded guilty. This evidence affirms the hypothesis that the guilty plea phenomenon in Victoria coincided with a significant change in the relationship between defence lawyers and their clients' pleas (table 3.4).

TABLE 3.4. Guilty pleas and legal representation, over time

	#defendants	% guilty plea
1901-1951		
Unrepresented	760	54%
Represented	1415	26%
Total	2175	36%
1956-1961		
Unrepresented	471	74%
Represented	448	48%
Total	919	61%

Note: The pre-transition period is 1901-1951. The post-transition period is 1956-1961.

This shift in the practices amongst represented defendants might signify a change in lawyers' practices that supported defendants' guilty pleas. It is also possible that the post-transition relationship between guilty pleas and legal representation reflects normative practice in the emergent guilty plea system; i.e. more defendants pleaded guilty whether they were represented or not. The Victorian dataset does not include

information that captures the mechanisms driving these accelerating pleas amongst represented defendants. Unlike the Queensland register, the Victorian record does not include information on the timing of defendants' pleas, so it is impossible to know whether the significant increase in the proportion of guilty pleas amongst represented defendants related to early guilty pleas, or involved bargained-for late guilty pleas. Further qualitative archival research is required to search for evidence of bargaining practices.

The empirical evidence presented here challenges the dominant plea bargaining argument that the presence and practices of defence lawyers were directly related to the rise of the guilty plea. Across the sample period, lawyers appeared to provide protection against the likelihood that represented defendants would convict themselves on their plea. However, the dramatic increase in the proportions of guilty pleas amongst legally represented defendants during the transition to a guilty plea system suggests that defence lawyers' practices changed. Alternately, the increasing proportion of represented defendants pleading 'guilty' mirrored the overall change in plea practices. This shift, and the concurrent overall decline in the levels of legal representation, both coincided with the acceleration of guilty pleas in the Victorian Supreme Court. The qualitative study involves the in-depth archival research necessary to investigate defence counsel's practices in guilty plea cases.

Conclusion

The quantitative study provides strong empirical evidence that trial by jury was the dominant mode of criminal prosecution in Australian Supreme Courts until the middle of the twentieth century. The rise of the guilty plea occurred in the Queensland and Western Australian courts between 1947 and 1950, and in the Victorian court

Chapter 3 – The Guilty Plea Phenomenon

between 1952 and 1955. System transformation in Australia occurred significantly later than in the US and English court systems. Similarly to other jurisdictions, the rise of the guilty plea in Australia was propelled by acceleration in defendants' pleas in prosecutions for property offences. Stealing and burglary prosecutions dominated the courts' caseloads, and these offences attracted substantially higher proportions of guilty pleas compared with other offences. The significant acceleration in the proportion of defendants' guilty pleas for both burglary and stealing offences ensured that all three Supreme Court jurisdictions transitioned to a guilty plea system, irrespective of how defendants pleaded to other types of offences.

Professionalisation scholars argue that the guilty plea phenomenon was the outcome of plea bargaining as an emergent practice between lawyers. The lack of documented bargaining requires historical plea bargaining scholars to look for patterns in large scale data that imply a possible bargain. These include patterns in the proportion of late guilty pleas, and in guilty pleas to lesser offences. The quantitative study employed jurisdiction-specific variables to test for these patterns in pleas. The Queensland data reveals that there is no evidence that guilty pleas to lesser offences or late pleas more generally, were present to any significant degree and that early guilty pleas, rather than late pleas, dominated the sample. The theory that plea bargaining was driving the guilty plea phenomenon does not hold in Queensland. Early guilty pleas accelerated concomitant with the overall acceleration of guilty pleas in the Queensland Supreme Court suggesting that detectives and police prosecutors were increasingly more successful in obtaining defendants' early guilty pleas. These findings suggest a new theory that associates police practices with the rise of the guilty plea in the Queensland Supreme Court.

Chapter 3 – The Guilty Plea Phenomenon

The professionalisation scholars also argued that substantial increases in the numbers of defence lawyers in the nineteenth century significantly contributed to the emergence of plea bargaining. The quantitative study tested this premise employing data from the Victorian court register. The literature presumes that the increasing presence of defence lawyers led to bargaining and an increase in the proportion of defendants subsequently pleading guilty; however, the Victoria evidence shows an inverse relationship between lawyers and pleas. Defendants were more likely to plead ‘not guilty’ and proceed to trial when legally represented. However, this relationship changed over time. In the post-transition period, defendants who were represented were increasingly more likely to plead guilty. Yet it appears that the lack of legal counsel was more critical. The number of defence lawyers declined dramatically in the post-transition period. Both outcomes significantly contributed to the acceleration in guilty pleas in the Victorian Supreme Court.

The findings from the quantitative study challenge current hypotheses that align late guilty pleas and legal representation with plea bargaining, and hence the rise of the guilty plea. The evidence shows that early guilty pleas, rather than late pleas, were instrumental in driving the guilty plea phenomenon in the Queensland Supreme Court. While the plea bargaining hypothesis argues that guilty pleas accelerated due to bargaining practices between defence and prosecuting counsel, the quantitative study findings imply that police, rather than crown prosecutors, were critical in defendants’ decisions to plead guilty. Furthermore, the Victorian data reveals that even when defence lawyers were present there was little evidence of systemic bargaining between defence and prosecuting counsel. Most defendants with counsel pleaded ‘not guilty’, and although this relationship weakened over time, most legally represented defendants continued to plead guilty after the transition to a guilty plea system. These findings

Chapter 3 – The Guilty Plea Phenomenon

suggest that plea bargaining was not the primary mechanism driving the guilty plea phenomenon in Australian courts.

These important findings are not conclusive for understanding the practices underpinning the rise of the guilty plea in Australian courts. Macro level data cannot identify and untangle the specific practices that are related to policing and guilty pleas; this requires in-depth qualitative and archival research. The qualitative study meets recent calls for qualitative archival research “to fully explain the forces in play” evidenced in the patterns in large scale data.⁷¹ The qualitative study examines the ‘forces at play’ in the prosecution process, from the police investigation through to the sentencing hearing, in prosecutions for burglary and stealing. Part Three of this thesis presents the results and discussion from the qualitative study. Each of the following three chapters examines the professional practices of key criminal justice actors – police, lawyers and the judiciary - to understand how their practices and responsibilities may have influenced defendants’ decisions to plead guilty. The qualitative study therefore provides closer inspection of the factors that possibly explain the rise of the guilty plea in the Australian context.

⁷¹ Hitchcock and Turkel, "Old Bailey Proceedings," 953.

Part Three: The Qualitative Study

Chapter 4. The Police and the Guilty Plea

Police have both inquisitorial and adversarial responsibilities.¹ They investigate offences, apprehend suspects and are responsible for initiating prosecutions in the police courts. These responsibilities include obtaining evidence that can successfully sustain a prosecution and, at least in the contemporary context, influence the likelihood that defendants plead guilty. Yet some legal scholars argue that these responsibilities create a conflict of interest that prevents “the impartial collection of evidence”.² This conflict is considerably complicated by the history of dubious policing practices that led to several Royal Commissions and inquiries into police and policing from the late nineteenth century onward.³

In 1960, the September edition of the *Queensland Justice of the Peace and Local Authorities Journal* (QJPR) published an article entitled “Police Interrogation”.⁴ It included a selection of extracts from an article by renowned legal scholar Dr Glanville Williams relating to police interrogation, confessions, and the process of cautioning suspects. Williams argued against the rule that “persons in custody should not be

¹ Feld, Hemming, and Anthony, *Criminal Procedure*, 4.

² Ibid.

³ Geoffrey Arthur George Lucas, Desmond Gordon Sturgess, and Dynes Malcolmson Becker, "Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland," (Brisbane: The Queensland Government, 1977); Gerald Edward Fitzgerald, "Report of a Commission of Inquiry Pursuant to Orders in Council: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct," (Brisbane: The Queensland Government, 1989); James Roland T Wood, "Royal Commission into the New South Wales Police Service: Final Report," (Sydney 1997); GA Kennedy, "Royal Commission into Whether There Has Been Corrupt or Criminal Conduct by Any Western Australian Police Officer: Final Report Volume 2" (Perth: Government of Western Australia., 2004).. For secondary literature on police inquiries, see Mark Finnane, "Police Corruption and Police Reform: The Fitzgerald Inquiry in Queensland, Australia," *Policing and Society* 1, no. 2 (1990): 163; *Police & Government*; Alan Beckley, "Royal Commissions into Policing-Australia," *Salus Journal* 1, no. 3 (2013); Alderson, "Powers and Responsibilities."

⁴ "Police Interrogation," ed. T.J. Lehane, *The Queensland Justice of the Peace and Local Authorities' Journal* (Brisbane: Law Book Company of Queensland, 1960), 121-25.

questioned without the usual caution being first administered”.⁵ He advocated fewer constraints upon police questioning, arguing that confessions obtained at any time during the police investigation process should be admissible in evidence.⁶ Yet Williams acknowledged that there were occasions where police used methods of ‘debatable propriety’ although he did not expand upon these ‘dubious’ methods.

Throughout the twentieth century, Australian newspapers published allegations raised by defendants and their lawyers of police abuse and misconduct.⁷ Common complaints included police using violence to obtain confessions and making promises to influence sentencing outcomes in return for defendants’ guilty pleas.⁸ The legal principle since 1893 stipulated that confessions must be voluntary and not the consequence of inducements like threats or promises; an involuntary confession would be ruled as inadmissible evidence.⁹ Although the extracts in the QJPR did not discuss voluntariness, Dr Williams admitted that suspects sometimes confessed to offences they did not commit to avoid the “atmosphere of suspicion and hostility” inherent to the interrogation process. Yet Williams was adamant that “a confession given to the police as a result of ordinary questioning is likely to be true”.¹⁰ Detectives were “remarkably successful in obtaining incriminating statements” but although this success “naturally awakens dark suspicions” he thought it unnecessary “to suppose that unfair methods have been used”:

⁵ Rule 3. *Ibid.*, 122.

⁶ *Ibid.*, 124.

⁷ “Third Degree,” *The Daily Telegraph*, January 1, 1914, <http://nla.gov.au/nla.news-article239022191>; “Third Degree,” *Moree Gwydir Examiner and General Advertiser*, June 12, 1922, <http://nla.gov.au/nla.news-article111853682>; “Third Degree,” *The Braidwood Dispatch and Mining Journal*, May 10, 1930, <http://nla.gov.au/nla.news-article119272263>.

⁸ “Third Degree,” *Warwick Daily News*, June 22, 1935, <http://nla.gov.au/nla.news-article177390031>; “To Substitute Plea,” *Daily Examiner*, October 31, 1931, <http://nla.gov.au/nla.news-article193780032>.

⁹ *R v Thompson* [1893] 2 QB 12; *Ibrahim v R* [1914] AC 599; *R v Zerafa* [1935] QSR 227.

¹⁰ “Police Interrogation,” 122-23.

Chapter 4 – The Police and the Guilty Plea

When an offender has been caught in incriminating circumstances, he often judges it better to confess and plead guilty, hoping thereby to get a lighter sentence. Moreover (and this is a fact too little understood by those who express alarm when confessions are made to police), a guilty person who finds himself detected often wishes to confess in order to obtain relief from the feeling of guilt.¹¹

Similar opinions were held by many members of the Australian judiciary during the twentieth century. Legal scholar David Brown claims that magistrates and judges were strongly resistant to allegations against police concerning inadmissible confessional evidence, and breaches of the Judges' Rules that were the only guidelines for police cautioning and interrogation.¹² Some officials were overtly hostile to defendants and defence lawyers when allegations against police were raised in their courts.¹³ There was little acknowledgement of any evidence of the systemic police corruption in Queensland later revealed by the Lucas and Fitzgerald inquiries in the 1970s and 1980s. This resistance continued to characterise complaints against police up until the 1980s, despite numerous appeal cases and criminal trials where defendants raised allegations about inducements to confess and plead guilty.¹⁴ Although the reforms recommended by the Fitzgerald Report included tape recorded sessions of interviews and accountability of police during the interrogation process,¹⁵ this was almost four decades after the Queensland Supreme Court transitioned to a guilty plea system.

¹¹ *Ibid.*, 123.

¹² Brown, "Royal Commission," 237.

¹³ "Circuit Court," *Cloncurry Advocate*, March 5, 1932, <http://nla.gov.au/nla.news-article170046063>.

¹⁴ *R v Zerafa* [1935] QSR 227; [1943] QWN 21; *McDermott v R* [1948] HCA 23; *Halfpapp v Bateman, Ex parte Halfpapp* [1951] QWN 19; *Fursman v Blackman and Nicholls, ex parte Blackman and Nicholls* [1953] Qd R 33; *R v The Stipendiary Magistrate at Cloncurry and Corbett, Ex parte Page* [1959] Qd R 75; *Hallahan v Kryloff, Ex parte Kryloff* [1960] QWN 18; *R v Willie* [1960] Qd R 525; *R v Tatnell* [1962] Qd R 11.

¹⁵ Finnane, "Police Corruption," 163.

Chapter 4 – The Police and the Guilty Plea

This system transformation was strongly associated with police practices and investigation leading to proceedings in the lower courts. The empirical evidence presented in the quantitative study shows that the guilty plea phenomenon in Queensland was driven by the acceleration of early guilty pleas in the police courts. The historical plea bargaining literature argues that improved policing practices and investigation techniques ensured stronger cases against the defendants who then engaged in charge bargaining with police in the hope of a more lenient outcome.¹⁶ These early guilty pleas might therefore be the consequence of police prosecution cases founded on strong evidential material. However, any analysis of the association between policing practices and the rise of the guilty plea in the mid-twentieth century must also consider the entrenched nature of police corruption that permeated the prosecution process during this period.

The qualitative study component of this thesis investigates the processes and practices of key criminal justice actors – police, lawyers, and the judiciary – that appear to have influenced defendants’ guilty pleas in the Queensland Supreme Court between 1926 and 1961. This chapter is the first of three chapters that discuss the findings from the qualitative study. The chapter begins by outlining the research methodology that underpins the qualitative study that centres on 60 criminal deposition files involving defendants pleading guilty to property theft offences. The chapter outlines the selective sampling strategy employed in data collection, and describes the sample characteristics. The discussion then explains the committal process evidenced in the depositions before

¹⁶ Ferdinand, *Boston's Lower Courts*, 101.

Chapter 4 – The Police and the Guilty Plea

outlining some of the issues arising from a close reading of this material, in particular problematic police practices that occurred during this period.

Chapter four then turns to a discussion of the policing practices that appear to be associated with early guilty pleas in the police courts. It analyses the various processes and practices involving police from the investigation phase through to the final stage in the committal hearing when defendants entered their plea at the close of the police prosecution case. The chapter's findings are structured in sections that align with the different stages of the pre-trial process as described in detectives' testimonies at the committal hearing, including the apprehension and interrogation of the defendant. Guilty pleas appear to be associated with policing practices that focused on defendants' confessions as the primary means of securing a conviction. There is little evidence that police employed the range of technological tools at their disposal to build strong evidentiary cases against defendants. Rather, defendants' allegations of police inducements to confess and plead guilty became commonplace during the rise of the guilty plea.

Methodology

In this part of the thesis, the focus shifts from a macro to a micro level analysis to investigate the particular practices and processes that influenced defendants' guilty pleas during system transformation to a guilty plea system. The qualitative study asks the final research question:

3. How did the practices of police, lawyers, and the judiciary influence defendants' guilty pleas?

Chapter 4 – The Police and the Guilty Plea

The qualitative study research design is informed by the quantitative study findings. These findings showed that early guilty pleas were instrumental to the guilty plea phenomenon in the Queensland court. This evidence challenges the historical plea bargaining hypothesis that the key mechanism driving the shift to a guilty plea system was the acceleration in late guilty pleas, as evidence of bargaining between prosecuting and defence counsel. The quantitative study also showed that burglary and stealing offences dominated prosecutions in Australian courts, and that guilty pleas to these offences were a critical driver of the guilty acceleration. These factors justify the selection of a sample of burglary and stealing prosecutions disposed of by guilty pleas in the Queensland Supreme Court.

This in-depth research undertakes an innovative approach to exploring the practices of police, lawyers and the judiciary. It analyses and synthesises a range of primary source data, including 60 Queensland Supreme Court deposition files and Crown solicitor circular letters,¹⁷ case law (particularly Court of Criminal Appeal cases) and professional texts accessed by police and lawyers, and historical newspaper reports. News reports were collected from the National Library of Australia's Trove database.¹⁸ A detailed description of the qualitative study's use of sources, data collection and analyses is provided in Appendix Four (pg. 295).

¹⁷ Queensland State Archives Series ID 15536, Information, Depositions and Associated Papers in Criminal Cases Heard in Sittings in Brisbane; Queensland State Archives Series ID 18038, Criminal Depositions – Supreme Court, Brisbane; Queensland State Archives Series ID 18034, Indictments (Supreme Court, Brisbane); Queensland State Archives Series ID 5521, Indictments, Depositions and Related Papers in Criminal Sittings; Queensland State Archives Series ID 9264, Criminal Case Files; Queensland State Archives Series ID 17863, Criminal Files; Queensland State Archives Series ID 7132, Circulars Books and Queensland State Archives Series ID 10797, General Correspondence.

¹⁸ National Library of Australia, Available online at <https://trove.nla.gov.au/>.

The qualitative sample

The qualitative analysis centres on 60 criminal deposition files of burglary and stealing cases prosecuted between 1926 and 1961. These files are held in the Queensland State Archives (QSA). I employed a selective sampling strategy to collect 15 burglary and 15 stealing cases from the pre-transition period (1926-1946, n=30), and the same number of cases from the post-transition period (1951-1961, n=30). Selection was based on several criteria, the most critical being the availability of deposition files held in the archives.¹⁹ Because property offences often involved co-accused defendants, I selected a balance of both single and co-accused defendants across the sample. The final sample of 60 cases included 70 single and co-accused defendants. Appendix Six (pg. 310) provides a table of the sample defendants' characteristics, including age and gender.

64 of the 70 sample defendants were male. Half of the sample was aged below 26 years of age; the youngest defendant was aged 17, the eldest 56. I sourced the occupations of 49 defendants from the court calendars, committal forms, and newspaper reports. Most defendants were working class. Male defendants were generally labourers (15); farm workers (5); or painters (4) while female defendants included domestics (2), a tailor (1), and a housekeeper (1). Most defendants pleaded guilty early in the police courts (49 out of 70).

¹⁹ The Queensland State Archives do not hold every Supreme Court criminal deposition file of cases prosecuted during the twentieth century. Many central and northern supreme court documents were destroyed during natural events like cyclones. Other files were unusable due to mould damage. Consequently, the sample in the post-transition period is heavily skewed towards defendants sentenced in the Brisbane Supreme Court sittings.

Chapter 4 – The Police and the Guilty Plea

Most guilty pleas were “on the nose”, i.e. there was no reduction in the number or severity of the defendants’ charges.²⁰ Only two defendants entered late guilty pleas to lesser offences, the pattern synonymous in the historical scholarship with plea bargaining.²¹ Subsequent charges were dropped in seven guilty plea cases. Three of these seven defendants pleaded guilty to subsequent charges after they were found guilty of the first offence by a jury. Rates of legal representation were low. Only a third of the sample defendants had a lawyer present during the committal proceedings.

The depositions

The 60 criminal depositions are the administrative records of the first stage of the trial process, the committal hearing. The files generally contain all the materials created during the committal proceedings in the police courts. After Queensland police arrested and charged the defendant with a serious indictable offence, they were brought before either a police magistrate or a bench of justices of the peace, to decide whether the police case was strong enough to support a prosecution.²² During the early to mid-twentieth century, defendants in rural and regional areas were often brought before a bench consisting of multiple justices of the peace (JP), or a mixed bench of a police magistrate and one or two JP’s. From at least the late nineteenth century, cases heard in the police courts were prosecuted by police prosecutors. For example, on May 4, 1901, Sub-Inspector Burke prosecuted John William Neary for stealing and receiving. He was committed for trial but later that month pleaded guilty to larceny in the Supreme

²⁰ Mather, "History of Plea Bargaining," 284.

²¹ Lawrence M. Friedman, "Plea Bargaining in Historical Perspective," *ibid.*: 249.

²² *Criminal Code 1899* (Qld), s552.

Chapter 4 – The Police and the Guilty Plea

Court.²³ In rural courts, the senior investigating officer generally prosecuted defendants, but in urban areas like Brisbane prosecutorial duties were ascribed to specific officers who prosecuted on behalf of the Criminal Investigation Branch (CIB).

The committal process was straight forward and proceeded in a consistently structured format. The police prosecution case opened with testimony from the investigating detective (who also entered evidential material obtained during that investigation), before testimonies were heard from victims and eyewitnesses. Testimony was given in terms of answers to questions from the police prosecutor. In most cases the depositions recorded the answers and not the questions asked. From the 1950s, however, some of the depositions included a ‘question and answer’ format recording the cross-examination by defence lawyers. The final stage involved the police magistrates asking the defendant for their statement; that is, their plea. This was usually the only time that the defendant’s voice was recorded in the deposition records.

The committal process did not generally allow for evidence from the defendants, and they could not call witnesses in their defence. Only one 17-year-old unrepresented defendant made a sworn statement on oath. In 1931, George Waters pleaded guilty to burglary, but also testified under oath. He explained to the court that he committed the offence because he and his co-accused were starving; the local shopkeepers had refused them food because “there were too many unemployed” in town.²⁴ In his plea for leniency, he reminded the court that he had never previously been in trouble.

²³ Queensland State Archives Item ID95471, Depositions and indictments.

²⁴ Queensland State Archives Item ID212640, File - criminal case; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #81235, QLDSC, George Waters, 1931.

Chapter 4 – The Police and the Guilty Plea

The defendants, or their defence counsel if represented, could cross-examine the prosecution witnesses including detectives, but most did not. There were, therefore, very few cases when defendants' speech was recorded in the depositional material. This archival material does not mean that defendants *were* silent. Newspaper reports sometimes recorded presumably verbatim interactions between defendants and police. Nevertheless, most defendants in this sample did not speak even when they represented themselves and could potentially challenge the police evidence. Engaging with these silences is difficult. The historical context of 'dubious' police practices means it is very possible that some of the sample defendants pleaded guilty because of police pressure.²⁵ Although police were the dominant 'voices' in these texts, there were also silences in the detectives' evidence in terms of the information about their practices that they were unwilling to divulge. For example, detectives' testimonies typically implied that other officers were present when defendants made verbal confessions, yet it was only during targeted cross-examination by defendants' lawyers that officers admitted that their colleague was elsewhere when the admission was made, and there was no corroboration.²⁶ These silences therefore require a considered, critical reading of possibly unreliable police testimonies.

²⁵ Queensland State Archives Item ID96173, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #36690, QLDSC, Anon., 1951 and Queensland State Archives Item ID96179, Depositions and indictments, The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #52562, QLDSC, Anon., 1951.

²⁶ The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #32474, QLDSC, Mabel Travers, 1926; Queensland State Archives Item ID95776, Depositions and indictments; Queensland State Archives Item ID95777, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #39757, QLDSC, George Miller, 1926; Queensland State Archives Item ID3410, Depositions and indictments; PP, Trial ID #33936, QLDSC, John Walder, 1931.

Analytical approach

Police corruption in the prosecution process in Australia was not systematically addressed until the formation of oversight organisations like Queensland’s Criminal Justice Commission (CJC). These bodies emerged from respective police inquiries held during the late twentieth century.²⁷ These inquiries revealed systemic corruption by the police in the prosecution process. CIB detectives engaged in widespread fabrication of evidence, illegal confessions, and perjury.²⁸ Police historian Mark Finnane provides strong, consistent evidence of the historical continuity in these practices that he refers to as a “conviction at all costs” mentality.²⁹ Australia’s policing history and culture has ramifications for the analysis of deposition transcripts that favoured the police prosecution case. David Dixon stresses that scholars must acknowledge that “miscarriages of justice and investigative failures were disturbingly common in the twentieth century”.³⁰ To engage with these police court testimonies requires a critical awareness of the historical context of corruption that questions the credibility and reliability of police witnesses.

With this in mind, I engaged with these archival sources on two levels. I accepted the police evidence at face value, but I also closely read the text for signals that indicated the police testimony was perhaps disingenuous. For example, police often and grudgingly disclosed details about the interrogation in response to questioning by

²⁷ Tim Prenzler, "The Evolution of Police Oversight in Australia," *Policing and Society* 21, no. 3 (2011): 290.

²⁸ Fitzgerald, "The Fitzgerald Report."; Lucas, Sturgess, and Becker, "The Lucas Report."; Kennedy, "The Kennedy Report."

²⁹ Finnane, *Police & Government*, 77.

³⁰ David Dixon, "Questioning Suspects: A Comparative Perspective," *Journal of Contemporary Criminal Justice* 26, no. 4 (2010): 431.

defence lawyers that they did not disclose during their own testimonies. I analysed the dates and times of defendants' apprehension and their subsequent confessions, and their movements between police stations, watch houses, and crime scenes. I was conscious of periods of time that were unaccounted for and might suggest situations when pressure was applied to attain defendants' confessions. I read closely for testimonies from multiple officers that were almost verbatim; some of the defence lawyers in this sample were also mindful of this practice, and will be discussed more fully in the following chapter regarding lawyers' practices.³¹

The evidence from the police courts

This part of the chapter analyses the deposition cases and identifies key policing practices that were critical to defendants' guilty pleas. It is structured in two sections. The first examines evidence from the depositions pertaining to police practices and procedures during the investigation and interrogation stages of the prosecution process. This includes how police framed the prosecution case through their testimonies in the police court, including the information related to the defendant's apprehension and interrogation. The second section analyses the evidence presented in these testimonies and finds that, contrary to the expectations suggested by the historical plea bargaining literature, most of the 60 sample cases were not constructed on strong evidential material emerging from modern police techniques or technology. Police were instead

³¹ Queensland State Archives Item ID95777, Depositions and indictments; PP, Trial ID #39757, QLDSC, George Miller, 1926; Queensland State Archives Item ID95776, Depositions and indictments, PP, Trial ID #32474, QLDSC, Mabel Travers, 1926; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #37214, QLDSC, Anon., 1951, Queensland State Archives Item ID96184, Depositions and indictments.

heavily reliant on confessional material that was obtained without meeting the requirements of their own rules and general instructions.

The police investigation

A close reading and analyses of the depositions shows consistency in the police testimonies over times. Police prosecutors, detectives, and other officers followed the same processes and were remarkably consistent in how little information they disclosed during the committal hearings. For example, police described their investigation and interrogation practices in an almost templated presentation form, regardless of whether the prosecution occurred before or after the guilty plea transition, i.e. 1947-1950. From the outset the police testimony established the defendant as a guilty and willingly participant in the prosecution process. First, the investigating officer identified themselves to the court and stated that they approached the defendant in some way. Detectives did not generally disclose the circumstances leading to the identification of the defendant as a possible suspect. Typically, police testified that the defendants admitted responsibility and confessed. Most police testified that this admission occurred during this initial conversation, almost as soon as police identified themselves. Police used language expressing the defendant's relief and cooperation: "I understand. I will help you if I can. I want to get it over and done with".³² In a third of cases however, police claimed that defendants initially denied their involvement in the offence but during the interrogation process made a verbal confession.

³² Queensland State Archives Item ID95995, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #17916, QLDSC, Anon., 1941.

Chapter 4 – The Police and the Guilty Plea

Police then described how they asked the defendants to “accompany” them to the CIB or local police station. Police always testified that this was a voluntary act on the part of defendants: “The tools were taken to the CIB in a motor truck and the defendant accompanied us”.³³ Some detectives claimed that it was the defendant who offered to accompany them. For example, in 1931 a defendant allegedly said “What do you want me to do? Do you want me to come with you?”.³⁴ Framing this as a voluntary decision on the part of defendants to “accompany” detectives allowed police to circumvent restrictions on police powers of arrest.

Laws around arrest and questioning meant that police could not legally question suspects about an offence after they were formally arrested. The 1953 *Policeman’s Manual* General Instruction 402 stated it was “improper” to put questions about an offence to a person who had been arrested or was in police custody.³⁵ Police could question anyone in connection with an offence without a caution, but they could not compel them to attend the police station without first arresting them; to do so, would make further questioning improper. So, detectives framed these encounters as acts of voluntary compliance. The suspect’s consent was critical, even when it was “highly questionable that reasonable consent was actually granted”.³⁶

Further, defendants “accompanied” detectives to various locations, during the interrogation process. In 1941, Detective Constable J.P. McIver testified that, before

³³ Ibid.

³⁴ Queensland State Archives Item ID95858, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #34253, QLDSC, George Newsome, 1931.

³⁵ John Smith, *The Queensland Policeman's Manual* (Brisbane: Queensland Government, 1953), 237.

³⁶ Richard V. Ericson, "Rules in Policing: Five Perspectives," *Theoretical Criminology* 11, no. 3 (2007): 370.

leaving the city watch house, he told one defendant, “We believe that there are further tools concealed at your house. Will you come with us while we make a further search”.³⁷ In some cases, burglary defendants allegedly consented to accompany the detectives to crime locations, or second hand dealers, for further identification purposes.³⁸ In others, the police testified that they drove past a location, and the defendant merely pointed out the premises where the offence had occurred.³⁹ None of the defendants in the 60 prosecutions sample refused to accompany police.

The interrogation

In urban areas, police interrogations generally occurred at the CIB offices rather than local police stations, but local stations were typical in rural cases. In Brisbane, defendants were also occasionally questioned at the city watch or moved between the CIB and the watch house during questioning.⁴⁰ It is difficult to tell from the testimonies what happened during the interrogation process.

During this time, of course, police were not required to provide any objective evidence of the interrogation process. In 1977, the Lucas Inquiry recommended that recorded interviews should be introduced into Queensland, but these were ignored until the subsequent recommendations by Commissioner Fitzgerald in 1989.⁴¹ The only records of the interrogation process were the detective’s notebooks. Although police

³⁷ Queensland State Archives Item ID95995, Depositions and indictments; PP, Trial ID #17916, QLDSC, Anon., 1941.

³⁸ Queensland State Archives Item ID96072, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #9620, QLDSC, Anon., 1946.

³⁹ Queensland State Archives Item ID96173, Depositions and indictments; PP, Trial ID #36691, QLDSC, Anon., 1951.

⁴⁰ Queensland State Archives Item ID95928, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #47785, QLDSC, Edgar Smith, 1936.

⁴¹ Finnane, "Police Corruption," 163.

relied on their personal notebooks and could ask to refer to these during their testimony, this rarely occurred. Further, these notebooks and other police documentation concerning the matter were not disclosed to the defendant or defence counsel. In fact, the 1939 police manual explicitly stated that police should “respectfully refuse” to produce any such documentation in court before a magistrate.⁴² The evidence from this sample suggests that a detective’s testimony was given from memory alone.

Detectives said almost nothing about the interrogation process during their testimonies. They provided very little description of the interrogation process, unless pressed to do so during cross-examination by defence lawyers. This reticence is a critical example of the silences that permeate policing practices in the deposition texts. Even during cross-examination, police were reticent to divulge anything more than minimal information, at most disclosing a specific room where an interview took place or who was- or was not- present. For example, in 1926 Mr Crawford asked extensive questions about his female client’s interrogation at the Brisbane CIB, eliciting more detail than Detective Lawrence had provided in his testimony:

During the conversation with the defendant at the CI branch office, [Detective] Bookless was present. He was in the room-I could not say whether he could hear the conversation or not. He was moving about the room. I don’t think I was sitting down with Bookless or with the defendant at any time that I remember-I think I was sitting on the end of a table on one occasion and Bookless was sitting on a chair. I was on [sic] the front of her and may have been a little to the side. I have been six years in the police force in New South Wales. The conversation was an important one but can’t say whether Bookless heard it or not. I was sitting on the table when I spoke to her.⁴³

⁴² Cecil James Carroll, *The Queensland Policeman's Manual* (Brisbane: Queensland Government, 1939). General Instruction 1515(2)

⁴³ Queensland State Archives Item ID95776, Depositions and indictments, Trial ID #32474, QLDSC, Mabel Travers, 1926.

Chapter 4 – The Police and the Guilty Plea

This lack of objective evidence of the interrogation process meant that police could easily testify that defendants made verbal confessions, and there was little recourse for defendants to challenge these allegations. This was particularly the case when police colluded to present the same evidence. In 1951, a young man was prosecuted for stealing money from a relative's house. During the officer's cross-examination, defence lawyer Mr Delaney, queried the similarities between his and the senior investigating officer's testimonies:

Delaney: Would you be surprised to know that your evidence is practically syllable for syllable to [PC Constable] McGrath's?

Horne: I would be surprised. I have not a copy of my evidence on me now.⁴⁴

There were a small number of sample cases where officers' testimonies were remarkably similar. These similarities suggest that officers agreed on the wording of their answers to the police prosecutor beforehand. Certainly, by the 1970s, there were cases where police "runners" acted as go-betweens in Queensland courthouses, running between courtrooms and witness waiting rooms to update police on their colleagues' testimonies, to ensure they testified consistently.⁴⁵

So, police depositions provide little information about the processes pertaining to interrogations. The focus of the police testimonies was the evidence presented in the police prosecution case. The plea bargaining hypothesis posits that police professionalisation and improvements in evidence created strong cases that appeared

⁴⁴ Queensland State Archives Item ID96184, Depositions and indictments; PP, Trial ID #37214, QLDSC, Anon., 1951.

⁴⁵ Colleen Lewis, Janet Ransley, and Ross Homel, "The State We Were In," in *The Fitzgerald Legacy: Reforming Public Life in Australia and Beyond*, ed. Colleen Lewis, Janet Ransley, and Ross Homel (Bowen Hills, QLD: Australian Academic Press, 2010), 4.

pointless for defendants to challenge at trial. Yet analysis of the Queensland sample suggests that police relied heavily on confessional material, rather than eyewitness or forensic evidence that arguably arose from investigative techniques. The following sections discuss the nature of, and practices eliciting, the police evidence with focus first on the identification and forensic evidence. The final section focuses on the importance of confessional material for both the police case, and the likelihood that defendants pleaded guilty.

The police evidence

The plea bargaining literature suggests that police professionalisation was integral to the development of plea bargaining. Modern policing practices and technologies led to stronger cases of evidence against defendants, so that more truly guilty defendants were caught and subsequently prosecuted. Faced with an overwhelming body of evidence against them, defendants and their lawyers negotiated a guilty plea rather than face certain conviction at the hands of a jury. Yet little empirical evidence supports this suggestion.

The professionalisation hypothesis, at first glance, cannot be applied to explain the guilty plea phenomenon in Queensland. Guilty pleas dominated case outcomes sometime between 1947 and 1950. This was long after the introduction of fingerprinting, photography, the telephone, and the sharing of information between state police agencies.⁴⁶ For example, Australian state police agencies had collected and

⁴⁶ W Ross Johnston, *The Long Blue Line: A History of the Queensland Police* (Bowen Hills, QLD: Boolarong Publications, 1992), 143-44.

shared fingerprint evidence from the early 1900s.⁴⁷ From 1914, the Queensland Policeman's Manuals provided police with detailed instructions about the proper collection and interpretation of fingerprints.⁴⁸ If these elements of police practice were integral to the acceleration of guilty pleas then the rise of the guilty plea should have occurred decades earlier. The following section analyses the evidence presented in the police prosecution case, to identify the relevant aspects in the police evidence that appeared to influence defendants' guilty pleas.

Evidence

At committal, evidence presented to and accepted by the police courts generally met a lower standard of rules of evidence than the Supreme Court. Evidence could be given on any "facts, testimony, and documents" legally required to prove an offence.⁴⁹ Magistrates only had to decide that the police evidence was sufficient to establish a *prima facie* case against the defendant. Police witness evidence was rarely challenged. Further, it was difficult to ascertain why the police initially identified some defendants as suspects. Some investigating officers testified about speaking with the defendant "in connection with another matter".⁵⁰ This other matter sometimes referred to an initial offence leading to the first charge or was otherwise related to a misdemeanour, later dealt with summarily. For example, in 1941, a soldier stole his major's pistol and attempted two robberies in the one evening.⁵¹ The stolen pistol was dealt with

⁴⁷ Robert Haldane, *The People's Force: A History of the Victoria Police* (Carlton, VIC: Melbourne University Press, 1986), 130.

⁴⁸ William Geoffrey Cahill, *The Queensland Policeman's Manual* (Brisbane: Queensland Government, 1914), 44-51.

⁴⁹ Smith, *Manual*, General Instruction 688.

⁵⁰ Queensland State Archives Item ID95989, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #48393, QLDSC, Anon., 1941.

⁵¹ *Ibid.*

summarily, but he pleaded guilty to two counts of armed robbery and was committed to the Supreme Court for sentencing.

Occasionally police told the court they had received information from an unnamed source. The police manuals urged officers to be reticent in sharing their sources of information or their informants' identities.⁵² A close reading of the sample cases suggests that CIB detectives had networks of informants who provided information, either about property presumed to be stolen or possible suspects. In some cases, information was received from publicans, and boarding house landlords.⁵³ These informants provided information about recently arrived suspicious persons or identified them as selling goods around town. Second hand dealers figured strongly in both types of theft offences and were the most common type of prosecution witness other than police, usually identifying both property and the defendant.⁵⁴ This identification provided strong evidence against defendants and may have influenced their decisions to plead guilty.

Eyewitness identification

Witnesses in criminal cases might identify objects or people associated with an offence. Most witnesses in this sample identified their property rather than the defendant; eyewitness identification of the defendant committing the offence was rare.

⁵² Carroll, *Manual*, 516. General Instruction 1417

⁵³ Queensland State Archives Item ID95990, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #16938, QLDSC, Anon., 1941; Queensland State Archives Item ID96179, Depositions and indictments, PP, Trial ID #52562, QLDSC, Anon., 1951.

⁵⁴ Queensland State Archives Item ID95928, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #47788, QLDSC, Harry Foster, 1936; Queensland State Archives Item ID96180, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #36820, QLDSC, Anon., 1951.

Chapter 4 – The Police and the Guilty Plea

Only 16 of the 70 defendants were caught or seen during the offences. In 1931, in a town west of Brisbane, a young defendant attempted to break into a local store through a back-alley window in the early hours of the morning, when he was interrupted by two local constables on patrol. Brown made no attempt to deny his crime; when asked what he was doing, he allegedly replied, “Trying to break in”.⁵⁵ Defendants were occasionally apprehended in the act by other people. In 1946, the daughter of a Brisbane publican found the defendant in her room in the upper level of the hotel.⁵⁶ He tried to escape, but her mother sent another patron in pursuit and the defendant was detained at the hotel until detectives arrived. In cases of such strong eyewitness evidence, it was useless to plead ‘not guilty’ and challenge the prosecution case. A guilty plea was the natural result.

Contemporary Australian common law regards an identification line-up as the most reliable means of identifying offenders.⁵⁷ There was no consistent judicial approach to the proper procedure for identifying offenders until 1937 when the HCA unanimously accepted the English Court of Criminal Appeal ruling that suspects should not be taken before witnesses on their own but should appear in a line-up with other people.⁵⁸ The expected procedure outlined in the 1939 police manual involved the suspect being placed with “four or five others as similar in age, clothes, and position in life as possible”.⁵⁹ Witnesses would be brought before the line-up individually, then

⁵⁵ “Caught in Act,” *Queensland Times*, July 28, 1931, <http://nla.gov.au/nla.news-article116143526>

⁵⁶ The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #9811, QLDSC, Anon., 1946; Queensland State Archives Item ID96073, Depositions and indictments.

⁵⁷ *Alexander v R* (1981) 145 CLR 395.

⁵⁸ *Davies & Cody v R* (1937) 57 CLR 170; Barry, Paton, and Sawyer, *Introduction to the Criminal Law*, 67.

⁵⁹ Carroll, *Manual*, 229. General Instruction 486(1). The 1914 and 1925 manuals do not refer to witness identification or line-ups in the sections pertaining to evidence or witnesses, see Cahill, *Manual*; William

asked to place their hand upon the person they identified.⁶⁰ Yet the depositions reveal that the practice was another matter. Detectives in this sample rarely used the correct procedure to attain admissible identification evidence.

Police only sporadically followed the proper procedure for obtaining evidence of witness identification. In 1936, a 22-year-old assaulted an elderly woman whilst they were alone in a train carriage, punching her multiple times and then going through her purse, before changing carriages at the next stop.⁶¹ The extensive police investigation included two witnesses who saw the defendant entering the second carriage and later identified him in a line-up with six other men. The witnesses were asked to tap the man they recognised on the left shoulder. However, the victim did not identify the defendant from a line-up. Instead, three detectives took him to her hospital bed where the *defendant* was asked whether he knew the victim and he replied, “Yes, she is the lady that was in the carriage”. The woman later told the Police Court that is the only time she could remember seeing him.

In contemporary courts, this kind of “confrontation identification” is highly disapproved of and is only provided to the court in exceptional circumstances.⁶² It was quite common in the sample cases however. For example, property theft victims were often brought into the presence of the defendant while they were in custody in the CIB office. In one case there were four eyewitnesses who testified seeing the defendant attacking another man while both were using the town’s public urinal. Yet in his

Harold Ryan, *The Queensland Policeman's Manual* (Brisbane: Queensland Government, 1925).

⁶⁰ Carroll, *Manual*, 229. General Instruction 486(2)

⁶¹ Queensland State Archives Item ID867934, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #35578, QLDSC, Frederick Holloway, 1936.

⁶² Feld, Hemming, and Anthony, *Criminal Procedure*, 319.

testimony, the Acting Sergeant failed to mention any identification line-up involving either the victim or the three eyewitnesses who testified for the prosecution. Detectives either omitted any mention of identification line-ups or testified that it did not occur because defendants chose to forgo the process.

Some officers testified that they offered line-ups to defendants, but the offers had been refused. In 1926, two 17- and 18-year-old brothers were charged with robbery. Detective Constable Stone told the court that both Herbert and Allan Stewart had repeatedly refused a line-up, saying “We don’t want it. He won’t pick us”. There was no suggestion from the magistrate that Stone should have insisted that the correct procedure was followed to meet the required rules of evidence. Rather, Stone and others implied that it was sufficient enough practice to offer line-ups as a choice for defendants to make:

I said to both defendants, “Mr Caswell has arrived. He is in the front office now, and I am going to bring him into have a look at you and see if you are the men. Do you want a line-up with other men?” Each defendant replied, “No we don’t want a line-up”. I said, “You can have a line-up if you want it”. The both replied, “We don’t want it. He won’t pick us”.⁶³

Police were not overly concerned that that failure to undertake the correct line-up procedure might affect the quality, or the admissibility, of the identification evidence. Most sample cases that included identification evidence in the police courts did not meet the requirements under evidence law, which stipulated that a witness “should only

⁶³ Queensland State Archives Item ID95778, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #46331, QLDSC, Allan Stewart, 1926 and co-defendant The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #46332, QLDSC, Herbert Stewart, 1926.

be asked to identify the person in the dock when he has previously done so at an identification parade...merely demonstrating his consistency".⁶⁴ The lack of proper procedure regarding line-ups and identification evidence meant that some defence counsel might successfully challenge the admissibility of identification evidence if the case proceeded to trial, or at least ask that a jury be given special directions about the dangers of such evidence.⁶⁵

This was likely in cases where the failure to follow correct line-up procedure might result in misidentification of suspects. In 1961, a young public servant, charged with robbery with violence, was taken back to a crime location (the family home behind the shop) and in front of both witnesses, asked to place a handkerchief over his face.⁶⁶ The mother could not identify him with or without it, but the daughter only identified him with the handkerchief, *after* hearing her mother say she could not identify him. The lack of proper procedure here might have raised doubts in the mind of the jury, if the case had gone to trial. Research shows eyewitness identification can be affected by the presence or absence of a weapon, the lighting, and whether the offender wears a disguise.⁶⁷ Memories are fallible, easily affected by post-event experiences, including conversations with police; further, offender, witness, and situational characteristics can

⁶⁴ Sidney Lovell Phipson, *Phipson's Manual of the Law of Evidence*, ed. D.W. Elliott, 8th ed. (London: Sweet & Maxwell, 1959), 65.

⁶⁵ *R v Courtney* (1957) 74 WN (NSW) 204.

⁶⁶ Queensland State Archives Item ID204171, Depositions; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #566252, QLDSC, Anon., 1961.

⁶⁷ Gary L. Wells and Elizabeth A. Olson, "Eyewitness Testimony," *Annual Review of Psychology* 54, no. 1 (2003): 281.

seriously impair eyewitness identification.⁶⁸ Misidentification has historically accounted for a “very significant proportion” of wrongful convictions.⁶⁹

However, it is likely that some defendants perceived eyewitness identification evidence as further evidence of a strong prosecution case against them, particularly when police alleged that defendants made verbal confessions. When the Stewart brothers were brought before the magistrate in 1926, neither brother cross-examined the eyewitness. When the magistrate asked if they had any questions to put to the witness, however, Allan Stewart replied, “No, but I would like to congratulate this gentleman on the lies he has told”.⁷⁰ It appears that identification evidence was difficult to refute.

Identification of Property

Most identification evidence involved owners identifying their stolen property, including items like clothing, jewellery, motorcycles, and money. Property identification was straightforward and overwhelmingly in favour of the prosecution case. After the investigating detectives had finished testifying, the police prosecutor then asked the witness to identify the relevant exhibit as their property. A 1946 burglary case in Maryborough provides the best example in this sample of police investigative techniques using property identification evidence.⁷¹ The witness told the court his practice over many years was to record the serial numbers of any monetary notes in a notebook that he kept separately from the notes that were stored in a tin box in his

⁶⁸ Loretta Re, "Eyewitness Identification: Why So Many Mistakes," *Australian Law Journal* 58, no. 9 (1984): 3.

⁶⁹ Feld, Hemming, and Anthony, *Criminal Procedure*, 298.

⁷⁰ “We Did the Job,” *The Telegraph*, April 15, 1926, <http://nla.gov.au/nla.news-article179307543>.

⁷¹ Queensland State Archives Item ID867941, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #7012, QLDSC, Anon., 1946.

bedroom wardrobe. The witness gave the notebook to the local constable after he found his back door forced open and the notes missing. Detective Constable Hambrecht subsequently provided a list of the serial numbers to the local banks, in case the offender deposited the notes into his own account, thus alerting the police to his identity. The victim and the bank teller both testified to the list of serial numbers. The defendant admitted guilt and was committed for sentence. Witnesses in other cases sometimes identified their property by describing marks or engravings on the items. In 1941, 13 carpenters and builders identified a variety of stolen tools found at the defendant's home.⁷² When cross-examined by defence counsel, they described various means of identification including their initials, or in one case, an Army discharge number.

Few witnesses failed to identify property belonging to them, even when ownership was not objectively sustained. The witnesses' ability to claim ownership was very tenuous in some cases. In 1926, a draper, whose business premises were burgled some months prior to the defendant's arrest, claimed he was able to distinguish his unmarked stolen property from a garage load of stockings, ribbons, and ties, stating they were like the kind he had stocked himself.⁷³ Notes and coins were particularly difficult to identify as one's own; the Maryborough case of the stolen bank notes traced by recorded serial numbers was the exception. In most burglaries involving money, detectives simply linked the stolen cash with any money found in the pockets of the

⁷² Queensland State Archives Item ID95995, Depositions and indictments; PP, Trial ID #17916, QLDSC, Anon., 1941.

⁷³ Queensland State Archives Item ID95777, Depositions and indictments; PP, Trial ID #39757, QLDSC, George Miller, 1926.

Chapter 4 – The Police and the Guilty Plea

defendant at the time they were taken into custody, no matter how many days passed between the burglary and the apprehension.

In 1926, Harry Foster was apprehended at one o'clock in the morning whilst sleeping on a park bench.⁷⁴ There had been a series of break and enters of local shops over the preceding few weeks and Foster was later charged with six offences, including the theft of a few silver coins left in a kiosk register. There was no proof that the coins in Foster's pockets were the ones taken from the register, yet the witness stated they matched the colour of the coins left in the till. Since the defendant was unemployed and sleeping rough, the police could argue that the coins in Foster's pockets were directly related to the thefts in question.

Other defendants tried to explain the presence of any money on them as the outcome of other sources of gain, including employment or a win on the horses.⁷⁵ Police did not take these seriously however. Even tenuously connected property was constructed by police as firm evidence of the offence, and the defendant had little recourse. For the truly guilty, this was yet further proof of a strong *prima facie* case against them. For those who were not guilty, the apparently overwhelming evidence against them suggested the same conclusion.⁷⁶

⁷⁴ Queensland State Archives Item ID95776, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #39308, QLDSC, Harry Foster, 1926.

⁷⁵ Queensland State Archives Item ID95928, Depositions and indictments; PP, Trial ID #47785, QLDSC, Edgar Smith, 1936.

⁷⁶ Mack and Roach Anleu, *Pleading Guilty: Issues and Practices*, 108.

Forensic evidence

The historical plea bargaining literature argues that improvements in police evidence were more likely to lead to “dead bang” cases where proof of guilt was undeniable.⁷⁷ Few studies examine the association between the development of professional policing practices and technologies and the rise in guilty pleas. In their New York court study sample, Mike McConville and Chester Mirsky found that finger prints were of “marginal significance in detection”.⁷⁸ There was no evidence that any technological advance in detection made any difference to the outcome of a trial.⁷⁹ This section discusses the range of forensic techniques that Queensland police employed as the evidential basis of their cases. Queensland police by this time had access to forensic technologies that were not available to New York police in the mid-nineteenth century, yet this analysis shows that forensic evidence was rarely included in prosecution cases.

During the mid-twentieth century, police employed forensic techniques that typically involved fingerprinting, and photograph files; deoxyribonucleic acid (DNA) evidence did not exist during this period. The 1914 police manual outlined the forensic practices in burglary investigations, instructing police to take:

...special notice of the manner in which an entrance has been effected, with a view to ascertaining whether the offence was perpetrated by persons acquainted with the place or by strangers... The ground under windows and around the house should be closely examined, and if foot marks be found they should be guarded till casts are taken of the impression. If finger prints be found, they should be carefully preserved for the purpose of examination.⁸⁰

⁷⁷ McConville and Mirsky, *A True History*, 5.

⁷⁸ "Rise of Guilty Pleas," 462.

⁷⁹ *A True History*, 247.

⁸⁰ Cahill, *Manual*, 31.

Yet the evidence in this sample suggests that police practices involving forensic evidence had a very limited role in the police prosecution case. Rather than being used in the manner described in 1914, to provide evidence directly linking the defendant to the offence, fingerprints and photographs were generally only used to identify defendants' previous convictions.

Fingerprint evidence has been employed by police across Australia from the early 1900s.⁸¹ From the early twentieth century, police were instructed to systematically collect fingerprints from suspects.⁸² In Queensland, the Fingerprint Bureau was an established section of the CIB since at least 1914.⁸³ The 1914 Manual provide instructions on how to take prints, what types of ink to use, and required police to take any fingerprint evidence to the CIB.⁸⁴ The general instructions regarding fingerprint retrieval and identification became more comprehensive from 1925 through to the 1953 manual.⁸⁵ However, the evidence from this sample suggests that fingerprint evidence did not play a large evidential role in historical police prosecutions for burglary and stealing during the mid-twentieth century.

Little forensic evidence was retrieved from crime scenes and subsequently used to connect defendants with the property crimes. Most discussions concerning fingerprint material occurred in burglary cases and focused on the inability of police to obtain evidence. For example, a detective admitted during cross-examination that an attempt had been made to retrieve prints from the scene but “whoever worked the place had

⁸¹ Finnane, *Police & Government*, 80.

⁸² *Ibid.*

⁸³ Cahill, *Manual*, 48.

⁸⁴ *Ibid.*, 44-50.

⁸⁵ Smith, *Manual*; Carroll, *Manual*.

gloves on”.⁸⁶ Fingerprints were mentioned in six of the 60 cases. Only one of these involved a stealing offence; despite the defendants’ use of guns in some stealing cases, fingerprints were never retrieved from these items.⁸⁷ In 1926, a detective admitted taking the female defendant’s fingerprints during her interrogation, but these were never produced in court and no finger marks were found on the cheques she illegally cashed.⁸⁸ Similarly, detectives mentioned fingerprints in their testimonies in three burglary cases, but did not admit any fingerprints in evidence against the defendants.⁸⁹

In 1951, Constable Denis Bodenham testified that a fingerprint allegedly taken from a burgled house matched with those of an intellectually impaired female defendant.⁹⁰ This fingerprint was the only evidence tying the defendant to the crime, other than her verbal and handwritten confessions. Yet the fingerprint was never entered as evidence. Further, there was no testimony from a police fingerprint classification officer that the print was matched with the defendant, the usual practice in cases where fingerprint exhibits were entered as evidence. Yet Bodenham continued to give evidence on the conversation he had with the defendant about this alleged fingerprint. He testified that when he told her that a fingerprint was found, the defendant allegedly said, “it will probably be mine”. This case raises suspicion that there was no fingerprint taken from the house. The deposition record shows that Bodenham testified that he later

⁸⁶ Queensland State Archives Item ID95777, Depositions and indictments; PP, Trial ID #39757, QLDSC, George Miller, 1926.

⁸⁷ Queensland State Archives Item ID95776, Depositions and indictments; PP, Trial ID #32474, QLDSC, Mabel Travers, 1926.

⁸⁸ Ibid.

⁸⁹ Queensland State Archives Item ID96179, Depositions and indictments, PP, Trial ID #52562, QLDSC, Anon., 1951; Queensland State Archives Item ID96306, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #55458, QLDSC, Anon., 1951.

⁹⁰ Queensland State Archives Item ID96173, Depositions and indictments; PP, Trial ID #36691, QLDSC, Anon., 1951.

went to the fingerprint section of the CIB and “ascertained that the fingerprint had been classified”. That sentence was struck out.

Some detectives used the lack of forensic evidence as evidence itself. Police testified that they discussed the presence or absence of fingerprint material with defendants in ways that added further weight to police allegations of verbal confessions. One detective told the court that when presented with the fingerprint evidence, the defendant allegedly expressed surprise, saying that he “didn’t think they would have shown up”.⁹¹ On the second charge against the same defendant, a second detective testified that when he told the defendant that police could only find fingerprints belonging to the warehouse employees, the defendant allegedly replied, “You’d be flat out finding any of my prints. I wore gloves when I did that job”. These alleged admissions added weight to the defendant’s verbal confessions that were the only pieces of evidence against him. Police presented these conversations with defendants as further evidence of guilt, to support the lack of conclusive forensic evidence.

Fingerprint evidence was employed mostly as a means of identifying recidivist offenders and to provide information to the Supreme Court for sentencing. The 1925 police manual states that the primary purpose of taking fingerprints was “to secure an indisputable means of identifying persons of the criminal class when again brought before the court”.⁹² Mark Finnane and John Myrtle have documented the history of state police co-operation in Australian states since Federation.⁹³ This co-operation included

⁹¹ Queensland State Archives Item ID96179, Depositions and indictments, PP, Trial ID #52562, QLDSC, Anon., 1951.

⁹² General instruction 652. Ryan, *Manual*, 213.

⁹³ Mark Finnane and John Myrtle, "An Exercise in Police Co-Operation? The Origins of the Conference of Australian Police Commissioners," *Australian Journal of Politics & History* 57, no. 1 (2011): 8.

the sharing of offenders' information including photographs and fingerprint documentation to aid police in the surveillance of criminals across state borders.⁹⁴ This inter-agency co-operation is evidence in the 1941 case of a Calcutta-born defendant.⁹⁵ The deposition file includes fingerprint and photographic evidence from Broken Hill, NSW (1929); Pentridge Prison, Victoria (1930); and an undisclosed location in Victoria in 1935. These photographs and prints were used to establish his identity as a recidivist offender, with an extensive criminal history of property offending dating from 1919 in Western Australia, through to Queensland in 1940.

Other forensic-type material was entered in evidence against burglary defendants that focused on the physical nature of the crime. Testimonies by detectives and sometimes property owners mentioned tools and other objects to provide evidence of the breaking-in element of the offence. These included detailed discussions of broken pieces of glass, and broken hacksaw blades found at the crime scene.⁹⁶ In one case, the police produced rope that the defendant had allegedly stolen from a local church bell in order to drop down through a shop roof.⁹⁷ Police also retrieved items from the defendants' homes, including braces and chisels that police alleged could have been used by defendants to break into the premises. Sometimes the police prosecutor asked the shop or home owners for their opinions whether the items could have been used to

⁹⁴ *Ibid.*, 8, 25.

⁹⁵ Queensland State Archives Item ID95991, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #16993, QLDSC, Anon., 1941.

⁹⁶ Queensland State Archives Item ID95777, Depositions and indictments; PP, Trial ID #39757, QLDSC, George Miller, 1926.

⁹⁷ Queensland State Archives Item ID3410, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #34043, QLDSC, Albert Brown, 1931.

Chapter 4 – The Police and the Guilty Plea

complete the break-ins.⁹⁸ Police prosecutors elicited these personal opinions that were merely circumstantial evidence yet constructed them as material evidence of the defendants' guilt.

The forensic evidence, and lack thereof, discussed during police and witness testimonies provided little physical evidence linking defendants to the actual offences. Instead, fingerprints and photographs were employed to establish identity, a “criminal identity” particularly. Material physical evidence presented to the court pertained more to explaining *how* an offence was committed, rather than *who* committed that offence. In terms of its value to detectives' testimonies, forensic material (whether it existed or not) was appropriated to augment other verbal admissions that defendants allegedly made to police.

These verbal confessions were the foundations of the police evidence, rather than identification and forensic evidence. The following section outlines this reliance on confessional material in police prosecution cases. It discusses the issue of voluntariness in the admissibility of confession evidence and presents evidence of police practices that induced confessions and guilty pleas from defendants. This chapter concludes by describing the ambiguous nature of the only guidelines concerning police procedure during interrogations, the Judges' Rules, and discusses how police did or did not follow these guidelines.

⁹⁸ Queensland State Archives Item ID95777, Depositions and indictments; PP, Trial ID #39757, QLDSC, George Miller, 1926.

Confessions

In traditional legal parlance, a confession was another term for a guilty plea.⁹⁹ It was sometimes referred to as a ‘judicial confession’.¹⁰⁰ Confessions are admissions of the facts of an offence and “*prima facie* excludes any defence” which might otherwise be available to the defendant.¹⁰¹ Confessions are the “gold standard” in evidence, more likely to persuade jurors of guilt than other forms of evidence.¹⁰² By 1930, Queensland courts regarded confessions as explicit acknowledgments of guilt.¹⁰³ This goes some way to explaining the reliance on confessional material by Queensland detectives in the early to mid-twentieth century.

Queensland police manuals in the first half of the twentieth century defined a defendant’s confession as “an admission made at any time by a person charged with an offence, stating, or suggesting the inference, that he committed such offence”.¹⁰⁴ According to detectives’ testimonies, almost every defendant in the 60 cases made verbal confessions, almost as soon as police made contact. Police testified about these admissions using language that implied both cooperation and relief on the part of defendants: “I understand. I will help you if I can. I want to get it over and done with”. Yet police were less successful in obtaining the written versions of those confessions.

⁹⁹ Frederick Hugh Short and Francis Hamilton Mellor, *The Practice on the Crown Side of the King's Bench Division of His Majesty's High Court of Justice*, 2nd ed. (London: Stevens & Haynes, 1908), 124.

¹⁰⁰ Sidney Lovell Phipson, *The Law of Evidence*, 6 ed. (London: Sweet & Maxwell, 1921), 263.

¹⁰¹ T. P. Fry, "Admissibility of Statements Made by Accused Persons," *Australian Law Journal* 11, no. 10 (1938): 438.

¹⁰² Kassin et al., "Police-Induced Confessions: Risk Factors and Recommendations," 4.

¹⁰³ *R v Nielson* [1930] QWN 15.

¹⁰⁴ Cahill, *Manual*, 130.

Chapter 4 – The Police and the Guilty Plea

Detectives obtained both verbal and written confessions from just over half of the defendants in the 60-case sample. A substantial number of these cases hence relied solely on detectives' assertions that verbal admissions were ever uttered. This is problematic because, historically, unsigned statements of interview were often submitted as evidence of a confession.¹⁰⁵ This "reprehensible, but perhaps easy, course of fabricating confessions" was identified as a systemic problem in the Lucas Report.¹⁰⁶ The Report's recommendation to introduce tape recorded interviews was ignored, however. According to Fitzgerald inquiry informant Jack Herbert, police sat at a typewriter and made "the story up" as they went along.¹⁰⁷ It is difficult to know when police 'verballing' and fabricating of confessions became systemic, or how widespread the practice was during the case sample period. There are very few studies that examine Queensland police corruption from the late 1920s through to the early 1960s.¹⁰⁸ Furthermore, it is extremely difficult to identify how many of the verbal confessions in this sample may have been the consequence of corrupt practices.

Very few of the sample defendants, or defence counsel when present, made allegations against police. However, there were "practical limitations" on defendants' ability to challenge police testimony.¹⁰⁹ The Wood inquiry into NSW police corruption found that complaints were often "not made in court because of fear that it would be detrimental" to the defendant.¹¹⁰ First, the judiciary was resistant to allegations against

¹⁰⁵ Brown, "Royal Commission," 299.

¹⁰⁶ Lucas, Sturgess, and Becker, "The Lucas Report," iv.

¹⁰⁷ Fitzgerald, "The Fitzgerald Report," 206.

¹⁰⁸ For an examination of criminal law reform to address police corruption in NSW, see Alderson, "Powers and Responsibilities."

¹⁰⁹ Brown et al., *Criminal Laws*, 301.

¹¹⁰ Brown, "Royal Commission," 231.

police.¹¹¹ Magistrates sometimes expressed hostility towards the defendant or their legal counsel for suggesting police corruption.¹¹² In a 1949 Queensland murder trial, for example, Justice Mansfield admitted both a verbal and a written confession even though police were accused of using violence to extract them. The judge said that, based on the evidence of such “responsible officers....”, he had no reason to disbelieve them”. One of the detectives accused of punching and threatening the defendant told the defence barrister that using violence to get a confession simply “could not happen in Queensland”.¹¹³ These attitudes consistently permeated justices’ decisions in the Supreme Court. In a 1934 trial, Justice Henchman found there was no threat to the defendant prior to his confession, even though the crown prosecutor Joseph Sheehy acknowledged that the defendant was handcuffed and one of the detectives held a revolver in this hand during the interrogation.¹¹⁴ In 1955, Justice Matthews ruled that a verbal confession was admissible but admitted “the matter might have been more judiciously handled”.¹¹⁵ The alleged confession was obtained in hospital where the female defendant was under guard, detectives had refused her access to her family and solicitor, yet Matthews ruled there was no threat or intimidation. In a 1945 trial, a 29-year-old defendant alleged that police punched and threatened him. Justice Philp, who ruled the confessions were admissible, reportedly said “You have made a serious charge against the police. Why did you not yell for help?”

¹¹¹ John B. Bishop, *Prosecution without Trial* (Sydney: Butterworths, 1989), 176; Brown, "Royal Commission," 301.

¹¹² “Counsel Alleges Police Used ‘Stand-over Tactics’ to Get Confession from Woman,” *The Telegraph*, December 1, 1938, <http://nla.gov.au/nla.news-article184347427>.

¹¹³ “Judge Clears Police of Violence Charge,” *The Courier-Mail*, November 18, 1949, <http://nla.gov.au/nla.news-article49716533>.

¹¹⁴ *R v Fitzpatrick* [1934] QWN 25.

¹¹⁵ *R v Tunbridge* [1955] QWN 22.

Chapter 4 – The Police and the Guilty Plea

Making a ‘serious charge’ against police potentially risked the defendant’s defence. Defendants with criminal records who alleged police corruption made themselves vulnerable to cross-examination on grounds of character.¹¹⁶ In a 1960 case, the defendant alleged that police lied about his verbal confession.¹¹⁷ The crown prosecutor subsequently asked the trial judge to exercise his discretion, and the defendant was cross-examined on his previous convictions in front of the jury and subsequently convicted. The appeal court supported that decision. Finally, there were no ramifications for police even “in blatant cases where lies have been exposed”.¹¹⁸ The judiciary’s inability to acknowledge police corruption as a systemic problem meant there was “virtually no risk involved for police in misconduct such as verballing and the chances of success are excellent”.¹¹⁹ It is understandable then that there are so few examples from the 60 sample cases where defendants or defence lawyers raised allegations of police misconduct.

Fabricated confessions

A close reading of the 60 sample cases provides some evidence that suggests the possibility of police process corruption involving fabricated confessions and evidence. For example, a small number of cases involved defendants who pleaded guilty in the Police Court to some, but not all, of the charges against them. In every case the investigating detectives testified that the defendant had made a verbal confession. In 1936, Edgar Smith was committed for sentence on two charges of ‘breaking and entering’ yet pleaded ‘not guilty’ to a charge of ‘breaking, entering and stealing’ from a

¹¹⁶ Brown et al., *Criminal Laws*, 300.

¹¹⁷ *R v Thompson* [1961] Qd R 503.

¹¹⁸ Fitzgerald, "The Fitzgerald Report," 207.

¹¹⁹ *Ibid.*

shirt warehouse.¹²⁰ The only evidence tying the defendant to the offence (other than the verbal confessions) was a single shirt allegedly found in the defendant's possession, and some money. Detectives alleged he told them the shirt was purchased from a shop, and the money came from winnings at the horse races. The defendant did not cross examine the detectives in the other charges but engaged in the most comprehensive example of cross-examination by a self-represented defendant in the 60 prosecutions sample. The crown prosecutor later withdrew the charge through a "no true bill". There is no obvious reason for this other than the defendant's resistance.

A similar set of circumstances occurred in the case against legally represented defendant John Walder in 1931.¹²¹ In that case, the prosecutor disposed of a similarly disputed charge through a *nolle prosequi*. The defence lawyer raised issues of detectives engaging in inducements to obtain Walder's alleged verbal confession. It is curious that defendants who willingly pleaded guilty to most of the charges against them would argue so strenuously against just one charge.

One possible explanation is that these defendants were willing to own the crimes they did commit and plead guilty accordingly but were not prepared to wear the conviction for crimes committed by someone else. An informal interview with a former Queensland Police Service inspector provides anecdotal evidence that suggests these contested charges might be related to police "clear up" practices.¹²² In the years leading

¹²⁰ Queensland State Archives Item ID95928, Depositions and indictments; PP, Trial ID #47785, QLDSC, Edgar Smith, 1936.

¹²¹ Queensland State Archives Item ID3410, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #33936, QLDSC, John Walder, 1931.

¹²² Hosking, Peter, and Ray Brownhill. Interview with Lisa Durnian. Personal interview. Brisbane, November 8, 2017.

up to the Fitzgerald inquiry, the break and enter squad would drive defendants around city streets with a list of unsolved crime locations, querying whether defendants were responsible. A strenuous denial usually meant the defendant was innocent of that offence.

There was some hint in the sample cases that detectives engaged in the practice of “loading”; that is, planting evidence on the suspect.¹²³ In 1951, a defendant charged with multiple counts of burglary alleged that police lied during their testimonies.¹²⁴ The evidence in the third charge relied on the defendant’s alleged verbal confession and two fountain pens that detectives claim were taken from the warehouse office and later found in the defendant’s suitcase. The only fingerprints found at the scene belonged to the office employees. Detective Sergeant Frank White testified that his colleague Detective Constable Douglas Dux found the pens in the suitcase and Dux then said to the defendant that:

These two pens appear to me to be identical with two fountain pens which were stolen from the premises of W. Ltd between the fourth and fifth May this year. Those premises were broken and entered and the pens stolen from a drawer in the manager’s office on the ground floor. I am going to ask you some questions in connection with this matter, and I warn you that you are not obliged to answer any questions, or to make any statement, and that anything you do say may be used in evidence. Do you understand?

Defendant replied, “Yes I understand, but tell me where is this place you are talking about”. Dux said, “Near the corner of Mary and Edward Street. The rear yard runs into Mary Street”. Defendant replied, “I remember doing that place, that’s where I climbed up the back wall”. Dux said, “Do you admit stealing these pens from the premises of W. Ltd?” Defendant replied, “Yes, I got them out of a drawer as you said. I also got some money from the place, but I don’t remember exactly how much. I done [sic] the money at the game the following day”.

¹²³ Brown, "Royal Commission," 231.

¹²⁴ Queensland State Archives Item ID96179, Depositions and indictments; PP, Trial ID #52562, QLDSC, Anon., 1951.

The police testimony provides a tidy confession that included the means of entry as well as the defendant's admission about stealing both pens and money from the office. However, when the self-represented defendant cross-examined he attacked Dux's truthfulness. The defendant asked him if he went to church (implying that Dux should tell the truth), and accused Dux of fabricating the confession and reconstructing the evidence in the case "to suit himself".¹²⁵ The detectives' testimonies reveal that Detective Dux and another officer, Detective Sargent William Beer (who testified on the second charge against the defendant), had both attended the warehouse at 8pm on a Saturday evening after the nightwatchman discovered the break in. They "made an examination of the building" although it is unclear from any of the witness testimonies about the duration of that visit. The detectives apparently returned two hours later when the manager arrived at 10pm. If the defendant was truthful, and the police did fabricate the evidence and confessions, then there were means and opportunity to remove the two fountain pens. This evidence could be utilised later, either to tie the actual offender to the crime in lieu of any forensic evidence or use it to frame another suspect and 'clear up' an outstanding burglary.

It is worth noting the presence of Detective Sargent William Raetz, the lead investigating detective on this defendant's first charge. Raetz was present with Detectives White, Dux, and Beer during the defendant's apprehension and interrogation. Five years earlier, then Detective Constable Raetz was involved in a false confession

¹²⁵ "Court Told 'Cat' Wanted to Flee from Missus," *Brisbane Telegraph*, May 23, 1951, <http://nla.gov.au/nla.news-article212276838>.

Chapter 4 – The Police and the Guilty Plea

case that went to the CCA.¹²⁶ The conviction was quashed on appeal, although not on the grounds of the false confession. Yet although the CCA found that the confession could not possibly be true, there was no criticism made of Raetz or his colleague. Furthermore, Justice E.A. Douglas stated that he thought “the jury was entitled to find that the confession was voluntary, but not that it was true.” Judgments like these arguably emboldened some Queensland detectives to continue, if not expand, their practices of police verballing.

When faced with these outcomes, it is understandable that some defendants pleaded guilty to offences they did not commit. Baldwin and McConville’s examination of plea bargaining in the Birmingham Crown Court in the early 1970s revealed that confessional materials, particularly verbal statements, were damaging to defendants.¹²⁷ Most cases relied on verbal confessions to sustain the police prosecution case. Yet almost half of their interviewees claimed these confessions were fabricated by police. Confessions were almost guarantees of convictions, even when they were not in writing. In fact, the force of verbal confessions “is never spent until after sentence”.¹²⁸ Raising allegations against police in court was a course of action that was “fraught with danger”, and defendants in Baldwin and McConville’s study noted that defence lawyers urged them not to ‘annoy’ the judge with these allegations. It is not surprising that defendants faced with this police evidence pleaded guilty, convinced “of the hopelessness of [their] position, so that all thought of being acquitted evaporates”.¹²⁹ Yet the premise that

¹²⁶ *R v Cross* [1946] SRQ Qd 65.

¹²⁷ Baldwin and McConville, *Negotiated Justice*, 68.

¹²⁸ *Ibid.*, 69.

¹²⁹ *Ibid.*, 70.

defendants had no recourse against police misconduct violates the law that confessions must be voluntary.

Voluntary confessions

The legal issue for both guilty pleas and confessions revolved around voluntariness. The common law required that a confession be made voluntarily. This rule derived from what T. Fry (a Queensland legal academic writing in 1938) referred to as “the ancient policy of the Common Law that...nobody must be forced to criminate himself”.¹³⁰ The legal authorities *R v Thompson* [1893], *Ibrahim v R* [1914], and *R v Zerafa* [1935] stipulated a set of principles governing the admissibility of confessional evidence.¹³¹ Confessions were inadmissible if “induced by any promise or threat relating to the charge and made by, or with the sanction of, a person in authority”.¹³² Persons in authority were those engaged in “the arrest, detention, examination, or prosecution of the accused”.¹³³ However, persons in authority could also include employers and parents. In a 1932 trial, Justice Webb ruled that an 18-year-old defendant’s confession was not free and voluntary because his mother told him to tell the truth.¹³⁴

In Queensland, there were statutory provisions for the admissibility of confessional material in section 10 of *The Criminal Law Amendment Act 1894*. The section stipulated that a confession must be voluntary and was inadmissible in evidence if obtained by threats, inducements or promises. Prior to 1935, it was a matter for judges

¹³⁰ Fry, "Admissibility of Statements," 426.

¹³¹ 2 QB 12; AC 599; St R Qd 227.

¹³² Phipson, *Law of Evidence*, 263.

¹³³ *Manual of the Law of Evidence: For the Use of Students*, 3rd ed. (London: Sweet and Maxwell, 1921), 78. The term includes persons who had some authority over the defendant; for example, the parent of a juvenile suspect, who induced a confession in the presence of police.

¹³⁴ *R v Tooma* [1932] QWN 2.

to decide whether a threat or promise had occurred. In 1934, Robert Baxter stood trial for robbery; his co-defendant had pleaded guilty.¹³⁵ Baxter's defence lawyer argued that Baxter's confession was inadmissible because he was threatened prior to making his statement. Constable Francis Jimmieson, who called him 'a thing' allegedly said to Baxter, "You have been thieving all your life and a man ought to knock you down!" Justice Webb's response suggests he had not frequented many public bars:

Webb: Do you suggest that the threat to knock him down is a threat which might be taken up that way?
Defence: It might have been.

Despite the onus of proof that the crown had to show the confession was voluntary,¹³⁶ the police merely had to deny the charges and "that was the end of it".¹³⁷ Webb found there was no threat or promise and that the confession was voluntary. The judiciary typically sided with police. Yet despite the legal relevance of confessional material the police manuals included sparse detail about the procedures involved in obtaining admissible confessions, even though the amount of content included in the general instructions on confessions expanded over time.

The 1914 Policeman's Manual includes a single paragraph on "Confessions".¹³⁸ It states that "confessions...must be free and voluntary and must not be obtained by any promise of favour or reward or fear of any threat". The 1925 manual used the terminology "inducement, threat, or promise"; a promise was something that gave the defendant reasonable grounds to think they could gain "some advantage or avoid some

¹³⁵ *R v Harding & Baxter* [1934] QSR 29.

¹³⁶ *R v Lewis & Wilson* (1933) 27 QJPR 55.

¹³⁷ "Violence Plea Called 'Thin'," *Brisbane Telegraph*, February 11, 1954, <http://nla.gov.au/nla.news-article217205649>.

¹³⁸ General Instruction 30. Cahill, *Manual*, 137.

Chapter 4 – The Police and the Guilty Plea

evil”.¹³⁹ Any confession obtained after such threat or promise was deemed to have been induced. The 1939 manual expanded inducement to a promise or threat that was implied and not necessarily expressed.¹⁴⁰ This terminology had important legal implications for the admissibility of confessions, and later for guilty pleas. The 1939 and 1953 manuals therefore provided three examples for police to understand what was meant by inducement:

You had better tell me where you got the property;
It might be better for you to tell the truth and not a lie; and
You had better tell all you know.¹⁴¹

These bland expressions fail to capture “the stark realism” that characterised some Queensland defendants’ experiences.¹⁴² In a 1934 reported trial, as we have seen, the defendant alleged that police had taken a “rough attitude” during his interrogation, calling him “a thing” and telling him “a man ought to knock you down”.¹⁴³ In a 1945 trial for burglary, a detective allegedly said “You had better come clean or we will do you up”, and pulled the defendant’s arms while another detective “punched him in the stomach” and pulled his nose.¹⁴⁴ The defendant’s conviction was later quashed on appeal, although the CCA did not explicitly refer to the violence alleged against police other than to note that the only “common ground” agreed on by both the defence and the crown was that “at some stage the young man [and co-defendant] Wade was in tears”.¹⁴⁵

¹³⁹ Ryan, *Manual*, 130.

¹⁴⁰ Carroll, *Manual*, 203.

¹⁴¹ *Ibid.*; Smith, *Manual*, 235.

¹⁴² Fry, "Admissibility of Statements," 426.

¹⁴³ *R v Harding & Baxter* [1934] QSR 29.

¹⁴⁴ “Alibis Defence at Trial,” *Maryborough Chronicle, Wide Bay and Burnett Advertiser*, July 17, 1945, <http://nla.gov.au/nla.news-article151780307>.

¹⁴⁵ *R v Cross* [1946] QSR 65 at 72. The CCA ruled that the appellant’s conviction could not stand because “the evidentiary value of his confession was destroyed” by the acquittal of his co-defendant. The jury found that the co-defendant’s alleged confession could not be true because several independent witnesses placed him hundreds of kilometres away the crime location at the time the offence allegedly occurred.

Defendants often alleged that violence and threats were used to induce their verbal and written confessions. Although under law this made those confessions involuntary and thus inadmissible, in practice Supreme Court judges and Criminal Courts of Appeals delivered judgments that conflicted with the rule of voluntariness and created “doubt and confusion”.¹⁴⁶

Inducements: The ‘third degree’

Police violence became a “routine and systematic police practice” by the end of the nineteenth century. Sometimes referred to as the ‘third degree’, it involved physical force or duress against defendants in custody with the sole purpose of obtaining a confession of guilt.¹⁴⁷ By the 1930s, allegations of police violence during interrogations were commonplace in Australian newspapers.¹⁴⁸ Defendants across multiple jurisdictions alleged that violence and threats were used to obtain confessions.

The ‘third degree’ was well-known in Brisbane’s legal circles. In 1930, police magistrate H.L. Archdall was reportedly startled by “blood-curdling screams” coming from the watch house next door and asked what they might be.¹⁴⁹ Barrister Tom McLaughlin quipped that the police were “obviously getting another voluntary confession, Your Worship”. Yet the official response was that, in many cases, defendants’ allegations were easily made but less easily substantiated. In 1934, after a

The CCA did not comment on the allegations of violence.

¹⁴⁶ Fry, "Admissibility of Statements," 425.

¹⁴⁷ Richard A Leo, "The Third Degree and the Origins of Psychological Interrogation in the United States," in *Interrogations, Confessions, and Entrapment*, ed. G. Daniel Lassiter (New York: Kluwer Academic, 2004), 52; Wood, "The Third Degree."

¹⁴⁸ "Prisoner Ill-treated," *Daily Advertiser*, February 21, 1930, <http://nla.gov.au/nla.news-article142747794>; "Young Thief Accuses Police," *Truth*, June 24, 1934, <http://nla.gov.au/nla.news-article169327199>; "Sydney Police," *The Telegraph*, September 17, 1931, <http://nla.gov.au/nla.news-article190692568>.

¹⁴⁹ "Truth to Tell," *Truth*, June 27, 1948, <http://nla.gov.au/nla.news-article203232158>.

Chapter 4 – The Police and the Guilty Plea

series of cases alleging police misconduct during interrogations, the *Truth* newspaper asked the Home Secretary for comment.¹⁵⁰ The Home Secretary reassured the public that the Queensland Government did not desire police to “use threats, violence, or exceed their duty in any way to obtain convictions”. However, he reminded them that:

the allegations of criminals, or persons charged with crimes, cannot be readily accepted by the public as evidence of misconduct on the part of police...It is an easy matter for a criminal to say that a policeman said something to him, but there is no way of checking up, or proving it.

Yet newspapers continued to report allegations that were raised during jury trials in the Supreme Court in this period. In 1948, a defendant charged with the murder of his wife alleged Brisbane CIB detectives punched and threatened him to induce his confession.¹⁵¹ A 1947 Brisbane report subtitled “Youth alleges Third Degree” accused CIB Detective Sgt Bauer of pulling the defendant backwards by his hair while Detective J.P. McIver “pummelled him severely about the body”.¹⁵² Bauer also denied slapping the defendant’s face when he asked to see a solicitor, or saying it would be “a long time” before he saw anyone. At trial, both detectives testified that the defendant “freely and openly admitted everything in connection with the offence and had voluntarily written and signed the confession before the court”. They did admit, however, that he was kept in custody for two days without being allowed to seek legal advice.

It was much rarer to read allegations made during committal hearings alleging police brutality. There is little overt evidence of violence or coercion in the police

¹⁵⁰ “Grave Charges against C.I.B.,” *Truth*, March 4, 1934, <http://nla.gov.au/nla.news-article198230409>.

¹⁵¹ “Judge Clears Police of Violence Charges,” *The Courier-Mail*, November 18, 1949, <http://nla.gov.au/nla.news-article49716533>.

¹⁵² “Policemen Deny Bashings,” *Truth*, December 14, 1947, <http://nla.gov.au/nla.news-article203233029>.

interrogations of the 60 sample cases in either newspaper reports or the deposition material. A 1951 case is an important exception. A German-born seafarer was charged with breaking and entering a warehouse in South Brisbane. Detective Senior Constable D. Chippendall alleged he found the defendant inside the warehouse office. During the cross-examination, the self-represented defendant asked him three questions, although only the answers were recorded. Two questions pertained to threats and violence.

Chippendall said:

It is not true that I gave you a bashing at the CIB office.
I did not say that if you die we just make a report, nothing happens.
I did not say that I would just have to swear in court and it would be alright.¹⁵³

At the end of the police prosecution case, the defendant was asked to enter his plea. His allegations against the police were so strongly worded that they were entered, possibly verbatim, on the ‘Witness Statement’ sheet by either the court clerk or the magistrate.¹⁵⁴

The *Brisbane Telegraph* also quoted his statement, almost verbatim:

I wish to plead guilty like I did in first instance. This officer, meaning Detective Chippendall, has given false evidence against me to you but I would not be in a position to prove he did because he told me at the CIB office if I said anything against him the judge and the court would not believe me because I am a criminal and he is a public servant. He said, “We can make it very hot for you, we even can say that when we arrested you that you had a gun in your hand and wanted to shoot me.”¹⁵⁵

Interestingly, no mention was made of the allegations at the defendant’s sentencing hearing. Instead, he pleaded for leniency, telling the judge he had lost his ‘self-

¹⁵³ Queensland State Archives Item ID96173, Depositions and indictments

¹⁵⁴ Queensland State Archives Item ID96173, Depositions and indictments

¹⁵⁵ “Accuses Police,” *Brisbane Telegraph*, December 11, 1950, <http://nla.gov.au/nla.news-article216584786>

control'.¹⁵⁶ The question arises, however, why some defendants remained silent about police misconduct, either at the committal hearing or in the Supreme Court. In December 1931, the Brisbane *Truth* published allegations of police violence emerging from a Supreme Court trial of three co-accused defendants charged with counterfeiting. The defendants claimed they confessed because of physical violence used against them by police which included grabbing one man by his hair, rolling him onto the floor and kicking him.¹⁵⁷ During cross-examination, the crown prosecutor asked why the defendant did not make these allegations to the magistrate at the committal hearing, and the defendant said they were “just in and out of court”. He did not complain to the Senior-Sergeant in charge because he “knew it would be useless”.

Crown prosecutors and the judiciary were suspicious of allegations against police and made no allowances for the nature of the prosecution process that was likely to overwhelm defendants. In 1951, a burglary defendant, who subsequently accused police of lying under oath, was marched into court “flanked by more than 20 detectives”.¹⁵⁸ Their presence possibly lent visual support for the police prosecutor’s objection to bail claiming the defendant was a flight risk. Courtrooms are often “alien” and “threatening” spaces, and “even for the better educated and more confident” the prosecution process is a daunting experience.¹⁵⁹ Unrepresented defendants with no experience of the committal process would be at a disadvantage.

¹⁵⁶ “A Strange Awakening,” *Brisbane Telegraph*, February 12, 1951, <http://nla.gov.au/nla.news-article212598244>.

¹⁵⁷ “Punched and Kicked,” *Truth*, December 13, 1931, <http://nla.gov.au/nla.news-article203925179>.

¹⁵⁸ “No Bail for NSW Salesman,” *Townsville Daily Bulletin*, May 11, 1951, <http://nla.gov.au/nla.news-article63145193>.

¹⁵⁹ Peter A. Sallmann and John E. Willis, “Taking Sentencing Seriously,” *Australian & New Zealand Journal of Criminology* 17, no. 3 (1984): 137.

Prosecutions against violent police

It was very difficult for magistrates to accept allegations against police, but it was more difficult for defendants and their lawyers to substantiate those allegations. Police culture “made it difficult to combat police misconduct”.¹⁶⁰ Prosecutions against police who used violence during interrogations were rare. On May 7, 1951, ‘well-known’ CIB Detective Constable John Cronin was committed for trial for an assault on a prisoner during his interrogation for stealing a motor vehicle.¹⁶¹ The prisoner alleged that when he was detained in a police cell in Stanthorpe, west of Brisbane, he was set upon by multiple officers, “pummelled”, and abused. Cronin allegedly kicked him in the abdomen while he was in handcuffs.¹⁶² At trial, the defence claimed the allegations were “devised to discredit in advance admissions made by him [prisoner] to Cronin”.¹⁶³

There are aspects about the case that suggest a police cover-up. Justice Philp remarked on the “peculiar manner” of one of the witnesses, former Constable Molyneux. Under cross-examination, Molyneux denied that Sub-Inspector Buggy threatened to transfer him to the remote outback town of Boulia (close to the Queensland-Northern Territory border) to “get him to make a statement” that presumably supported Cronin’s version of events.¹⁶⁴ In answer to the judge, Molyneux admitted that there was a “suggestion” that if he did not “know the statement” he would

¹⁶⁰ Mark Finnane, "Phillip's Brief: The Third Degree," *Criminal Law Journal* 41 (2017): 297.

¹⁶¹ “Detective for Trial on Charge of Assault,” *Warwick Daily News*, May 8, 1951, <http://nla.gov.au/nla.news-article190442810>.

¹⁶² “Assault in Cell Denied,” *Brisbane Telegraph*, May 30, 1951, <http://nla.gov.au/nla.news-article212272540>.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

Chapter 4 – The Police and the Guilty Plea

be transferred. He had already resigned from the Force prior to the trial. Cronin was subsequently acquitted and returned to his duties.¹⁶⁵

It was culturally very difficult for ‘good’ detectives to speak out against colleagues who committed misconduct. In rare instances, officers did speak out against colleagues’ violent practices that were used to extract confessions. One 1930 case involved a police whistle blower who appeared at a government inquiry in Canberra investigating the ‘third degree’ practices of a Federal Capital Police officer.¹⁶⁶ Sgt James Shepherd was accused of violence against a young defendant during his interrogation. Despite having a renowned Kings Counsel as representation, the evidence from Shepherd’s colleague Constable William Fellowes was damning, and corroborated the defendant’s claims. Furthermore, the administrative inquiry found that the police culture encouraged the use of violence to extract confessions.¹⁶⁷ Yet Australian courts repeatedly failed to acknowledge evidence of widespread and systemic misconduct by police.

Defendants who were on the receiving end of this treatment, without the protection of legal counsel, therefore faced an unenviable position challenging police in the courts. Considering the high value placed on confessional material as evidence, and the difficulty persuading the judiciary that misconduct had occurred, it is likely that many defendants saw the futility in proceeding to trial and pleaded guilty early, perhaps to end the experience as quickly as possible. The historical record shows that some

¹⁶⁵ “Cronin Back in Force,” *Brisbane Telegraph*, May 31, 1951, <http://nla.gov.au/nla.news-article212271187>.

¹⁶⁶ Finnane, “The Third Degree,” 295.

¹⁶⁷ *Ibid.*, 297.

defendants were also induced to plead guilty in return for promises extended by Queensland police.

Inducements: Promises

Police have long exercised a prerogative to exercise discretion in determining the nature and the number of charges against the defendant.¹⁶⁸ In the contemporary context, this involves charge negotiations with defendants in return for a wide range of outcomes including the granting of bail, the contents of confessions, the legal facts presented in the case against the defendant, and even the “preparedness to drop complaints against police”.¹⁶⁹ Interviews with US and English defendants pleading guilty in the 1950s and the 1970s revealed that charge bargaining was common; police promised to reduce either the severity or the number of charges, in return for the defendants’ agreement to plead guilty.¹⁷⁰ The depositions provide evidence that Queensland police engaged in the same inducements to obtain guilty pleas and confessional material even though confessions were inadmissible if elicited by a promise or some form of inducement.

Newspapers reported many cases where police allegedly promised better outcomes for defendants in return for their confessions. In 1936, a defendant alleged during his trial for armed robbery that police promised to stack the jury to ensure an acquittal. He claimed that Detective Hird offered to get him a drink, later returning to

¹⁶⁸ "The Politics of Police Powers: The Making of Police Offences Acts," in *Policing in Australia: Historical Perspectives*, ed. Mark Finnane (Sydney: University of New South Wales Press, 1987), 104.

¹⁶⁹ Brown et al., *Criminal Laws*, 298.

¹⁷⁰ Baldwin and McConville, *Negotiated Justice*, 25; Donald J Newman, "Pleading Guilty for Considerations: A Study of Bargain Justice," *The Journal of Criminal Law, Criminology, and Police Science* 46, no. 6 (1956): 783.

Chapter 4 – The Police and the Guilty Plea

the cell with a bottle of beer that they both shared.¹⁷¹ Hird told the defendant he could ensure the jury was fixed with any men the defendant wanted. Under cross-examination, Hird denied making any such inducement to the defendant although he did acknowledge it had been his practice in Ipswich over the preceding five years to assist the crown prosecutor in vetting the jury because “he had the best knowledge of the locality”. In other cases, police allegedly promised not to lay charges if the defendant confessed to an offence. In 1931 a defendant alleged that police obtained his confession by promising that “no action would be taken against him” if he did so.¹⁷²

Newspapers also reported defendants’ allegations that police made promises or guarantees, to obtain guilty pleas. In some cases, these promises involved charge negotiations. For example, detectives might suggest pleading guilty to a lesser offence. A 1936 newspaper report suggested that police were heavily involved in the “breaking-down business” involving guilty pleas in the police courts. It claimed that defendants were entering guilty pleas to lesser offences in cases where the police probably had doubts about securing a conviction otherwise.¹⁷³ There is some limited evidence in the 60 sample cases that suggests that charge bargaining occurred with regards to confessions and guilty pleas. However, detectives were careful to distance themselves from suggestions that they engaged in these practices with defendants during interrogations. Instead they testified that defendants initiated these charge discussions. For example, one defendant with a long list of offences from the previous decade was charged with ‘entering a dwelling house with intent to commit a crime’. He allegedly

¹⁷¹ “Alleged Robbery Under Arms,” *The Telegraph*, February 27, 1936, <http://nla.gov.au/nla.news-article184017589>.

¹⁷² “Punched and Kicked,” *Truth*, December 13, 1931, <http://nla.gov.au/nla.news-article203925179>.

¹⁷³ “An Uneasy Feeling,” *Daily Standard*, May 5, 1936, <http://nla.gov.au/nla.news-article184480955>.

said to the detective, “That is a heavy one, how about breaking it down to stealing if I plead guilty in the morning”.¹⁷⁴

Previous research suggests that recidivist offenders knew how to engage in charge negotiations through their previous experiences with police interrogation.¹⁷⁵ However, another defendant with no previous convictions similarly initiated charge bargaining with detectives, offering to plead guilty to receiving on one of the three stealing charges laid against him.¹⁷⁶ It is unlikely that defendants with no previous experience of the prosecution process would know how to initiate such discussions. Bargaining for lesser or reduced charges ultimately extended the defendant a lighter penalty than they might otherwise receive when sentenced for more serious charges. Furthermore, there is some evidence that police also promised better outcomes in sentencing in exchange for defendants’ guilty pleas.

The promise of a lighter sentence is a hallmark of plea bargaining in the US jurisdiction, but it appears to have been a promise also extended by Queensland police. The *Courier-Mail* reported that during his sentencing hearing, a defendant explained to the judge that he had pleaded guilty to each one of his 16 prior stealing convictions because he was “bluffed into pleading guilty” and told he would “get off lighter”.¹⁷⁷ In 1941, a defendant charged with sexual offences against a child told the trial court that Detective J.P. McIver said that “it would be best to plead guilty...[the defendant] would

¹⁷⁴ Queensland State Archives Item ID96073, Depositions and indictments; PP, Trial ID #9811, QLDSC, Anon., 1946.

¹⁷⁵ Baldwin and McConville, *Negotiated Justice*, 26.

¹⁷⁶ Queensland State Archives Item ID95928, Depositions and indictments; PP, Trial ID #47785, QLDSC, Edgar Smith, 1936.

¹⁷⁷ “In the Courts,” *The Courier-Mail*, July 3, 1936, <http://nla.gov.au/nla.news-article38498423>.

Chapter 4 – The Police and the Guilty Plea

get out on a bond”.¹⁷⁸ Another defendant who pleaded guilty for a similar crime in 1951 also stated he was offered a bond in return for a guilty plea.¹⁷⁹ By the 1950s, a number of defendants appealed their convictions on the basis of police inducements to plead guilty.

Analysis of Queensland CCA reported decisions between 1926 and 1962 reveals cases where appellants sought leave to appeal their convictions claiming police induced them to plead guilty. In 1951, a female appellant alleged that the detective induced her to plead guilty to stealing her fellow trainee’s nurses uniform although she had intended to return it.¹⁸⁰ Two appellants convicted for stealing five chickens from a relative’s home in 1953, claimed their guilty pleas were “obtained by intimidation and improper pressure by police officers”.¹⁸¹ In 1955, a defendant charged with rape tried to change his ‘guilty’ plea to ‘not guilty’. He claimed that he had been “forced” and “talked into” pleading guilty and that he did not know the implications of pleading guilty.¹⁸² Other appellants cited “fraud and other misconduct on the part of police”.¹⁸³ Most reported decisions do not detail the kinds of inducements allegedly used by police to influence these guilty pleas, but the connection between involuntary confessions and police violence provides some suggestions. However, it was as difficult to prove that promises were made as it was to prove police violence.

¹⁷⁸ “Public Menace,” *Truth*, August 1, 1941, <http://nla.gov.au/nla.news-article203199874>.

¹⁷⁹ “Not Allowed to Alter Plea,” *Townsville Daily Bulletin*, February 15, 1951, <http://nla.gov.au/nla.news-article63134747>

¹⁸⁰ *Halfpapp v Bateman, Ex parte Halfpapp* [1951] QWN 19.

¹⁸¹ *Fursman v Blackman and Nicholls, ex parte Blackman and Nicholls* [1953] Qd R 33.

¹⁸² *R v Frazer Brown* [1955] QSR 74.

¹⁸³ *R v The Stipendiary Magistrate at Rockhampton and other, Ex parte Parker* [1957] QWN 10.

Changes to the police manuals

By 1959, this series of critical appeal cases forced the Queensland judiciary to acknowledge the systematic practice whereby police induced defendants' guilty pleas. But although police inducements were contrary to the principle of voluntariness,¹⁸⁴ the Queensland judiciary continued to extend police the assumption that these practices emerged from the best intentions. In the appeal case *Heffernan v Ward*, Justice Stanley expressed his concern about police encouraging guilty pleas:

...the allegation and the denials [regarding police advice to plead guilty] are of such common occurrence that I feel compelled to say that...however meritorious it may be, the motive prompting a policeman to give such advice should be disregarded and he should not give such advice.¹⁸⁵

It is difficult to see the merit Stanley refers to, when encouraging defendants to plead guilty contradicted the 'ancient rule of Common law' that defendants should not be induced to convict themselves.¹⁸⁶ Yet police continued to ignore his direction. In 1962, two appeal cases showed that Queensland police continued to induce guilty pleas. One appellant claimed that the arresting officer told him that the "best thing" he could do for himself was to go to court and plead guilty:

The magistrate will only fine you and there'll be no publicity. The best thing you can then do is get out of the State. Tell the magistrate that you're sorry and that you will leave the State straight away.¹⁸⁷

¹⁸⁴ *R v Thompson* [1893] 2 QB 12; *Ibrahim v R* [1914] AC 599; *R v Zerafa* [1935] QSR 227.

¹⁸⁵ *Heffernan v Ward* [1958] Qd R 12.

¹⁸⁶ Fry, "Admissibility of Statements," 426. Of course, this is the standard intention of the contemporary criminal justice system that focuses on how to encourage more guilty pleas at earlier stages of the prosecution process.

¹⁸⁷ *Hallahan v Kryloff, Ex parte Kryloff* [1960] QWN 18.

Chapter 4 – The Police and the Guilty Plea

In another case, the defendant was pressured to plead guilty to save his pregnant wife from being called as witness. The detective allegedly stated that the defendant would not want her put “in the box now she only has 20 days to go, and that will be nice publicity on your side if you do have her in the box”.¹⁸⁸ In both cases, the CCA discussed the role of the magistrate in protecting defendants from pressure to plead guilty, and in *Hallahan* advised police magistrates to inquire whether police had given “advice, or inducement, or enticement” to plead guilty, particularly in cases involving unrepresented defendants.¹⁸⁹ These judicial comments possibly prompted the response of then-Police Commissioner Frank Bischof.

In November 1963, Bischof issued an amendment to General Instruction Rule 74 in the 1953 policeman’s manual. This was the section pertaining to police misconduct. Sub-rule (2) substantially increased the number of matters that were officially construed as police misconduct, including (2h) “any act of oppression or tyranny, (2ag) “making any false entry in any official book or diary”, and critically, (2ao) “persuading or endeavouring to persuade a person to plead guilty.”¹⁹⁰ This 1963 amendment is a critical moment in the history of the guilty plea in Queensland. The expansion of the scope of official ‘misconduct’ acknowledges that police were instrumental in eliciting guilty pleas in the lower courts; further, that this could jeopardise a conviction if appealed. The amendment is one of only a handful of examples from the official bureaucratic record that provides documentation of official

¹⁸⁸ *R v Tamell* [1962] Qd R 11.

¹⁸⁹ *Ibid.*

¹⁹⁰ Smith, *Manual*, 66. The possible penalties imposed included the officer’s transfer, removal from the Force, or prosecution.

Chapter 4 – The Police and the Guilty Plea

recognition that there was a negative relationship between police and defendants' guilty pleas.

Despite the amendment, police continued to induce defendants' guilty pleas. Police cultures are historically resistant to change. The findings of both the Lucas and Fitzgerald inquiries in the 1970s and 1980s show the limitations in the expectation that amendments to procedural rules can overcome police culture and enact reform in previously accepted police practice. It is worth considering the career of the Police Commissioner responsible for implementing the 1963 amendment, Frank Bischof, as an example of a detective who influenced the Brisbane CIB culture during the post-transition phase, but whose own practices were problematic.

Police Commissioner Frank Bischof

Frank Bischof, who joined the CIB in 1933,¹⁹¹ was no stranger to allegations that he induced both confessions and guilty pleas. In 1935, Justice Henchman criticised Bischof for his treatment of a young defendant in a patricide case in Boonah.¹⁹² The defendant allegedly made a verbal confession that he killed his abusive step-father yet the defendant was not arrested until sometime after the admission. Further, he allegedly wrote the statement with only Bischof present. Henchman was critical of the interrogation process and sent the jury out while he heard evidence from every officer involved to ascertain whether there were any threats or promises involved in the confession. He was satisfied there was none but voiced his displeasure with the interrogation process.

¹⁹¹ Fitzgerald, "The Fitzgerald Report," 31.

¹⁹² "Police Methods," *Morning Bulletin*, October 2, 1935, <http://nla.gov.au/nla.news-article54796058>.

Chapter 4 – The Police and the Guilty Plea

In 1949, Bischof was alleged to be complicit in an interrogation where detectives used the ‘third degree’.¹⁹³ Bischof allegedly ran interference when one of the defendant’s solicitors attempted multiple times to interview his client at the Brisbane CIB. In 1953, then Detective Inspector Bischof allegedly induced a confession from a defendant charged with murder.¹⁹⁴ He reportedly suggested that the defendant could plead guilty to manslaughter, and promised he could “get [the defendant] off with seven to ten years”.¹⁹⁵ Furthermore, the defendant could frame the interaction that led to the victim’s death “whichever way [he] liked...whatever [his] story”, Bischof promising to “back it up to the limit”.

Two years later, Bischof was officer-in-charge of the CIB, and in 1958, became Queensland’s Police Commissioner.¹⁹⁶ The Fitzgerald Report noted that “police corruption had acquired a quaint quasi-legitimacy by the Bischof era”.¹⁹⁷ During his tenure from 1958 until 1969, Bischof oversaw the emergence of the protection racket known as ‘the joke’ that launched the career of ‘bagmen’ like Jack Herbert.¹⁹⁸ Bischof was alleged to have been involved in the prostitution and graft ring operating in the National Hotel, the subject of an ineffective Royal Commission into policing practices in 1964. He finally resigned in February 1969 under a cloud of corruption.¹⁹⁹

¹⁹³ “Obstacles Put in His Way,” *Brisbane Telegraph*, February 23, 1949, <http://nla.gov.au/nla.news-article216508181>.

¹⁹⁴ Fitzgerald, "The Fitzgerald Report," 31.

¹⁹⁵ “Detective's Talks with Halliday,” *The Courier-Mail*, February 25, 1953, <http://nla.gov.au/nla.news-article50538138>.

¹⁹⁶ W Ross Johnston, "Bischof, Francis Erich (Frank) (1904–1979)," Australian National University, <http://adb.anu.edu.au/biography/bischof-francis-erich-frank-9513/text16747>.

¹⁹⁷ Fitzgerald, "The Fitzgerald Report," 31.

¹⁹⁸ *Ibid.*, 32-33.

¹⁹⁹ Johnston, "Bischof, Francis Erich (Frank) (1904–1979)".

Chapter 4 – The Police and the Guilty Plea

Bischof's career in the Brisbane CIB overlaps with the rise of the guilty plea in Queensland. How much influence he had over the practices in the CIB is impossible to say, although as a detective in the site of Queensland's busiest courts it is probable that he engaged in the same practices as those apparent in the deposition material. Police process corruption involving fabrication of evidence and police verballing were rife during this period.²⁰⁰ These practices were engaged in, and possibly encouraged, by Bischof and other like-minded detectives. This includes the corrupt Police Commissioner Terrence Lewis, who joined the Brisbane CIB in 1950.²⁰¹

The troubling police practices documented in the historical record appear to have instrumentally contributed to the rise of the guilty plea in Queensland. The influence of police practices regarding verbals and false confessions combined with the reliance on confessional material, raises questions about the rules that guided police interrogations in the decades before widespread police process corruption was acknowledged and addressed. For example, there were no statutory provisions that dictated the roles and responsibilities of police in obtaining confessional material until the latter end of the twentieth century. Queensland police were guided by a set of 'rules of practice' provided in the police manuals and commonly referred to as the Judges' Rules.

The Judges' Rules

The English Judges' Rules specified the practices that guided police in their interactions with suspects during questioning, interrogation, and following their formal

²⁰⁰ Alderson, "Powers and Responsibilities," 258-59.

²⁰¹ Fitzgerald, "The Fitzgerald Report," 42.

Chapter 4 – The Police and the Guilty Plea

arrest.²⁰² The rules focused on protections for defendants by means of police-issued cautions and warnings that defendants' words could be used as evidence against them. These nine rules developed over time, from a series of memorandums issued by the English Home Office from 1906 that were first approved by the King's Bench in 1912, that were then extended and forwarded to the English courts and police in 1918.²⁰³ In 1929, the rules were reaffirmed in the Report of the Royal Commission on Police Powers and Procedure.²⁰⁴ An outcome of that Report was a Home Office Circular, dated June 1930, advising the proper meaning of the Judges' Rules as agreed upon by the Secretary of State and His Majesty's Judges.²⁰⁵ The circular was published in full later that year, in the QJPR.

As discussed earlier, the evidence from the sample cases shows that police regularly breached the law of voluntary confession. The evidence from the historical record shows that English and Australian police also breached the Judges' Rules. John Baldwin and Mike McConville's path breaking work on plea bargaining in the Birmingham Court found that police regularly breached the Judges' Rules in the early 1970s.²⁰⁶ This was a continuum of practice recognised by both the 1929 and 1962 inquiries into policing in England.²⁰⁷ The Queensland judiciary were also regularly

²⁰² This assertion is based on analyses of the Queensland Reports and Queensland Justice of the Peace and Local Authorities' Journals between 1926-1962, and the Queensland Policeman's Manuals (1914; 1925; 1939; and 1953).

²⁰³ Wood, "The Third Degree," 473-74.

²⁰⁴ Ibid.

²⁰⁵ "Criminal Law- Police Powers and Procedure," in *Queensland Justice of the Peace and Local Authorities Journal*, ed. J.J. Walsh (Brisbane: The Law Book Co., 1930), 150.

²⁰⁶ Baldwin and McConville, *Negotiated Justice*, 102-03.

²⁰⁷ David Dixon notes that the 1962 English Royal Commission on the Police was a "lost opportunity"; although the terms of reference included an investigation into the implementation of the Rules, the Commission instead referred the Rules to the judges, for further consideration, see *Law in Policing: Legal Regulation and Police Practices* (Oxford: Clarendon Press, 1997), 134-35.

called upon to determine whether police practices breached the rules.²⁰⁸ Some breaches related to widespread confusion regarding the application of the rules.²⁰⁹ In Queensland, this was possibly associated with curious situation that saw only the first four rules included in the Policeman's Manuals until the 1953 edition.²¹⁰ This meant that police were ignorant of the more complicated issues around cautioning and custody inherent in the five missing rules. This added complexity to the already contentious nature of the rules and the criticism of police practices by some Queensland judges during the 1930s. Justice Henchman, an advocate for the adoption of the rules in Queensland, regularly directed the attention of police and crown prosecutors to the Home Office circular published in the QJPR.²¹¹

A breach of the rules might lead to the exclusion of a verbal or written statement.²¹² Although the rules did not have the force of law, trial judges had the discretion to exclude evidence that was in breach of the rules.²¹³ Yet English and Australian judges regularly included confessional material as evidence even though the rules were breached, if they considered that the confessions were 'voluntary'.²¹⁴ The analysis of the 60 prosecutions sample reveals systemic breaches of the rules by Queensland police between 1926 and 1961.²¹⁵ The most problematic issue concerned cautioning defendants who were in custody. Police generally framed their pre-arrest interactions with defendants as informal and voluntary. In most cases they alleged that

²⁰⁸ *R v Livingston* [1933] QSR 42; *R v Fitzpatrick* [1934] QWN 25; *R v Hawkins* [1949] QWN 34; *R v Nichols, Johnson and Aitcheson* [1958] Qd R 200. See also *McDermott v R* [1948] HCA 23.

²⁰⁹ Wood, "The Third Degree," 474.

²¹⁰ Smith, *Manual*, 237-39.

²¹¹ *R v Fitzpatrick* [1934] QWN 25.

²¹² *Ibid.*

²¹³ Baldwin and McConville, *Negotiated Justice*, 102.

²¹⁴ *Praeger* [1972] 1 All ER 1114, cited in *ibid.*, 102 fn 4.

²¹⁵ This analysis of the systemic patterns in breaches of the Judges' Rules is currently a work in progress for publication.

defendants admitted guilt almost at the first instance. This effectively sidestepped the requirement that defendants were cautioned before making their admissions. Yet despite that, detectives routinely failed to caution defendants after they made their verbal confessions. In fact, in the pre-transition period 1926 to 1947, most defendants were not cautioned until the final step of the process, during their formal arrest and charge. In 1928, a former secretary of the Ancient Order of Foresters Society, Alfred Shelford, illegally claimed reimbursement for the death benefits of a child that was not actually deceased.²¹⁶ In 1931, the incoming secretary discovered the anomaly in the Society's books; when confronted by his Order colleagues, Shelford confessed and subsequently signed a typed confession. Detective Constable Joseph McCullough's testimony details how the defendant attended the CIB office and answered several questions regarding the offence. But despite having already made a voluntary statement that was later relied on in court he was not cautioned prior to, or following, his subsequent verbal confession to police.

In the later period post-1950, police were more mindful of their cautioning practices. There were also far fewer breaches of the rule pertaining to written confessions during this period. The rules required that police obtain signed written confessions, yet most of the depositions relied only on verbal confessions. This was problematic, considering that the fabrication of false confessions and police verbals was a systemic problem not addressed until the latter end of the twentieth century. The evidence shows that police were more successful in obtaining written confession post-1950. It is possibly a consequence of that rule's inclusion in the police manuals for the

²¹⁶ Queensland State Archives Item ID95855, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #34147, QLDSC, Alfred Shelford, 1926.

first time. It might also be evidence that police verballing and the fabrication of written statements increased during this time. This suggests that police observances of the Judges' Rules were inconsistent, at best, and at worst designed to benefit the police case at the expense of the defendant's rights. These arguably inadmissible confessions might have influenced some defendants to plead guilty rather than challenge the police evidence, even though some of that evidence might well have been inadmissible and thus not put before a jury.

Conclusion

The role of police in the prosecution process is “largely ignored by historians”.²¹⁷ This research provides significant new evidence of police practices in the pre-trial processes including investigation, interrogation, and police prosecution in the lower courts. It provides a more nuanced understanding of police professionalisation by synthesising the primary source evidence with a contextual account of policing history in Queensland, particularly relating to police corruption. It associates the rise of the guilty plea with police practices that were designed to induce confessions, but then over time expanded to include guilty pleas.

The quickest route to obtaining a guilty plea conviction was through a confession. This chapter provides empirical evidence that mid-twentieth century Queensland detectives focused on obtaining confessional material as the basis of a strong case against defendants. They knew that a confession almost guaranteed a conviction, without any scrutiny in the Supreme Court regarding the admissibility of

²¹⁷ Emsley, *Crime and Society*, 190.

Chapter 4 – The Police and the Guilty Plea

evidence, such as confessional material. Once the defendant pleaded guilty, the only avenue for appeal was on the grounds of the sentence imposed, but rarely the conviction itself. By the late 1950s, police were leveraging confessional material to induce defendants to plead guilty, sometimes offering promises they could not deliver, like specific sentencing outcomes.

Scholars aligned with the professionalisation hypothesis focus on the benefits associated with modernising police organisations, including more scientific approaches to investigation practices and the use of technology. However, in the Australian context modernised policing was already entrenched when guilty pleas began accelerating in the late 1940s. Policing techniques including fingerprinting, photography, and information-sharing (both at an intra and inter-state level) were well-established years before the guilty plea transition. Yet despite this access to the technology at hand, there is little evidence in the 60 prosecutions sample that forensic evidence was widely used to create strong evidential cases. Instead, fingerprints were used primarily for identification and for proof of previous convictions. When police included identification evidence it generally involved the property itself, or home owners testifying to the defendant's presence in their home during the police investigation process. There is no evidence that police employed modernised policing techniques to provide reliable and persuasive evidence.²¹⁸ The evidence in this research questions the modernisation hypothesis that improvements in forensic technologies influenced the likelihood that more factually guilty people would plead guilty. Some of the police evidence seems problematic. Some cases were very weak, relying only on verbal confessions connecting defendants to the offences and might possibly have earned an acquittal at trial in the hands of an

²¹⁸ McConville and Mirsky, *A True History*, 5.

Chapter 4 – The Police and the Guilty Plea

experienced barrister. It is possible that police inflated the importance of the forensic material during defendants' interrogations.

The professionalisation thesis, at least as it regards police, does not explain the rise of the guilty plea in the Queensland context unless the hypothesis is broadened to consider other forms of police practice. Currently, the hypothesis ignores the darker side of professionalised policing, and the misuse of police powers, violence, and process corruption that continued unabated for decades. This failure to critically consider the evidence that police corruption was arguably becoming more systematic while guilty pleas were accelerating undermines the association between police practices and the rise of the guilty plea. The professionalisation thesis must consider the connection between police corruption as well as other police practices rewarding the getting of convictions, and guilty pleas.

Chapter 5. The Lawyers and the Guilty Plea

On November 16, 1941, Brisbane newspaper *Truth* published an article entitled “Crown Blunder- Awful Attack on Girl”.¹ It referred to a Mackay Circuit Court case and a defendant committed for trial for a rape which *Truth* described as “one of the most savage and brutal assaults in the State’s history”. On the morning of the trial, the crown prosecutor John Quinn and the defendant’s publicly appointed solicitor, Thomas Barron discussed a plea negotiation.² Quinn accepted Barron’s suggestion that the defendant plead guilty to a lesser charge. The defendant was subsequently sentenced to two years, the maximum penalty for indecent assault prescribed by the Criminal Code. The paper questioned the “inexplicable” rationale behind this decision.³

Truth called for a full inquiry. It noted Justice Douglas’ remarks during the sentencing that the evidence disclosed “a revolting and disgusting state of affairs” and that the defendant was “very lucky” that the crown prosecutor accepted the guilty plea.⁴ Within weeks, then-Premier and the Member for Mackay, William Forgan Smith, announced a Royal Commission into the case to be led by Queensland Supreme Court justice Alan Mansfield.⁵ A key area of the Commission’s inquiry was the extent and acceptability of the practice of crown prosecutors negotiating guilty pleas to lesser offences. It also considered whether the practice should be left to crown prosecutors’ discretion, or whether the decision required prior approval from the Crown Law Office.

¹ “Crown Blunder,” *Truth*, November 16, 1941, <http://nla.gov.au/nla.news-article203206864>.

² “Mackay Inquiry on Rape Case Started,” *The Telegraph*, December 8, 1941, <http://nla.gov.au/nla.news-article172356406>.

³ “Crown Blunder,” *Truth*, November 16, 1941, <http://nla.gov.au/nla.news-article203206864>.

⁴ *Ibid.*

⁵ “Mackay Rape Case,” *Warwick Daily News*, December 5, 1941, <http://nla.gov.au/nla.news-article186819369>.

Chapter 5 – The Lawyers and the Guilty Plea

This was not an extensive inquiry into the bargaining practices of prosecuting and defence counsel. The Commission sat for three days of hearings between December 8 and December 20, hearing testimony from only four lawyers, two of whom were involved in the Mackay case.⁶ Commissioner Mansfield's report was quickly finalised, and the main findings announced on December 31, 1941.⁷ Commissioner Mansfield found that the prosecutor, John Quinn, had acted within his responsibilities as crown prosecutor. Further, Mansfield recommended that there was no legal requirement for a crown prosecutor to hear witnesses give evidence or seek permission from either the Crown Law Office or the attorney general before exercising that discretion. The inquiry gave Queensland crown prosecutors *carte blanche* approval to engage in plea bargaining as they saw fit.

A key theory explaining the guilty plea phenomenon ties the professionalisation of lawyers to an increasingly adversarial criminal trial process that subsequently encouraged bargained-for guilty pleas. Prosecutors engaged in bargaining with defendants and defence counsel to avoid protracted trials and negotiate better outcomes for defendants. The combination of increasing proportions of legally represented defendants, and strong evidential material provided by police, encouraged bargains where an acquittal was unlikely.⁸ However, there are few instances presented in the historical plea bargaining scholarship that explicitly document the practices and

⁶“Mackay Inquiry on Rape Case Started,” *The Telegraph*, December 8, 1941, <http://nla.gov.au/nla.news-article172356406>; “Mackay Commission,” *Townsville Daily Bulletin*, December 10, 1941, <http://nla.gov.au/nla.news-article61798965>; “Commission on Mackay Case Closed,” *The Telegraph*, December 23, 1941, <http://nla.gov.au/nla.news-article172351025>.

⁷“Crown Prosecutor’s Actions in Mackay Case Was Justified,” *The Telegraph*, December 31, 1941, <http://nla.gov.au/nla.news-article172349091>

⁸Smith, “Eclipse of Jury,” 135; Feeley, “Legal Complexity,” 187.

processes leading to alleged bargains.⁹ The 1941 Royal Commission provides important evidence of documented bargaining practices between lawyers.

This chapter expands the current guilty plea scholarship by examining the practices of crown prosecutors and defence lawyers. The discussion focuses on the bargaining practices of the four lawyers involved in the 1941 Royal Commission hearings before examining lawyers' practices in the 60 prosecution case sample. The analysis reveals that lawyers engaged in a range of bargaining techniques in late guilty plea cases. This chapter extends current historical plea bargaining scholarship in two ways. First, it discusses lawyers' practices in late guilty plea cases where any suggestion of bargaining is absent. More importantly, it discusses new evidence of prosecutors' practice whereby defendants pleaded guilty on *ex officio* indictment to dispose of subsequent charges. This process involved police, crown prosecutors, and occasionally defence lawyers. The discussion then turns to defence lawyers' practices that challenged the police prosecution case in the Police Court, particularly in situations that suggest that confessions were either involuntary or otherwise inadmissible as evidence.

The 1941 Mackay Royal Commission

There is almost no evidence of lawyers' bargaining practices documented in the historical records.¹⁰ An often-cited example is the evidence emerging from an 1844 Massachusetts' House Committee investigation of DA Asahel Huntingdon, and his practice of negotiating guilty pleas.¹¹ The Mackay Royal Commission provides an

⁹ Smith, "Eclipse of Jury," 137.

¹⁰ Fisher, "Bargaining's Triumph," 864.

¹¹ Vogel, "Social Origins," 224 fn88; Ferdinand, *Boston's Lower Courts*. See also George Fisher's in-depth analyses of Huntingdon's prosecution practices that identifies the two-count process beginning in

equally relevant insight into the plea negotiation practices of Australian prosecutors in the mid-twentieth century. However, there is little official extant evidence of the Commission itself and the Mackay Commission is barely traceable in the historical record. The Commission is noted in only one of the two authoritative bibliographies of Australian Royal Commissions.¹² There are no surviving transcripts of the Commission in the Queensland State Archives, the Supreme Court Library, the Queensland Parliamentary Library, or the Queensland State Library. There is no mention in Hansard, and the findings were not reported in either the Parliamentary Debates or the Government Gazettes.

The only existing documentation is Commissioner Mansfield's Notebook, held in the Queensland State Archives collection.¹³ The notebook includes the dates of five circular letters, written between 1885 and 1933, that were submitted for consideration by the Crown Law Office pertaining to crown prosecutors' practices.¹⁴ There is no evidence as to the substance of these letters in newspaper coverage of the inquiry. All but one of these letters are held in the state archives series of Circular Books. None of the circulars with those dates specifically refer to the practice of accepting guilty pleas to lesser offences. The letters concern crown prosecutors' discretion not to proceed with

1834. Fisher, "Bargaining's Triumph," 879.

¹² Dietrich Hans Borchardt, *Supplement to Checklist of Royal Commissions, Select Committees of Parliament, and Boards of Inquiry, 1856-1980*, vol. 37, Library Publication (Bundoora: La Trobe University Library, 1990); Jean Hagger and Tina Montanelli, *Consolidated Index to the Checklists of Royal Commissions, Select Committees of Parliament and Boards of Inquiry Held in the Commonwealth of Australia, Queensland, New South Wales, South Australia, Tasmania and Victoria, 1856-1960*, vol. 19ibid. (Bundoora, VIC1980). The Commission's title is not included in the 1980 index but there are entries for both A. Mansfield and defendant T.E. Hutton with the same index number, Q314.

¹³ Queensland State Archives Agency ID2665, Royal Commission on the Case of Thomas Edward Hutton in the Mackay Circuit Court in November 1941

¹⁴ See Queensland State Archives Item ID269827, Circulars. Exhibit 1: 1 June 1895; 2 July 1895. Exhibit 7: 6 July 1906; 7 June 1909; 22 October 1933. I believe the last circular letter's date is incorrect. The Circular Book 1891 - 1942, Vol 1 contained the 7 June 1909 letter, and two pages later includes a letter dated 22 October 1913 that directly references the June 1909 letter.

Chapter 5 – The Lawyers and the Guilty Plea

a prosecution, the first step in accepting a guilty plea to a lesser offence.¹⁵ The circular dated July 2, 1895, stated that crown prosecutors must seek the attorney general's approval before entering a *nolle prosequi*.¹⁶ This suggests that historically prosecutors did not have *carte blanche* discretion to withdraw a prosecution. The remaining three circulars are evidence of a shift over time in that discretionary power. Published between 1895 and 1913, the letters required crown prosecutors to send a report to the Justice Department after each circuit court sittings, detailing the result of each case tried and, in the event "of your not having proceeded with the prosecution of any case, stating your reasons therefor".¹⁷ This correspondence implies that crown prosecutors had the discretionary power of *nolle prosequi* and the only requirement placed on them was to inform the Department after the event.¹⁸

The only other sources that record the Commission's proceedings are found in historical newspapers. These provide the bulk of the evidence about witnesses' practices during the three days of hearings. Four lawyers appeared before the inquiry: Thomas Patrick Barron and John Quinn (the defence and prosecuting counsel involved in the Mackay rape case), Mackay barrister and solicitor, William Amiet, and Brisbane Supreme Court crown prosecutor (and later Supreme Court justice) Joseph Sheehy.¹⁹ All four lawyers told the Commission that crown prosecutors had long held the right to

¹⁵ The crown prosecutor would enter a *nolle prosequi* on the original charge then file an indictment on the lesser charge to which the defendant pleaded guilty.

¹⁶ Queensland State Archives Item ID269827, Circulars

¹⁷ 1 June 1895. Queensland State Archives Item ID269827, Circulars

¹⁸ Queensland State Archives Item ID269827, Circulars 7 June 1909. This letter instructed Crown prosecutors to immediately advise the Department that if they decided not to proceed with a case so that the defendant might be informed.

¹⁹ "Mackay Inquiry on Rape Case Started," *The Telegraph*, December 8, 1941, <http://nla.gov.au/nla.news-article172356406>; "Royal Commission," *Daily Mercury*, December 10, 1941, <http://nla.gov.au/nla.news-article170836550>; "Crown Prosecutor Tells." *Truth*, December 21, 1941, <http://nla.gov.au/nla.news-article203208497>.

accept a guilty plea to a lesser offence. All approved of the practice. William Amiet, for example, spoke favourably of its utility “in the search for justice and the carrying out of justice” because it saved time and money.²⁰ His testimony provides evidence that crown prosecutors did not always instigate negotiations; a defence lawyer might approach a prosecutor with the suggestion that:

We are certainly not guilty of what we are charged with, but we have a suspicion that we have done something wrong and may be prepared to plead guilty if you charge us with so and so.²¹

The practice of pleading guilty to lesser offences was supported by the Criminal Code provisions. Joseph Sheehy told the Commission that the practice of accepting guilty pleas to lesser offences was provisioned by section 598(1) of the Criminal Code.²² This section, included in the original 1899 Act, enabled defendants to plead guilty to the original charge or any other offence for which they might be convicted upon the indictment; that is, a lesser offence. Sheehy explained that he frequently acted on this section.²³ The newspapers reported that Sheehy and the other lawyers referred to anecdotal examples of reducing charges that reflected the degree of harm perpetrated in non-sexual violent offences like ‘bodily harm’.²⁴ The inquiry heard that prosecutors routinely accepted guilty pleas to ‘common assault’ or ‘assault occasioning bodily

²⁰ “Royal Commission,” *Daily Mercury*, December 10, 1941, <http://nla.gov.au/nla.news-article170836550>.

²¹ *Ibid.*

²² “Assault Inquiry,” *The Northern Miner*, December 23, 1941, <http://nla.gov.au/nla.news-article81629506>.

²³ “Crown Prosecutor Tells,” *Truth*, December 21, 1941, <http://nla.gov.au/nla.news-article203208497>.

²⁴ *Ibid.*

²⁴ “Royal Commission on Harbour Road Case Begins,” *Daily Mercury*, December 9, 1941, <http://nla.gov.au/nla.news-article170839478>; “Crown Prosecutor Tells,” *Truth*, December 21, 1941, <http://nla.gov.au/nla.news-article203208497>.

harm' when the victim's injuries did not justify the more serious charge.²⁵ Joseph Sheehy told the inquiry that:

it depended on the case...in a grievous bodily harm cases, if [he] considered the medical evidence would not be sufficient to support the charge, I would accept a plea of assault occasioning bodily harm.²⁶

Guilty plea negotiations were therefore justified in some cases because the downgraded charge reflected the strength of the evidence.²⁷ However, the anecdotal evidence provided to the inquiry pertained to non-sexual violent crimes, None of the lawyers were reported discussing experiences negotiating the reduction of charges in sexual offences to reflect the degree of the victims' injuries or other evidence issues, like the lack of positive identification of the perpetrator.²⁸ Yet the lawyers' testimony implied that the evidence in the Mackay case was not strong enough to sustain a rape prosecution but was sufficient to successfully prosecute the lesser offence of 'indecent assault'.²⁹

There were other factors beyond the strength of the police evidence that underpinned John Quinn and Thomas Barron's decision to instigate plea negotiations in the rape case. A close reading of the reports reveals that Barron admitted to being unwell before the trial, receiving the brief the weekend before the Monday morning

²⁵ "Crown Prosecutor Tells," *Truth*, December 21, 1941, <http://nla.gov.au/nla.news-article203208497>.

²⁶ *Ibid.*

²⁷ "Investigation into Rape Case," *The Courier-Mail*, December 9, 1941, <http://nla.gov.au/nla.news-article41922942>.

²⁸ "Royal Commission on Harbour Road Case Begins," *Daily Mercury*, December 9, 1941, <http://nla.gov.au/nla.news-article170839478>.

²⁹ In my reading of the depositions of the investigating detective and victim, there were issues pertaining to identification evidence, but the strength of the evidence did not, at first glance, warrant accepting the plea. See Queensland State Archives Item ID132745, File - criminal case. The Royal Commission heard allegations that the local Inspector argued with the prosecutor that the strength of the case and the sentiment of a local jury would certainly see a conviction, see "Royal Commission on Harbour Road Case Begins," *Daily Mercury*, December 9, 1941, <http://nla.gov.au/nla.news-article170839478>.

trial.³⁰ He attempted to pass the case on to other local solicitors, but they were too busy. This was a period when lawyers were overworked due to the shortage of solicitors during World War Two (WWII).³¹ Barron asked the crown prosecutor John Quinn for an adjournment to prepare his case, but Quinn did not comply with the request.³² It was only at that point that Barron raised his concerns that the evidence did not constitute the more serious offence.

It is not clear why John Quinn refused the initial adjournment although he may have been avoiding the likelihood of an appeal if the case proceeded to trial. The Commission heard that the committal hearing had been covered by the local paper in detail, and the local Mackay populace were ready to “hang” the defendant.³³ A guilty plea avoided the possibility that the prisoner might lodge a successful appeal against the conviction on the grounds of the perception of an unfair trial. Quinn had prosecuted a very similar sexual offence case in 1937 that went to appeal. The CCA were scathing in its judgment, ruling that the conduct of the trial in that case constituted “a most serious miscarriage of justice.”³⁴ A guilty plea was difficult to appeal unless there was conclusive evidence that the alleged offences were not committed or that the defendant did not understand the exact meaning of his plea.³⁵

Regardless of the motivation, Commissioner Mansfield found that John Quinn had acted “in accordance with the law.... [and] in the particular circumstances of this

³⁰ “Royal Commission on Harbour Road Case Begins,” *Daily Mercury*, December 9, 1941, <http://nla.gov.au/nla.news-article170839478>.

³¹ W Ross Johnston, *History of the Queensland Bar* (Brisbane: Bar Association of Queensland, 1979), 17.

³² “Royal Commission on Harbour Road Case Begins,” *Daily Mercury*, December 9, 1941, <http://nla.gov.au/nla.news-article170839478>

³³ “Investigation into Rape Case,” *The Courier-Mail*, December 9, 1941, <http://nla.gov.au/nla.news-article41922942>.

³⁴ “Appeal Upheld,” *The Northern Miner*, August 4, 1937, <http://nla.gov.au/nla.news-article81288536>.

³⁵ *R v Webb* [1960] Qd R 443.

case, in accordance with the due and proper administration of justice”.³⁶ Further, there was no requirement for the prosecutor to hear witnesses give evidence first, nor to seek prior approval from the Crown Law Office or the attorney general. Queensland crown prosecutors received approval for the practice without any limitations on that discretionary power. Yet the report also stated that it was not the duty of a prosecutor to obtain a conviction.³⁷ It was his duty at a trial to put all the facts before the jury and to see that the case for the crown was properly presented. This is at odds with the guilty plea process that circumvents both trial and jury. Justice Mansfield’s comments suggest that in 1941 he still considered the jury trial to be the dominant mode of case disposition. Nothing presented to the inquiry foreshadowed that, within ten years of Mansfield’s report, guilty pleas would dominate case outcomes in the Queensland Supreme Court.

The 1941 Royal Commission provides fascinating insight into lawyers’ practices in plea bargaining for late guilty pleas. This rare evidence adds to the few cases of documented bargaining identified in the historical plea bargaining literature. The inquiry reveals that evidential material was not the only influence in negotiations for late guilty pleas. Other possible considerations included a lack of time for publicly appointed lawyers to prepare a case, and the fears of an appeal. The findings from the quantitative study reveal that late guilty pleas were not driving the guilty plea phenomenon in Queensland, despite approval for the practice. Nonetheless, these late guilty pleas provide further evidence of bargains between prosecutors, defence counsel, and defendants.

³⁶ “Crown Prosecutor’s Action in Mackay Case Was Justified,” *The Telegraph*, December 31, 1941, <http://nla.gov.au/nla.news-article172349091>.

³⁷ *Ibid.*

Late pleas and plea bargaining

The historical plea bargaining literature argues that a guilty plea to a lesser offence is an unambiguous sign of a plea bargain.³⁸ Yet there is little evidence of a systemic pattern in these kinds of guilty pleas in the Queensland historical records. The quantitative study conclusively showed that late guilty pleas to lesser offences were not accelerating in concert with the overall acceleration in the proportion of guilty pleas in the Queensland Supreme Court. Further, early guilty pleas always dominated police prosecutions for serious offences, with little effect following from the approval of the practice granted by the Mackay inquiry.³⁹ Plea bargains between lawyers were occurring during this period but were not the key mechanism driving the guilty plea phenomenon in Queensland.

The sample cases in the qualitative study do suggest some evidence of different kinds of plea bargaining practices involving lawyers. The following discussion presents evidence from the 60 sample cases in the qualitative study involving 70 defendants. This evidence suggests that some crown prosecutors engaged in a range of bargaining practices, either with defence lawyers or directly with defendants. In total, 22 of the 70 defendants entered late guilty pleas after being committed for trial in the police courts. Only two of these defendants entered late pleas to lesser offences. 13 of the 22 defendants changed their plea without receiving any obvious concession. Four defendants pleaded guilty to one charge and their remaining charges were not proceeded with. A further three defendants were convicted by a jury on their first charge and

³⁸ Friedman, "Historical Perspective," 249.

³⁹ The quantitative study found that late pleas constituted 26% of all guilty pleas in 1941 and increased to 33% in 1946. By 1951, when guilty pleas dominated case outcomes, only 18% of guilty pleas were entered late, and very few of these were late guilty pleas to lesser offences. See Chapter three (pg. XXX).

subsequently pleaded guilty to the remaining charges. In some instances, the outcomes suggest the possibility that lawyers, and defendants engaged in a range of bargaining practices in exchange for these late guilty pleas.

No concessions

In the qualitative study sample, there was no evidence of any benefit to the defendant in exchange for their guilty plea in most of the late guilty plea cases. 13 of the 22 defendants who entered late guilty pleas, pleaded guilty to all the charges against them without any obvious concession. One defendant pleaded guilty to three counts of burglary-related offences at his arraignment, but There was no reduction in the severity, or the number, of those charges.⁴⁰ Lynn Mather argues that these guilty pleas might be motivated by ‘implicit plea bargaining’.⁴¹ Implicit bargaining occurs in cases where there is no overt evidence of bargaining; scholars posit that defendants have a perception that they will benefit from a lighter sentence if they plead guilty.⁴² In the contemporary context, Friedman argues that:

prosecutors and judges have a similar understanding, and defence attorneys pass the word to their clients. Hence defendants who plead guilty strike a kind of bargain even though no word of a "deal" has been spoken.⁴³

There is also some evidence in the historical record that lawyers and defendants assumed that pleading guilty resulted in a reduction in sentence in the mid-twentieth century. John Carter Wood argues that early twentieth century popular culture

⁴⁰ Queensland State Archives Item ID95777, Depositions and indictments; PP, Trial ID #39757, QLDSC, George Miller, 1926.

⁴¹ Mather, "History of Plea Bargaining," 284.

⁴² Milton Heumann, "A Note on Plea Bargaining and Case Pressure," *ibid.* (1975): 526.

⁴³ Lawrence M. Friedman, "Plea Bargaining in Historical Perspective," *ibid.* 13, no. 2 (1979): 253.

transmitted Americanised ideas and attitudes about criminal justice issues and policing practices into the British consciousness through film and theatre, including the term ‘the third degree’.⁴⁴ Arguably, fictional narratives of police bargaining practices were similarly transmitted to English and Australian audiences, yet David Papke notes that Hollywood films focus on the idealised jury trial rather than the realities of plea bargaining.⁴⁵ Australian audiences were certainly exposed to discussions on guilty pleas and sentence bargaining in the widely published accounts of the 1931 prosecution of Chicago criminal Al Capone that linked guilty pleas with sentence reductions, although not in Capone’s case.⁴⁶ In 1938, the newspaper serial column “*Lawyer’s Diary*” published an anecdote about a defence lawyer’s advice to a client charged with burglary:

As the elements of the charge are all present I can’t offer you much hope of getting off. And of course, you may get a lighter sentence by pleading guilty. That’s worth considering, I should think.⁴⁷

Contemporary research also acknowledges that late guilty pleas can indicate the defendant is finally submitting to the inevitable. Defendants might enter a late plea in acknowledgement of the strength of the evidential case against them because they were truly guilty. It might also suggest a late acknowledgement that a successful challenge to inadmissible police evidence was probably impossible.

⁴⁴ Wood, “The Third Degree,” 468-70.

⁴⁵ David Ray Papke, “Law, Cinema, and Ideology: Hollywood Legal Films of the 1950s,” *UCLA Law Review* 48, no. 1473 (2001): 1478.

⁴⁶ “Capone Case,” *The Northern Herald*, August 8, 1931, <http://nla.gov.au/nla.news-article149889929>; “Al Capone’s Re-Trial,” *Weekly Times*, October 10, 1931, <http://nla.gov.au/nla.news-article225745153>; “Bombshell for Al Capone,” *The Daily News*, August 1, 1931, <http://nla.gov.au/nla.news-article83885047>.

⁴⁷ “Lawyer’s Diary,” *Sunday Mail*, October 16, 1938, <http://nla.gov.au/nla.news-article98000652>.

Chapter 5 – The Lawyers and the Guilty Plea

There is another explanation for late guilty pleas that is unrelated to plea bargaining but involved applications for state-funded legal advice. The precursor to Queensland's contemporary Legal Aid scheme was the legal advice, and possible representation, provided by the Public Defender (PD).⁴⁸ The scheme encouraged late guilty pleas because, under the *Poor Prisoner's Defence Act* provisions, defendants could only apply for legal advice or representation after they were committed for trial on a serious offence.⁴⁹ Those defendants who pleaded guilty were unable to apply. It is possible that some defendants may have intended to plead guilty but hoped for legal advice before doing so, particularly if they were unable to access legal representation during the committal process.

Furthermore, the application process depended on the police magistrates. Defendants were required to submit written applications to the magistrates only after the close of the committal proceedings. Magistrates were then required to request a financial statement from police to enable the magistrate to assess the defendants' incapacity to pay for legal advice. If the magistrate decided the defendant was "suitably" indigent they certified the application which was then submitted to the attorney general for consideration.⁵⁰ Only very rarely were defendants granted representation after pleading guilty early, and only upon the direction of the attorney general.⁵¹

⁴⁸ *Poor Prisoners' Defence Act of 1907* (7 Edw VII No 4).

⁴⁹ M. J. Shanahan, "100 Years of the Public Defender in Queensland," in *History Program*, ed. Supreme Court of Queensland Library (Supreme Court of Queensland Library, 2016), 9.

⁵⁰ *Ibid.*

⁵¹ As per regulation 40 made under provisions of Public Curator Acts 1915-1947.

Chapter 5 – The Lawyers and the Guilty Plea

The Queensland register books reveal that six defendants in the 60 prosecutions sample were provided with legal counsel by the PD. The attorney general appears to have intervened in one of the sample cases. In 1951, an unrepresented Latvian-born defendant pleaded guilty to ‘assault with intent to steal’ and was committed for sentence. Yet both the register book and newspaper reports show that he was represented at sentencing by Mr McAlpine, the PD, who noted his good character. This appears to be an interesting anomaly. The remaining five defendants represented under the PD scheme subsequently entered late guilty pleas. Only one of these involved a late guilty plea to a lesser offence, suggesting that public defenders were not bargaining with prosecutors in these cases.⁵² It is possible that other late guilty plea defendants in the 60 case sample applied for legal aid, but were unsuccessful. The system was not adequately resourced to fund most defendants. Between 1934 and 1940, the PD (or retained defence counsel) represented only 402 defendants.⁵³ In the absence of any explicit evidence of plea bargaining, pleading ‘not guilty’ in the Police Court was a legitimate tactic to increase the defendants’ chances of accessing legal advice. If the application was unsuccessful then defendants may have pleaded guilty later in the hope of a lighter sentence.

Withdrawal of subsequent charges

The historical plea bargaining scholarship relies on guilty pleas to lesser offences as the driving force behind the guilty plea phenomenon,⁵⁴ yet the most

⁵² Queensland State Archives Item ID96073, Depositions and indictments; PP, Trial ID #9811, QLDSC, Anon., 1946.

⁵³ Shanahan, "100 Years of the Public Defender in Queensland," 7.

⁵⁴ Friedman, "Historical Perspective," 249; Ferdinand, *Boston's Lower Courts*, 81; McConville and Mirsky, *A True History*, 287-90.

prevalent pattern in the qualitative sample involved late guilty pleas in exchange for a reduction in the number of charges. Crown prosecutors employed their discretionary power to withdraw indictments for prosecutions of subsequent charges through the *nolle prosequi* mechanism.⁵⁵ Four of the twenty-two defendants who entered late pleas pleaded to one charge, and had the subsequent charges withdrawn.

Sometimes contested police evidence prompted the withdrawal of charges in some instances. In 1931, defence lawyer Mr Casey succeeded in arguing a downgrade of the committal charge against his client, arguing that the police evidence did not sustain the charge.⁵⁶ Casey engaged in detailed cross-examination of detectives, questioning the admissibility of the confessional material although the magistrate did not agree. The defendant subsequently pleaded ‘not guilty’ to all charges in the Police Court. At trial, the defendant (again represented by Mr Casey) pleaded guilty to the first, less serious offence, and the prosecutor withdrew the subsequent charges through a *nolle prosequi*. It is quite possible, considering the bargaining practices described by William Amiet at the Mackay inquiry, that Mr Casey and the crown prosecutor Mr O’Driscoll, discussed the charges and the weakness in the evidential material prior to the arraignment.

Another case suggests that other forms of negotiation occurred in this pattern of practice. In contemporary plea bargaining, prosecutors are reported to obtain guilty pleas by promising “not to charge a friend or family of the accused who might be

⁵⁵ Philip C. Stenning, *The Modern Prosecution Process in New Zealand* (Wellington, NZ: Victoria University Press, 2008), 52-53.

⁵⁶ Queensland State Archives Item ID3410, Depositions and indictments; PP, Trial ID #33936, QLDSC, John Walder, 1931. Walder was initially charged with attempted break and enter but the charge was reduced to ‘found having instruments of housebreaking in his possession in the daytime with intent to commit a crime’.

actually or incidentally involved in the offence”.⁵⁷ There is some suggestion that this practice occurred in a 1936 case against a mother and son.⁵⁸ 46-year-old Flora O'Donnell and her 18-year-old son Dennis, both farmers, were committed for trial in the Bowen Police Court. Dennis was charged with three counts of stealing; his mother, with three counts of receiving. Flora was represented at both the committal and sentencing hearing by solicitor Mr J. Barry, and at sentencing by barrister Mr T. Barry. The prosecutor was John Quinn, who was at the centre of the Mackay Royal Commission five years later. Flora entered a late guilty plea to one charge of receiving, and the remaining charges against her were withdrawn. Further, the crown prosecutor entered a *nolle prosequi* in every charge against Dennis O'Donnell, despite the legal facts of the case where the mother's offence was directly related to the theft allegedly committed by her son. The outcome suggests a possible bargain negotiated between Messrs Barry and John Quinn.

Jury convictions

In three of the sample cases, defendants pleaded guilty to subsequent charges only after a jury convicted them on the first charge. These late pleas do not necessarily indicate a plea bargain but might signal the defendant's capitulation to an inevitable outcome. During this period, subsequent charges were heard by the same jury. It is not a stretch to imagine that some defendants presumed that the jury was likely to also convict them on their subsequent charges. In 1931, for example, barrister Mr Jeffriess

⁵⁷ McGuire, "Plea Bargaining: Part 1," 3.

⁵⁸ Queensland State Archives Item ID295779, File - criminal case; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #36490, QLDSC, Flora O'Donnell, 1936.

represented Harold Robinson, a salesperson charged with three stealing offences.⁵⁹ The jury convicted him on the first offence, but recommended mercy on account that the complainant company's poor accounting practices contributed to the offence. The defendant subsequently pleaded guilty to the remaining charges. It is possible that Mr Jeffriess advised his client, who had no previous convictions, that he was likely to receive some leniency in sentencing because of that recommendation. Justice Macrossan did in fact "give effect to the jury's recommendation", imposing an 18-month suspended sentence on the first charge and releasing the defendant on bonds on the other counts.⁶⁰ There is no evidence of a bargain here, unless defendants and their lawyers engaged in implicit bargaining, assuming that pleading guilty to subsequent charges and ending the prosecution earlier than would otherwise be the case, might achieve some leniency in sentencing. It also suggests the possibility that some defendants pleaded guilty after a conviction to avoid any further engagement and cost in the trial process. As Malcolm Feeley notes, engagement with the criminal prosecution process itself is a form of punishment.⁶¹

Lesser offences

The focus of the Mackay inquiry was the practice of accepting guilty pleas to lesser offences. This practice typified plea bargaining in the historical literature yet was the least common pattern of lawyers' practices in the 60-prosecution sample. There

⁵⁹ Queensland State Archives Item ID95862, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #34571, QLDSC, Robinson, 1931.

⁶⁰ "The Law Courts," *The Brisbane Courier*, December 3, 1931, <http://nla.gov.au/nla.news-article21755100>.

⁶¹ For a discussion on the cost that the prosecution process itself holds for defendants, see Malcolm M. Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* (New York: Russell Sage Foundation, 1979).

Chapter 5 – The Lawyers and the Guilty Plea

were only two cases where defendants entered late guilty pleas to lesser offences. The outcomes in both cases suggest some form of negotiation between the prosecuting and defence counsel. In November 1946, a 25-year-old labourer appeared in the Brisbane Supreme Court before Justice Philp, accompanied by his PD barrister Mr McAlpine.⁶² The defendant had been committed for trial on a charge of ‘entering a dwelling house with intent to commit a crime’, an offence liable to seven years imprisonment. He subsequently pleaded guilty to the lesser offence of stealing, liable to a maximum penalty of three years imprisonment.⁶³ Although there is no documented evidence of a bargain in the record, there is an implication of negotiation. According to the police testimony in the lower court, the defendant had attempted to engage in charge bargaining with them during the interrogation, offering to plead guilty to stealing if they ‘broke the charge down’.⁶⁴

There is no explicit evidence that the late guilty pleas evidenced in the 60 sample prosecutions were the consequence of bargaining. Yet a close reading of individual cases provides patterns that suggest the possibility of negotiated guilty pleas between defence and prosecuting counsel. These patterns include changes in offences in cases where evidence may have been weak, and bargains that involved withdrawing prosecutions from co-accused. The mere presence of the public defender in late guilty pleas suggests the possibility that defendants were diverted away from a jury trial and pressured to plead guilty, either because the police confessional evidence was difficult

⁶² Queensland State Archives Item ID96073, Depositions and indictments; PP, Trial ID #9811, QLDSC, Anon., 1946. Johnston, *Queensland Bar*, 134. Wallace Robert Armour McAlpine joined the Crown Law Office and was admitted to the Bar in 1936; he was Public Curator and at one stage Public Defender.

⁶³ *Criminal Code 1899* (Qld) s430; s398.

⁶⁴ Queensland State Archives Item ID96073, Depositions and indictments; PP, Trial ID #9811, QLDSC, Anon., 1946.

to dispute or because defence lawyers assumed that pleading guilty led to lighter sentences.

Alternately, defendants who pleaded ‘not guilty’ in the police courts were able to apply for legal advice that they could not otherwise afford. The legal aid provisions served to encourage late guilty pleas by requiring defendants to plead ‘not guilty’ at committal. If defendants were not successful in their application for legal aid, then they were unrepresented at their trial where it is possible that some crown prosecutors engaged in plea bargaining. It is impossible to determine this from the current evidence because there is no explicit evidence of bargaining in the historical case files. However, the qualitative study does uncover a different practice by crown prosecutors that was clearly designed to encourage defendants to plead guilty in a manner that circumvented any oversight in the police courts through the use of the *ex officio* indictment process.

Guilty pleas to *ex officio* indictments

Ex officio indictments are traditionally filed by the attorney general (in contemporary courts, the Department of Public Prosecution) and indict a defendant for trial without the requirement of a committal hearing.⁶⁵ Historically, the Queensland crown prosecutor was empowered to enter *ex officio* indictments for indictable offences whether the person had been committed for trial or not.⁶⁶ A crown prosecutor could also present an *ex officio* indictment “when a person consents to plead guilty to a charge in respect of which no committal proceedings have been taken”.⁶⁷ For example, *ex officio*

⁶⁵ Feld, Hemming, and Anthony, *Criminal Procedure*, 403.

⁶⁶ Criminal Code 1899 (Qld) s561.

⁶⁷ K.W.R., 1961, p. 275

indictments were sometimes filed in response to witnesses committing perjury during a trial.⁶⁸ Some historical newspapers reports show that northern crown prosecutor John Quinn, the prosecutor at the centre of the 1941 Mackay inquiry, filed a number of *ex officio* indictments in the 1930s and 1940s.⁶⁹ There is some evidence that by 1945, it was a “common” practice, at least in the northern court district.⁷⁰ Nevertheless, there are no guilty pleas on *ex officio* indictment in the sample cases prior to 1951.

Pleading guilty on *ex officio* indictment was an emerging pattern in prosecutions for multiple offences in the post-transition period in Queensland. Nine of the fourteen defendants charged with multiple offences between 1951 and 1961 pleaded guilty by *ex officio* indictment. Most involved burglary offences. Three defendants had just one subsequent charge dealt with on *ex officio* indictment but in other cases the *ex officio* charges numbered between three and six. Only three of the defendants were legally represented.⁷¹ There is no evidence in the deposition files to explain the diversion from the usual practice of bringing multiple charges before a magistrate. All the matters were investigated, and evidence obtained at the same time as the charge that was deal with in the Police Court. However, a close reading of the police *ex officio* indictment

⁶⁸ “Thou Shalt Not Lie!” *The Telegraph*, November 3, 1933, <http://nla.gov.au/nla.news-article181169558>; “This is Your Only Chance,” *Truth*, March 9, 1930, <http://nla.gov.au/nla.news-article206160445>; “Woman Bound Over,” *The Courier-Mail*, October 20, 1934, <http://nla.gov.au/nla.news-article35629664>; “Bigamy Charge,” *Cairns Post*, May 10, 1945, <http://nla.gov.au/nla.news-article42461693>.

⁶⁹ “Supreme Court,” *Townsville Daily Bulletin*, July 28, 1936, <http://nla.gov.au/nla.news-article64083825>.

⁷⁰ “Supreme Court,” *Townsville Daily Bulletin*, May 24, 1945, <http://nla.gov.au/nla.news-article61959358>; “Bigamy Charge,” *Cairns Post*, May 10, 1945, <http://nla.gov.au/nla.news-article42461693>.

⁷¹ Queensland State Archives Item ID204171, Depositions; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID # 566253, QLDSC, Anon., 1961 and co-defendant PP, Trial ID #566252, QLDSC, Anon., 1961. See also Queensland State Archives Item ID96306, Depositions and indictments; Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #40096, QLDSC, Anon., 1956.

applications included in the deposition files provides some evidence of the factors influencing these guilty pleas.

The ex officio process

On the August 8, 1956, 17-year-old apprentice cabinet maker John Wheeler first appeared in the Brisbane Police Court on a charge of ‘breaking, entering, and stealing’ in the Graceville Cricket Ground canteen.⁷² On September 4, 1956, he pleaded guilty and was committed for sentence. His defence counsel Mr Connolly failed to cross-examine Constable J. Fillingham on any part of his testimony, although the police investigation was open to challenge. For example, Wheeler and his co-defendant were apprehended in a street by a patrolling officer and allegedly admitted to the offence. The boys were then taken to the Sherwood police station at 11:30pm, where they were interrogated and allegedly gave verbal confessions without their parents being present. Both boys were later released and told to bring their parents to the station the following day. Wheeler’s parents were allegedly present when he wrote and signed a 96-word confession. Both defendants’ confessions ended in variations of the same line:

I knew I was doing the wrong thing when we did this;
I knew I was doing wrong when we done this.⁷³

This signals the possibility that the defendants were either told what to say or were verballled. Yet Mr Connolly never questioned whether Constable Fillingham, or the

⁷² Queensland State Archives Item ID96306, Depositions and indictments; PP, Trial ID #40096, QLDSC, Anon., 1956. John Wheeler is a pseudonym.

⁷³ Queensland State Archives Item ID96306, Depositions and indictments; PP, Trial ID #40096, QLDSC, Anon., 1956; Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #82720, QLDSC, Anon., 1956.

defendants' parents, had made threats, promises, or inducements to obtain the written statements.

Wheeler and his co-accused defendant allegedly confessed to two other offences during their interrogation. These offences involved starting a fire in the dressing sheds at the Graceville cricket ground two days prior to the break and enter offence and an attempted break and enter of a warehouse, two months previously. The documentation in the deposition file does not reveal whether these admissions were made during the midnight interrogation, or the following day in the presence of the parents. The former scenario would provide police with the opportunity to fabricate the defendants' verbal confessions. Despite the canteen burglary and attempted arson occurring at the cricket ground within days of each other, the magistrate only heard evidence on the first charge. There is no explanation in the records for the failure to commit the defendants on these related charges.

According to police, John Wheeler made an application to have the two other charges dealt with by *ex officio* indictment, effectively removing the charges from the oversight of the police magistrate. The applications to plead guilty on *ex officio* indictment were typically processed by the investigating officer. The 1939 and 1953 Policeman's Manuals provided some limited instruction to police about this process.⁷⁴ While police were to provide the "particulars of the facts" and statements of crown witnesses, only one of the nine *ex officio* indictment sample cases provided the complainant's statement in the application.⁷⁵ The applications consisted of a cover letter,

⁷⁴ Carroll, *Manual*, 418; Smith, *Manual*, 480.

⁷⁵ Queensland State Archives Item ID204171, Depositions; PP, Trial ID #566253, QLDSC, Anon., 1961 and PP, Trial ID #566252, QLDSC, Anon., 1961.

Chapter 5 – The Lawyers and the Guilty Plea

written by the investigating detective, outlining the defendants' intention to plead guilty by *ex officio* indictment, the defendants' statement, and a description of the facts of the offence. The documents were then forwarded to senior ranking police officers before they reached the crown prosecutor's office.

On September 15, 1956, Detective Constable C.J. Montgomery sent John Wheeler's application to the Sub-Inspector of Police. It was signed and forwarded to the Inspector of Police, Frank Bischoff, who signed and then forwarded the document to the crown prosecutor's office. The cover letter explained that the defendant was committed for sentence outcome on the first offence and that the defendant expressed his "desire" to plead guilty by *ex officio* indictment to the remaining two charges. The defendant's signed statement admitted responsibility for those offences:

I am responsible for committing these offences. I do not desire to hear any evidence in connection with them in the Police Court. I desire to plead guilty to these charges at the criminal sittings of the of the Supreme Court and I request that I be dealt with by way of *ex officio* indictment at the September sittings of the Supreme Court.⁷⁶

The language in these statements uses a formality that implies a technical knowledge of legal practice that were beyond the defendants' capacity, particularly considering that most of these defendants had no previous experience of supreme court proceedings.⁷⁷ For example, an intellectually impaired female defendant's signed statement reads: "my position has been fully explained to me, and I understand my rights, should I desire to

⁷⁶ Queensland State Archives Item ID96306, Depositions and indictments; PP, Trial ID #40096, QLDSC, Anon., 1956.

⁷⁷ Nina Stevenson, "Criminal Cases in the NSW District Court: A Pilot Study," in *The Criminal Injustice System*, ed. John Basten, et al. (Clayton, Victoria: Australian Legal Worker's Group, 1982), 127.

plead ‘not guilty’ to these charges’.⁷⁸ Solicitor Nina Stevenson’s analysis of written confessions in NSW District Court cases during 1979 revealed similar formal language in confessions allegedly written by defendants with below average intelligence or whose first language was not English.⁷⁹ This suggests that police were responsible for constructing these statements. Yet these *ex officio* confessions were not open to any cross-examination or oversight in the police court, unlike written confessions entered as evidence. The facts of the offence were also not open to challenge.

The *ex officio* applications included the facts of the charges admitted by the defendant and outlined by police. Each page includes the defendant’s name, the offence, and the number of the charge. The facts are outlined in a few paragraphs that include the notification by the complainant, the address of the property, and the list of stolen items. The summary of the police investigation is perfunctory; there is no information provided to explain why police apprehended the defendant for these offences. According to police, the defendant was already in custody and when questioned on the subsequent offence, confessed. These presented facts are essentially a truncated version of a detective’s police court testimony. There is no other evidence that links the defendant to the offence other than the confessional material. Evidentially these cases are weaker than many of the cases that were processed through the police courts, but unlike those committed charges, the *ex officio* offences were not subject to possible challenge by the defendant, defence counsel or the magistrates. Despite the seriousness of this outcome, none of the documents detail when or how the decision was made to deal with these matters on *ex officio* indictment.

⁷⁸ Queensland State Archives Item ID96173, Depositions and indictments; PP, Trial ID #36691, QLDSC, Anon., 1951.

⁷⁹ Stevenson, "Criminal Cases," 127.

The decision-making process

The law frames the *ex officio* indictment process as a top-down process controlled by the crown prosecutor, in the historical context, or the Director of Public Prosecutions (DPP), in the contemporary context. However, the police cover letters clearly position the defendant as the instigator of the process. For example, the defendant ‘requests’ or ‘desires’ that their subsequent charges are dealt with by *ex officio* indictment and that the subsequent application was then sent to the crown prosecutor for their ‘consideration’. Yet some of these defendants were first time offenders, with presumably little knowledge of the processes involved in resolving serious offences.⁸⁰ This implies that any suggestion to plead guilty by *ex officio* indictment was initially broached by the investigating police, police prosecutors, or defence counsel.

According to detectives, defendants allegedly made these requests sometime “at the completion of proceedings in the Police Court”.⁸¹ In some cases, this involved a conversation in the Police Court that implies the police magistrate was also complicit in the process. In December 1950, a German national allegedly told the police prosecutor that he wished to plead guilty to all charges by way of *ex officio* indictment.⁸² Magistrate McKenna then adjourned the sittings for those offences until February the following year. It is possible that this adjournment was made to allow time for the police to liaise with the crown prosecutor regarding the application. The defendant subsequently

⁸⁰ Ibid.

⁸¹ Queensland State Archives Item ID96306, Depositions and indictments; PP, Trial ID #40096, QLDSC, Anon., 1956.

⁸² Queensland State Archives Item ID96173, Depositions and indictments; PP, Trial ID #36690, QLDSC, Anon., 1951.

pleaded guilty to all the charges against him in the Supreme Court on February 12, 1951.

There is clear evidence that police consulted with the crown prosecutor about *ex officio* indictments prior to detectives writing the application. However, these cases do not clearly delineate who was responsible for these discussions with the prosecutor. Regardless, the evidence suggests that rather than a top-down process, this process was instigated by police with the approval of crown prosecutors. In John Wheeler’s case, Detective Montgomery wrote to his superiors that he (Montgomery) first flagged the defendant’s intention to plead guilty with the crown prosecutor:

I communicated with Mr Martin crown prosecutor of the Supreme Court and informed him of [Wheeler’s] request. Mr Martin informed me that Mr Carter Chief crown prosecutor was absent on sick leave, but he advised me to prepare the necessary documents and [Wheeler’s] request will be given consideration.⁸³

Similarly, in the 1951 case of the German-born defendant, PC Constable Cronin wrote that he “interviewed Mr Carter...in connection with this matter. Mr Carter intimated to me that he would concede [defendant’s] application”.⁸⁴ In two 1956 cases, the Sub-Inspector “communicated with Mr Carter by telephone... and he agreed to give consideration to presenting *ex officio* indictments against [the defendant]”.⁸⁵ In a 1961 case, both the investigating officer and the defence lawyers involved discussed the *ex*

⁸³ Queensland State Archives Item ID96306, Depositions and indictments; PP, Trial ID #40096, QLDSC, Anon., 1956.

⁸⁴ Queensland State Archives Item ID96173, Depositions and indictments; PP, Trial ID #36690, QLDSC, Anon., 1951.

⁸⁵ Queensland State Archives Item ID96306, Depositions and indictments; PP, Trial ID #55458, QLDSC, Anon., 1951; Queensland State Archives Item ID96302, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #55068, QLDSC, Anon., 1956.

officio indictment outcome with the prosecutor. In his letter dated June 26, 1961, Detective Senior Constable P. Daly noted that he had communicated with crown prosecutor Mr Martin who requested that the complainant’s statement be included in the application.⁸⁶ The letter explained that during the committal hearing the defendants had “intimated through their respective counsel that this [subsequent] matter be dealt with by way of *ex officio* indictments”. The defence lawyers for the two co-accused defendants in the 1961 case also contacted Mr Martin following the committal hearing. According to Daly, the crown prosecutor “intimated that he is prepared to present *ex officio* indictments in connection with the latter mentioned charge”.⁸⁷ Rather than a top-down process stipulated by the letter of the law, this evidence suggests that legal practice for *ex officio* indictments involved a bottom-up process instigated by the police. Furthermore, although the crown prosecutor had the discretion to refuse these applications, there is little suggestion that prosecutors had any reservations. The benefits might have outweighed any concerns about the lack of evidence presented in these applications.

The benefits of the practice

There were multiple benefits for prosecutors and police provided by the *ex officio* process. First, the process saved time and resources. Prosecutions were fast-tracked, without requiring police or witnesses to appear in the Police Court. The process also ensured a conviction without any challenge. The evidence was never presented before a magistrate so there was no possibility of cross-examination by either the

⁸⁶ Queensland State Archives Item ID204171, Depositions; PP, Trial ID #566253, QLDSC, Anon., 1961 and PP, Trial ID #566252, QLDSC, Anon., 1961.

⁸⁷ Ibid.

defendant or their counsel.⁸⁸ This ensured that otherwise evidentially weak or inadmissible material could pass through the prosecution process unnoticed. Finally, there was a limited possibility of an appeal upsetting the conviction (and possibly the sentence). Appeals against conviction were generally unsuccessful in guilty plea cases, but an application to appeal an *ex officio* indictment was further undermined by the absence of any depositional material that the CCA typically relied on to assess the legality of the appellant's grounds. Judges were thus unable to check "whether in law and fact" the defendant was guilty.

The first Queensland appeal case to consider the practice of guilty pleas on *ex officio* indictment occurred in 1960 in the *Webb* case.⁸⁹ The CCA acknowledged that it was "increasingly common" in Queensland for defendants to plead guilty to charges in which no committal proceedings had occurred.⁹⁰ Justice Philp warned that the process was "fraught with danger".⁹¹ He criticised the lack of evidence collected in *ex officio* indictments that might lead to an injustice, particularly in cases involving juvenile defendants. He implied that unnamed persons (but presumably the police) "persuaded" young defendants to plead guilty on *ex officio* indictment when their guilt was doubtful. Without the documents produced by the committal proceedings, crown prosecutors did not have access to the complainants' or witness statements but were reliant on the "instructions of police as to their contents".⁹² Defendants were thus deprived "of the protection of the magistrate and there being no depositions he has limited his protection by the crown prosecutor and the judge".

⁸⁸ *Barton v R* (1981) 147 CLR 75.

⁸⁹ *R v Webb* [1960] Qd R 443. This case related to breaches of the Trust Accounts Act. The CCA quashed the conviction and ordered a new trial.

⁹⁰ *Ibid*, 447.

⁹¹ *Ibid*.

⁹² *Ibid*. 448.

Legal rhetoric assumes that the prosecutor has some interest in protecting the defendant. A close reading of the *ex officio* indictment material challenges this assumption. Six of the nine *ex officio* indictment defendants in this sample were aged nineteen and younger, yet there was little evidence to suggest that crown prosecutors queried the police evidence even though the charges in these cases relied solely on police-obtained confessions. Furthermore, the *ex officio* indictment practice involved the cooperation of the police and the crown prosecutors. While it is possible that the practice was first initiated by the police, any proliferation of the practice could only occur with the sanction of the crown prosecutors. It appears that the benefits for the crown outweighed any detrimental outcome to the defendant. There were so few lawyers in this sample that it is impossible to know whether defence lawyers actively resisted suggestions that their clients plead guilty on *ex officio* indictment. However, evidence from other sample cases shows that some defence lawyers did challenge those police practices that were designed to influence their clients' decisions to plead guilty.

Defence lawyers' practices in the Police Court

While defence lawyers in the 60 prosecutions sample generally engaged in cross-examination in attempts to provide their clients with the best possible defence, challenging police confessions and prosecution evidence was difficult. This possibly influenced defendants' decisions to plead guilty, either early in the police courts or later at the Supreme Court. This discussion begins by discussing the absence of lawyers in this sample before turning to the specific practices of the lawyers who were present.

Legal representation

The level of legal representation in the 60 Queensland prosecution cases was low; only 23 of the 70 defendants were legally represented. This was evenly distributed across the guilty plea transition periods however. Between 1926 and 1946, 11 defendants were represented at some stage of the committal proceedings; between 1951 and 1961 there were 12 represented defendants. The low rates of representation might be explained by the general shortage of lawyers in Australia during and after WWII. Queensland experienced a disparity between the levels of legal work that the public and the courts required, and the lack of legal professionals to undertake that work.⁹³ Many young solicitors and barristers in Queensland joined the defence forces voluntarily in 1939, whilst older legal counsel were later drafted when Japan entered the war in 1941; consequently, some country towns lost access to legal services altogether.⁹⁴ Queensland also experienced an increase in civil workload after WWII, particularly related to negligence cases involving motor vehicle and insurance companies.⁹⁵ There were associated difficulties related to educating young lawyers to meet this demand because “permanent continuing legal education” was not established in Queensland until 1960.⁹⁶ The other factor that might explain the low levels of representation in the sample concerned the provisions for legal aid in Queensland.

⁹³ Johnston, *Queensland Bar*, 17.

⁹⁴ Helen Gregory, *The Queensland Law Society Inc: 1928-1988 : A History* (Brisbane: The Queensland Law Society, 1991), 101-03.

⁹⁵ Johnston, *Queensland Bar*, 6.

⁹⁶ Gregory, *Qld Law Society*, 107-08.

Chapter 5 – The Lawyers and the Guilty Plea

As we discussed earlier, Queensland enacted its first legal aid scheme with the *Poor Prisoner's Defence Act 1907*.⁹⁷ The provisions were restrictive. Defendants could not access advice or defence counsel in court until their application was processed by police magistrates at the close of the committal proceedings. This means defendants were required to first enter their plea, and that plea impacted their application considerably because public defence was generally not extended to defendants who pleaded guilty. As noted earlier, this policy encouraged some defendants to enter late guilty pleas after they had the opportunity to apply for, and perhaps receive, some legal advice. It is possible that some defendants who entered late guilty pleas in the Supreme Court without successfully accessing legal advice, may have had potential to challenge inadmissible confessional material or raise allegations of police inducements to plead or confess guilt.

Defence counsel

The evidence from the Queensland depositions shows that, although a defendant might have legal counsel at some stage of the committal process, solicitors were not always present at every committal appearance. Most of the 23 represented defendants appeared at least twice in the police court, even when they were charged with a single offence. Some lawyers were only present at the first appearance that typically involved the primary investigating detective offering the sparsest of details in his testimony including the facts of the offence, the arrest and the charge. There was no cross-examination on this initial testimony; it was a procedural formality that justified the investigating officer's decision to charge the defendant and the police prosecutor's

⁹⁷ *Poor Prisoners' Defence Act of 1907* (7 Edw VII No 4).

application for an adjournment until the subsequent hearing. It is possible that some defendants could only afford the cost of one day's representation; alternatively, they may have received early advice to plead guilty.⁹⁸ In other cases, defendants were represented by more than one lawyer at different committal hearings. For example, in 1951, one defendant was represented at different appearances by solicitor Daniel Hempenstall,⁹⁹ and barrister W.B. Campbell (who later became CJ in the early 1980s).¹⁰⁰

Lawyers were not present during any of the 23 defendants' interrogations, although two defendants appeared to have had legal advice prior to their apprehension by police. These defendants appear to have anticipated the likelihood of an investigation, and allegedly contacted a solicitor. This advice did not necessarily deflect the police interrogation. In 1926, solicitor James Crawford cross-examined police about their failure to allow his client, Mable Travers, to ring for a solicitor during her interrogation.¹⁰¹ The detective strongly denied the allegation, claiming the defendant never asked for her solicitor. In 1931, Detective Constable P. Glynn admitted that the defendant, Harold Robinson, told police he had been advised not to say anything by his solicitor yet detectives continued to question him regardless.¹⁰²

⁹⁸ Queensland State Archives Item ID1677081, Depositions; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #38443, QLDSC, Anon., 1961.

⁹⁹ Gregory, *Qld Law Society*, 178. Helen Gregory records that Daniel Patrick Hempenstall, born 1908, was known as the 'the underdog's mate', and worked extensively in criminal and matrimonial law. He was later appointed the executive officer for Queensland in the Australian Legal Aid Office in Brisbane until 1982.

¹⁰⁰ Queensland State Archives Item ID96179, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial#40144 ID #52557, QLDSC, Anon., 1951; *ibid.*, 218. Walter Campbell was the first chair of the Queensland Law Reform Commission in the late 1960s and later became CJ from 1982 to 1985.

¹⁰¹ Queensland State Archives Item ID95776, Depositions and indictments; PP, Trial ID #32474, QLDSC, Mabel Travers, 1926. This case was previously discussed in the police chapter.

¹⁰² Queensland State Archives Item ID95862, Depositions and indictments; PP, Trial ID #34571, QLDSC, Robinson, 1931.

Chapter 5 – The Lawyers and the Guilty Plea

Contemporary research suggests that denying access to legal counsel is a longstanding police practice. Despite interrogation reforms in England and Wales following the 1990s Royal Commission into policing, for example, legal scholar Andrew Ashworth found that most defendants were still not aware they had a right to legal counsel during questioning,¹⁰³ or the right to silence. David Dixon notes that NSW police were often remiss in informing defendants of these rights.¹⁰⁴ Furthermore, contemporary and historical evidence shows that some police provided defendants with the names of certain solicitors, who were known to assist police in obtaining convictions.

Defence lawyers were sometimes complicit with police in encouraging clients to plead guilty. For example, some police waited until after the formal charge was laid to recommend solicitors to the defendant who had reputations for “going in and getting coughs for the police”.¹⁰⁵ A ‘cough’ presumably meant a confession. There is evidence that these practices also occurred in the Australian context. In June 1943, two NSW police constables were dismissed from the Force for collaborating with Sydney solicitor Harold Munro, to extort money from wrongfully arrested defendants.¹⁰⁶ Munro regularly defended underworld crime figure Tilly Devine, in both civil and criminal matters.¹⁰⁷ Constables Carney and Grigg were accused of wrongfully charging several men on public indecency charges that allegedly occurred in public toilets. Several defendants

¹⁰³ Andrew Ashworth, *The Criminal Process: An Evaluative Study*, 2nd ed. (Oxford: Clarendon Press, 1998).

¹⁰⁴ Dixon, *Law in Policing*, 229.

¹⁰⁵ *Ibid.*, 238.

¹⁰⁶ “Constables Charged,” *The Age*, June 16, 1943, <http://nla.gov.au/nla.news-article206841677>.

¹⁰⁷ “Tilly Devine Seeks Divorce,” *The Newcastle Sun*, March 30, 1943, <http://nla.gov.au/nla.news-article167633687>; “Black Thursday For Tilly Devine,” *Truth*, June 20, 1943, <http://nla.gov.au/nla.news-article168976992>; “‘Tilly’ Devine Discharged,” *The Sydney Morning Herald*, March 30, 1945, <http://nla.gov.au/nla.news-article17937320>.

claimed that Carney asked if they wanted to see a solicitor, and subsequently recommended Mr Munro. Munro would visit the men in the watch house and tell them he “knew a press man” who would keep the case out of the news if the defendant provided him with “a present” of money; most of these men subsequently pleaded guilty. The constables successfully appealed their dismissals, and Munro continued practising.¹⁰⁸

However, in other circumstances Harold Munro engaged in practices that challenged the admissibility of confessional material to hold other police to account. In 1944, he represented a defendant who alleged that police “brutally assaulted him and forced a confession from him”. Munro insisted that the injuries be recorded in the depositions: “a scar on the nose, one on the ear, his false teeth are broken, and he has a black eye”.¹⁰⁹ Although Munro appeared complicit against some defendants, he was clearly mindful of protecting others. Defence lawyers’ practices that ensured evidence and allegations of police violence were recorded in the depositions was a critical lawyering practice undertaken by solicitors.

Challenging the charge

The presence of lawyers in the police courts was a key factor in establishing a later defence in the Supreme Court. Although some unrepresented defendants attempted to challenge the police prosecution case, they were generally ignorant of the required legal standards of proof or possible defences to the charges. These defendants were also unlikely to challenge the appropriateness of specific charges as legally trained

¹⁰⁸ “Appeals Board Reverses Decision of Police Inquiry,” *Truth*, June 27, 1943, <http://nla.gov.au/nla.news-article168982490>.

¹⁰⁹ “Says Police Bashed Him,” *Truth*, June 11, 1944, <http://nla.gov.au/nla.news-article168757012>.

Chapter 5 – The Lawyers and the Guilty Plea

professionals might. In one of the 60 prosecution cases, an unrepresented defendant pleaded guilty to three burglary offences and a further charge of ‘receiving’. Yet neither his verbal, nor written, confessions provided evidence that sustained an actual offence.¹¹⁰ His confession stated that:

I did not break into this house in fact I do not know where this house is but I admit that I should not have received this property as I knew this man had a criminal record but he did not tell me these goods were stolen.

The issue was recognised in a letter from the Sub-Inspector of Police to the crown prosecutor. He noted that the defendant’s statement did not disclose the element of the offence that he received the goods ‘knowing them to be stolen.’ Yet there were no changes to the indictment and the defendant pleaded guilty to all four charges. Similarly, in 1956, an unrepresented 50-year-old defendant with no previous convictions pleaded guilty in the police court to a charge of ‘receiving’.¹¹¹ The defendant had apparently bought stolen jewellery (with price tags still attached) from an associate and then, unawares, attempted to sell them to the same store from which they had been stolen. The storekeeper recognised the goods and rang the police while the defendant was still in the shop. Detective Constable Patrick Quinn allegedly asked the defendant if he suspected the items were stolen or had asked his associate where he got them from; the defendant allegedly responded:

I didn’t ask him where he got them from. I thought he might have knocked them off at Bundaberg. A man certainly walked into a trap trying to sell that joker his own stuff.

¹¹⁰ Queensland State Archives Item ID96180, Depositions and indictments; PP, Trial ID #36820, QLDSC, Anon., 1951.

¹¹¹ Queensland State Archives Item ID96179, Depositions and indictments; PP, Trial ID #40144, QLDSC, Anon., 1956.

The only evidence provided by police was an alleged verbal admission. Quinn testified that he asked for a written statement, but the defendant refused saying, “I haven’t got much of an education, anyway you wrote it in your book, you shouldn’t forget what I said”. The evidence was arguably weak, and a defence lawyer might have successfully argued that the required element of ‘receiving’ that the defendant knew the items were stolen was not met.

One represented defendant did benefit from his lawyer’s advocacy in this area. In 1931, solicitor John Casey successfully challenged the elements of a ‘breaking and entering’ charge.¹¹² The defendant faced multiple charges for burglary type offences. Casey argued vigorously that the evidence presented did not sustain the first charge because the police failed to establish that an attempted entry had occurred. The police magistrate refused to dismiss the charge, but the crown prosecutor did not. Crown prosecutor Joseph Sheehy altered the indictment to a charge of ‘being found in possession of housebreaking instruments’.

Casey’s cross-examination of PC Constable Vincent Quinn’s testimony in the police court on the other charges appeared to have had some affect. Casey had questioned Quinn on a range of matters related to the second burglary charge, including: the defendant’s level of intoxication when he was apprehended at the Palais Royal Hotel, whether the defendant was nervy and shaking, whether Quinn verballled his client and whether Quinn promised that if the defendant “dumped the rest” he would give him

¹¹² Queensland State Archives Item ID3410, Depositions and indictments; PP, Trial ID #33936, QLDSC, John Walder, 1931.

“a break”. The strenuous cross-examination created some doubts regarding the strength of the evidence that consisted solely of a verbal confession. This might provide an explanation why the two remaining burglary charges were withdrawn by the prosecutor through a *nolle prosequi*. Considering the guilty plea to the lesser offence, this suggests a possible plea negotiation. Cross-examination of detectives in the police courts was therefore critical, either in reducing charges, or strengthening the defendants’ bargaining position.

Cross-examination

Defence lawyers employ cross-examination to “weaken, qualify, or destroy” the police case by either “attacking” the witness’ truthfulness or accuracy, or by contradicting or qualifying their testimony.¹¹³ 16 of the 23 defence lawyers in the depositions engaged in cross-examination in the Police Court. Eleven of these engaged in relatively extensive cross-examination; i.e. lawyers asked multiple questions about multiple issues. A consistent pattern was that most defence lawyers did not engage in extensive cross-examination of non-police witnesses. Only eight of the twenty-three defence lawyers cross-examined victims and property owners, and this cross-examination generally focused on undermining the witnesses’ ability to adequately identify their stolen property. In 1941, Mr J. Aboud represented a 46-year-old linesman charged with 14 counts of stealing tools from building sites around Brisbane, between 1938 and 1941. Aboud’s cross-examination of all 14 witnesses was so extensive that the local papers reported that the committal hearing went until 10:15pm, the longest day on

¹¹³ Phipson, *Phipson's Evidence*, 235.

Chapter 5 – The Lawyers and the Guilty Plea

record for many years.¹¹⁴ Mr Aboud made repeated inquiries about how the witness identified their tools and equipment from the multitude of pieces laid out on a table in the Brisbane CIB office. For example, one witness identified a single screwdriver that was valued at 5/6:

I'm quite sure Exhibit 1 is my screwdriver, there are other screwdrivers like that, but it is not a common make. I get to know my own tools after handling them. I have an identification mark on it, I am satisfied beyond all doubt that is my screwdriver. I suppose it could belong to another person, but I'm sure it is mine.¹¹⁵

The alleged owner of the screwdriver was not able to identify his property by a unique mark or feature of the tool, unlike another witness who had marked his vice using his Army discharge number. Mr Aboud's cross-examination questioned the veracity of this identification evidence so that much of the evidence appeared weak. This deliberate and lengthy examination might have provided Mr Aboud with some bargaining power. The defendant was committed for trial on all charges, yet he later pleaded guilty to only two of those charges. The crown prosecutor Joseph Sheehy subsequently dropped most of the other charges but sent a handful back down to the police court to be dealt with summarily. This was an unusual case; most cross-examination by defence lawyers in this sample focused on the detectives' testimonies rather than owners and victims.

Defence lawyers focused on a variety of different themes when they cross-examined Queensland detectives, including the apprehension of the defendant. In 1956, PC Constable Arnold Williams testified that he 'saw' the 20-year-old defendant at the

¹¹⁴ "Night Court Sitting to Hear Theft Charges," *The Courier-Mail*, September 9, 1941, <http://nla.gov.au/nla.news-article41925759>.

¹¹⁵ Queensland State Archives Item ID95995, Depositions and indictments; PP, Trial ID #17916, QLDSC, Anon., 1941.

outpatients' department at Brisbane's Mater Hospital, in connection with the theft of a motorcycle.¹¹⁶ The defendant allegedly confessed and accompanied detectives to the South Coast CIB. In cross-examination, the defendant's solicitor Mr H.J. Bodenham established that his client was ill and receiving treatment at the time that police attended the hospital and interfered in that treatment:

Bodenham: On 20th August you say you interviewed [defendant] at the Mater public hospital?

Williams: Yes.

Bodenham: Did he tell you for what purpose he was there?

Williams: Yes.

Bodenham: Did he tell you he suffered from a duodenal ulcer?

Williams: Yes.

Bodenham: Had you called at his home previous to your visit to the Mater?

Williams: Yes.

...

Bodenham: At the Mater didn't you say, "Will you accompany us to the CIB"?

Williams: Yes.

Bodenham: Didn't he say, "what for"?

Williams: No. He replied, "yes".

Bodenham: Didn't you say, "You'll find out when we get you to the CIB"?

Williams: No.

Bodenham: Didn't the defendant say, "I haven't done anything"?

Williams: No.

Bodenham: I am putting it to you that he didn't go willingly from the Mater to the CIB, that he went under pressure from you and Fawkes?

Williams: No duress was used whatever. He left there in the presence of the nursing staff.

Bodenham: He was waiting at the Mater to be attended to by the nursing staff?

Williams: He had been attended to. We made the arrangements so that he could be dealt with expeditiously.

Detectives only admitted issues that implicitly raised issues around the voluntariness of subsequent confessions. Defence lawyers' cross-examination sometimes focused on the interrogation process itself, querying aspects of the detectives' testimonies that did not

¹¹⁶ Queensland State Archives Item ID96307, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #82736, QLDSC, Anon., 1956.

align with defendants' alleged experiences during interrogation and detention.¹¹⁷ This might involve the length of time that defendants underwent interrogation, and who was present during that interrogation. In 1926, Mr J.S. Gilshenan cross-examined two officers about his client's alleged confessions to show that there was no corroboration of these alleged admissions:

There were plenty about the CI branch when I questioned the defendant, but none close enough to hear the questioning. When he was questioned about this charge there was nobody else present. I read the charge to the defendant at the watch house, I did not read it to him at the CI branch. It was not read to him at the CI branch without my knowledge, it was impossible for anyone else to read it to him but myself. If the defendant says it was read to him at the CI branch that would be untrue. I was with the defendant at the CI branch at intervals practically from 2pm till 6pm at his house and at the CI branch. I think Detective Brannelly was with him when I was absent. Detective O'Rourke was also with him in connection with another charge.¹¹⁸

Cross-examination on confessional material was a significant element of lawyering practice in these cases. The earlier analysis of policing practices in the 60-prosecution sample showed that Queensland police focused on obtaining confessional material, rather than forensic evidence, to tie defendants to their offences. Much of defence lawyers' cross-examination therefore pertained to this confessional material.

Confessional material

Most lawyers' cross-examination focused on attacking the admissibility of confessional material. One tactic to undermine the truthfulness and veracity of alleged

¹¹⁷ Queensland State Archives Item ID95776, Depositions and indictments; PP, Trial ID #32474, QLDSC, Mabel Travers, 1926; Queensland State Archives Item ID95777, Depositions and indictments; PP, Trial ID #39757, QLDSC, George Miller, 1926.

¹¹⁸ Cross-examination of Detective Acting Sergeant Michael Cahill. PP, Trial ID #39757, QLDSC, George Miller, 1926; Queensland State Archives Item ID95777, Depositions and indictments.

verbal confessions involved probing whether other officers corroborated the detectives' allegations of verbal admissions. Police testimony generally implied that defendants were questioned and subsequently confessed in the presence of other police. Yet cross-examination revealed discrepancies in this evidence. In almost every case of defence lawyers using this tactic, the cross-examination provided evidence that the other officer may not have heard the alleged admission:

[Constable] Costigan, I think, was backward and forward into the room at the time that I was interrogating the defendant. I could not say if he heard.¹¹⁹

The conversation was an important one but can't say whether [Detective Constable] Bookless heard it or not.¹²⁰

When the defendant stated that he did that job, defendant and I were present. There were others walking about the room but there was no one else near the table but the defendant and I. Others could hear what was said but of my knowledge I do not know if anybody else did.¹²¹

These grudging admissions indicate the degree to which police were unwilling to admit knowledge that alleged verbal confessions could not be corroborated. Police testimony was not forthcoming about this lack of corroboration, and police prosecutors never raised the question of corroboration either. The depositions show that, although not overtly lying, detectives skirted around the possibility that other officers witnessed the confession. The historical evidence shows that police practices did involve lying under oath. In 1996, the NSW inquiry into police corruption acknowledged that the Defence Bar had raised concerns about the “regularity” of defendants' claims of police perjury

¹¹⁹ Queensland State Archives Item ID3410, Depositions and indictments; PP, Trial ID #33936, QLDSC, John Walder, 1931.

¹²⁰ Queensland State Archives Item ID95776, Depositions and indictments; PP, Trial ID #32474, QLDSC, Mabel Travers, 1926.

¹²¹ Cross-examination of PC Constable Thomas O'Rourke. PP, Trial ID #39757, QLDSC, George Miller, 1926; Queensland State Archives Item ID95777, Depositions and indictments.

Chapter 5 – The Lawyers and the Guilty Plea

since at least 1970.¹²² This was substantiated in testimony at police inquiries from corrupt Queensland police officers, including Jack Herbert. Herbert detailed how police used ‘runners’, officers who would run between courts to ensure that detectives gave the same evidence.¹²³ There is some evidence in the sample depositions that lawyers cross-examined police attempting to raise suspicion that there was collusion between officers in their testimonies. In 1951, solicitor J. Delaney strongly objected to the admissibility of his 22-year-old client’s confession to stealing upwards of five pounds from the home of the defendant’s aunt.¹²⁴ Delaney challenged PC Constable Cecil Horne’s testimony by questioning his experience as a witness. He asked how many times Horne had given evidence prior to that case; Horne answered ‘three’. Delaney then asked him:

Would you be surprised to know that your evidence is practically syllable for syllable to [PC Constable] McGrath’s?

I would be surprised. I have not a copy of my evidence on me now. I had a discussion with McGrath about this case at lunchtime-not about the evidence I was going to give.

Courtroom perjury was a practice identified in police inquiries across multiple Australian jurisdictions.¹²⁵ Delaney’s cross-examination obtained an admission that the police witnesses were discussing their evidence prior to their court appearance, with the implication that the younger inexperienced officer’s testimony had been coached. In the same case, Mr Delaney questioned the officer’s procedures for cautioning his client during the interrogation. He asked McGrath if and when he issued cautions to the

¹²² Brown, "Royal Commission," 233.

¹²³ Lewis, Ransley, and Homel, "The State We Were In," 4.

¹²⁴ Queensland State Archives Item ID96184, Depositions and indictments; PP, Trial ID #37214, QLDSC, Anon., 1951.

¹²⁵ Lucas, Sturgess, and Becker, "The Lucas Report."; Fitzgerald, "The Fitzgerald Report."; Wood, "Royal Commission into the New South Wales Police Service: Final Report."; Kennedy, "The Kennedy Report."

defendant, when he first knew that he intended to arrest the defendant, and whether he or colleague Constable Horne said anything to the defendant to induce his statement.

McGrath answered that:

I had warned him once before we got to the waterhole. I gave him the second warning just before he gave the written statement. I deemed prudent to do so. I always give two warnings before I get a written statement.

The Judges' Rules required that defendants were cautioned at various points in the interrogation process. However, it was difficult for lawyers to obtain admissions from police that they had breached the Judges' Rules. Conversely, it was relatively simple for police to frame their failure to caution by relying on rule two that only required police to caution defendants under questioning (who were not yet in 'custody') once they decided there was ample evidence to sustain the arrest. For example, in a 1956 case involving a stolen motor cycle, the solicitor Mr Aboud asked Constable Williams if he cautioned the defendant before asking him what he knew, prior to the defendant's confession:

Aboud: Did you give him any warning before you asked him to tell you what he knew?

Williams: No.

Aboud: Don't you think that was the appropriate time to give a warning?

Williams: I was then not of the opinion that he was one of the principal offenders.

Aboud: But you had been given certain information about the missing cycle?

Williams: I had been informed that he knew of the missing motorcycle.

Aboud: By [co-defendant]?

Williams: No.

Aboud: But the mere fact that you are investigating his association with it, do you think that warranted a warning at that moment?

Williams: I was trying to obtain information. At that time, I did not realise that he was an offender.

Judges' Rule one maintained that police could question anyone in relation to an offence without first warning them. This is arguably why police testified in the format previously identified in this analysis, when detectives alleged that defendants admitted their guilt almost as soon as police raised the topic and before they were taken into custody. That same framework subsequently protected police during their cross-examination. Additionally, these rules were 'rules of practice' rather than law. Although judges could use their discretion to exclude statements when they believed police infringed upon the rules, this was uncommon, particularly in the later period.¹²⁶ This judicial lack of recognition of the Judges' Rules might explain why so few lawyers in the sample cases put forward arguments that confessions were inadmissible because of inadequate cautioning by police.¹²⁷ Perhaps defence lawyers avoided focusing on issues related to the Judges' Rules because of the ease with which police could deny, and the judiciary could ignore these allegations. Instead, most defence lawyers' cross-examination focused on the voluntariness of confessional material.

Involuntary confessions

Confessional material was only legally admissible if it was voluntary.¹²⁸ The leading authorities stipulated the confessions were not voluntary if they proceeded from "hope or fear".¹²⁹ Defence lawyers therefore attacked the voluntary nature of alleged confessions by suggesting that confessions were induced through threats or promises. The following newspaper report illustrates why it was critical that defence lawyers

¹²⁶ Phipson, *Phipson's Evidence*, 136-37.

¹²⁷ Queensland State Archives Item ID96179, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #52556, QLDSC, Anon., 1951 and PP, Trial ID #52557, QLDSC, Anon., 1951.

¹²⁸ Phipson, *Phipson's Evidence*, 137.

¹²⁹ *R v Thompson* [1893] 2 QB 12; *Ibrahim v R* [1914] AC 599; *R v Zerafa* [1935] QSR 227.

raised allegations against police in the lower courts, irrespective of the magistrates' decisions not to exclude potentially inadmissible material.

On February 11, 1954, solicitor Cyril Casey appeared for a defendant charged with rape.¹³⁰ Casey cross-examined Detective D. Chippendall about the “rough handling” that his client received at the CIB. “I put it to you,” said Casey, “that the other officer held him by his collar and you hit him about the face and stomach”. The detective denied it. Police prosecutor Sub-Inspector Risch told the court that these kinds of “suggestions are [often] made and they are not backed up by evidence”. Police magistrate Burchill appeared to agree, stating that Casey’s cross-examination was “a bit thin”. He questioned why the defendant had not “taken action in the right place” about the assault, implying that the police court was not the avenue to raise such allegations. Yet defence lawyers understood that cross-examination on issues of police misconduct was critical to their defence at trial. Cyril Casey reminded the magistrate that:

cases had occurred in the higher court in which the Judge had remarked, when similar allegations had been made, that there had been no cross-examination referring to it in the lower court. From this the inference could be drawn that the allegation was a fabrication, made after evidence had been taken in the lower court.

This exchange captures two relevant issues for defendants who were on the receiving end of police ‘inducements’ to confess. First, magistrates were generally unwilling to consider the possibility that police used violence or intimidation against defendants. As magistrate Burchill said to Casey, if the detective denied it then “that is the end of it”.¹³¹

¹³⁰ “Violence Plea Called ‘Thin’,” *Brisbane Telegraph*, February 11, 1954, <http://nla.gov.au/nla.news-article217205649>.

¹³¹ *Ibid.*

Chapter 5 – The Lawyers and the Guilty Plea

Furthermore, defendants' allegations were not considered genuine unless the defendant had made a formal complaint, generally to other police.

Critically for an understanding of defence lawyer's practices, the case reveals an overlap between the lower and higher courts in terms of evidence. The failure of defence lawyers (and by extension unrepresented defendants) to challenge the police evidence in the lower court in terms of voluntary confessions had later bearing on possible defence strategies that challenged the crown's evidence in the Supreme Court. This suggests that by the mid-1950s, judges were critical of allegations against police practices if they were not first raised at the committal hearing. Hence defence lawyers not only provided defendants with their professional knowledge of the law, and experience of the legal processes involved in navigating the criminal trial, they also legitimised defendants' allegations against police.

Some defence lawyers in the 60 prosecutions sample employed cross-examination tactics that implied the interrogation process was violent or intimidating. This provided documented material in the deposition files that could later be utilised to argue that the subsequent confessions breached the law of evidence concerning voluntariness. In 1956, two twenty-year-old co-accused defendants gave written statements to police confessing their guilt in stealing a motor cycle.¹³² During cross-examination, Mr J. Aboud accused Constable Williams of using violence and threats to obtain the defendant's written confession. Mr Aboud suggested that Williams had

¹³² Queensland State Archives Item ID96307, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #39102, QLDSC, Anon., 1956 and PP, Trial ID #82736, QLDSC, Anon., 1956.

“adopted a hostile attitude” to the defendant since learning he intended to plead ‘not guilty’:

Aboud: I put it to you that you belted this lad before he wrote this statement?

Williams: No.

Aboud: I put it to you that you belted him with such force that you made him cry?

Williams: No.

...

Aboud: Did you say to [defendant] in the watch house recently that you would drag these cases on?

Williams: No.

Aboud: Did you say to him in the watch house that you would eat your hat if you didn't get him three years and at the same time showing him your hat?

Williams: No.

Aboud: You do wear a hat, do you?

Williams: Yes.

The most extensive example of cross-examination of police that framed the interrogation as intimidating and threatening (and hence the confession as involuntary) in this sample occurred in a 1926 stealing case. James Crawford, “one of the most widely known solicitors practising in Brisbane”,¹³³ comprehensively questioned detectives about the apprehension and interrogation of his 31-year-old female client, Mable Travers.¹³⁴ There are almost four typed pages of Mr Crawford's cross-examination in the deposition alleging that his client was intimidated during the interrogations. Detective Constable John Bookless was forced to provide information not disclosed in his testimony; namely, that police searched the women's home at nine

¹³³ “Mr J. Crawford Dead,” *The Telegraph*, January 13, 1930, <http://nla.gov.au/nla.news-article181977905>.

¹³⁴ Queensland State Archives Item ID95768, Depositions and indictments, PP, Trial ID #32474, QLDSC, Mabel Travers, 1926. The defendant, a tailor, faced three charges of stealing that involved forging telegrams from one unwitting victim to another, then intercepting and cashing the money orders sent by telegram.

o'clock in the morning without having a warrant. Crawford suggested that detectives bullied the defendant and her mother, but Bookless refuted the imputations:

I did not say to the mother, "I have had dealings with you before". I said, "I have seen you before". She did not become indignant and say, "I have not seen you before, where have you seen me, and what dealings have you had with me?" I said, "I've seen you before" and she said, "Where", and I said, "At Roma Street railway station". I did not say to her, "Put your things on and come with me to the CI, if you don't I'll take you as you are". She did not say, "Indeed I can't come". I did not say, "Well, I will take you as you are". I had no occasion to say anything of the sort to her and I did not say to her, "I am going to look through your house". I did not look through her house. I searched the front room first-the mother told me it was the defendant's bedroom. Detective Lawrence took some letters from there, and he has them.

The cross-examination also revealed contradictions in the detective's retelling of the events regarding the defendant's apprehension. Bookless testified that police saw the defendant at her workplace in a clothing factory in Fortitude Valley and told her they were making enquiries into a complaint that a Mr Curtis had sent £140 to a Mrs Sarah Foster who never received the monies. She allegedly replied, "All right, wait a minute until I see if I can get off". She then accompanied them to the CI branch, where she eventually confessed. However, Mr Crawford's cross-examination suggests a very different scenario:

She did not say to me, "I'm going to see my solicitor". I don't know who the solicitor was. I did not ask her uncle to get a letter from Mr Chrystal-she said she would get a letter from her solicitor, but she did not mention Mr Chrystal's name. I did not say, "We don't want to see your solicitor we want you". She did not say, "My solicitor told me I was to ring him up". I did not say "you do as you are told or you will be forced [sic] go and put your hat on, I'll fetch it for you".

...

We got to the CI branch, I gave her a chair. I don't know whether I sat on the right side and Lawrence on the left. We sat near her.... I did not say to her, "now Miss Travers, tell me what became of money" and she did not say "Mrs Foster had it all". I did not arise from my chair and say, "ugh you

Chapter 5 – The Lawyers and the Guilty Plea

make me sick”. There was no chair there to rise from... I did not say to her [the defendant], “If you don’t tell us that this man Gray had the money, we will lock you up in a room with iron bars, you are very stubborn and self-willed”. I did not threaten to put her in prison....

Detective Bookless also admitted that the defendant was left alone with Detective Lawrence while Bookless left for lunch, and when he returned she was “not sitting in the same place...and she was a little different”. The language that Crawford used was deliberate; “if you don’t tell us” implied that it was best if the defendant did tell them something. Certain words, used by persons in authority during an interrogation, made any subsequent confession inadmissible. “You had better...” was recognised by the courts as having acquired “a sort of technical meaning, and are objectionable because they suggest that it would be better for accused to say something”.¹³⁵ So phrases that imported to the defendant that it would be better for them to say something were grounds to reject the confession.¹³⁶ Defence lawyers accordingly challenged police on their alleged use of these words. In a 1951 case, Mr Delaney used a similar phrase in his cross-examination of Constable McGrath regarding the alleged inducement uttered by his colleague, Constable Horne:

Horne did not have anything to say to defendant before I got the statement. He definitely did not tell defendant he better behave himself, tell the truth, that we did not want to have any trouble.¹³⁷

Yet it was almost impossible for defence lawyers to successfully maintain that threats or inducements were used to obtain confessions, despite the onus of proof of a voluntary

¹³⁵ *R v Jarvis* (1867) LR 1 CCR. 96; *R v Thompson* (1893) 2 QB 12.

¹³⁶ *R v Dance and Hendry* [1943] QWN 21.

¹³⁷ Queensland State Archives Item ID96184, Depositions and indictments; PP, Trial ID #37214, QLDSC, Anon., 1951.

confession being on the crown. Police merely refuted the allegations and denied any occurrence put to them by the lawyer; police magistrates subsequently refused to exclude contested confessions. Without any recordings of interrogations, it was the word of police against the defendant and their lawyer. In the handful of cases where lawyers did challenge confessions, they could do little more than put forward the defendant's version of events that were subsequently denied by detectives. Detectives could corroborate each other's accounts, even when these accounts were remarkably similar.

Conclusion

This research contributes in two ways to the historical plea bargaining literature. The first contribution concerns the 1941 Mackay Royal Commission that inquired into the practices of crown prosecutors accepting late guilty pleas to lesser offences. This inquiry is important legal history, despite its obscurity. Such richly documented examples of the processes involved in plea negotiations are rare, and this is one of the better ones. The Royal Commission provides as equally a unique addition to the historical plea bargaining scholarship as the often-referenced 1844 Massachusetts committee inquiry into DA Asahel Huntington's plea bargaining practices. The history of the Mackay inquiry deserves to be more extensively documented.

This thesis has also uncovered another significant contribution to the history of the guilty plea; the guilty plea on *ex officio* indictment. The historical plea bargaining literature does not document any similar development in the US context, or notes its significance. The evidence from the criminal depositions reveals that, in the post-transition period, some burglary prosecutions of multiple charges were dealt with using this process. The practice might be restricted to a short period of time, from the early

1950s until the *Webb* judgment in 1960 criticised the practice. Secondary literature suggests that in the contemporary context, *ex officio* indictments are the province of attorneys general and are used sparingly.¹³⁸ The evidence certainly suggests that police and crown prosecutors were complicit in the practice, so it is possible that the practice was confined to the Brisbane Supreme Court. Further research is required to investigate whether this evidence reveals a previously undocumented short-lived anomaly in legal practice.

For some scholars, the late plea of the kind represented in the Mackay rape case was clear evidence of a plea bargain.¹³⁹ Like previous studies, there is little evidence of documented bargaining in the deposition material in this study. A change in plea to a lesser offence was the least documented pattern in guilty pleas in the 60 prosecutions sample. If such a pattern is an “unambiguous sign” of plea bargaining, as suggested by Lawrence Friedman,¹⁴⁰ there is little sign of the practice in the Queensland Supreme Court before 1961. In most cases, defendants pleaded guilty late without receiving any concessions. In other circumstances, there are stronger hints that lawyers and defendants were bargaining for pleas. A handful of cases involved defendants who pleaded guilty late to one or two offences, and the remaining charges were withdrawn. Again, this pattern is not widespread but suggests that crown prosecutors were taking short cuts to offload cases where the evidence was perhaps not strong enough to win a jury over, but just strong enough to persuade a guilty defendant to plead guilty and attain the concession of reduced charges. This may have been the case particularly when defence

¹³⁸ Feld, Hemming, and Anthony, *Criminal Procedure*, 403.

¹³⁹ McConville and Mirsky, *A True History*, 287-89.

¹⁴⁰ Friedman, "Historical Perspective," 249.

lawyers were pro-active and actively challenged the police case during the committal hearing.

In this sample, there is little evidence that defence lawyers were engaged in vigorous plea bargaining with crown prosecutors. Rather, the practices of defence counsel tend to support the Victorian findings in the quantitative study that showed that defendants with defence lawyers were generally less likely to plead guilty. Although the outcomes in the qualitative sample cases were guilty pleas and convictions, defence counsel at committal generally engaged in cross-examination to provide their clients with some kind of defence should the case have proceeded to trial. Defence lawyers utilised their knowledge of the law and rules of evidence most effectually during their cross-examination of police, and engaged in a range of practices that challenged the police prosecution case in the lower courts. These included flagging issues relating to problematic police practices, challenging the admissibility of confessional material, and engaging in (often terse) cross-examination with police, in a manner that was beyond most defendants' abilities or inclinations.

Defence lawyers' practices may have protected defendants from police pressure to plead guilty, pressure that increased during the 1950s. Solicitors' clever cross-examination potentially provided barristers with evidential material that did not arise from the police evidence alone. This possibly provided the foundation for a vigorous defence at trial. The difficulty, however, was that police simply denied the lawyers' allegations. There were no real consequences for police from the judiciary, even when

Chapter 5 – The Lawyers and the Guilty Plea

allegations against police were proven.¹⁴¹ The judiciary's failure to accept allegations that police investigation and interrogation practices might be corrupt arguably protected police. The following chapter analyses the 60 sample cases to examine how police magistrates and judges responded to allegations raised by defence lawyers and defendants against police. It also identifies other aspects of the role of the judiciary during the rise of the guilty plea in the Queensland Supreme Court.

¹⁴¹ Brown et al., *Criminal Laws*, 301.

Chapter 6. The Judiciary and the Guilty Plea

On October 6, 1958, Justice Stanley handed down his judgment in an appeal against the severity of the appellant's sentence. John Ward had pleaded guilty to 'dangerous driving' and was sentenced to one month's imprisonment although it was the appellant's first conviction.¹ Justice Stanley found in favour of Ward on the grounds that the police complainant's version of events could not be corroborated, and the charge was not clearly defined. Ward's sentence was subsequently varied to a bond under s656 of the Criminal Code.

John Ward gave evidence during the appeal that a police officer had induced his guilty plea. Ward was advised to "plead guilty, say nothing and you'll get off with a light fine." Although Justice Stanley was not required "to determine whether such advice was given or not", he repeated his concerns voiced two years earlier in a similar traffic-related case involving a police officer who allegedly advised the defendant to plead guilty.² Stanley noted that the "allegations and the denials" of police advising defendants to plead guilty were of "common occurrence". He could not condone the practice, regardless of how "meritorious ... the motive prompting a policeman ... he should not give such advice".³ His *per curiam* judgment stipulated that as a "rule of prudence" magistrates would be "well advised" to ask unrepresented defendants whether "anyone connected with the police force" had suggested they plead guilty.⁴ If the defendant did not reply with a "prompt and convincing disclaimer" then magistrates

¹ *Heffernan v Ward* [1958] Qd R 12.

² See *Fuller v Postich, Ex parte Postich (No. 1)* [1956] QWN 36.

³ *Heffernan v Ward* [1958] Qd R 12, 16.

⁴ *Ibid*, 12.

should suggest that the defendant plead 'not guilty' and "emphasise the impropriety of such advice".

The *Heffernan* decision was a key moment in the history of the guilty plea phenomenon in Queensland. The decision touches on many of the themes already discussed in this thesis, including the role of police in influencing defendants' guilty pleas and the absence of lawyers and the subsequent lack of protection afforded to defendants. Stanley acknowledged that the police practice to advise defendants to plead guilty was an 'improper process'. Yet His Honour stopped short of commenting on whether police induced defendants' guilty pleas, and instead framed this practice as one that did police credit. These police practices were 'meritorious' behaviour, driven by good intentions, rather than behaviour that conflicted with the principle of voluntariness. This is an example of the judiciary's deep ambivalence regarding criticism of the police. Even when judges acknowledged that police practices were improper, officers' motivations were still laudable.

The *Heffernan* ruling was also a significant development in guilty plea history because Justice Stanley referred to sentencing outcomes for guilty pleas in his judgment. A close reading of reported decisions between 1926 and 1962 suggests that this was the first time that the CCA referred to an association between guilty pleas and sentencing. Rather than signal that guilty pleas were deserving of some leniency or consideration, Justice Stanley's judgment advised magistrates that they should inform defendants that "the severity of penalties does not depend on whether he pleads guilty or not guilty". *Heffernan* provides crucial evidence that there were no sentence discounts for guilty pleas in 1958. It also demonstrates the absence of any systemic sentence bargaining in the Queensland Supreme Court at this time.

Chapter 6 - The Judiciary and the Guilty Plea

This chapter focuses on the roles of magistrates and judges, including the CCA, to understand how the judiciary's practices influenced the rise of the guilty plea in the Queensland Supreme Court. In contemporary criminal courts, judges have discounted sentences for guilty plea convictions since the early 1970s. In some jurisdictions, statutory provisions direct judges to extend specific sentence discounts, depending how early the defendant enters their guilty plea.⁵ As discussed, Justice Stanley's judgment in *Heffernan* provides evidence that in 1958 at least, judges were not reducing sentences simply because defendants pleaded guilty. Nonetheless, the evidence provided by the qualitative study in the preceding chapters reveals the existence of negotiations between defendants, police, and lawyers based on an assumption that pleading guilty might lead to a reduced sentence.

This chapter builds on the findings from the previous two chapters related to the practices of police and lawyers and the influence of these practices on defendants' guilty pleas. The evidence in this chapter reveals how the judiciary responded to these practices. Firstly, the chapter analyses the role of magistrates including their responsibility for assessing whether the police case constituted *prima facie* evidence against the defendant, and the overseeing of the consistent recording of the depositional material that could subsequently provide benefits to the defendant at sentencing, or on appeal. The discussion includes magistrates' responses to allegations of problematic police practices and the subsequent changes to magistrates' practices following a series of appeal decisions that occurred after the *Heffernan* decision.

⁵ *The Sentencing Act 1995* (WA).

Chapter 6 - The Judiciary and the Guilty Plea

The second part of the chapter focuses on judges' sentencing patterns in guilty plea cases in the Supreme Court. *Heffernan* implies that judges were not yet expected to reduce sentences for guilty pleas although there was a perception that pleading guilty might result in some leniency. This suggests the possibility that, in practice if not in law, individual judges did regard guilty pleas as mitigating factors. The qualitative study therefore examines the sample judges' sentencing patterns and sentencing remarks for any evidence that judges did mitigate sentences for guilty pleas. The analysis in this chapter draws on the same historical sources as the preceding two chapters; namely, the 60 prosecutions cases for burglary and stealing, reported decisions, administrative records, and historical newspapers. The discussion begins with the magistrates in the Queensland police courts.

Police magistrates

Whilst police are the gatekeepers to the prosecution process, magistrates are the gatekeepers to the trial and sentencing phase of the process. Contemporary and historical criminal law texts regard the committal process as one that “protects the accused and also saves the criminal justice system the expense of a trial which is foredoomed to failure”.⁶ The magistrates' main responsibility is to weigh up the prosecution's evidence to decide if a *prima facie* case exists where a jury might reasonably accept the evidence in that case.⁷ These practices stem partly from the traditional functions of the English grand jury; when unsatisfied that a *prima facie* case “of guilt in law and in fact has been made” magistrates can refuse to commit the

⁶ Colvin, Linden, and McKechnie, *Criminal Law in Queensland* 668.

⁷ Feld, Hemming, and Anthony, *Criminal Procedure*, 397.

defendant.⁸ Magistrates in the contemporary context are generally reluctant to discharge police prosecutions for serious offences.⁹

Historically, magistrates were also reluctant to discharge police prosecutions. Appeal cases in the mid-twentieth century found that some magistrates committed defendants in cases where the police evidential material did not sustain a *prima facie* case. This issue was exacerbated by the fact that, over time, more defendants pleaded guilty before the close of the police prosecution case. This effectively interrupted the committal proceedings and meant that magistrates did not hear the entire police prosecution case, or determine whether there was a *prima facie* case against the defendant. This had serious repercussions for defendants because committal hearing evidence that was not recorded in the depositions could not be later consulted by the higher courts in the event of a change in plea or an appeal against sentence.¹⁰

Police magistrates also had to consider the admissibility of police evidence. However, magistrates were generally reluctant to consider defendants' and defence lawyers' claims that police evidence was obtained through illegal practices. Magistrates also failed to investigate allegations that police induced defendants' guilty pleas at committal. The problem of police inducing guilty pleas became so widespread that, after several CCA decisions, the Department of Justice issued a circular that outlined the proper practice for magistrates in guilty plea cases where defendants raised allegations of police inducement.

⁸ *R v Webb* [1960] Qd R 443, 447.

⁹ Feld, Hemming, and Anthony, *Criminal Procedure*, 397.

¹⁰ *R v Webb* [1960] Qd R 443.

Chapter 6 - The Judiciary and the Guilty Plea

a. Assessing a prima facie case

Criminal procedure maintains that the magistrate's primary role is to determine whether there is sufficient evidence to sustain a prosecution; only then is the defendant asked to enter their plea.¹¹ The magistrate has the right to discharge a defendant when a *prima facie* case is not established. The evidence from the Queensland reported decisions reveals that some police magistrates committed defendants for trial or for sentence even though a *prima facie* case did not exist. Some guilty plea convictions were ordered for retrial after the CCA found that police magistrates either accepted guilty pleas when there was no evidence to maintain the charge, or accepted defendants' guilty pleas although police had advised them to plead guilty.¹²

One appellant's conviction was quashed on the grounds that a *prima facie* case did not exist. He also alleged that the confession and guilty plea were induced by investigating detectives. In 1957, Henry George Parker pleaded guilty in the magistrates' court to a charge of stealing. Police accused him of keeping a letter containing £10 that he had been given to post to a company called McDonald and East Ltd. The basis of the evidence was that the company did not receive the letter and the defendant allegedly confessed to the offence. However, the letter was later found in the McDonald and East offices, undermining the legality of the original charge.¹³

Parker appealed against his guilty plea conviction in the magistrates' court on grounds that no offence was committed. While the appellant's application included

¹¹ Feld, Hemming, and Anthony, *Criminal Procedure*, 397.

¹² *Fuller v Postich, Ex parte Postich (No. 1)* [1956] QWN 36; *R v The Stipendiary Magistrate at Rockhampton and other, Ex parte Parker* [1957] QWN 18.

¹³ *R v The Stipendiary Magistrate at Rockhampton and other, Ex parte Parker* [1957] QWN 18.

further grounds “alleging fraud and other misconduct on the part of the police”, these grounds were not argued at appeal, so the alleged fraud on the part of police was not discussed in Justice Stanley’s judgment. Stanley found that in the circumstances, no offence had been committed. But rather than criticising either the police or the magistrate for an outcome that Stanley referred to as “a blot on the justice of the State and its administration”, the judge blamed the appellant:

The circumstances that cause me very grave anxiety are that this man is in the position in which he is today by reason of the fact that he pleaded guilty knowing that he had not committed the offence. In so doing, it seems to me that he, in a measure, perpetrated a fraud on the court that had to hear the case.¹⁴

The Parker case does not disclose the police practices that induced the defendant’s guilty plea. It is unclear whether the magistrate in the Parker case was privy to the defendant’s later allegations against police. The case does demonstrate a lack of oversight by some magistrates when assessing the police evidence particularly when, as in Parker’s case, there was no evidence tying the defendant to the offences other than their alleged confession.

The evidence from the qualitative sample depositions suggests that police magistrates were reluctant to dismiss police evidence in guilty plea cases, even when that evidence relied solely on verbal confessions. Many of the 60 prosecution cases were similarly reliant on confessional material that magistrates were unwilling to review, even though defendants made allegations against the police. In addition, there is some evidence that police and crown prosecutors were aware that magistrates failed to

¹⁴ Ibid.

correctly assess *prima facie* evidence against defendants. In a 1951 case, discussed earlier, Police Magistrate McKenna accepted an unrepresented defendant's guilty pleas to four charges; three for burglary and one for receiving.¹⁵ The receiving charge allegedly occurred two or three months before the other offences. This raises some concerns in consideration of police 'clear up' practices. The 29-year-old labourer admitted selling items to two second-hand dealers in Brisbane, but claimed he did so, on behalf of an acquaintance who wanted to off-load the goods before the acquaintance's estranged wife might. The defendant admitted selling the goods in his own name to shield the discovery of his friend's activities. However, a letter to the crown prosecutor from the Brisbane CIB Sub-Inspector acknowledged that the defendant had never admitted the necessary elements of receiving required to constitute an offence:

During the hearing of these cases a statement made by the accused was tendered and admitted as an exhibit in each case. The statement tendered in respect to the receiving charge discloses no offence as far as receiving the goods 'knowing them to be stolen' is concerned. However, accused pleaded guilty, admitting the offence, and he was committed for sentence as already set out in this report.¹⁶

The Sub-Inspector's letter implies that the defendant's subsequent pleas to three other offences negated any wrong-doing in accepting his guilty plea to evidence that did not sustain the charge. The prosecutor, Mr Carter, did not mention the issue at the defendants' sentencing hearing and the defendant was subsequently sentenced to two years imprisonment on all counts. It is unlikely that the outcome would have been any

¹⁵ Queensland State Archives Item ID96180, Depositions and indictments; PP, Trial ID #36820, QLDSC, Anon., 1951.

¹⁶ Queensland State Archives Item ID96180, Depositions and indictments; PP, Trial ID #36820, QLDSC, Anon., 1951.

different without the fourth guilty plea, however the moral and ethical implications for the defendant, and arguably the criminal justice system, are another matter.

Magistrates in the 60 prosecutions sample were relatively passive during the committal hearing. There is no record of the police magistrate's 'voice' recorded in either the deposition files or newspaper reports in at least 27 of the 60 depositions. Magistrates engaged in very little questioning of detectives to clarify the police evidence against defendants. None of the sample magistrates seriously challenged the evidence submitted by the police prosecutor although much of this evidence relied on verbal confessional material. Magistrates failed to challenge the police case even when defendants' alleged that these confessions were induced or were otherwise involuntary.

In most cases, when magistrates did intervene in the committal process, the interaction appears to have clarified the evidence to strengthen the police case against the defendant. Magistrates' engagement in the cross-examination of detectives and prosecution witnesses appeared to be biased towards the police prosecution. For example, one police magistrate questioned a detective about the presence of a fellow officer to elicit information that subsequently corroborated the evidence against the defendant.¹⁷ In a 1956 case, the magistrate's cross-examination clarified whether the defendant was drunk when he 'accompanied' police to the CIB where he was subsequently interrogated:

Defendant: Was I drunk or sober when arrested?

Det Sgt D. Buchanan: You had some drink taken. You had been drinking prior to my seeing you.

¹⁷ Queensland State Archives Item ID3410, Depositions and indictments; PP, Trial ID #33936, QLDSC, John Walder, 1931

Chapter 6 - The Judiciary and the Guilty Plea

[Buchanan to the Magistrate]: He was not drunk.¹⁸

There was no further re-examination required by the police prosecutor because the magistrate had prompted Buchanan to positively affirm that the defendant was not drunk at the time of the attempted entry. Magistrates sometimes asked detectives more probing questions than were asked by the police prosecutor and these questions prompted definitive replies from detectives that subsequently strengthened the prosecution case. Interestingly, magistrates' practices of cross-examination tended to occur only after self-represented defendants cross-examined the police. It is not possible to identify the motivation behind magistrates' cross-examination from these texts.

Contemporary research shows that magistrates' practices can "influence the circumstances" that encourages defendants to plead guilty.¹⁹ It is reasonable to suggest that magistrates' cross-examination practices likely signalled to some defendants the futility of challenging the police case against them.

The police magistrate's role was also critical in recording the police evidence against the defendant. A guilty plea entered before the close of the police prosecution case limited the amount of evidence recorded in the depositional material. The prosecutor, judge, and appeal court could not weigh up the strength of the evidence against the defendant if that evidence was not included in the depositions. The evidence from the sample cases suggests that magistrates in the pre-transition period were more likely to dissuade defendants from entering their plea before the close of the police case.

¹⁸ Queensland State Archives Item ID96302, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #55529, QLDSC, Anon., 1956.

¹⁹ Roach Anleu and Mack, "Intersections between in-Court Procedures and the Production of Guilty Pleas."

Chapter 6 - The Judiciary and the Guilty Plea

In 1941, a 31-year-old unrepresented defendant charged with stealing from his employer attempted to plead guilty before the committal hearing had ended.²⁰ The police magistrate told the defendant that he:

had the right to plead guilty at any stage of his trial, but he [Police Magistrate Aitken] must hear the evidence until he was satisfied that the prosecution had established a *prima facie* case against him.²¹

After 1950, there was an increase in the number of unrepresented defendants who interrupted the police prosecution to plead guilty.²² There is no record of attempts by the magistrates to deflect defendants from this course of action in these cases, despite the implications for further defence or appeal consideration.²³ In 1961, a defendant interrupted the police evidence to plead guilty on the third charge against him that

²⁰ Queensland State Archives Item ID95993, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #17550, QLDSC, Anon., 1941.

²¹ “‘I Want to Plead Guilty,’ Says Clerk During Hearing of Stealing Charge,” *The Telegraph*, June 20, 1941, <http://nla.gov.au/nla.news-article186634452>

²² Queensland State Archives Item ID96173, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #36794, QLDSC, Anon., 1951 and co-defendant The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #36792, QLDSC, Anon., 1951; Queensland State Archives Item ID96307, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #39447 QLDSC, Anon., 1956; Queensland State Archives Item ID96305, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #56365 QLDSC, Anon., 1956; Queensland State Archives Item ID1677342, Depositions; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #566250, QLDSC, Anon., 1961; Queensland State Archives Item ID204169, Depositions; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #566256 QLDSC, Anon., 1961; Queensland State Archives Item ID1677355, Depositions; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #38065 QLDSC, Anon., 1961. There was one case involving two co-defendants in the pre-transition period that involved the defence lawyer requesting the end of proceedings, see Queensland State Archives Item ID96070, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #9025 QLDSC, Anon., 1946, and The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #9026 QLDSC, Anon., 1946.

²³ Queensland State Archives Item ID1677355, Depositions; PP, Trial ID #38065, QLDSC, Anon., 1961.

involved stealing a key from a boarding house he once lodged in.²⁴ This key was allegedly found on the defendant when the police apprehended him whilst returning a stolen car he had taken for a joy ride. The magistrate appears to have made no attempt to dissuade him from pleading guilty early, despite the unsigned written confession constituting a single line: “On Christmas Day, I went to Netherway private hotel and I took a key from a door of the room.” The magistrate is not recorded commenting on this incomplete confession or cross-examining the police witness to clarify the alleged verbal confession that was the only evidence against the defendant.

There were serious ramifications arising from these failures. In the *Webb* decision, Justice Philp stressed the magistrate’s important role recording criminal depositions.²⁵ A lack of substantive depositional material meant that appellants “limited [their] protection by the crown prosecutor and the judge”.²⁶ The police magistrate’s practice to persuade defendants to enter their plea at the close of the police case was crucial to providing those defendants with legal protection later in the prosecution process.²⁷ Yet magistrates were disinclined to accept allegations accusing police of such pressure.

b. Allegations against police

Queensland newspapers regularly reported allegations that police used physical violence and intimidation to extract confessions during interrogations.²⁸ Years before

²⁴ Queensland State Archives Item ID204169, Depositions; PP, Trial ID #566256, QLDSC, Anon., 1961.

²⁵ *R v Webb* [1960] Qd R 443.

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ “Police and Prisoners,” *Cairns Post*, July 6, 1936, <http://nla.gov.au/nla.news-article41762881>; “City Detective Denies He Bashed Man in Cell at Police Station,” *Truth*, May 13, 1951,

the *Heffernan* decision, newspapers reported defendants' allegations that police pressured them to plead guilty.²⁹ Yet magistrates were disinclined to accept allegations accusing police of practices involving threats and promises to obtain defendants' confessions and guilty pleas. In most of the 60 sample cases, the police prosecution relied heavily on alleged verbal confessions that were questionably obtained, either through police failure to correctly caution defendants before they made incriminating statements, or the possibility that police fabricated some of these confessions. These practices possibly impacted defendants' guilty pleas because of the high value of confessional material and the subsequent futility faced by defendants if they challenged the police case.

Many police magistrates were dismissive when defendants made allegations against police. Magistrates were generally reticent to admit the possibility that these police practices were anything more than an attempt by defendants and lawyers to create a credible defence. Some magistrates sided with police without giving serious consideration to the defendant's allegations. Defence lawyers also faced difficulties overcoming magistrates' resistance to these allegations because magistrates were generally supportive of the police. Finnane argues that magistrates' support for police influenced political lobbying by police unions during the early decades of the twentieth century.³⁰ Police successfully persuaded the Queensland government to expand the range of summary offences prosecuted in the police courts to obtain more favourable judgments from police magistrates than they might achieve in the Supreme Court. This

<http://nla.gov.au/nla.news-article201518145>.

²⁹ "Serious Charge," *The Canberra Times*, October 31, 1931, <http://nla.gov.au/nla.news-article2258364>

³⁰ Finnane, "Politics of Police Powers," 104.

suggests that many police magistrates were less likely to be open to allegations that discredited police.³¹

One magistrate was reluctant to the point of hostility when asked to rule out evidence obtained by police without a warrant and in intimidating circumstances. In 1938, Brisbane's Chief Police Magistrate F.C.M. Burne engaged in a verbal sparring session with defence solicitor, John Casey.³² Casey alleged that a Detective Cullen had intimidated the female defendant into confessing. Cullen had reportedly "followed [the defendant] into her bathroom and told her to get dressed". Cullen did not appear in court; rather, junior officer PC Constable Browne testified as the investigating officer. This might have been the result of a complaint lodged by the female defendant with the Police Commissioner regarding Cullen's behaviour. Mr Casey questioned Constable Browne on Cullen's behaviour; Browne admitted that Detective Cullen entered the house without a warrant. Mr Burne intervened in the first instance then, as the cross-examination continued, Burne attacked the credibility of the defendant:

Mr Burne: I do not think this cross-examination is relevant.

Mr Casey: It is very relevant. Probably it may go further,

Mr Burne: I won't allow it. I don't want any threats from counsel.

Mr Casey: We don't want any threats from the police.

.....

Mr Casey: No authority was given Cullen to enter the house? No. We knocked at the door.

Mr Burne: What has that got to do with it?

Mr Casey: I want to bring out the stand-over tactics of the police.

Mr Burne: She was calm enough to say very little.

Mr Casey: Innocent enough perhaps.

Mr Burne: This man behaved himself excellently.

³¹ Bishop, *Prosecution without Trial*, 176. John Bishop comments that the relationship between police and guilty plea outcomes was further problematized by the expansion of summary jurisdiction to include previously indictable offences without any "concomitant requirement that the accused be legally represented".

³² "Counsel Alleges Police Used 'Stand-over Tactics' To Get Confession from Woman," *The Telegraph*, December 1, 1938, <http://nla.gov.au/nla.news-article184347427>

Chapter 6 - The Judiciary and the Guilty Plea

The extract indicates the level of hostility that characterised some magistrates' reactions to allegations of police misconduct. Burne refused to inquire into the possibility of police misconduct in the case. He stated that he was not "holding a court of inquiry. Action should be taken through the Commissioner in connection with any complaints". This was a powerful message to Brisbane detectives and local legal counsel that allegations of police misconduct were likely to meet with little serious consideration from Brisbane magistrates. It is possible that some magistrates regarded defendants' allegations against police to be "the standard response of the truly guilty".³³ Nonetheless, the evidence suggests that police magistrates failed to examine the evidence even when it was questionable.

Police magistrates generally failed to critically examine the evidence presented by police in cases where defendants challenged that evidence. In the 1951 Brisbane "cat burglar" case, Chief Magistrate R.C. Byrne heard one detective admit under cross-examination by the defendant's solicitor that there was no warrant when five police officers physically apprehended the defendant at an airline ticket office.³⁴ The defendant was subsequently searched and interrogated both at that location and at the CIB, however Byrne did not make any ruling against the evidence arising from either the search or the interrogations. Furthermore, he did not inquire into the defendants' allegations that Detective Constable Dux had lied and framed the verbal confession, raised during the detective's cross-examination by the defendant.

³³ Brown, "Royal Commission," 231.

³⁴ Queensland State Archives Item ID96179, Depositions and indictments; PP, Trial ID #52562, QLDSC, Anon., 1951.

Chapter 6 - The Judiciary and the Guilty Plea

An even more glaring example of a magistrate refusing to examine police evidence occurred in another 1951 case. The German-born defendant alleged that he was abused and seriously threatened by police. He accused the police of misconduct by using violence and issuing threats against him.³⁵ Although the magistrate noted these were serious allegations he did not inquire any further, merely recording both the defendant's allegation and his own response:

SM states: This is a peculiar position with defendant pleading guilty yet making serious allegations against a police officer. However, in view of the mandatory nature of section 113 of the Justices Act, I shall commit defendant for sentence.³⁶

Rather than inquire into the police practices involved in the case, Magistrate McKenna retreated behind the procedural requirements of the law, even though the law also required that magistrates inquire into allegations that confessions or pleas were involuntary. Instead, the magistrate used the defendant's guilty plea as justification for his failure to do so. In another case, the magistrate's decision not to uphold a defence lawyer's objection to the material is recorded in full. This case involved two young defendants, one a minor, who were taken into custody and questioned without the presence of a parent and who subsequently gave a verbal confession:

Mr Campbell: I am objecting to the admissibility of the statements made by both the defendants prior to their being warned.
Sub- Inspector Risch [police prosecutor]: I submit it is admissible.
Police Magistrate George: I do not think I can exclude it. I am satisfied that the evidence is properly on the record and refuse to exclude it.³⁷

³⁵ Queensland State Archives Item ID96173, Depositions and indictments; PP, Trial ID #36690, QLDSC, Anon., 1951.

³⁶ Ibid. Justice Act 1886 (Qld).

³⁷ Queensland State Archives Item ID96179, Depositions and indictments; PP, Trial ID #52556, QLDSC, Anon., 1951 and PP, Trial ID #52557, QLDSC, Anon., 1951.

Defence lawyers raised similar objections to confessional material when police had failed to warn defendants as per the Judges' Rules but magistrates generally accepted the material without comment.³⁸ In 1956, both co-defendants' defence lawyers, Mr About and Mr Bonham, objected to the admission of their clients' signed statements, alleging that neither statement was written voluntarily.³⁹ The confessions were admitted into evidence without query, despite the alarming circumstances involved in detaining and interrogating Mr Bonham's client. Detectives admitted that they had "apprehended" the young defendant at the Mater hospital when he was receiving treatment for a duodenal ulcer. He was taken into custody at 9:00am and allegedly wrote the statement at 12:30pm. Although the detective refused to acknowledge under cross-examination that the defendant was in a "physically bad condition", he did admit that the defendant was given a bottle of milk during the interrogation "because his stomach wasn't feeling well". Despite this, magistrate A.V. Smith failed to rule the confession out. Instead, the deposition records that:

Mr Bonham objects to the admission of this statement as an exhibit on the same grounds as Mr About that it is that the statement was not obtained voluntarily (statement tendered and admitted marked Exhibit 2).⁴⁰

There were serious omissions on the part of the magistrate in this case. The police testimony reveals several breaches of the Judges' Rules in terms of cautioning but also reveals a lack of proper practice in handling the co-defendants' alleged confessions during the interrogations. Further, the nature of the ill defendant's alleged written

³⁸ Rather, there is no inclusion of any commentary about the objections recorded in the depositions.

³⁹ Queensland State Archives Item ID96307, Depositions and indictments; PP, Trial ID #39102, QLDSC, Anon., 1956.

⁴⁰ Ibid.

statement is troubling. The detective testified that he (correctly) cautioned the defendant before asking him to make his statement, and the defendant replied:

‘I would like to write a statement but I have a crook hand and I can’t write but you type it out and I will sign it.’ The defendant then dictated a statement which I typed. The defendant then read over this statement and signed it.⁴¹

The subsequent statement is three times the length, and much more detailed, than the co-defendant’s four sentence confession. It is possible that detectives fabricated the confession. It is also possible that the defendant did not voluntarily sign the typed statement, when considering that his co-defendant’s legal counsel accused police of “belting” his client before he confessed. Yet Magistrate Smith appears to have been unperturbed by the case.⁴²

It was difficult, if not impossible, to persuade police magistrates to critically engage with or question police evidence and testimony. Conversely, it appears to have been very easy for magistrates to dismiss counsels’ allegations that police evidence was inadmissible without real consideration. There appears to have been little oversight of magistrates’ practices towards police testimony and defendants’ confessions and guilty pleas until the late 1950s. In a series of cases between 1956 and 1962, including the *Heffernan* case that began this chapter, the CCA critiqued magistrates’ responsibilities and practices regarding guilty plea cases.⁴³ These cases involved magistrates’ decisions in the lower court in circumstances where defendants alleged that confessions were

⁴¹ Ibid.

⁴² Queensland State Archives Item ID96307, Depositions and indictments; PP, Trial ID #82736, QLDSC, Anon., 1956.

⁴³ *Fuller v Postich, Ex parte Postich (No. 1)* [1956] QWN 36; *Fuller v Postich, Ex parte Postich (No. 2)* [1956] QWN 49; *Heffernan v Ward* [1958] Qd R 12; *Hallahan v Kryloff, Ex parte Kryloff* [1960] QWN 18; and *R v Webb* [1960] Qd R 443.

involuntary or that police had obtained their guilty pleas through threats or promises. Police practices, and magistrates' failures to address these practices, appeared intractable. The 1959 *Hallahan* decision referred specifically to the court's previous ruling in *Heffernan*. Justice Stanley reiterated the court's position that magistrates should inquire into guilty plea cases when unrepresented defendants alleged they were given "advice, or inducement, or enticement by police to plead guilty".⁴⁴ Justice Wanstall agreed, advising that it would be prudent for magistrates:

to intimate positively to the defendant...his right of putting everything he wishes before the magistrate, provided it is relevant to the charge, and then getting down on the record the agreement of the accused person that he has said all that he wishes to say.⁴⁵

It was another year before the QJPR summarised the *Hallahan* judgments in an article entitled "Duty of Magistrate where an Unrepresented Accused Pleads Guilty".⁴⁶ Perhaps it was this publication in Queensland's peak professional legal text that prompted a 1961 Crown Law Office circular to every magistrate in the State regarding proper practice in guilty plea cases.

c. Police inducements and guilty pleas

On December 8, 1961, the Department of Justice issued a circular to all Queensland magistrates addressing their role in cases when defendants pleaded guilty in the lower court. The circular repeats Justice Stanley's *per curiam* decision from *Heffernan* delivered two and a half years earlier:

Sir, I desire to inform you that in the case Heffernan v Ward... reference is made to the headnote at page 13 reading as follows:

⁴⁴ *Hallahan v Kryloff, Ex parte Kryloff* [1960] QWN 18, 23.

⁴⁵ *Ibid*, 24.

⁴⁶ *Ibid*.

Chapter 6 - The Judiciary and the Guilty Plea

Per curiam: as a matter of prudence, before accepting a guilty plea in any case involving police as complainant, and the accused is not represented by counsel or solicitor, a stipendiary magistrate would be well advised to point out to any such accused that the severity of penalties does not depend on whether he pleads guilty or not guilty, and to enquire of the accused whether anyone connected with the police force has suggested that he should plead guilty; and if the magistrate does not receive from the accused a prompt and convincing disclaimer of any such suggestion, he should suggest to the accused to plead not guilty and emphasise the impropriety of any such advice.

Some Magistrates have already obtained suitable Rubber Stamps, and at the present time, the Government Printer is preparing further Rubber Stamps in order to facilitate the work of the Stipendiary Magistrate in these cases.

The Rubber Stamps are as follows:

1. After I explain to him his rights and the procedure under s444 The Criminal code, DEFENDANT ELECTS TO HAVE THE CHARGE DEALT WITH SUMMARILY BEFORE ME [sic]. The Charge having been reduced to writing and already read to defendant, DEFENDANT WAIVES THE RE-READING OF THE CHARGE AND PLEADS GUILTY.
2. Defendant Pleads GUILTY. (I inform him that severity or punishment does not depend on whether the plea is guilty or not.) He states that no one connected with the Police or other person of Authority has suggested how he should plead and that he makes his plea voluntarily. The Prosecutor and the Defendant are heard and defendant states:

[left blank for defendant's response]

If you have not been supplied with Stamps set out above, kindly forward your Requisition urgently to this Department.

Yours faithfully, R.J. Matthews, Under Secretary.⁴⁷

It is unclear what prompted the circular's publication. The CCA's ongoing comments regarding magistrates' problematic practices in guilty plea cases in three appeal cases subsequent to the *Heffernan* decision must have had some effect. The circular can be read as an implicit acknowledgement by administrators that magistrates failed to protect

⁴⁷ Queensland State Archives Item ID2236722, Circulars. Circular no. 56/61.

Chapter 6 - The Judiciary and the Guilty Plea

defendants in cases involving troubling police practices. Both the circular and the administrative rubber stamp that was designed to ‘facilitate’ the committal process suggest three considerations. First, these developments suggest that the Department of Justice could not trust magistrates to regulate their own practices in the police courts when defendants made allegations against police although it is unclear if the Department undertook any later action to evaluate magistrates’ actions as outcomes of the new policy. The presence of the circular and the specialised stamp also suggests that justice administration officials were cognisant that defendants were pleading guilty in great enough numbers to warrant a specific intervention in terms of magistrates’ handling of the cases.

The circular also reveals that the Queensland State Government placed the onus of responsibility for ‘policing the police’ onto magistrates, yet failed to address the actual police practices that were central to the issue. The Police Commissioner did not make the 1963 amendments to the 1953 edition of the Policeman’s Manual until 14 months after the circular’s publication. These amendments extended the definition of police ‘misconduct’ to include inducements and advice given to defendants to obtain guilty pleas.⁴⁸ This evidence suggests that miscarriages of justice emerging from police inducements to plead guilty were probably common occurrences prior to 1963. This provides further support for the qualitative study findings that problematic policing practices were critical to the acceleration of guilty pleas in the Queensland Supreme Court.

⁴⁸ Smith, *Manual*. The amendments were made Commissioner Frank Bischof’s tenure. The subsequent revised edition of the police manual was not published until 1969.

Chapter 6 - The Judiciary and the Guilty Plea

The circular also provides unique evidence pertaining to the rise of the guilty plea in the Queensland Supreme Court. It is the only official administration record sourced during this research that documents an official position by the Department of Justice that guilty pleas were not mitigating factors deserving of any benefit in sentencing. This circular, combined with evidence from the appeal cases, provides further evidence that the discount principle did not exist in practice before 1962. This evidence raises serious questions about the reasons for some defendants' perceptions (also held by police and lawyers) that pleading guilty might lead to a lighter sentence. These perceptions suggest a possibility that, before the *Heffernan* decision clarified the CCA's position on the issue, some judges did extend some leniency in consideration for a guilty plea.

Supreme Court Judges

On December 19, 1950, a 26-year-old waterside worker was apprehended stealing a pair of trousers from a ship tied up at a South Brisbane wharf.⁴⁹ In the police court, Detective Constable James Bidner testified that the defendant initially denied the offence, and then later suggested he found the trousers on the ship's deck. The verbal confession was the only evidence other than testimony from an eye witness who saw the defendant hide something in a wharf warehouse. Although the defendant was legally represented, the depositions do not record any speech by his defence counsel Mr G. Smith. The defendant was committed for trial but entered a late guilty plea at the arraignment.

⁴⁹ Queensland State Archives Item ID96176, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #37307, QLDSC, Anon., 1951.

Chapter 6 - The Judiciary and the Guilty Plea

The deposition files include Justice Macrossan's sentencing remarks in which the judge acknowledged that the trousers were not of great value but held "intrinsic value" to their owner. Macrossan referred to some kind of "excuse" submitted by the prisoner's counsel; the remarks intimate that it concerned the prisoner's attempts to house his family.⁵⁰ The sentencing remarks record an exchange between the prisoner and the judge, despite the presence of Mr Smith, as follows:

Macrossan: ...It seems to me that if I were to accede to your counsel's request I would be encouraging other people ---

Prisoner: I ask you to give me this one chance.

Macrossan: You have had several chances.

Prisoner: I gave away the drink 15 months ago; I was doing alright up to this.

Macrossan: Drinking cannot be responsible for the present offence.

Prisoner: No, I didn't mean that.

Macrossan: I would be encouraging ---

Prisoner: I ask for one chance. I am endeavouring to get a temporary dwelling and I want to get it up because of my wife and baby.

Macrossan: Your counsel has told me about that and I have said that if I was to give you that leniency it would be an encouragement to everyone else.

Prisoner: Could you put me on a bond or something?

Macrossan: The sentence I impose is imprisonment with hard labour for the period of two months.

The prisoner attempts to negotiate some leniency and in his desperate interjection, provides the Court with mitigating factors. He implies that a custodial sentence will create hardship for his family. He argues that his previous offending was the consequence of alcohol abuse that has since been addressed. He even attempts to engage in some negotiation of the penalty. Although the prisoner's interjection was unusual --

⁵⁰ Australia faced an acute shortage of housing in the early 1950s, and thousands of residents lived in housing camps throughout Brisbane. "Housing Shortage is Acute," *Maryborough Chronicle*, May 13, 1950, <http://nla.gov.au/nla.news-article147802645>; "This is the Housing Camp Story" *Sunday Mail*, May 14, 1950, <http://nla.gov.au/nla.news-article98328315>.

Chapter 6 - The Judiciary and the Guilty Plea

especially because he was legally represented – these sentencing remarks are comparable to those present in the 60-prosecution case sample.

Just over half (33) of the depositions include some form of sentencing remarks. Some remarks only include the judge pronouncing the sentence, but others include reasons for the judge's decision. Sentencing remarks were collected from newspaper reports in a further 22 cases. Ten of the deposition files also included letters written by defendants to the judge that included pleas for leniency and provided justifications or mitigating circumstances to explain their offending. The judges often referred to the contents of these letters in their sentencing, but often referred to other mitigating and aggravating circumstances considered in their sentencing deliberations. Not one judge in the 60 prosecutions sample mentioned the prisoner's guilty plea.

The remainder of this chapter examines judges' sentencing practices. Although judges in the 60 cases did not refer to guilty pleas as mitigating factors, the previous evidence from the qualitative study suggests that defendants, police, and lawyers believed that pleading guilty could result in a lighter sentence. This discussion therefore explores the factors that judges did consider in guilty plea cases. These include prisoners' degree of criminality, their age, effects of alcohol, and consideration for the impact on the defendants' families. This research provides evidence of the specific factors that judges considered in their deliberations in the absence of any mitigating effect of the guilty plea.

Sentencing

The final stage in the prosecution process for serious offences is the sentence hearing in the Supreme Court. Sentencing is “the lynch-pin of the criminal justice

Chapter 6 - The Judiciary and the Guilty Plea

system”.⁵¹ Current Queensland judges rely on statute provisions and common law precedents to guide their sentence determinations.⁵² Section 9 of the *Penalties and Sentences Act 1992* lists the purposes of sentencing, and the mitigating and aggravating factors that judges must consider in their sentencing deliberations.⁵³ Mitigating factors can reduce a sentence, aggravating factors can increase it.⁵⁴ Aggravating offences include the nature and extent of harm to victims and the community, or the prisoner’s previous convictions. Mitigating factors include the prisoner’s background and characteristics, their cooperation with police, and whether they pleaded guilty. In contemporary Australian criminal law, judges are increasingly expected to consider how early the prisoner entered their guilty plea.

Late twentieth century developments in the common law generally warranted a sentence reduction of about 25 percent for guilty pleas.⁵⁵ In some jurisdictions, legislatures have passed statutory provisions that determine this discount.⁵⁶ In other jurisdictions, including Queensland, the discount is at the judges’ discretion.⁵⁷ By early 1970, it was accepted practice in case law in both the English and Australian courts that judges reduced sentences in consideration for defendants’ guilty pleas. This is sometimes called the ‘discount principle’.⁵⁸ The earliest Queensland case connecting a

⁵¹ Sallmann and Willis, "Taking Sentencing Seriously," 33.

⁵² Feld, Hemming, and Anthony, *Criminal Procedure*, 611. Judges also consider reports from experts, including probation officers and medical professionals, as well as victim and community impact statements.

⁵³ *Penalties and Sentencing Act 1992* (QLD).

⁵⁴ Feld, Hemming, and Anthony, *Criminal Procedure*, 612.

⁵⁵ *Cameron v R* [2002] HCA 6; 209 CLR 339. Recent statutory developments prescribe a 25 percent reduction for an early plea compared with 12/5 percent for a late guilty plea, see *Criminal Case Conferencing Trial Act* (NSW), s17.

⁵⁶ *The Sentencing Act 1995* (WA).

⁵⁷ In Queensland, the *Penalties and Sentences Act 1992*, s13 stipulates that judges “must take the guilty plea into account”. Guilty pleas can reduce a sentence (at the Judges’ discretion) and this discount can depend on how early the defendant enters their guilty plea.

⁵⁸ Baldwin and McConville, *Negotiated Justice*, 106.

guilty plea to a reduction in sentence was *R v Perry* [1969] where the full court agreed with Justice Campbell's ruling that "regard should be had to the mitigating circumstances of the applicant's confession of guilt and his co-operation with the investigating police officers".⁵⁹ This expressly followed an earlier English appeal case that held that "it is undoubtedly right that a confession of guilt should tell in favour of an accused person, because that is clearly in the public interest".⁶⁰ By the early 1970s, Queensland legal authorities stipulated that guilty pleas were to be considered amongst other mitigating factors in terms of sentence reduction.⁶¹ Yet it was another decade before an Australian appellate court ruled that judges were not to engage in sentencing discussions with legal counsel and defendants for late guilty pleas.⁶²

Whether judges included guilty pleas as mitigating factors in their sentencing determinations prior to the 1970s has until now been unknown. Australian sentencing research was "in its infancy" when Duncan Chappell published a summary on Australian sentencing issues in 1968, and he makes no reference to guilty pleas as mitigating factors.⁶³ There appears to be no legal research on sentencing and guilty pleas prior to the *Perry* decision.⁶⁴ The research in this thesis confirms that guilty pleas were not considered to be mitigating factors worthy of consideration in sentencing until at least 1963. First, the 1961 Crown Law circular, discussed above, provides evidence that

⁵⁹ QLR 34 at 38.

⁶⁰ *R v De Haan* (1968) 2 QB 108 at 111.

⁶¹ *R v Cox* [1972] QWN 54; *R v Perry* [1969] QWN 17.

⁶² F.M. McGuire, "Plea Bargaining: Its Significance in the Australian Criminal Justice System- a Postscript," *The Queensland Lawyer* 7, no. 4 (1985); *R v Marshal* [1981] VR 725.

⁶³ Duncan Chappell, "Sentencing- an Unrewarding and Painful Task," *Australian & New Zealand Journal of Criminology* 1, no. 3 (1968): 178.

⁶⁴ R.P Roulston and P.G. Ward, "The Sydney Project on Sentencing" (paper presented at the Judicial Seminar on Sentencing, Sydney, 1969). The Sydney Institute of Criminology held a judicial seminar on sentencing that focused on sentencing disparity in the higher courts. The published proceedings also include a 1968 preliminary report by the Sydney Project on Sentencing that analysed pre-sentence reports issued between 1960 and 1964. However guilty pleas were not included as a variable associated with sentencing.

Chapter 6 - The Judiciary and the Guilty Plea

in official discourse guilty pleas were not rewarded with leniency. This is further substantiated in the Queensland reported decisions. Analysis of CCA appeal cases where appellants had pleaded guilty but then appealed the severity of their sentences reveals that guilty pleas were not discussed by appellants or the CCA. In fact, when the appeal court did refer to mitigating factors in determining whether the sentence was excessive, there was no mention of the plea as deserving of any discount.⁶⁵ Despite the lack of any evidence of the discount principle in the Queensland Supreme Court prior to 1963, police, defendants, and - to some extent - lawyers, assumed that pleading guilty might result in a more lenient sentence.

Sentence outcomes in the 60 prosecutions sample

Judges had broad discretion in their sentencing during the period examined in this qualitative study. Although the Criminal Code prescribed the maximum penalties for specific offences, it did not provide guidelines that aided that decision-making.⁶⁶ Stealing offences were liable for three years imprisonment compared to a maximum of seven years for cattle stealing. Burglary offences varied in the range of penalties for different offences. For example, breaking into a dwelling house during the day attracted a maximum of seven years; if the offence occurred at night, the maximum penalty was 14 years hard labour. Judges relied on common law principles and precedents, including principles of individualisation and totality, to guide their sentencing decisions. This arguably resulted in sentence disparity in the courts. By the late 1960s, it was evident

⁶⁵ *R v Murphy* [1947] QWN 4; *Williamson v Antill* [1955] QWN 43; *Heffernan v Ward* [1958] Qd R 12; *R v Kelly* [1960] QWN 30; *R v Williams* [1961] QWN 12.

⁶⁶ Chappell, "Sentencing," 174.

that there was substantial disparity in judges' sentencing practices that could not to be reasonably justified in offences of comparable seriousness.⁶⁷

There is also evidence of this disparity in some of the 60 prosecution samples although the sentences were consistently well below the maximum sentence imposed under the Code. 54 of the 70 prisoners in the prosecutions sample received imprisonment sentences. These sentences ranged from two months to fifteen years. The most serious offence involved the 1936 robbery and assault of an elderly woman on a train; the sentence of 15 years was an exceptionally harsh sentence in comparison with the wider sample. Almost three quarters of the prisoners in this sample were sentenced to 18 months imprisonment or less, sentences that were significantly below the maximum penalties for stealing and burglary offences.

Most sentences were well below the maximum sentence. For example, two co-defendants pleaded guilty to cattle stealing in 1946 were treated very leniently considering the maximum penalty was seven years imprisonment. The recidivist offender received a two year suspended sentence, and the first time offender was discharged on a bond.⁶⁸ Most burglary sentences were also substantively below the maximum thresholds. 28 of the 35 burglary defendants were sentenced to two years or less. Previous research suggests that Queensland judges prescribed sentences that were "well below the provided statutory minimums".⁶⁹ If sentencing well-below the

⁶⁷ Ibid.

⁶⁸ Queensland State Archives Item ID96070, Depositions and indictments; PP, Trial ID #9025 QLDSC, Anon., 1946 and PP, Trial ID #9026 QLDSC, Anon., 1946.

⁶⁹ Yorick Smaal, "The 'Leniency Problem': A Queensland Case Study on Sentencing Male Same-Sex Offences, 1939–1948," *Women's History Review* 21, no. 5 (2012): 804-05.

maximum penalty was the norm in Queensland during this period, then it is difficult to presume that lighter sentences were the consequence of prisoners' guilty pleas.

Leniency is sometimes indicated using non-carceral options, such as bonds and probation or suspended sentences.⁷⁰ Judges could extend leniency by using their discretionary power to invoke section 656 of the Criminal Code 'Conditional suspension of Punishment on First Conviction'. This section was included at the Code's enactment, and empowered judges to release prisoners on a bond if they were first time offenders. Most judges in the 60 prosecutions sample did sentence prisoners under s656 during this period. 19 of the 54 imprisonment sentences were suspended, including 15 first time offenders. For example, in 1946, two co-accused defendants pleaded guilty to stealing two cars in Queensland, selling them in northern NSW.⁷¹ They were sentenced to two years, and fifteen months, imprisonment respectively. Despite Justice E.A. Douglas' concern that the offences revealed "a very bad state of affairs when cars can be stolen in one State and taken over the border and then sold with impunity", he suspended the sentences for both "foolish boys".⁷² There were only two cases where first time offenders were sentenced to imprisonment without benefitting from section 656. In 1941, one prisoner pleaded guilty to two counts of stealing tools although he was initially committed for trial on 16 similar counts. Although defence counsel Mr

⁷⁰ Piper and Finnane, "Defending the Accused," 42.

⁷¹ Queensland State Archives Item ID96072, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #9714, QLDSC, Anon., 1946 and co-defendant The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #9716, QLDSC, Anon., 1946.

⁷² "Sale Over the Border," *The Northern Miner*, October 15, 1946, <http://nla.gov.au/nla.news-article82787363>; "Cars Stolen in Queensland Sold in NSW," *The Telegraph*, October 14, 1946, <http://nla.gov.au/nla.news-article187252765>.

Chapter 6 - The Judiciary and the Guilty Plea

Aboud asked that the prisoner pay restitution and be “allowed to rehabilitate himself” Justice Philp sentenced the prisoner to six months imprisonment.

Fewer prisoners received suspended sentences in the post-transition period. Whilst thirteen prisoners received suspended sentences between 1926 and 1946, only seven prisoners had their sentenced suspended after 1950. Furthermore, fewer defendants received fully suspended sentences in the post-transition period. This reflects the 1943 introduction of partially suspended sentences in Queensland.⁷³ Amendments to s656 enabled judges to deliver sentences that required prisoners to serve a portion of imprisonment time in jail before the remaining portion was suspended. One example involved the Latvian-born immigrant who attempted to rob a store in Fortitude Valley in 1951 with an unloaded gun.⁷⁴ The prisoner failed to obtain any money, leaving the shop because the female shopkeeper did not stop screaming. Justice Macrossan sentenced him to 12 months imprisonment, to serve three months and then the remainder was suspended on a bond. Macrossan noted the prisoner had no previous convictions but could not ignore the aggravating circumstances and the seriousness of the offence, hence the partial rather than a completely suspended sentence. Aggravating and mitigating factors were crucial in judges’ sentencing deliberations.

⁷³ *Criminal Code Amendment Act* (1943) 7 Geo. VI. No. 14, s26.

⁷⁴ Queensland State Archives Item ID96183, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #36983, QLDSC, Anon., 1951.

Sentencing factors, 1926-1961

In 1958, a 30-year-old defendant pleaded guilty to three charges of ‘breaking, entering, and stealing’ committed in shops and warehouses over a three-week period.⁷⁵ The crown prosecutor informed the court of the police facts in the case. These included both mitigating and aggravating factors that could potentially reduce or increase the sentence. The mitigating factors included: O’Keefe’s origins from “a good home environment”, his status as a married man and his previously steady employment. The prosecutor acknowledged that the police report included the defendant’s recent reversal of fortunes, his subsequent onset of excessive drinking, and his cooperation in recovering some of the worth of the property. There were references provided to the court as evidence of his general honesty and good character attested to by previous business associates. The police report stated that was not believed to be the principal instigator of the most serious burglary offence. The sole aggravating factor (other than the multiple offences) was that the defendant absconded on bail following the committal hearing for the third offence. However, the subsequent appeal case report notes that sentencing judge Justice Townley’s remarks did not dwell on any of these factors.

The focus of sentencing was the restitution offered by the defendant.⁷⁶ O’Keefe’s legal counsel told the judge that there was a cheque for £800 allegedly brought into court for one of the complainants. Townley subsequently sentenced O’Keefe to 12 months hard labour on each charge, to be served concurrently. Yet there was no mention made of the defendant’s guilty plea, by either the crown prosecutor or the judge. The

⁷⁵ *R v O’Keefe* [1959] Qd R 395. The CCA comprised Justices Stanley, Wanstall, and Stable. Justice Stanley wrote the judgment, both Wanstall and Stable in agreement.

⁷⁶ *Ibid.*

attorney general appealed the sentence, on the grounds that it was insufficient and inadequate. A third reason was that the trial judge was misled because he took the restitution amount into consideration in sentencing, yet the money was never paid to the complainant. The CCA dismissed the appeal. In its judgment, the Court considered the same mitigating and aggravating factors put to the trial judge. They noted the prisoner's "unblemished record", his support of his wife and family, habitual honest work, and the severe financial loss he sustained in joining his father in the bookmaking business. His uncharacteristic drinking was also regarded as a mitigating circumstance in this case.

Justice Stanley stated that:

due to unexpected adversity and excessive drinking of alcohol to which he was unaccustomed, this man's habitual standard of conduct was temporarily lowered, and that he was exploited when in that condition by some other person or persons for their advantage.

The loss of ongoing employment and the subsequent shift away from usual sober and working habits were regarded as contributing circumstances to O'Keefe's offending. Yet the focus of the CCA's reported decision was the issue of restitution.⁷⁷ Justice Stanley was clear that courts were not "debt collecting institutions" for complainants, and so offers of restitution should not sway a trial judge. To do so would induce in defendants the belief that they could escape punishment merely by offering compensation. This was qualified, however, by Stanley's suggestion that restitution could signal either remorse or the appellant's desistance from crime. This depended on the trial judge's "assessment of character" of the prisoner, and whether the act or offer of restitution was an attempt to "buy himself out" without any intention of abandoning a

⁷⁷ The CCA noted that the appellant offered no authorities on 'the effect that should be given to an offer of restitution'.

criminal lifestyle. If the offer was motivated by the prisoners “genuine intention to go straight in the future” then an offer of restitution could be an indication of his honesty in that regard. The CCA had no doubt of O’Keefe’s genuine intention to make restitution, even if he was unable to affect this. But although this discussion revolved around notions of remorse and genuineness in terms of making some form of compensation, the discussion did not extend to O’Keefe’s plea. The appellant, the respondent, and Justice Stanley made no reference to the appellant’s guilty plea as a sign of remorse.

Similarly, in the 60 prosecutions sample, prisoner’s pleas are not discussed by any of the sentencing judges in their remarks. There is no evidence that judges regarded guilty pleas as indicative of either remorse or as providing some utilitarian benefit, saving the court’s time and resources. Although the ‘discount principle’ in sentencing was not yet evident in this period, judges did consider a variety of other factors that impacted their sentencing decisions. This information was conveyed to the court through police reports, defence counsel submissions, and prisoners’ letters.

Police reports and prisoner’s letters

Judges were presented with a range of information to consider in their sentencing during this period. This information included the police reports that were compiled for the crown prosecutors and included the facts of the case and relevant details about the prisoner, such as their family background, employment status, and criminal record. The crown prosecutor then presented the judge with the report. The police reports were not included in the 60 deposition files but their content can be gleaned from prosecutors’ comments reported in the press.

Sentencing reports were critical sources of information for judges to consider any aggravating or mitigating circumstances related to the offence or the prisoner.

Chapter 6 - The Judiciary and the Guilty Plea

Duncan Chappell warns that they often lacked “the objective and impartial quality so crucial in reports of this kind”.⁷⁸ This might have serious ramifications for the prisoner, particularly if police withheld important details or skewed the information. There is evidence from appeal cases during this period that police were responsible for compiling reports that were prejudicial to the prisoner, and in some cases, included untrue fabrications against the prisoner.

A handful of appeal cases cited grounds for appeal that included prejudicial police reports. For instance, in 1931, a waterside worker pleaded guilty to stealing from the person and was sentenced to 18 months imprisonment. His successful application to appeal found the police had supplied the sentencing judge with incorrect information. Though police alleged he had been out of regular work since 1921, the appellant provided proof that he had been regularly employed on the cattle stations and wharves since 1920.⁷⁹ In 1932, the CCA held that the prisoner’s two-and-a-half-year imprisonment sentence was excessive, and that the sentencing judge had been “influenced by “improper and inevitable prejudice” created by the injurious police report”.⁸⁰ Further, the report failed to include that the prisoner assisted police to retrieve the boat and made reparations towards its repair. His sentence was amended to six months imprisonment, suspended under the First Offenders Act. These examples highlight the power that police held in their responsibility to compile these reports. They could damage prisoner’s chances at sentencing in terms of the information they did or did not include. This provides evidence that police reports could be framed in ways that influenced judges’ sentencing practices.

⁷⁸ "Sentencing," 179.

⁷⁹ *R v Oberthur* [1930] QWN 4. His sentence was reduced to a good behaviour bond for 18 months.

⁸⁰ *R v Palmer* [1932] QWN 27.

Chapter 6 - The Judiciary and the Guilty Plea

This police practice regarding negative police reports was an ongoing issue. In 1947, during the transition to a guilty plea system in Queensland, police were again held responsible for compiling a report that was skewed against the prisoner.⁸¹ In this case, however, the CCA also provided direction to judges on the correct practice regarding allegations that reports were incorrect. The appellant Murphy had pleaded guilty to bigamy, but the police report represented the second ‘wife’ as a ‘respectable’ woman. The prisoner provided the appeal court with evidence that when he and the woman met and married, she was working in a brothel; this situation casting shadow over the courts’ perceptions of her ‘respectability’. The appeal court agreed that, had this fact been known to the trial judge, it might have influenced his sentencing deliberations. The CCA subsequently halved the original sentence of three years imprisonment. In its judgment, the court held that trial judges were not entitled to assume that the statements provided by the police were true, and that if the prisoner made allegations claiming as much, judges were required to investigate these claims prior to sentencing.

These cases present yet another police practice that possibly influenced some defendant’s decisions to plead guilty. Police reports offered detectives, and perhaps crown prosecutors, a degree of influence over judges’ sentencing processes. This could possibly have provided police some bargaining power during the investigation phase of the prosecution process to induce defendant’s guilty pleas. There is some evidence that police engaged in a form of sentence bargaining for guilty pleas. During the interrogation process, police allegedly communicated their ability to affect sentence outcomes.⁸² In a 1932 trial, CJ Blair heard that police had promised one defendant that

⁸¹ *R v Murphy* [1947] QWN 4.

⁸² “In the Courts,” *The Courier-Mail*, July 3, 1936, <http://nla.gov.au/nla.news-article38498423>.

Chapter 6 - The Judiciary and the Guilty Plea

“a word to the judge from us will go a long way”.⁸³ These ‘words’ to judges presumably refer to the police reports that in some cases were very favourable to the prisoner. In a 1931 sample case, the former police officer, soldier, and Foreign Service agent appeared for sentence for stealing property of upwards of £500.⁸⁴ The crown prosecutor noted that the police report gave him an excellent character and informed the judge that the prisoner had tried to make restitution, but it was difficult to do so because he was out of work. The prisoner was subsequently sentenced to 12 months imprisonment, to be released on a bond after serving just four months of that term.

Police reports also provided crown prosecutors with some bargaining power with defence counsel particularly in late guilty plea cases. In 1926, a represented female defendant entered late guilty pleas to all three indictments for stealing.⁸⁵ At sentencing, the crown prosecutor Joseph Sheehy framed the prisoner as the victim. He described the case as “a remarkable one, showing a system of fraud and deceit by a young woman who was wax in the hands of a scoundrelly married man”.⁸⁶ Her barrister, Mr Real, also “made a pressing appeal for leniency to the accused woman who was one of a respectable family”. Apparently persuaded by this description of the prisoner as victim, Justice agreed that she had evidently been the “catspaw” of this man. Owing to her previous very good character, he decided to look upon the three charges as one and

⁸³ “Admissibility of Confession,” *The Telegraph*, September 27, 1932, <http://nla.gov.au/nla.news-article181159443>.

⁸⁴ “Supreme Court,” *The Brisbane Courier*, February 17, 1931, <http://nla.gov.au/nla.news-article21670200>.

⁸⁵ Queensland State Archives Item ID95776, Depositions and indictments; PP, Trial ID #32474, QLDSC, Mabel Travers, 1926.

⁸⁶ “Catspaw or Calculating Crook?,” *Truth*, February 14, 1926, <http://nla.gov.au/nla.news-article206476070>.

sentenced her to a suspended imprisonment sentence of nine months.⁸⁷ Judges were clearly influenced by these reports.

Judges also considered information supplied by the prisoners themselves. Ten deposition files included letters written by prisoners directly to the judge. These letters do not appear to have been the outcome of legal advice; only one of these prisoners had legal representation at any phase of the prosecution process. The letters provide important information that judges could draw on in their considerations, including family problems, poverty and unemployment, and remorse. In 1951, a young intellectually impaired woman professed a strong degree of alleged remorse:

Dear Sir, I'm very sorry for what I have done, I don't know what made me do such a foolish thing. If given another chance I promise to go straight. I have a good home offered me and I will go straight to it. Yours respectfully...⁸⁸

Although some letters expressed a great deal of remorse, none of the prisoners referred to their guilty plea as either a bargain or deserving of leniency. Perhaps the implicit expectation that guilty pleas led to better outcomes than those defendants did not need to refer to their plea. Friedman and Percival suggest that defendants believed they were “better off” pleading guilty as a consequence of “rumours, hints, veiled threats, and guarded promises” that leniency was a likely outcome.⁸⁹ Prisoners’ letters and judges’ sentencing remarks considered other themes in terms of mitigating and aggravating circumstances that affected judges’ willingness to extend leniency. These include justifications for criminality and recidivism, alcoholism and alcohol-related offending,

⁸⁷ Ibid.

⁸⁸ Queensland State Archives Item ID96163, Depositions and indictments

⁸⁹ Friedman and Percival, *Roots of Justice*, 214.

and employment-related and family issues. Judges during this period may not have provided a sentence discount for prisoners' guilty pleas, but they did acknowledge justifications for sentencing reductions and leniency for other factors.

Leniency and first offenders

Judges extended leniency in sentencing most consistently to young and first time offenders. The Criminal Code's provisions under section 656 empowered judges to use their discretion to place prisoners on a bond or suspended sentence for their first conviction. Hence, most first time offenders in the 60 prosecutions sample received either a probation or suspended sentence. Many of these were young offenders, who were most likely to receive leniency from judges. For example, in 1951 a young defendant who pleaded guilty to 'stealing in a dwelling house' was sentenced to a two year bond.⁹⁰ Justice Stanley noted the favourable character references provided by the prisoner's counsel, and urged the young man to reform:

As you are a much younger man and have not been imprisoned before, I propose to give you a chance to amend your ways and keep out of prison.

Additionally, the judge ordered that the prisoner repay the money he stole from his aunt. This was framed as an appropriate deterrent to the young prisoner, Stanley remarking that having to repay the money "may do more towards showing you how silly it was to take it than anything else that I can say". Judges were thus aware that young offenders might be diverted from future offending; they were not yet 'real' criminals. It appears that some judges extended leniency in sentencing for first time offenders as a form of

⁹⁰ Queensland State Archives Item ID96171, Depositions and indictments; PP, Trial ID #37214, QLDSC, Anon., 1951.

rehabilitation. Prisons during this period were not focused on rehabilitation programs and services, so a bond, probation, or suspended sentence enabled the prisoner to undertake their own rehabilitation.

The implication was that a suspended sentence or bond might be deterrent enough for prisoners who were “relatively young” and not inherently criminal.⁹¹ In 1931, three co-accused prisoners convicted of counterfeiting received three year suspended sentences.⁹² Justice Webb decided that they were not “criminals” and their “ages and records deserve some consideration”. It is not surprising then that some prisoners wrote to judges to reframe their offending as aberrant behaviour, rather than the outcome of an inherent criminogenic propensity. One 17-year-old female prisoner, who pleaded guilty to receiving stolen clothing, professed remorse and attested to her non-offending nature, pleading for a specific sentence outcome in her letter:

I have never been in trouble with the police before and I know I have done wrong this time, the only trouble being the bad company I was in...If your Honour would please give me a bond, I promise not to let him down in any way, I also promise to break all relationship with these men and any men like them.⁹³

In a 1936 case, the 26-year-old prisoner produced a letter in court from his previous employer, a farmer willing to offer him employment.⁹⁴ The farmer wrote that he did not think that the prisoner was a criminal. “Neither do I think that you are,” agreed His

⁹¹ Queensland State Archives Item ID204171, Depositions; PP, Trial ID #566252, QLDSC, Anon., 1961 and PP, Trial ID #566253, QLDSC, Anon., 1961.

⁹² “Punched and Kicked,” *Truth*, December 13, 1931, <http://nla.gov.au/nla.news-article203925179>.

⁹³ Queensland State Archives Item ID96295, Depositions and indictments; PP, Trial ID #54665, QLDSC, Anon., 1951. The defendant received a three-year bond but breached that bond seven months later and was sentenced to six months imprisonment.

⁹⁴ “In the Courts,” *The Courier-Mail*, November 10, 1936, <http://nla.gov.au/nla.news-article37009736>.

Honour.⁹⁵ In this way, prisoners' letters could provide "a guide to judicial sentencing by determining whether, irrespective of their guilt, the offender was truly a "criminal".⁹⁶

Although a prisoner's status as a first-time offender was regarded as a mitigating factor in sentencing, continued reoffending was evidence of a prisoner's inherent criminality, and so was not treated as lightly.

Recidivism

Judges were generally unwilling to extend leniency when police reports attested to a prisoner's history of offending.⁹⁷ 34 of the 70 prisoners in the prosecutions sample had prior convictions. Typically, their recidivism was regarded as an aggravating circumstance, regardless of their guilty plea. Recidivist offenders received little compassion or leniency in sentencing during this period. The general attitude of judges was that reoffending prisoners had squandered their previous opportunities to rehabilitate themselves. In 1961, Judge Andrews reminded one recidivist offender that "people have to learn that when leniency is extended to them, it is extended in good faith by the court" with the expectation that this "will assist offenders to mend their ways and to lead a decent life in the future". Yet a guilty plea was evidence provided by the offenders themselves that they had failed to 'mend their ways'. For example, Justice Philp told two young prisoners in 1951 not to expect any further leniency from the court:

You two boys have both had chances; you both have convictions; you both have had chances. You have not profited by them. In my opinion, as I have expressed so often from this bench, lads like you are entitled to one chance,

⁹⁵ "Farmer Gives Back Job to Man Convicted of Breaking and Entering," *The Telegraph*, November 9, 1936, <http://nla.gov.au/nla.news-article180737239>.

⁹⁶ Piper, "To Judge a Thief," 115.

⁹⁷ "Caught in Act," *Queensland Times*, July 28, 1931, <http://nla.gov.au/nla.news-article116143526>.

Chapter 6 - The Judiciary and the Guilty Plea

perhaps two, sometimes, but that it is wrong to give you the idea that you will always get a bond no matter what you do while you are under 20.⁹⁸

This suggests that some judges were willing to extend probation penalties to young offenders even when they had previously reoffended. In this case, however, Philp felt that he would be “doing wrong” to the community and the prisoners themselves if he did not send them to jail. He subsequently sentenced both prisoners to six months imprisonment, a lighter sentence possibly owing to their youth.

Recidivism was an aggravating circumstance that affected judges’ sentencing deliberations. Some judges responded with sentences that were harsh and often denunciatory, in one case referring to the prisoner as “a jackal”,⁹⁹ and in another as an “undesirable”.¹⁰⁰ In 1926, Alfred Ernest King pleaded guilty to the attempted robbery of a man in a public toilet. King’s public defender, Mr Salkeld, pleaded for leniency on the basis that King’s convictions were all dated since sustaining a war injury. Acting Judge Dickson focused on “the long list of convictions” and the severity of the offence at hand. Dickson contemptuously stated that “garroters are lazy, good-for nothings, who loaf around the dark quarters of cities, waiting to rob drunken men” and subsequently sentenced King to three years imprisonment.¹⁰¹

These denunciatory statements were quite common for recidivist offenders. In cases involving immigrants, the subsequent imprisonment sentences were occasionally

⁹⁸ Queensland State Archives Item ID96179, Depositions and indictments; PP, Trial ID #52556, QLDSC, Anon., 1951 and PP, Trial ID #52557, QLDSC, Anon., 1951.

⁹⁹ “Man is Jackal, Says Judge,” *The Courier-Mail*, May 20, 1941, <http://nla.gov.au/nla.news-article41925262>.

¹⁰⁰ Queensland State Archives Item ID212640, File - criminal case; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #34803, QLDSC, Leo Dulle, 1931.

¹⁰¹ The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #32470, QLDSC, Alfred Ernest King, 1926; “Law Report,” *The Brisbane Courier*, February 9, 1926, <http://nla.gov.au/nla.news-article20991379>.

accompanied with advice to authorities to deport the prisoner at the end of their sentence.¹⁰² When Thomas Ghent pleaded guilty to a burglary charge of stealing goods worth £45 from a barber's salon in a north Queensland town in 1926, the judge stated that "men of his type are not wanted here; he should work his passage back to England as quickly as possible."¹⁰³ In 1931, an Italian immigrant committed a burglary offence with a young Australian farmer during the Depression period because they were hungry and the town locals in Bundaberg were unable to feed them. Justice Brennan called the Italian prisoner "a real waster", sentencing him to 12 months imprisonment in the Rockhampton jail. Brennan added that he was also recommending to the authorities that he be deported to Italy, because "we don't want foreigners of your sort who will not play the game".¹⁰⁴ There was little sympathy for the criminogenic forces at play in recidivist offenders' lives.

Some recidivist offenders wrote letters that attempted to explain or minimise their offending. These attempts to contextualise their offending trajectories received little sympathy from Queensland judges however. In 1956, a 28-year-old prisoner who pleaded guilty to 'bringing stolen goods into Queensland' wrote to the judge to explain his previous convictions.¹⁰⁵ He claimed that most of these offences were committed when he was "under the age of 16 years, and as far as [he] can remember there was never anything of value stolen". The prisoner described spending 11 years in a boys

¹⁰² See Mark Finnane, "Controlling the 'Alien' in Mid-Twentieth Century Australia: The Origins and Fate of a Policing Role," *Policing and Society* 19, no. 4 (2009): 9. Finnane notes that Australian State police (and evidence here shows the Courts also) played "a crucial role... in informing the responsible Commonwealth authorities" and facilitating deportation under the Commonwealth's Immigration Act.

¹⁰³ "Mackay Circuit Court," *Daily Mercury*, July 6, 1926, <http://nla.gov.au/nla.news-article169236065>.

¹⁰⁴ "Not Wanted," *Truth*, November 22, 1931, <http://nla.gov.au/nla.news-article203924383>.

¹⁰⁵ Queensland State Archives Item ID96291, Depositions and indictments; PP, Trial ID #39447 QLDSC, Anon., 1956.

home where he was often hungry and experienced bullying and violence. His young offending was directly related to this experience:

I got cold and hungry I would look for something to eat and keep me warm, and that is when I would break into beach shacks and kiosks on the beach just to get something to eat or keep me warm, if I had known where my parents were, I would have gone to them instead of doing all the things I've done.

Justice O'Hagan had little sympathy for the tale and sentenced the prisoner to three years imprisonment. He told the prisoner that nothing he said or wrote "could induce me to treat this matter leniently".¹⁰⁶ He referred to the aggravating circumstances that the prisoner had stolen a car and "took steps to prevent it being traced". However, the prisoner's recidivism was the more serious aggravating factor:

...nothing in your record could justify me in expecting, if I did treat you leniently, that you would benefit by it.¹⁰⁷

In 1941, a prisoner was sentenced for 'breaking, entering and stealing' 7s.10d from a café in South Brisbane. The prisoner's letter to Justice Philp referred to childhood factors that he claimed influenced his lengthy history of offending, in multiple Australian jurisdictions, dating from 1919.¹⁰⁸ Referring to himself as "a product" of an industrial training institution, the prisoner justified his offending as a reaction to circumstances, including the lack of parental guidance and ongoing unemployment. Philp was not sympathetic, noting that the prisoner appeared to have spent most of his

¹⁰⁶ Queensland State Archives Item ID96307, Depositions and indictments; PP, Trial ID #39447, QLDSC, Anon., 1956.

¹⁰⁷ Ibid.

¹⁰⁸ Queensland State Archives Item ID95985, Depositions and indictments; PP, Trial ID #16993, QLDSC, Anon., 1941.

life in prison.¹⁰⁹ He was subsequently sentenced to 12 months imprisonment but also included as part of the sentence that the prisoner be declared a “habitual offender”.¹¹⁰ This “declaration as a habitual criminal” was an early form of preventive detention.

Habitual Offender declaration

In the contemporary context, preventive detention is typically utilised for recidivist serious sexual offenders and terrorism suspects.¹¹¹ Statutory provisions can extend imprisonment beyond the end of a prison sentence, until prisoners convince the responsible authorities that they are at a low risk of reoffending. The roots of contemporary preventive detention trace back to the habitual offender provisions of the early twentieth century when judges had the statutory power to exercise their discretion and detain habitual offenders indefinitely. In 1914, section 659 of the Queensland Criminal Code was amended to empower judges to make a declaration that the prisoner was a “habitual criminal”, to be detained at Her Majesty’s Pleasure indefinitely. There were conditions attached to section 659 however. The prisoner must have been convicted of one of a specific list of offences, and to have been convicted on at least

¹⁰⁹ “Habitual Criminal Sections Should Be Used More, Says Judge,” *The Telegraph*, June 3, 1941, <http://nla.gov.au/nla.news-article186649801>.

¹¹⁰ The prisoner later appealed but the application was refused. PP, Trial ID #16993, QLDSC, Anon., 1941.

¹¹¹ Michelle Edgely, "Preventing Crime or Punishing Propensities-a Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia," *University of Western Australia Law Review* 33, no. 2 (2007); Svetlana Tyulkina and George Williams, "Preventative Detention Orders in Australia," *University of New South Wales Law Journal* 38, no. 2 (2015). Indefinitely detaining sexual offenders in Queensland traces back to *The Criminal Law Amendment Act 1945* that enabled the attorney general to make an application to the Supreme Court for a declaration that the offender “be detained during His Majesty’s Pleasure”, see Norval Morris, *The Habitual Criminal* (London: Longmans, Green and Co, 1951), 115.

three other occasions.¹¹² However, habitual offender provisions were little used in Queensland.

Although the Code was amended in 1914, criminologist Norval Morris argues that Queensland justices were “extremely reluctant” to impose a habitual offender declaration.¹¹³ The Australian Year Book records Queensland’s first habitual offender sentenced in 1922.¹¹⁴ By the beginning of the 60 prosecutions sample period in 1926, there were only 18 habitual offenders sentenced in Queensland.¹¹⁵ Habitual criminal declarations were not liberally employed in sentencing by Queensland judges during this period. The Prosecution Project database contains the prosecutions of 46 Queensland prisoners declared to be “habitual criminals” between 1922 and 1956.¹¹⁶ By 1964, there were just 238 habitual offenders in the total Australian prison population of almost 7,500 prisoners; only 14 habitual criminals were detained in Queensland at that time.¹¹⁷ The numbers of prisoners receiving declarations in their sentences were therefore quite low in comparison to the general prison population.

The CCA also appears to have extended a degree of leniency in terms of these declarations. The reported decisions provide examples where prisoners who pleaded guilty and were declared habitual offenders sought leave to appeal their sentences. In some cases the sentences and declarations were quashed although the terms of

¹¹² Duncan Chappell, "Preventive Detention and the Habitual Offender," *Australian & New Zealand Journal of Criminology* 2, no. 3 (1969): 161.

¹¹³ Morris, *The Habitual Criminal*, 108.

¹¹⁴ Australian Year Book 1929 see Australian Bureau of Statistics, "1301.0 - Year Book Australia: Past and Future Releases" 469. In 1929, there were only two prisoners sentenced to indefinite detention that year.

¹¹⁵ Morris, *The Habitual Criminal*, 113.

¹¹⁶ Almost all Queensland habitual criminal declarations involved property offences, particularly burglary type offences where defendants pleaded guilty.

¹¹⁷ Chappell, "Preventive Detention," 159.

imprisonment were typically increased in duration, to reflect the prisoner's offending history. In 1938, two prisoners separately appealed their sentences, and their declarations as habitual criminals were removed. However, one prisoner had his three and a half year sentence increased by another year, and the other prisoner's sentence doubled to three years imprisonment.¹¹⁸ None of these appeals mentioned the guilty plea as grounds for the appeal, either to challenge the declaration itself, or to appeal the severity of the sentence.

It is not surprising then that there are only three sentences in the qualitative study prosecutions sample that include a 'habitual offender declaration'. This appears quite low considering the high proportion of prisoners with previous convictions in this sample. There were other recidivist offenders who were not sentenced to preventive detention and might have been. It is unclear whether this related to sentencing decisions by judges, or whether crown prosecutors failed to make applications to the court to have a habitual declaration made against a prisoner.¹¹⁹ However, even when prosecutors applied to the court for a declaration to be made, some judges extended leniency and used their discretion not to include a declaration in the prisoner's sentence, for example, in the case of Harry Foster.

The PP database shows that recidivist offender Harry Foster was prosecuted multiple times in the Queensland Supreme Court between 1914 and 1936.¹²⁰ In February

¹¹⁸ *R v Roberts* [1938] QWN 37; *R v Molloy* [1938] QWN 21.

¹¹⁹ "Dealer, Who Boasted of Offences, Declared Habitual Criminal," *The Telegraph*, April 17, 1942, <http://nla.gov.au/nla.news-article171965610>.

¹²⁰ The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #47662, QLDSC, Harry Foster, 1914; PP, Trial ID #44491, QLDSC, Harry Foster, 1916; PP, Trial ID #135422, QLDSC, Harry Foster, 1919; PP, Trial ID #39308, QLDSC, Harry Foster, 1926; PP, Trial ID #47788, QLDSC, Harry Foster, 1936.

Chapter 6 - The Judiciary and the Guilty Plea

1926, Foster was sentenced for multiple charges of stealing and burglary. Because of his lengthy criminal history in multiple Australian states, Acting Judge Dickson felt he had “no choice but to declare him a habitual criminal and sentenced him to four years concurrently”.¹²¹ Foster was not released until June 30, 1933, almost three and a half years after his sentence ended.¹²² He appeared again for sentence in 1936, before CJ Blair, however the judge did not include a second ‘habitual offender declaration’. Crown prosecutor Joseph Sheehy had presented “a file of papers...and the necessary certificate from the Commissioner of Police and annexures” and directed Blair’s attention to section 659 of the Code.¹²³ The CJ used his discretion not to sentence Foster under the habitual offender provisions, but instead imposed a substantial six year prison sentence to “give [Foster] time in which to make up his mind to reform”.¹²⁴ Blair’s sentencing remarks did not refer to Foster’s plea, but did consider Foster’s alcoholism as a precipitating factor to the offence. Blair reportedly stated that he did not like to make the declaration when the outbreak of Foster’s offending related to his excessive drinking after some years of working. In this case, the prisoner’s alcohol abuse was treated by the judge as a mitigating circumstance deserving of some leniency. In other cases, judges considered alcohol abuse as an aggravating factor likely to increase the prisoner’s sentence.

¹²¹ “Sandgate Thefts,” *Daily Standard*, February 17, 1926, <http://nla.gov.au/nla.news-article179490320>. The court heard that since 1897, Foster had been sentenced by courts in NSW, Victoria and Queensland, to a total of 68 years imprisonment.

¹²² Queensland Police Gazette, 5 August 1933, p. 265

¹²³ “Man with Many Convictions,” *The Courier-Mail*, November 10, 1936, <http://nla.gov.au/nla.news-article37009699>.

¹²⁴ “Man Whose Sentences Totalled 68 Years is Given Six More Years,” *The Telegraph*, November 9, 1936, <http://nla.gov.au/nla.news-article180737346>.

Alcohol

Contemporary criminology provides a plethora of studies investigating the link between alcohol use and offending.¹²⁵ During the sample period, bureaucrats and court officials collected data on alcohol-related offending that reveals a preoccupation with this relationship. For example, the Australian Year Books compiled state-level statistics for convictions for ‘drunkenness’ as well as the national rates of alcohol consumption.¹²⁶ There was consensus regarding the link between alcoholism and criminal offending, including both violent and sexual offending, as well as property offending.¹²⁷ Criminal justice historians Lisa Featherstone and Andy Kaladelfos show that in sentencing rape offences judges “simultaneously [stated] that alcohol was not a legal defence ... while blaming alcohol for such behaviour”.¹²⁸ By the twentieth century, case law in the English and Australian courts made concessions whereby courts treated intoxication “as a mitigating consideration”.¹²⁹

The Queensland court also considered alcohol to be a mitigating factor. In 1948, the CCA delivered a judgment that discusses the mitigating effects of alcohol but also

¹²⁵ Jason Payne and Antonette Gaffney, "How Much Crime Is Drug or Alcohol Related? Self-Reported Attributions of Police Detainees," in *Trends & Issues in Crime and Criminal Justice* (Australian Institute of Criminology, 2012); Daniel S Nagin, David P Farrington, and Terrie E Moffitt, "Life-Course Trajectories of Different Types of Offenders," *Criminology* 33, no. 1 (1995); Sheldon Glueck and Eleanor Touroff Glueck, *500 Criminal Careers* (New York: A.A. Knopf, 1930); Kai Pernanen, "Alcohol and Crimes of Violence," in *Social Aspects of Alcoholism*, ed. Benjamin Kissin and Henru Begleiter (NY: Plenum, 1976)..

¹²⁶ Australian Year Book 1953 Australian Bureau of Statistics, "1301.0 - Year Book Australia: Past and Future Releases" 260-61.

¹²⁷ Allen A Bartholomew, "Alcoholism and Crime," *Australian & New Zealand Journal of Criminology* 1, no. 2 (1968): 71. Bartholomew notes that Norval Morris reported that up to 50 percent of those committing serious offence were under the influence of alcohol at the time of their offending. Ibid. found that 45 percent of recidivist property offenders in Victoria were intoxicated at the time of their offence.

¹²⁸ Lisa Featherstone and Andy Kaladelfos, *Sex Crimes in the Fifties*, History Series (Carlton, VIC: Melbourne University Publishing, 2016), 40.

¹²⁹ Nigel Walker, *Aggravation, Mitigation, and Mercy in English Criminal Justice* (London: Blackstone Press, 1999), 108.

Chapter 6 - The Judiciary and the Guilty Plea

makes a rare reference to a prisoner's guilty plea.¹³⁰ The case involved a father who pleaded guilty to incest. The grounds for appeal were that the sentence was excessive in comparison with other incest sentences, the prisoner was influenced by alcohol at the time of the offence, and he was previously of good character. There were no grounds stated for an appeal of the guilty plea. CJ Macrossan and Justice Philp refused the application, arguing that the prisoner had taken alcohol some hours before the offence. Justice Brennan stated he would have allowed the appeal and halved the sentence. Brennan specifically referred to the prisoner having stopped the police prosecution case in the police court to plead guilty, saving the witnesses the ordeal of testifying. Brennan's comment predates the utilitarian views later established by the courts in the 1970s.¹³¹ Brennan stated that in view of the prisoner's alcohol use at the time of the offences, and:

...further consideration for the family to the extent of not wanting to embarrass his wife and family by having them give evidence in the Police Court, I think that, although it is a serious crime, it is not such a crime that he has not been taught a lesson.¹³²

Although Brennan positioned the early guilty plea as evidence of remorse, Justice Philp was critical of the early guilty plea and its subsequent effect on the appeal case and on the task for appeal judges. Philp criticised the magistrate for failing to hear all the evidence because it meant the appeal court was:

... unfortunately placed in this case because all the evidence was not taken before the magistrate...[who] should have heard the evidence and then he would have known exactly what did occur...

¹³⁰ *R v Day* [1948] QWN 15.

¹³¹ Mackenzie, "Guilty Plea Discount," 208.

¹³² *R v Day* [1948] QWN 15, 19.

Chapter 6 - The Judiciary and the Guilty Plea

This has repercussions considering the evidence discussed earlier in this chapter that police magistrates increasingly allowed defendants to plead guilty prior to the close of the police case. If defendants then appealed their sentence (generally the only avenue for appeal in guilty plea cases) then the CCA had little evidence to review on which to consider the appellants' grounds for appeal. In this appeal case, the court referred to alcohol use as a mitigating factor that reduced some of the prisoner's responsibility for the incest. This provides evidence that prisoners and their counsel who raised alcoholism as mitigating factors were therefore likely to receive some form of consideration. In 1931, defence counsel John Casey referred to alcohol use as a very distant yet still mitigating factor in his clients' offending. Casey asked for leniency in view of the fact that:

he [the prisoner] had not appeared on any serious charges before and that he had been a faithful servant of the City Council and the A.I.F [Australian Imperial Forces]....Although he might not have been drinking on this particular date he was suffering from the effects of previous drinking".¹³³

Although some judges were open to considering alcoholism as a mitigating factor, others explicitly stated that they would not extend leniency based on the prisoner's alcoholism, even when prisoners linked their property offending to the loss of employment that was directly related to their drinking. When Walter Carey appeared for sentence in 1936, he provided the court with two character references from previous employers who attested to his hard work but noted his problems with alcohol had cost

¹³³ "Circuit Court," *Queensland Times*, February 27, 1931, from <http://nla.gov.au/nla.news-article115662511>.

him his employment.¹³⁴ Carey blamed his offending on his alcoholism, but Justice Blair stated that he could not extend leniency on that basis.¹³⁵

There is some evidence that judges who considered alcoholism to be an aggravating circumstance also framed alcoholism as a matter of self-responsibility. These judges consistently warned defendants to address their alcohol issues. In 1961, Justice Carter told a young prisoner that if he thought alcohol was the cause of his offending, then he should give “some thought” to stopping drinking.¹³⁶ In his sentencing of two young co-accused defendants for stealing a motor cycle in 1956, Justice O’Hagan warned one of the prisoners that:

If given a chance you may go straight, but you will never get an opportunity like this again. If, as your counsel says, lapses are due to drink then stay away from drink; stay away from bad company.¹³⁷

In their pleas for leniency, some prisoners blamed their drinking for the offence while others blamed the behaviour of other people, including the police, or the prisoner’s family (particularly wives). Generally, families were referenced as reasons for judges to extend leniency.

Other mitigating factors

Prisoners often asked for leniency by drawing links between their offending and other people. Sometimes this was based on problematic relationships with others. Some

¹³⁴ Queensland State Archives Item ID95916, Depositions and indictments; The Prosecution Project Database [PP], <https://prosecutionproject.griffith.edu.au/prosecutions> (version 1, 17 July 2016), Trial ID #47800, QLDSC, Walter Carey, 1936.

¹³⁵ PP, Trial ID #47800, QLDSC, Walter Carey, 1936.

¹³⁶ Queensland State Archives Item ID1677081, Depositions; PP, Trial ID #38443, QLDSC, Anon., 1961.

¹³⁷ Queensland State Archives Item ID96291, Depositions and indictments; PP, Trial ID #39102, QLDSC, Anon., 1956 and co-defendant PP, Trial ID #82736, QLDSC, Anon., 1956.

Chapter 6 - The Judiciary and the Guilty Plea

prisoners criticised the role of police in contributing to their recidivism while other prisoners apportioned responsibility to allegedly criminogenic circumstances, including their family members. More generally, these male prisoners referred to their responsibilities to wives and children as reasons why the judge should extend leniency to the prisoner.

It is probably not surprising, considering the insight into police practices revealed throughout this thesis, that some prisoners blamed the police for their offending. Two prisoners wrote letters to judges that specifically blamed their offending on the direct intervention of police in their working lives. Both prisoners alleged that police interfered in their chances of employment, and the subsequent lack of earning capacity led to their property offending. One prisoner clearly outlined the connection between police practices, employment and his reoffending in 1941:

Some person or the police tell your employer you are a convicted man, with the result that you are dismissed. There is only one alternative, and that is to go back to crime. You are forced back into it because you aren't allowed to work.¹³⁸

Another prisoner in 1951 told Justice Mansfield that “every time I get a job, the police come and tell my employer I’ve got a record. They seem to glory in doing this”.¹³⁹ It appears that some detectives went out of their way to inform employers about the prisoners’ police records.

Other prisoners blamed their families for their offending. In 1951, a prisoner who pleaded guilty to burglary wrote to the judge explaining that his offending was due

¹³⁸ “Habitual Criminal Sections Should Be Used More, Says Judge,” *The Telegraph*, June 3, 1941, <http://nla.gov.au/nla.news-article186649801>.

¹³⁹ “Convict’s farewell,” *Brisbane Telegraph*, July 24, 1951, <http://nla.gov.au/nla.news-article216561835>

in part to the fact his wife had demanded expensive goods. She had also foisted an illegitimate child onto him after the marriage took place, and later left him for another man after the prisoner's discharge from the Army.¹⁴⁰ Yet his plea for mercy left Justice Mansfield unimpressed:

As far as I am concerned, a person with a wife and child, who does not realise his responsibilities, will be viewed in a much worse light than a person who may not have those responsibilities. I personally see no excuse whatever, in your case.¹⁴¹

Most prisoners mentioned wives and children in their arguments justifying leniency and consideration. One prisoner explained that he was a married man with “a young and delicate wife and a baby son”, both of whom depended on government support. He justified his robbery to pay the maternity hospital bill for the baby's birth. He was “trusting your Honour will be as lenient as possible for the sake of my wife and child”.¹⁴² The argument was unlikely to sway the judge. In 1947, the CCA had ruled that any hardship to families should not shield offenders from the consequences of their serious offending.¹⁴³ Furthermore, although the prisoner expressed his remorse and promised not to reoffend, Justice Webb stated that he intended to send him “to jail for a long period”.¹⁴⁴ The sentence was one of the lengthiest in the 60 prosecutions sample: three years and nine months imprisonment. There was no leniency extended to him for being a first-time offender, let alone for pleading guilty.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Queensland State Archives Item ID95983, Depositions and indictments; PP, Trial ID #48393 QLDSC, Anon., 1941.

¹⁴³ *R v Steinberg* [1947] QWN 27.

¹⁴⁴ “Hold-Up Man Gaoled For 3 Years,” *Truth*, February 23, 1941, <http://nla.gov.au/nla.news-article199025989>.

Conclusion

The key findings from the *Heffernan* judgment permeate this chapter's consideration of the intersection between judicial and police practices associated with the rise of the guilty plea. The decision and subsequent changes to magistrates' responsibilities instigated by the Department of Justice occurred during the last years of the qualitative study period examined in this thesis. Most of the evidence framing this discussion therefore reflects on judicial (including magistrates') practices in the years prior to these developments, during the peak acceleration of guilty pleas.

The *Heffernan* decision, despite Justice Stanley's positive spin on police intentions, acknowledged that police practices were inducing guilty pleas, and that this was 'improper'. Yet this research shows that at committal proceedings, magistrates were generally disinclined to inquire into the elements of defendants' pleas or the police evidence to determine if that evidence constituted a *prima facie* case. When magistrates did question witnesses during the committal hearing it either served to strengthen the testimony of detectives against the defendant or possibly signalled to defendants the futility of challenging the police case. If magistrates did not believe defendants, why then might a Supreme Court judge?

Magistrates were typically dismissive of, and sometimes even hostile to, allegations made by defence lawyers and defendants that police engaged in 'improper' practices to obtain defendants' confessions and guilty pleas. Magistrates' attitudes were recalcitrant, typically regarding police process corruption as "anecdotal, fragmented,

and isolated rather than as part of a systemic, institutional pattern".¹⁴⁵ Magistrates were less likely to consider that police evidence might be compromised. Regardless of the post-*Heffernan* reforms requiring magistrates to inquire more closely into police practices, it appears that little changed until the policing reforms of the 1990s.¹⁴⁶

The *Heffernan* judgment and the subsequent Department of Justice circular concerned another key theme regarding guilty pleas. Justice Stanley's decision made it very clear that in terms of judges' sentencing, there was no relationship between a guilty plea and a reduced sentence. Furthermore, policy and law were aligned on this position. This provides strong evidence that both the courts and the state were at this stage opposed to the discount principle. It also suggests that there was no intention to engage in judicial or sentence plea bargaining. It does not mean, however, that judges were not extending leniency when defendants pleaded guilty.

This research finds that defendants, police and, to some extent, lawyers held an assumption that pleading guilty might lead to a lighter sentence. It is not evident what this presumption was based on, although it might be based on anecdotal experience. This research therefore analysed the mitigating factors that judges did consider in their sentencing deliberations in guilty plea cases. A range of mitigating factors were presented to the court, either through police reports to the crown prosecutor or submissions from defence lawyers or in letters from prisoners. Judges considered, for example, the prisoner's degree of criminality, often in conjunction with their age. Young first offenders were almost guaranteed to benefit from first offender provisions

¹⁴⁵ Susan Bandes, "Patterns of Injustice: Police Brutality in the Courts," *Buffalo Law Review* 47 (1999): 1275.

¹⁴⁶ Brown, "Royal Commission," 237.

Chapter 6 - The Judiciary and the Guilty Plea

that limited their sentence to a bond. However, even young recidivist offenders received a degree of leniency through suspended sentences. In contrast, older recidivist offenders were treated more severely, reflecting judicial attempts to stem recalcitrant criminality, while punishing offenders for their failure to rehabilitate themselves.

Alcoholism and alcohol-related offending were generally considered as mitigating factors, although some judges regarded alcohol as an aggravating circumstance. Whether alcohol was considered mitigating or aggravating depended on the prisoner's degree of criminality and youth. Few prisoners received, as part of their sentence, a 'habitual offender declaration' that imprisoned them indefinitely on a preventive order. While most of the prisoners in this sample had prior convictions that made them liable for such a declaration, only two judges delivered a declaration in their sentencing. It is unclear whether this outcome was due to failed applications on the part of prosecutors – and hence related to judges' leniency – or prosecutors decision not to make an application to the court in the first instance. In sum, none of the judges in any one of the 60 prosecutions cases made any reference in sentencing to prisoners' guilty plea. There is no evidence in this sample that individual judges were extending any leniency for a guilty plea between 1926 and 1961.

Part Four: Conclusions and Further Research

Chapter 7. Conclusion

A central tenet of contemporary criminal justice administration is that most defendants should plead guilty in the “interests of the smooth and efficient running of the judicial system ... provided they are in fact guilty”.¹ However, legal sociologist Sharyn Roach Anleu warns that sentence reductions and other incentives create “unacceptable inducements for innocent defendants to plead guilty”, particularly for those defendants who cannot afford access to legal representation.² This conflicts with the principle of evidence law that confessions and guilty pleas should be voluntary and should not arise from any promises, threats or inducements.

The research in this thesis reveals that historically defendants also faced ‘unacceptable inducements’ to plead guilty. I argue that police practices that induced guilty pleas were the foundation of the guilty plea system rather than the effect of that system. These practices were often troubling and in breach of the voluntariness principle. Rather than isolated incidents of behaviour committed by individual officers ‘dubious’ police practices became systemic amongst investigating detectives during the mid-twentieth century.³ Consequently, this resulted in increasingly significant numbers of defendants pleading guilty. By the 1950s, these practices elicited enough guilty pleas to trigger system transformation from prosecution by jury trial to guilty plea. However, the association between inducements and guilty pleas was not acknowledged until the late 1950s when a spate of appeal cases brought the issue to the notice of the CCA. The CCA was compelled to speak against the practice of police inducing guilty pleas,

¹ McGuire, "Plea Bargaining: Part 2," 65.

² Roach Anleu, *Law and Social Change*, 155.

³ "Police Interrogation."

although it did so with kid gloves. If the *Heffernan* judgment intended to arrest the acceleration in guilty pleas, it was too little and too late.

This research provides compelling quantitative evidence that the Supreme Court had already shifted to a guilty plea system, at least seven years before the *Heffernan* judgment. Although the guilty plea phenomenon was triggered by the acceleration in the increasing proportions of defendants pleading guilty in the police courts, the transformation itself was effected through the combination of several critical factors. These factors include the ‘gold standard’ nature of confessional material, the lack of statutory regulation of police interrogation processes, systemic police process corruption, and the general lack of judicial oversight of police practices in the courts. The rise of the guilty plea in Australia was not the outcome of systemic plea bargaining but was a product both of the history of police corruption, and the judiciary’s unwillingness to acknowledge that corruption. It is as much a history of policing as it is a history of the criminal prosecution process.

The research strategy

This thesis produces the first in-depth examination of the rise of the guilty plea in Australian Supreme Courts. Its aim was two-fold: to identify the origins of the Australian guilty plea system and suggest the factors and practices that were associated with this development. This research does not follow the same theoretical framework as historical guilty plea scholarship that positions plea bargaining as the unit of analysis. Australian history, conditions, and context suggested that plea bargaining was the outcome of the guilty plea system, rather than the cause. The current theories either lack an empirically strong foundation or the theoretical argument emerges from socio-political and legal contexts that vary considerably from the Australian context. For these

reasons, the unit of analysis in this research is ‘the guilty plea’ as opposed to ‘plea bargaining’.

The research aims of this thesis required a mixed methods approach to both data and methodology. This supported the in-depth analysis of the guilty plea phenomenon at both the macro and micro levels. This multi-dimensionality is key to understanding the practices influencing the guilty plea acceleration over time.⁴ The mixed methods design involved two studies. The quantitative study involved macro level quantitative analyses employing large scale data drawn from the PP database across the Queensland, Western Australian and Victorian Supreme Courts between 1901 and 1961. The qualitative study involved qualitative analyses of a range of rich archival documents and sources at the micro level of the Queensland Supreme Court between 1926 and 1961.

Quantitative findings

The first research question asked ‘**when did the rise of the guilty plea occur in the Australian Supreme Courts**’. The specific turning point in system transformation occurred sometime between 1947 and 1950 in Queensland and Western Australia, and between 1952 and 1955 in Victoria. The five-year sampling frame provides a proximate rather than a precise period of transition; future research on comprehensive post-war data may identify the transition year more precisely. The quantitative study also provides empirical evidence of the specific offence categories that were integral to the guilty plea phenomenon.

⁴Hitchcock and Turkel, "Old Bailey Proceedings," 953.

Research question two asked '**what factors were associated with the acceleration of guilty pleas over time**'. The evidence from the quantitative study analysed the patterns in guilty pleas to particular offences, the timing of guilty pleas, and the relationship between legal representation and pleading guilty. The quantitative study reveals that property theft offences attracted more guilty pleas across all three court jurisdictions than other offences. Furthermore, the rapid acceleration in guilty pleas to burglary and stealing offences were the empirical foundation of the guilty plea phenomenon. The evidence suggests that high numbers of guilty pleas were elicited in burglary cases prior to the acceleration, but then this pattern spread to stealing and other kinds of offences. This evidence associating guilty pleas with theft offending is lacking in contemporary guilty plea scholarship because court data is difficult to access.⁵ This difficulty is exacerbated by the recent ABS decision to conflate counts of 'guilty pleas' in with convictions at trial.⁶

Furthermore, the quantitative study utilised jurisdiction-specific data to test two key propositions posited by the professionalisation hypothesis that plea bargaining was the driver of the guilty plea acceleration. The first proposition was that this acceleration was the outcome of increasing numbers of late guilty pleas, the operationalised outcome of plea bargaining. I imputed plea timing from historical Queensland PP data to show change over time. Early guilty pleas accelerated in concert with the overall acceleration in guilty pleas over time, rather than late guilty pleas. This refutes the professionalisation hypothesis in the context of the Queensland Supreme Court. It also

⁵ Flynn, "Plea-Negotiations," 9.

⁶ "Criminal Courts, Australia, 2016-17: Higher Courts," Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2016-17~Main%20Features~Higher%20Courts~6>.

Chapter 7 - Conclusion

provides a new finding that suggests that police were more instrumental in obtaining guilty pleas, and in the shifts in the number of those pleas, than current theory considers.

The quantitative study findings suggest that prosecution practices in the lower courts were critical in the rise of the guilty plea.⁷ It is generally accepted that defendants began pleading guilty in greater numbers in the lower courts much earlier than in higher courts. For example, in 1929, 74 percent of defendants prosecuted in the Queensland summons courts pleaded 'guilty'.⁸ Some historical guilty plea scholars argue that plea bargaining began in the US lower courts before spreading to the middle and higher tier courts.⁹ These findings support that argument yet there is relatively limited scholarship on the historical practices of Australian lower courts during the early twentieth century.¹⁰ The focus of current historical scholarship focuses on the colonial period.¹¹ The findings from this research suggest that this is an area deserving of more interest, particularly in the twentieth century context of policing.

⁷ Ferdinand, *Boston's Lower Courts*; Vogel, "Social Origins."; *Coercion to Compromise*. Ferdinand argued that plea bargaining began with police prosecutors, as a natural extension of their policing strategies of negotiation and bartering with informants Ferdinand, *Boston's Lower Courts*. Cf Fisher, "Bargaining's Triumph."

⁸ "Record Number of Plaints," *Daily Standard*, February 6, 1929, <http://nla.gov.au/nla.news-article178903825>.

⁹ Ferdinand, *Boston's Lower Courts*. Cf Fisher, "Bargaining's Triumph."

¹⁰ Important exceptions are Finnane and Garton, "The Work of Policing: Social Relations and the Criminal Justice System in Queensland 1880-1914: Part 1."; Grabosky, *Sydney in Ferment: Crime, Dissent and Official Reaction, 1788 to 1973*; Mark Finnane and Stephen Garton, "The Work of Policing: Social Relations and the Criminal Justice System in Queensland 1880-1914 Part 2," *Labour History*, no. 63 (1992).

¹¹ See Lisa Ford and David Andrew Roberts, "'Mr Peel's Amendments' in New South Wales: Imperial Criminal Reform in a Distant Penal Colony," *The Journal of Legal History* 37, no. 2 (2016); Alex C. Castles, "The Judiciary and Political Questions: The First Australian Experience, 1824-1825," *Adelaide Law Review* 5 (1975); *An Australian Legal History*; Kercher, *An Unruly Child: A History of Law in Australia*; Gregory D. Woods, *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Annandale, NSW: Federation Press, 2002).; few explore processes in the lower courts, see Lisa Ford, "The Pig and the Peace: Transposing Order in Early Sydney," in *Law and Politics in British Colonial Thought: Transpositions of Empire*, ed. Shaunnagh Dorsett and Ian Hunter (New York: Palgrave Macmillan, 2010); Matthew Allen, "The Myth of the Flogging Parson: Samuel Marsden and Severity of Punishment in the Age of Reform," *Australian Historical Studies* 48, no. 4 (2017).

Chapter 7 - Conclusion

The quantitative study also challenged the hypothesis that defence lawyers were instrumental to the transition to a guilty plea system. The professionalisation argument is that the introduction of defence counsel increased levels of adversariness in the criminal trial, and plea bargaining mechanisms emerged to avoid trials. The Victorian PP data recorded the presence of defence counsel in the Supreme Court, enabling a test of the patterns in defendants' pleas associated with legally represented defendants. The findings showed that rather than facilitate the guilty plea process, lawyers appeared to resist it. In the pre-transition period, most guilty pleas were entered by defendants without defence counsel. Those with counsel were much more likely to proceed to trial. These findings show that lawyers extended some form of protection from pressure to plead guilty.

Two factors changed over time as guilty pleas increased. First, the proportion of defendants with defence lawyers declined. This decline was associated with an increase in numbers of defendants before the court more likely to plead guilty. Second, there was a slight shift in the practices of defendants when lawyers were present. In the post-transition period, more represented defendants were pleading guilty. This research draws on primary and secondary sources to suggest that there were not enough lawyers to meet demand during the 1950s. Social attitudes towards divorce and the expansion of civil suits during the 1950s saw an explosion of cases requiring solicitors. These cases were arguably more lucrative than criminal cases. In a system where it was becoming more common to plead guilty, and with professional caseload pressures, perhaps some defence lawyers stopped resisting pressures to plead guilty. Alternatively, defence lawyers were engaging in plea bargaining. Although the findings from the quantitative study show no empirical evidence of plea bargaining at the macro level, the findings

from the qualitative study in the Queensland Supreme Court reveal that bargaining did occur and did involve defence lawyers.

Qualitative findings

Guilty plea research, scholars argue, should pair large scale data analysis with “close reading and archival research”.¹² The qualitative study is the in-depth micro level examination of the guilty plea. It seeks to answer the final research question, **‘how did the practices of police, lawyers, and the judiciary, influence defendants’ guilty pleas.’** The ‘early plea’ evidence in the quantitative study prompted the subsequent decision to engage the Queensland Supreme Court as the research site for the qualitative study to understand the factors that influenced defendants’ decisions to plead guilty early. The analysis was based on 60 criminal deposition files between 1926 and 1961 that ended in guilty pleas. In total there were 70 defendants and co-defendants in the sample. The qualitative study was structured around the practices of key criminal justice actors: police, lawyers, and judges. These practices emerged from the deposition data and were supplemented by other primary sources, including newspaper reports, reported decisions, archived justice administration documents and secondary sources that contextualised these practices. This evidence was synthesised to examine the emerging framework of criminal justice processes that positioned police practices as the central mechanism underpinning the rise of the guilty plea in the Queensland Supreme Court.

¹² Hitchcock and Turkel, "Old Bailey Proceedings," 953.

Chapter 7 - Conclusion

The history of policing in Australia shows how police abused their “proper sphere” by pre-empting the trial process and deciding issues of guilt and innocence.¹³ Consequently, detectives were focused on the quickest route to a conviction – a guilty plea – rather than processes of investigation, evidence retrieval, and correct interrogation procedure.¹⁴ During the qualitative study sample period, evidence from one or two of the deposition files, from reported decisions, and newspapers revealed that police breached what limited guidelines, rules, and legal principles existed at the time to induce confessions, and increasingly over time, defendants’ guilty pleas. There are clear patterns that police induced confessions and pleas through ‘threats and promises’. Police committed violence, or threats of violence. Police fabricated verbal confessions. Police obtained confessions and guilty pleas by threatening to produce negative, sometimes fabricated, police reports for the judges’ sentencing considerations that might influence more severe sentences.¹⁵ These were promises that police could and did deliver. Police could not deliver the promised outcomes and lighter sentences.

In the contemporary guilty plea system, the greatest incentive to pleading guilty is the sentence discount. Innocent defendants will plead guilty because they are “so perturbed about the prospect of losing the discount”.¹⁶ There is no evidence from the qualitative study that judges during this period treated guilty pleas as mitigating factors. The evidence from the reported decisions and the 60 deposition files confirm that trial judges did not consider the guilty plea in their sentencing deliberations. Furthermore,

¹³ Dame Roma Mitchell, *The Web of Criminal Law*, ed. Australian Broadcasting Commission (Sydney: Australian Broadcasting Commission, 1975), 23.

¹⁴ Finnane, *Police & Government*, 85, 86.

¹⁵ *R v Oberthur* [1930] QWN 4; *R v Palmer* [1932] QWN 27.

¹⁶ Mirko Bagaric and Julie Brebner, "The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea—I'm Pleading Guilty Only Because of the Discount....'," *International Journal of the Sociology of Law* 30, no. 1 (2002): 13.

when asked to consider applications for appeals on sentence in the sample of guilty plea cases, the CCA considered a variety of mitigating and aggravating factors but never referred to the appellants' guilty pleas as a consideration. Prior to at least 1962, it appears that guilty pleas were not considered to be either a sign of remorse or a utilitarian mechanism that saved the court's time and resources that justified a sentence discount. Such decisions do not appear to have been made until the 1970s, long after the rise of the guilty plea in the Queensland Supreme Court.¹⁷ The development of the discount principle in the 1970s occurred almost two decades after Queensland's criminal justice system transitioned to a guilty plea system.

System transformation

This research argues that police were the central cog in a series of linked gears of practice involving lawyers and the judiciary. The evidence from the qualitative study positions police practices at the centre of the origins of the guilty plea system. These practices include detectives' 'conviction at all costs' mentality, and occasioned verbals and fabrications. Police employed threats and promises to induce more defendants to plead guilty whether the defendants were guilty of all the charges against them, or only some of them, or none. Practices that were designed to obtain guilty pleas appear to have expanded over time. Police traditionally focused on confessional material as the quickest means of guaranteeing convictions, particularly in burglary cases, but the use of confessions to influence defendants to plead guilty expanded to other offences, including stealing cases. Police practices then overlapped with the interests of crown prosecutors in what might be an anomaly of practice in the Supreme Court. This

¹⁷ *R v Cox* [1972] QWN 54; *R v Perry* [1969] QWN 17.

Chapter 7 - Conclusion

practice circumvented the pre-trial prosecution process by encouraging guilty pleas on *ex officio* indictment. Police became more focused on inducing defendants' pleas to the degree that the CCA, the Department of Justice, and the Queensland Police Commissioner were forced to act to express official disapproval of the practice. By that stage, system transformation was already complete.

For most of the twentieth century, crown prosecutors and the judiciary turned a blind eye to problematic police practices. Despite allegations of police violence and misconduct, in an environment where interrogation conditions supported police and failed to protect defendants, Supreme Court justices issued judgments that appear to have progressively undermined the law of voluntariness. In one 1946 appeal case that involved allegations of police violence and signed confessions that were proven to be factually impossible, Justice Douglas stated that "the jury was entitled to find that the confession was voluntary, but not that it was true".¹⁸ There was little recourse for defendants.

Between 1962 and 1969, a shift occurred in Queensland Supreme Court judges' sentencing practices. The 1969 *Perry* judgment stipulated that defendants' cooperation with police should be considered in judges' sentencing deliberations.¹⁹ This development heralded the emergence of the 'discount principle', the contemporary state-sponsored plea bargaining system that characterises the current prosecution system. This development occurred some 20 years after the rise of the guilty plea in the Australian Supreme Court. This thesis argues that, in the Australian context, plea

¹⁸ *R v Cross* [1946] QSR 65.

¹⁹ [1969] QLR 34, 38.

bargaining emerged as an outcome of the guilty plea system, it did not create that system.

Contribution and further research

This thesis provides evidence that has important ramifications for current theories on the development of plea bargaining. The current theory posits that modernising professional practices created a prosecution process that was complex, unwieldy and expensive. Administrators therefore required an alternative means of case disposition that avoided the problematic jury trial. But this theory does not explain why and how the guilty plea phenomenon occurred in the Australian context. The professionalisation of lawyers and police was completed decades before the rise of the guilty plea in these courts, and so cannot be relied on to explain the phenomenon. Further, lawyers do not appear to be as instrumental to the acceleration of guilty pleas, as posited by the literature. The Queensland data provides empirical evidence that most defendants pleaded guilty in the police courts, before they encountered the crown prosecutor. Although the plea bargaining literature relies on bargained-for guilty pleas with prosecutors to explain the guilty plea phenomenon in US courts, there was little evidence of this practice in the Queensland, Victorian, or Western Australian Supreme Courts. Moreover, the Victorian evidence shows that defendants were less likely to plead guilty when legally represented. Although levels of representation were higher for some offences than others, there is no suggestion that the presence of defence lawyers resulted in more bargained guilty pleas.

This history of the rise of the guilty plea in Australian Supreme Courts provides a substantial addition to Australian legal and criminal justice history. Its examination of system transformation from jury trial to a state-sponsored guilty plea system provides

Chapter 7 - Conclusion

new insights that contribute to historical plea bargaining scholarship. The basis of this contribution is that this research is the first guilty plea history in the context of the twentieth century, when previous research focuses on the mid-nineteenth century. This study will hopefully prompt further investigations of other jurisdictions that transitioned to a guilty plea system in the twentieth century.

The current research provides a fresh perspective on the practices and processes related to plea bargaining and guilty pleas that emerged from the key primary and secondary sources.²⁰ The 1941 Royal Commission provides unique and rich data on the practices of prosecutors and lawyers in negotiating guilty pleas to lesser offences that is worthy of inclusion in future guilty plea research, on a par with the practices of Asahel Huntingdon. My wider research into the background of the lawyers present at the inquiry and some of their previous cases reveals that they were not as forthcoming with previous practices of plea negotiations as they might have been. This form of bargaining, and other examples emerging from the depositions, provide evidence that some plea bargaining practices appeared to emerge naturally from modern prosecution process and procedure. Nonetheless, although there is some evidence that bargaining did occur in limited cases, bargaining was not a systemic practice. The Australian guilty plea system did not emerge from the development of plea bargaining, rather, systemic plea bargaining emerged several years after the transition to a guilty plea system.

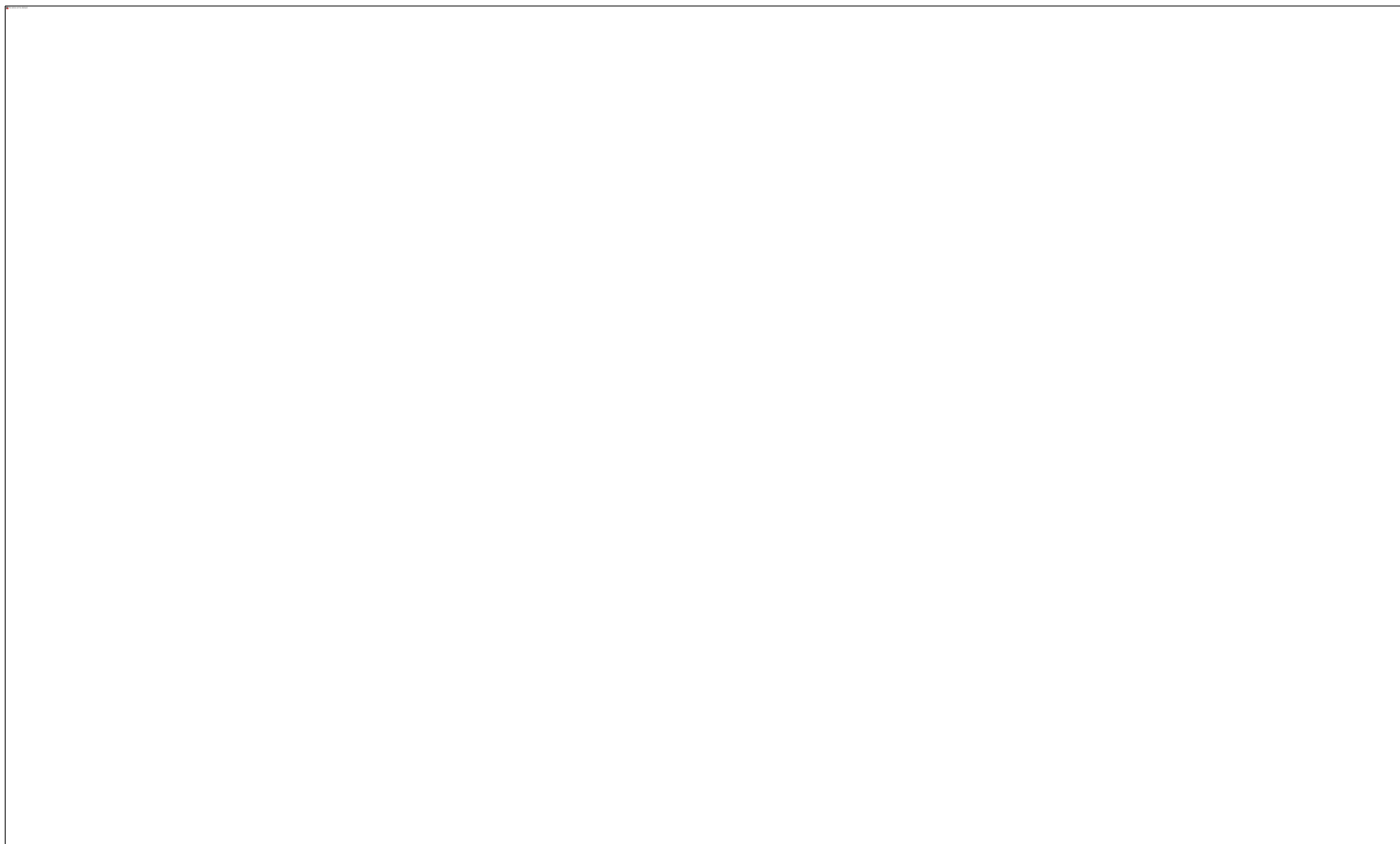
This research and its findings raise further questions. If guilty pleas were already dominant in a system that did not reward defendants' guilty pleas, then what factors triggered the development of the discount principle? When did judges first begin to

²⁰ McConville and Mirsky, *A True History*.

Chapter 7 - Conclusion

consider guilty pleas as mitigating factors in sentencing? Further research is required to bridge the gap between the evidence on sentencing provided by this research, and the case law on sentencing discounts from the 1970s onward. Other questions remain regarding the role of guilty pleas on *ex officio* indictment. Did this thesis uncover an anomaly in prosecution practices of both police and crown prosecutors that was confined to a specific period, ending with the *Webb* decision? Or did it continue, as police practices regarding involuntary confessions continued up until the Fitzgerald reforms? These areas are worthy of future research and consideration in the broader history of the guilty plea.

Appendix 1. Queensland Supreme Court register page, 1915



Appendix 2. The quantitative study variables

Variables consistent to all registers	Variables of interest
Register number (n)	
Name of accused (t)	Name of accused (t)
Aboriginal (t)	
Gender (t)	Gender (d)
Number of co-accused (n)	Number of co-accused (n)
First offence when committed (t)	First offence when committed (n)
First offence when tried (t)	First offence when tried (n)
Second offence when committed (t)	Second offence when committed (n)
Second offence when tried (t)	Second offence when tried (n)
Committal location (t)	
Magistrates name (t)	Magistrates name (t)
Committal date (n)	Committal date (n)
Place of trial (t)	Place of trial (t)
Level of court (t)	Level of court (n)
Witnesses (n)	
Bail (t)	
True bill (t)	True bill (d)
Judges name (t)	Judges name (t)
Plea (t)	Plea (d)
Verdict (t)	Verdict (n)
Trial date (n)	Trial date (n)
Sentence (t)	Sentence (n)
Sentence in years (n)	
Sentence in months (n)	
Sentence in weeks (n)	
Sentence in days (n)	
Remarks (t)	Remarks (t)
Notes (t)	Notes (t)
VICSC register	Variable of interest
Defended or undefended (t)	Defence (d)

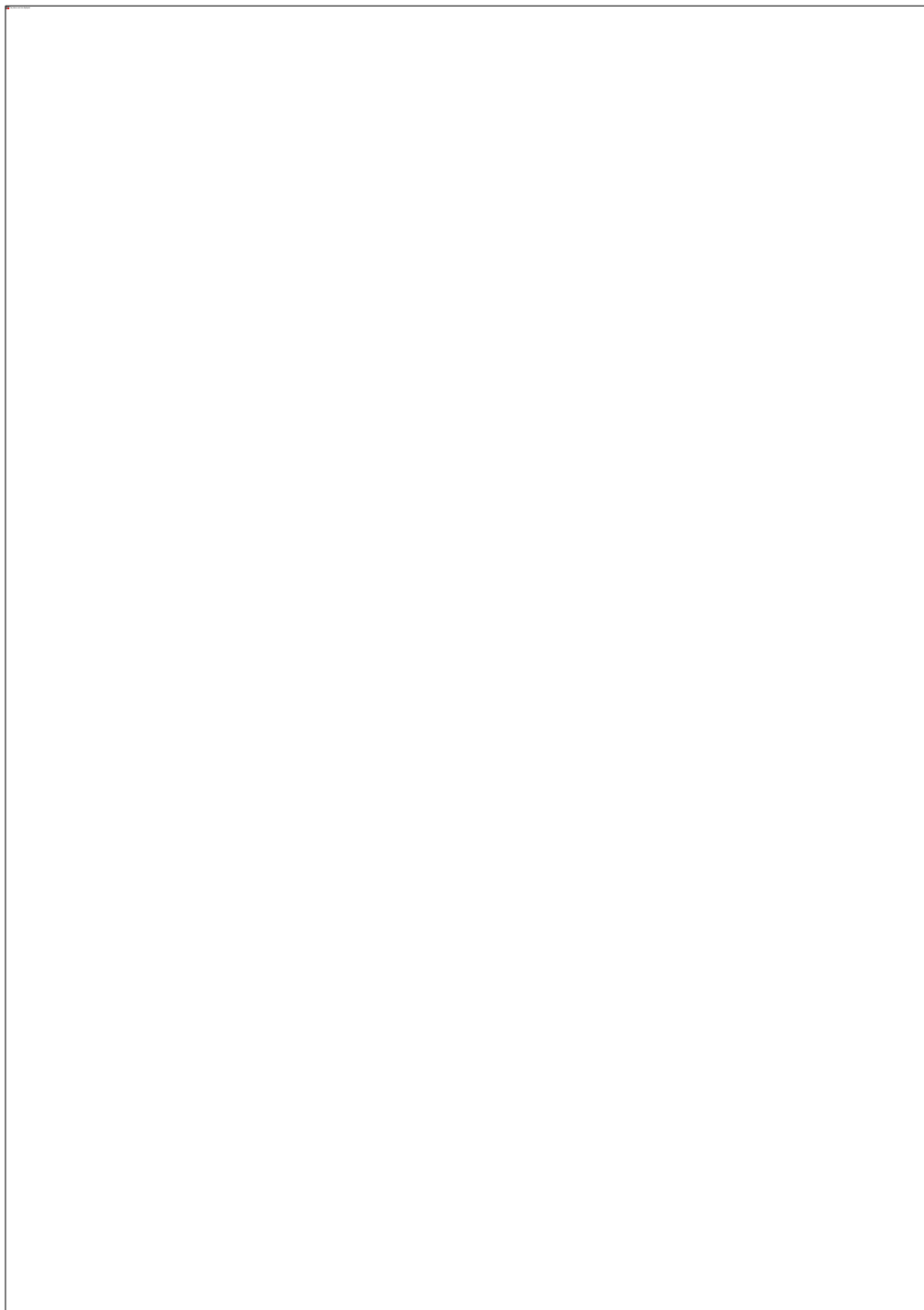
Appendix 2. The quantitative study variables

Note: Variables (n= numerical; t=text; d=dichotomous).

The data was downloaded from the Prosecution Project database, then uploaded into three separate SPSS files. I cleaned and coded the Queensland file first, documenting any decisions in a word document. This ensured consistency in coding decisions across the samples. Both textual and numerical variables were recoded where necessary, for example, the offence variables (first offence; second offence) included up to fifty different offence types that were recoded into categorical variables. Other variables, like gender and true bill, were recoded into dichotomous variables (d).

Appendix 3. Deposition examples

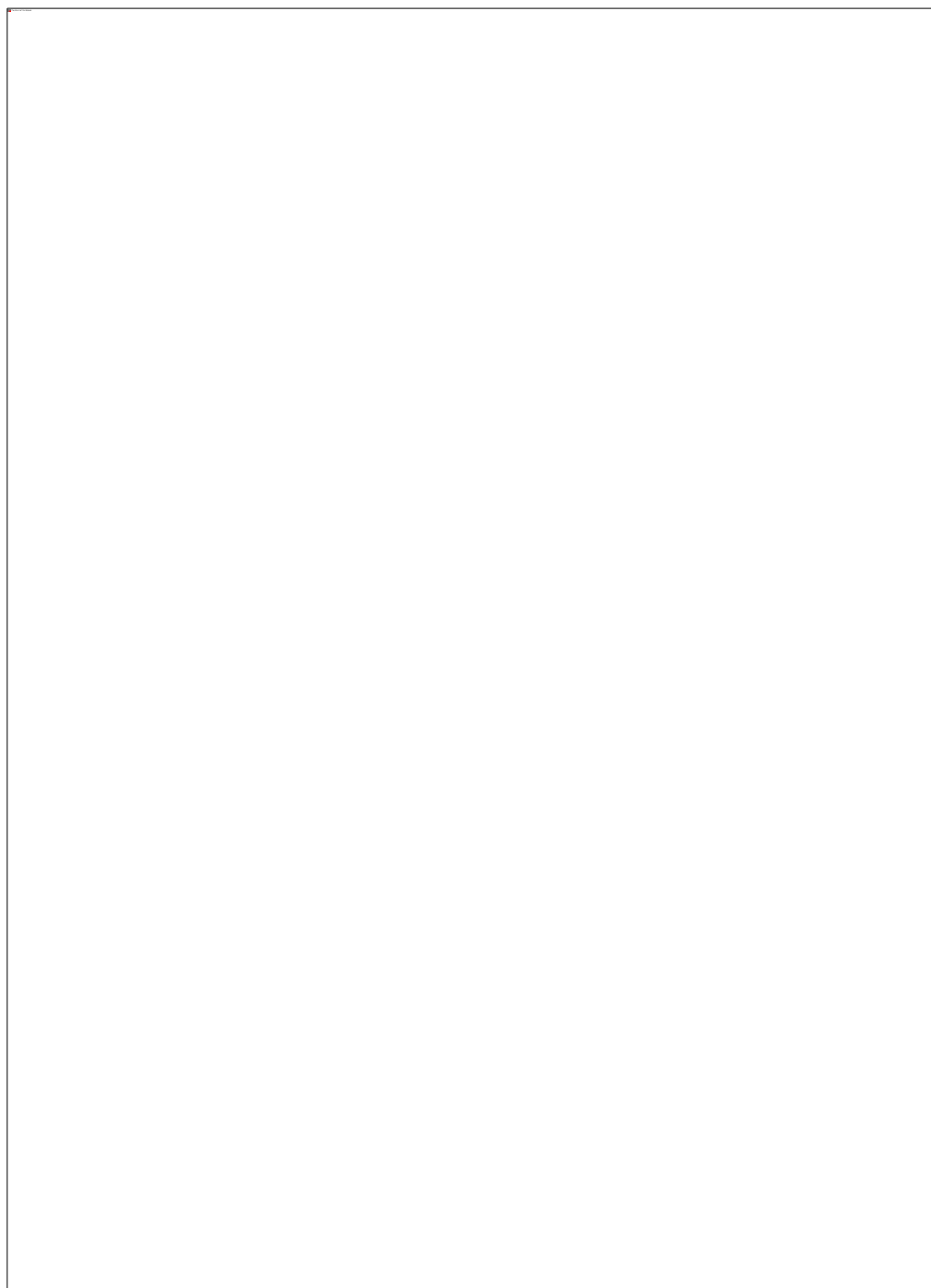
Image 1. Handwritten deposition. *R v Thomas Gent*, 1926.¹



¹Queensland State Archives Item ID3457, File - criminal case.

Appendix 3. Deposition examples

Image 2. Typed deposition. *R v Leo Dulle and George Waters*, 1931.²



²Queensland State Archives Item ID212640, File - criminal case

Appendix 4. Research methods

The quantitative study

The quantitative study sample is drawn from the Prosecution Project database of registers for the Supreme Courts of Queensland (n=5001); Western Australia (n=2208); and Victoria (n=3754).¹ I sampled every trial in every year at five yearly intervals for both Queensland and Western Australia from 1901 to 1961. Victorian data was collected for the same years, but only in the months of February, July and October. The three months of trials collected from the Victoria register are comparable to the Queensland data because there were many more criminal indictments prosecuted in the Victorian Supreme Court than in the other two jurisdictions combined. Similarly, I reduced the data collection in Queensland for the year 1961 because the number of prosecutions dramatically increased in that year. To avoid skewing the analysis I collected data for the same months as the Victorian sample, with the addition of cases prosecuted in April 1961. The data was uploaded into the SPSS software program for data cleaning, coding, and analysis in three separate data files.

Identifying guilty pleas in the historical record

The Prosecution Project database records defendants' pleas for either one or two indictable charges laid against defendants. In cases where defendants entered a combination of 'guilty' and 'not guilty' pleas for three or more charges, for example, the guilty pleas were only recorded in the descriptive 'Notes' or 'Remarks' fields in the database. Because the unit of analysis is the guilty plea, I created a 'plea' variable that

¹ M. Finnane, et al., "The Prosecution Project", Available online at: <https://prosecutionproject.griffith.edu.au/>.

Appendix 4. Research methods

captured any guilty plea entered to any offence to measure the proportion of guilty pleas over time. The variable was coded as [1] 'guilty plea' when the defendant entered at least one guilty plea to indictable offences. Pleas of 'not guilty' were coded as "0". Missing data was initially coded as 555 and categorised as a missing value in SPSS. In many cases, defendants' pleas could not be imputed when only a *nolle prosequi* was entered in the register. In these and other missing plea cases, I crosschecked the case in historical newspaper reporting for outcomes of committal hearings to identify the original plea entered by the defendants at committal. I recoded cases so that the offence that the defendant pleaded guilty to become the 'top charge'. I then visually cross-checked the plea and offence variables against the original court register images to verify the correct plea, corresponding verdict, timing of pleas, and the corresponding offence and updated my data files accordingly.

Coding the offence data

The PP data facilitates rich quantitative analyses of the offence types that underpinned the rise of the guilty plea. The register books recorded different offences, sometimes to a very detailed degree. As discussed in Chapter Three of this thesis, it was necessary to standardise the offences across the three jurisdictions because of differences in their respective criminal laws.

Previous historical guilty plea research provided a cursory examination of defendants' pleas to aggregated offences in the higher courts. This project goes a step beyond, disaggregating the broad offence variable into narrow offences. 'Offences against property' was disaggregated into burglary, stealing, fraud, and property damage offences, and 'offences against the person' was disaggregated into homicide offences and other personal offences. I did not disaggregate the remaining two broad offences. The total number of prosecutions for 'order and justice' (n=390) meant the frequencies

Appendix 4. Research methods

were too small to be analytically useful when disaggregated. Although “public injury” prosecutions were more substantive in number (n=1196), the broad variable consisted mostly of an even distribution of sexual offences, but individually the frequencies for each disaggregated sexual offence were not great enough to substantiate disaggregation. These offences were subsequently renamed ‘justice/regulatory offences’ and ‘sexual offences’, to avoid confusion with the broad offence titles.² Eight categories were coded in total. Appendix five presents a table of these offence categories aligned with the different parts of the Code.

Quantitative analyses

This research employs descriptive analyses to examine patterns in the data. This primarily involved cross-tabulation descriptive statistics of defendants’ pleas and trial year to track the changes in the proportion of guilty pleas entered over time. Appendix 7 presents the full report for the frequency and proportion of guilty pleas in the three Supreme Courts. I also employed descriptive statistics to explore the relationship between offence types and guilty pleas. A cross-tabulation of guilty pleas and broad offences across the entire sample period 1901 to 1961 did not reveal any strong relationship between pleas and offences. It was more meaningful to examine the change in the proportion of defendants pleading guilty to these narrow offences at the pre-and post-transition periods of the guilty plea transformation, to further explore the association between property offending and accelerating guilty pleas. Cross-tabulations were utilised to track change in the timing of guilty pleas and legal representation by comparing proportions before and after the guilty plea transitions.

² Sexual offences do not include rapes and attempted rapes; these are codified as personal offences in the Queensland Criminal Code 1899.

The qualitative study

The qualitative study shifts the focus of this research from macro patterns in large scale empirical data to a micro examination of the practices and processes in 60 prosecutions in the Queensland Supreme Court. The aim of the qualitative study is to draw connections between the professional practices and processes of key criminal justice actors-police, lawyers, and judges- that influenced defendants' guilty pleas. The qualitative study therefore involves in-depth qualitative research analysing a range of primary sources. The foundation of the qualitative study is the contextual analyses of 60 prosecutions of burglary and stealing offences between 1926 and 1961.

Criminal justice system sources

Queensland Supreme Court depositions

The criminal deposition files generally contain all the materials created during the committal process in the police courts. These materials include: the final committal sheet, with defendants' name and occasionally their age and occupation; and dated cover sheets for each committal hearing recording the names of the police magistrates, police prosecutors, and defence lawyers present. The most critical documentation is witness testimonies, especially detectives' testimony. The depositions record the witnesses' answers to questions asked by the police prosecutor, but not the questions. The cross-examination of prosecution witnesses is rarely recorded in question-answer format. The defendant's statement records their plea, generally entered at the close of the police prosecution case. These documents constitute the main of the deposition material although some files contain carbon copies of the Supreme Court judges sentencing remarks and letters written by the defendant to the judge. Ten of the depositions contained letters from the defendants to the sentencing judge. Character

Appendix 4. Research methods

references are also occasionally included with the letters. These documents were critical for analysing the mitigating effects of the guilty plea in sentencing.

Supreme Court indictment slips and court calendars

The qualitative study also analyses other Supreme Court material held in the archives. These included court calendars, and indictment slips filed by the crown prosecutors that were useful in identifying change in the number or severity of the defendants' charges between the committal and sentencing hearings. The documents provided further sources of demographic information about the defendant including age and occupation. The court calendars also included police reports of prior criminal history that enabled me to identify recidivist offenders.

Justice Department circulars

I searched for evidence of official administrative responses to guilty pleas. The Queensland State Archives series of Justice Department circulars, between 1886 and 1990, are bound collections of correspondence that provided instructions to criminal justice officials.³ These circulars were sent to the various court officials, including police magistrates, sheriffs, crown prosecutors, and Coroners. The circulars contain critical data capturing the policies, practices and procedures of the Queensland justice system.

The Circular Books first emerged as a key source of administrative data during my research into the 1941 Royal Commission into a Mackay plea bargaining case, discussed in Chapter Five. Commissioner Mansfield's Notebook records the dates of several circular letters, submitted for consideration to the Inquiry that related the key

³ Queensland State Archives Series ID 7132, Circulars Books; Queensland State Archives Series ID 10797, General Correspondence.

Appendix 4. Research methods

practices identified in the plea bargaining literature. These included commentaries on the practice whereby crown prosecutors accepted guilty pleas in return for withdrawing other charges through a *nolle prosequi*.⁴ I undertook a systemic search of the circular books for directions related to processes in the police courts; crown prosecutorial decision-making; and guilty pleas. This revealed critical documentation about the roles of police magistrates during the twentieth century, in terms of proper procedure in guilty plea cases, and regarding their gatekeeping role in defendants' applications for legal assistance.

Police manuals

My initial analysis of the sample cases revealed that confessional material was critical to the police prosecution cases in this sample. Secondary source material had already alerted me to the subject of problematic confessional material in the context of longstanding police corruption during the twentieth century. It was therefore important to understand what police themselves understood about these practices around obtaining legal confessional material. The key sources that record the officially sanctioned practices and procedures during this period were the Queensland Policeman's Manuals published.⁵ These manuals were key instructional manuals during the years prior to any formal institutional training. The manuals the "direct instruction from the Commissioner of Police to each and every member of the Police Force and should be obeyed as such".⁶ They provide critical evidence of the expectations of police in terms of interrogation, cautions, confessions, and guilty pleas.

⁴ Queensland State Archives Item ID92081, Papers - Royal Commission

⁵ Cahill, *Manual*; Ryan, *Manual*; Carroll, *Manual*; Smith, *Manual*.

⁶ *Manual*, 458 GI 1087 (2)

Appendix 4. Research methods

Professional legal sources

The legal and policing fraternity of Queensland benefited from two periodical publications that provided important resources to inform their professional practice: the Queensland Reports (QSR/Qd R) and the Queensland Justice of the Peace and Local Authorities Journal (QJPR). These resources included recent reported decisions from the Queensland- and other Australian state- Supreme Courts, and interesting decisions from criminal and civil trials and court of appeal cases from other jurisdictions, including the New Zealand and English courts of appeal. Further, the QJPR also included reports from criminal justice inquiries and scholarly articles for its readership's benefit.

Queensland CCA decisions are also useful sources to track appeals against conviction in guilty plea cases. This is critical in exploring how appeal judges responded to allegations of police misconduct, particularly when prisoners appealed their convictions on the grounds that their pleas were induced by police.

Trove database of historical newspapers

I collected historical newspaper reports related to the 60 sample cases. Newspapers' law reports often provided rich reports of individual criminal cases for their readers. Sometimes this included cross-examination between lawyers, and judges' sentencing remarks, and occasionally defendants' interactions with other courtroom actors. These reports are important; most defendants' voices are missing from the committal depositions. I also collected other guilty plea cases that provided interesting connections between guilty pleas and police, lawyers, and judges. Trove is an online database of historical newspapers freely available through the National Library of Australia providing access to newspapers reports from the early nineteenth century to the early 1950s.

Appendix 4. Research methods

There are some limitations with Trove data for this sample period because there is little court reporting available after 1952. There are almost no reports for cases from 1956 and 1961. I also searched the microfilmed copies of Queensland newspapers held in the Queensland State Library. This search revealed a shift in newspaper editorial practices from the mid-1950s onward. Law report sections were shortened considerably from their previously lengthy format. Instead, papers focused on individual, more sensationalised cases rather than reporting multiple prosecution outcomes. Nonetheless, there were rich reports available that covered the most critical period of the guilty plea acceleration prior to and including 1951.

Data collection and analysis

This research employed a selective sampling strategy to collect 60 burglary and stealing guilty plea cases across the pre-and post-transition periods in the Queensland Supreme Court identified in the quantitative study. The sample comprised 15 burglary and 15 stealing cases from the pre-transition period (1926-1946, n=30), and the same number of cases from the post-transition period (1951-1961, n=30). Selection was based on several criteria, the most critical being the availability of extant police court files held in the Queensland State Archives. The Queensland State Archives do not hold every Supreme Court criminal deposition files of cases prosecuted during the twentieth century. Many central and northern Supreme Court documents were destroyed during natural events like cyclones. Other files were unusable due to mould damage. Subsequently, the sample in the post-transition period is heavily skewed towards defendants sentenced in the Brisbane Supreme Court sittings.

Other sampling criteria included ensuring that the sample was inclusive of a range of different burglary and stealing offences. The qualitative study employs the categories of 'burglary' and 'stealing' throughout this research. However, these

Appendix 4. Research methods

classifications encompass a range of property offences. For example, stealing offences include ‘stealing’ (12 cases); ‘unlawful use of a motor vehicle’ (5); and ‘receiving’ (4). However, stealing also includes offences involving violence, like ‘robbery with violence’ (2 cases); ‘attempted robbery’ (1); and ‘assault with intent to rob’ (1). ‘Burglary’ refers to all breaking and entering type offences like ‘breaking, entering, and stealing’ (12 cases), ‘breaking and entering’ (8), and ‘breaking and entering a dwelling house with intent to commit a crime’ (2). Because property offences often involved co-accused defendants, the sampling strategy selected cases with sole defendants to provide a balance of both single and co-accused defendants across the sample. Due to the constraint of the project, I restricted the number of co-accused to two co-defendants. In total, the 60 prosecutions cases included 70 defendants and co-defendants.

Data collection

The primary sources, including the 60 depositions files, were collected in one of two ways. I photographed archival documents, reported decisions and professional journals, and policemen’s manuals with a mobile phone. These images were uploaded into separate case folders for each defendant, and then filed according to offence type and case year. The committal hearing depositions were subsequently transcribed using Dragon Speech software in a Word document for each defendant or co-accused pair. The transcription process supported my preliminary data analysis, proving an initial understanding of the prevalent patterns in data. I began the coding process once all of the depositions were transcribed. Historical newspapers were collected from Trove and filed into a Zotero library, under year and then by defendant’s name or subject matter as required.

Appendix 4. Research methods

Data coding

Coding started when the 60 deposition cases were transcribed into Word documents. This involved multiple steps. First, I used four colours to highlight the different text that signified the speech of different courtroom actors: yellow (police), green (defence lawyers and crown prosecutors), and blue (magistrates and judges), and beige (defendants). This provided an initial sense of the variation between the actors in their spoken content in each case. I then coded and analysed the detectives' discourse using 'review comments' to record my coding. For example, I highlighted any evidence where detectives' testimony implied a breach in the Judges' Rules, then recorded the Rule that was breached, and any notable quotes, in a review comment. I then coded the documents for the lawyers, and then the judiciary. I subsequently recorded this information in a SPSS data file, using dichotomous variables. Other dichotomous variables recorded the presence of forensic material in the police evidential case, including fingerprint evidence and photographs. The SPSS also recorded string variables collating the names of senior testifying detectives, defence lawyers, public defenders, and judges. This database provided a helpful visual aid to the data analysis. I progressively added new variables during coding for each court actor. For example, I coded the judge's name, whether sentence remarks or letters to the judge were included in the depositions, and sentencing data from the quantitative study data file. I also created separate 'analyses' documents, recording summaries of each case, including interesting quotes, and noted exemplars for the writing up phase of the project. At the end of the coding process I had three coded transcripts for each defendant/co-defendants, corresponding to each stage of coding.

Appendix 4. Research methods

Defendant characteristics

Only a third of the defendants had a lawyer present during proceedings. 23 defendants were legally represented, although this did ensure that a lawyer attended every appearance in the committal proceedings. In fact, only two defendants were represented at every one of their police court appearances in 1961.⁷ Multiple committal hearings were the norm; only four defendants were committed at their first appearance in the Police Court. The remaining 66 defendants appeared, on average, three times, before they were asked to enter their plea. Further, legal representation appeared to have little influence on the timing of guilty pleas in these cases. Defendants were as equally likely to enter an early guilty plea as a late plea when defence counsel was present.

Research strategy

This section outlines the analytical strategy and research process to investigate the practices associated with police, lawyers, the judiciary, and guilty pleas. The example discussed here is a key finding from this thesis that the police practices involved in obtaining confessional material were instrumental in guilty plea cases. The analytical process was circular, moving between a range of secondary and primary sources to reveal and synthesis new evidence of police practices in obtaining confessional material. The history of policing scholarship suggests there may be an association between defendants' confessions and their guilty pleas. However, that association is likely to be problematized by the historical context where Australian detectives were motivated to obtain convictions at any cost.⁸ Key primary and

⁷ Queensland State Archives Item ID204171, Depositions; PP, Trial ID #566252, QLDSC, Anon., 1961 and PP, Trial ID #566253, QLDSC, Anon., 1961.

⁸ Finnane, *Police & Government*, 77.

Appendix 4. Research methods

secondary sources document the long history of problematic police practices in obtaining confessional material that led to a series of Australian police inquiries, from the 1951 New South Wales Royal Commission through to the 2004 Western Australian Kennedy Report.⁹ These problematic practices include violence, fabricated evidence, and inducements to confess and to plead guilty. These sources speak to the widespread nature of police corruption in the prosecution process and provided examples of the behaviours that some detectives engaged in to obtain confessions.

This background literature prompted close reading of the Queensland reported decisions and professional discourse in the QJPR to understand how the courts responded to these practices over time. These professional documents - for the period 1926 to 1962 - were important sources of evidence capturing how police, the legal profession, and the judiciary, perceived and responded to allegations of police corruption during interrogations. This inquiry revealed several reported decisions that ruled on police practices around cautioning and interrogation. It showed that there were no statutory obligations on police concerning proper legal procedures during interrogations. Rather, police were guided by 'rules of practice' sometimes referred to as the English Judges' Rules, or Judges' Rules. However, the depositions revealed that police applied these Rules inconsistently, and breaches were common. It was therefore critical to understand how police acquired their knowledge about the practice related to these Rules, and how they were expected to follow them during their investigations.

The Queensland Policeman's Manuals embodied the rules and procedures for policing in Queensland. These manuals were published throughout the twentieth century and were authorised by the then-serving Police Commissioners and copies are currently

⁹ See also McDermott

Appendix 4. Research methods

held in the Queensland Police Museum. The Manuals comprise the rules and general instructions pertaining to policing practices, including correct procedure during interrogations and when to caution suspects as required by the Judges' Rules. The Manuals provided important information about the practices related to confessions and reveals how these instructions for practice changed over time.

Throughout the research process, I continued to collect data from other historical sources where there was evidence that confessional material was problematic. This involved collecting data from the Trove database of historical newspapers. I collected court reports pertaining to the sample defendants where available and read closely for evidence of problematic police practices in these accounts. I also analysed reports of other cases where defendants made allegations that police inducements, including threats and violence, led to either confessions or guilty pleas. The synthesis of these disparate sources of data provide a deeper understanding of the processes involved in obtaining confessions and how police practices possibly affected defendants' guilty pleas. This example presents a snap shot of the research process underpinning the qualitative component of this thesis.

Appendix 5. Offence categories

TABLE 1. Coding of offence categories in alignment with the Queensland Criminal Code

Criminal Code Parts	Chapters	Broad offence category	Narrow offence category
Part II Offences against public order	Seditious Offences against executive/legislative power Unlawful assemblies Offences against political liberty Piracy	Justice offences	Regulatory offences
Part III Offences against the administration of law & justice & against public authority	Disclosing official secrets Corruption & abuse of office Corrupt & improper practices at elections Selling & trafficking in offices Offences relating to admin of justice Escapes, rescues, obstructing officers of court Offences relating to the coin Offences relating to posts & telegraphs Misc. offences against public authority		
Part IV Acts injurious to the public in general	Offences relating to religious worship Offences against morality Nuisances, misconduct to corpses Offences against public health Miscellaneous offences	Public order offences	Sexual offences

Appendix 5. Offence categories

Criminal Code Parts	Chapters	Broad offence category	Narrow offence category
Part V Offences against the person, & relating to marriage & parental rights	Duties relating to the preservation of human life Homicide, suicide, concealment of birth Offences endangering life or health Assaults Assaults on female, abduction Offences against liberty Offences relating to marriage & parental rights & duties Defamation	Personal offences	Homicide
			Personal offences
Part VI Offences relating to property & contracts	Stealing Stealing with violence, extortion by threats Burglary, housebreaking & like offences Obtaining property/credit by false pretences, cheating Receiving property stolen or fraudulently obtained Frauds by trustees & offices of companies etc. Offences of injuries to property Forgery Preparation for forgery Personation Fraudulent debtors	Property offences	Burglary
			Stealing
			Fraud

Appendix 6. The qualitative study sample characteristics

TABLE 1. The qualitative study sample

PP #trial	Year	Gender	Age	Prior convictions	First offence	# charge	Co-defendant	Guilty plea	Detective	Lawyer
32470	1926	male	33	yes	attempted robbery	1	no	early	Acting Sgt CC Ricketts	none
32474	1926	female	31	no	stealing	3	no	late	Det Const JA Bookless	James Crawford
32631	1926	male	26	yes	breaking, entering and stealing	1	no	late	Det Snr Sgt A Jessen	none
39308	1926	male	46	yes	breaking and entering	6	no	late	Acting Sgt HJ Houston	none
39757	1926	male	48	yes	breaking, entering and stealing	3	no	late	Det Acting Sgt M Cahill	JS Gilshenan
46331	1926	male	18	yes	attempting to steal whilst armed with a dangerous weapon	1	yes	late	Det Const WF Stone	none
46332	1926	male	17	yes	attempting to steal whilst armed with a dangerous weapon	1	yes	late	Det Const WF Stone	none

Appendix 6. The qualitative sample

33936	1931	male	36	-	found having instruments of housebreaking in his possession	2	no	late	Const D Keeffe	John Casey
34043	1931	male	22	yes	Attempting to break and enter with intent to steal	1	no	early	Const G Pflugradt	none
34147	1931	male	37	no	stealing	1	no	early	Det Const J McCullough	none
34253	1931	male	44	yes	stealing	1	no	early	Act Sgt K Campbell	none
34571	1931	male	36	no	stealing	3	no	late	Det Const P Glynn	JR Gilbert
34803	1931	male	27	yes	breaking and entering a dwelling house with intent	1	yes	late	Const P Boyle	none
81235	1931	male	17	no	breaking and entering a dwelling house with intent	1	yes	late	Const P Boyle	none
35578	1936	male	22	yes	stealing with violence	1	no	early	Det Act Sgt J O'Malley	none
36490	1936	female	46	no	receiving	3	yes	late	Const N Bahr	J Barry
36599	1936	male	23	yes	stealing from a dwelling	2	yes	early	Det Act Sgt R Currie	none

Appendix 6. The qualitative sample

40048	1936	male	20	yes	stealing from a dwelling	2	yes	early	Det Act Sgt R Currie	John Casey
47785	1936	male	26	no	breaking and entering	3	no	early	Det Acting Sgt Burns	none
47788	1936	male	56	yes	breaking and entering	1	no	early	PC Const H Devantier	none
47800	1936	male	55	yes	breaking and entering	1	no	early	PC Const J Browne	none
16938	1941	male	19	no	breaking and entering a shop and stealing therein	2	no	early	PC Const A Purcell	none
16993	1941	male	48	yes	breaking, entering and stealing	1	no	early	PC Const A Purcell	Delaney
17538	1941	male	27	-	breaking, entering and stealing	1	no	early	Const FJ Monaghan	none
17550	1941	male	31	no	stealing as a servant	1	no	early	Det Const WR Carter	none
17916	1941	male	46	no	stealing & receiving	14	no	late	Det Const JP McIver	J Aboud
48393	1941	male	19	no	robbery whilst armed	2	no	late	Det Sgt WT Reedman	none

Appendix 6. The qualitative sample

7012	1946	male	36	no	breaking and entering a dwelling house	1	no	early	Det Const S Hambrecht	RL Weir
7095	1946	male	18	yes	stealing	1	no	early	Const H Smith	none
9025	1946	male	33	yes	cattle stealing conjointly	1	yes	early	PC Const NS Gildbrandsen	LB Moynihan
9026	1946	male	41	yes	cattle stealing conjointly	1	yes	early	PC Const NS Gildbrandsen	LB Moynihan
9620	1946	female	20	no	breaking and entering a dwelling house with intent	6	no	early	Det Const LR Wex	none
9714	1946	male	21	no	stealing a motor car	2	yes	early	Const L Seary	none
9716	1946	male	18	no	stealing a motor car	2	yes	early	Const L Seary	none
9811	1946	male	25	yes	entering a dwelling house with intent to commit a crime	1	no	late	PC Const K King	none
36690	1951	male	47	yes	breaking and entering	1	no	early	Det Snr Const D Chippendall	none
36691	1951	female	28	yes	breaking and entering a dwelling house with intent	1	no	early	Det Const Bodenham	none

Appendix 6. The qualitative sample

36792	1951	male	17	yes	breaking, entering and stealing	2	yes	early	PC Const R Edington	none
36794	1951	male	16	yes	breaking, entering and stealing	3	yes	early	PC Const R Edington	none
36820	1951	male	29	yes	breaking and entering	4	no	early	Det Const GPJ Adams	none
36983	1951	male	23	no	assault with intent to rob	1	no	early	Det Sgt LJ Platz	none
37214	1951	male	22	no	stealing in a dwelling house	1	yes	late	PC Const J McGrath	JT Delaney
37307	1951	male	26	yes	stealing	1	no	late	Det Const Bidner	G Smith
37412	1951	male	20	yes	breaking, entering and stealing from a warehouse	3	no	late	Det Sgt White	K Mitchell
51878	1951	male	41		stealing a motor car	1	no	early	Det Const P Steadman	none
52556	1951	male	18	yes	stealing	1	yes	late	PC Const FM Hannan	Walter Benjamin Campbell
52557	1951	male	17	yes	stealing	1	yes	late	PC Const FM Hannan	Walter Benjamin Campbell

Appendix 6. The qualitative sample

38853	1956	male	36	no	breaking and entering	1	no	early	Det Sgt L Hughes	none
39102	1956	male	20	yes	stealing	1	yes	late	PC Const AE Williams	J Aboud
39447	1956	male	28	yes	bringing stolen goods into Queensland	1	no	early	Det Const JR Landy	none
40096	1956	male	17	no	breaking, entering and stealing	1	yes	early	Const JB Fillingham	P Connolly
40144	1956	male	50	no	receiving	1	no	early	Det Const PE Quinn	none
54665	1956	female	17	no	receiving	1	no	early	Det Sgt WT Taylor	none
55068	1956	male	19	yes	breaking, entering and stealing	1	no	early	PC Const D McManus	none
55458	1956	male	36	yes	breaking, entering and stealing	1	no	early	PC Const H Doull	none
55529	1956	male	29	no	attempting to break and enter with intent	1	no	early	Det Sgt D Buchanan	none
56365	1956	male	26	yes	stealing	1	no	early	Det Const JR Shepherd	none

Appendix 6. The qualitative sample

82720	1956	male	17	no	breaking, entering and stealing	1	yes	early	Const JB Fillingham	none
82736	1956	male	20	no	stealing	1	yes	late	PC Const AE Williams	HJ Bodenham
37846	1961	male	55	no	breaking & entering a dwelling house at night with intent to commit a crime	1	no	early	Det Snr Const R Gray	none
38065	1961	female	35	yes	stealing	1	no	early	Det Snr Const GH Fursman	none
38441	1961	male	33		unlawful use of a motor vehicle	1	no	early	Const RA Houghton	none
38443	1961	male	25	yes	breaking, entering and stealing	3	no	late	Det Const Plint	McDonald
68927	1961	male	24	yes	unlawful use of a motor vehicle	1	no	early	PC Const DA Reay	none
70225	1961	male	18	no	breaking and entering a dwelling house with intent	1	no	late	Snr Const D McGrath	none
70689	1961	male	21	no	breaking & entering a dwelling house at night with intent to commit a crime	1	no	early	Det Snr Const H Doull	F Curro
566250	1961	male	19	no	receiving	1	no	early	Det Snr Const EW White	none

Appendix 6. The qualitative sample

566252	1961	male	18	no	robbery with violence	1	yes	early	Det Snr Const PD Daly	JF Ruddy
566253	1961	male	18	no	robbery with violence	1	yes	early	Det Snr Const PD Daly	JD Thomas
566256	1961	male	20	no	breaking and entering	3	no	early	Det Snr Const G Fursman	none

Appendix 7. The quantitative study: Accelerating guilty pleas

TABLE 1. Frequencies. Guilty pleas in Queensland, Western Australian & Victorian Supreme Courts, 1901-1961

Year	Court	Guilty plea	% all pleas	Total defendants
1901	QLD	92	23	404
	WA	n/a	n/a	n/a
	VIC	32	19	173
1906	QLD	88	27	331
	WA.	n/a	n/a	n/a
	VIC	45	24	189
1911	QLD	104	24	440
	WA	88	23	382
	VIC	59	38	154
1916	QLD	70	31	223
	WA	28	23	121
	VIC	56	36	156
1921	Qld.	152	35	433
	WA.	38	22	171
	VIC.	72	34	211
1926	QLD	123	31	401
	WA	47	44	108
	VIC	103	44	233

Appendix 7. Guilty pleas, 1901-1961

Year	Court	Guilty plea	% all pleas	Total #defendants
1931	QLD	112	28	394
	WA	56	58	97
	VIC	96	27	356
1936	QLD	98	33	300
	WA	22	23	94
	VIC	127	47	271
1941	QLD	78	32	247
	WA	36	37	98
	VIC	119	47	256
1946	QLD	130	32	411
	WA	59	39	152
	VIC	100	34	297
1951	QLD	210	54	389
	WA	96	57	170
	VIC	120	39	304
1956	QLD	399	62	642
	WA	178	72	247
	VIC	239	56	429
1961	QLD	201	68	297
	WA	172	75	228
	VIC	350	64	547

Appendix 7. Guilty pleas, 1901-1961

TABLE 2. Frequencies. Guilty pleas and offences in Western Australia, 1930-1932

	% guilty pleas	Total
1930	46	149
1931	57	97
1932	40	125

Note: TABLE 2 reveals that the spike in guilty pleas in 1931 is an anomaly. Over the three years the proportion averaged out to 48 percent.

Appendix 8. The quantitative study: Guilty plea timing

TABLE 1. Late and early guilty pleas in the Queensland Supreme Court (1901-1961)

	Late	Early	Missing	Total
1901	11	37	44	92
	12%	40%	48%	100%
1906	36	33	19	88
	41%	38%	22%	100%
1911	41	59	4	104
	39%	57%	4%	100%
1916	32	37	1	70
	46%	53%	1%	100%
1921	74	75	3	152
	49%	49%	2%	100%
1926	59	64	0	123
	48%	52%	0%	100%
1931	45	63	4	112
	40%	56%	4%	100%
1936	44	53	1	98
	45%	54%	1%	100%
1941	20	58	0	78
	26%	74%	0%	100%
1946	42	86	2	130
	32%	66%	2%	100%
1951	35	172	3	210
	17%	82%	1%	100%

Appendix 8. Guilty plea timing

	Late	Early	Missing	Total
1956	40	359	0	399
	10%	90%	0%	100%
1961	25	130	46	201
	12%	65%	23%	100%
Total	504	1226	127	1857
	27%	66%	7%	100%

Appendix 9. The quantitative study: Legal representation

TABLE 1. Frequencies. Legal representation, VIC (1901-1961)

Full sample	Freq.	% representation	% pleading guilty
Unrepresented	1237	33	62
Represented	1876	50	31
Missing data	641	17	-
Total	3754	100	
Subsample			
Unrepresented	1237	40	62
Represented	1876	60	31
Total	3113	100	

Note: Pre-transition period = 1901-1951. Post-transition period = 1956-1961. # refers to the number of defendants. % is the proportion.

TABLE 2. Frequencies. Confirmed legal representation subsample, VIC (1901-1961)

	Undefended	Defended	Total	% plead guilty
1901	35	82	117	14%
	30%	70%	100%	
1906	31	98	129	12%
	24%	76%	100%	
1911	29	62	91	19%
	32%	68%	100%	
1916	31	105	136	32%
	23%	77%	100%	
1921	50	114	164	34%
	31%	70%	100%	
1926	95	120	215	45%
	44%	56%	100%	
1931	116	192	308	27%
	38%	62%	100%	
1936	113	135	248	50%
	46%	54%	100%	

Appendix 9. Legal representation

	Undefended	Defended	Total	% plead guilty
1941	95	157	252	48%
	38%	62%	100%	
1946	91	191	282	35%
	32%	68%	100%	
1951	77	169	246	46%
	31%	69%	100%	
1956	196	207	403	56%
	49%	51%	100%	
1961	278	244	522	65%
	53%	47%	100%	
Total	1237	1876	3113	43%
	40%	60%	100%	

Appendix 10. The qualitative study: Criminal/civil caseload, 1946-1951

Committals	1946	1947	1948	1949	1950	1951
Victoria	1532	1783	1996	1751	1638	1650
Queensland	400	433	330	414	521	434
Western Australia	150	172	160	186	211	209
Total	2082	2388	2486	2351	2370	2293
Convictions						
Victoria	712	785	806	669	722	761
Queensland	261	270	250	313	346	336
Western Australia	94	102	107	110	149	141
Total	1067	1157	1163	1092	1217	1238
Civil causes						
Victoria	1553	2225	3202	3308	3851	4901
Queensland	1296	1034	827	1066	1173	1014
Western Australia	121	154	139	131	182	201
Total	2970	3413	4168	4505	5206	6116
Divorces granted						
Victoria	1648	2291	1679	1778	1602	1729
Queensland	1161	933	724	731	791	707
Western Australia	731	814	702	569	724	683
Total	3540	4038	3105	3078	3117	3119
Civil Court	6510	7451	7273	7583	8323	9235
Criminal Court	2082	2388	2486	2351	2370	2293

Note: Compiled from the Australian Year Books.¹

¹ Australian Bureau of Statistics, "1301.0 - Year Book Australia: Past and Future Releases".

Bibliography

- Alderson, Karl. "Powers and Responsibilities: Reforming NSW Criminal Investigation Law." PhD thesis, University of New South Wales, 2001.
- Allen, Matthew. "The Myth of the Flogging Parson: Samuel Marsden and Severity of Punishment in the Age of Reform." *Australian Historical Studies* 48, no. 4 (2017): 486-501.
- Alschuler, Albert W. "Plea Bargaining and Its History." *Law & Society Review* 13, no. 2 (1979): 211-45.
- Ashworth, Andrew. *The Criminal Process: An Evaluative Study*. 2nd ed. Oxford: Clarendon Press, 1998.
- Australian Bureau of Statistics. "1301.0 - Year Book Australia: Past and Future Releases." Australian Bureau of Statistics, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/second+level+view?ReadForm&prodno=1301.0&viewtitle=Year%20Book%20Australia~2012~Latest~24/05/2012&&tabname=Past%20Future%20Issues&prodno=1301.0&issue=2012&num=&view=&>.
- . "Criminal Courts, Australia, 2012-13: Method of Finalisation." Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2012-13~Main%20Features~Method%20of%20finalisation~13>.
- . "Criminal Courts, Australia, 2016-17: Higher Courts." Australian Bureau of Statistics, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/by%20Subject/4513.0~2016-17~Main%20Features~Higher%20Courts~6>.
- Bagaric, Mirko, and Julie Brebner. "The Solution to the Dilemma Presented by the Guilty Plea Discount: The Qualified Guilty Plea—I'm Pleading Guilty Only Because of the Discount. . . ." *International Journal of the Sociology of Law* 30, no. 1 (2002): 51-74.
- Baldwin, John, and Mike McConville. *Negotiated Justice: Pressures to Plead Guilty*. London, UK: Martin Robertson, 1977.
- Bandes, Susan. "Patterns of Injustice: Police Brutality in the Courts." *Buffalo Law Review* 47 (1999): 1275-341.
- Barry, J.V., G.W. Paton, and G. Sawyer. *An Introduction to the Criminal Law in Australia*. London: Macmillan, 1948.

- Bartholomew, Allen A. "Alcoholism and Crime." *Australian & New Zealand Journal of Criminology* 1, no. 2 (1968): 70-99.
- Beattie, J.M. *Crime and the Courts in England, 1660-1800*. Princeton: Princeton University Press 1986.
- . "Scales of Justice: Defense Counsel and the English Criminal Trial in the Eighteenth and Nineteenth Centuries." *Law and History Review* 9, no. 2 (1991): 221-67.
- Beckley, Alan. "Royal Commissions into Policing-Australia." *Salus Journal* 1, no. 3 (2013): 33-52.
- Bishop, John B. *Prosecution without Trial*. Sydney: Butterworths, 1989.
- Blackstone, William. *Commentaries on the Laws of England: In Four Books*. Vol. 2: JB Lippincott & Company, 1875.
- Borchardt, Dietrich Hans. *Supplement to Checklist of Royal Commissions, Select Committees of Parliament, and Boards of Inquiry, 1856-1980*. Library Publication. Vol. 37, Bundoora: La Trobe University Library, 1990.
- Brown, David. "The Royal Commission into the NSW Police Service: Process Corruption and the Limits of Judicial Reflexivity." *Current Issues in Criminal Justice* 9, no. 3 (1998): 228-40.
- Brown, David, David Neal, David Farrier, and David Weisbrot. *Criminal Laws: Materials and Commentary on Criminal Law and Process in NSW*. Sydney: Federation Press, 1990.
- Bryman, Alan. "Quantitative and Qualitative Research: Further Reflections on Their Integration." In *Mixing Methods: Qualitative and Quantitative Research*, edited by Julia Brannen, 57-78. London: Routledge, 1995.
- Cadoppi, A. "Towards a European Criminal Code." *European Journal of Crime, Criminal Law and Criminal Justice* 4, no. 1 (1996): 2.
- Cahill, William Geoffrey. *The Queensland Policeman's Manual*. Brisbane: Queensland Government, 1914.
- Carroll, Cecil James. *The Queensland Policeman's Manual*. Brisbane: Queensland Government, 1939.
- Castles, Alex C. *An Australian Legal History*. Sydney: Law Book Company, 1982.
- . "The Judiciary and Political Questions: The First Australian Experience, 1824-1825." *Adelaide Law Review* 5 (1975): 294.

- Chappell, Duncan. "Preventive Detention and the Habitual Offender." *Australian & New Zealand Journal of Criminology* 2, no. 3 (1969): 158-68.
- . "Sentencing- an Unrewarding and Painful Task." *Australian & New Zealand Journal of Criminology* 1, no. 3 (1968): 167-82.
- Cockburn, James S. "Trial by the Book? Fact and Theory in the Criminal Process, 1558–1625." edited by J.H. Baker. Cambridge: Royal Historical Society, 1978.
- Colvin, Eric, Suzie Linden, and John McKechnie. *Criminal Law in Queensland and Western Australia*. 4th ed. Chatswood, NSW: LexisNexis Butterworths, 2005.
- Corns, Christopher. "Police Summary Prosecutions in Australia and New Zealand: Some Comparisons." *University of Tasmania Law Review* 19, no. 2 (2000): 280-310.
- Crawford, J., and B.R. Opeskin. *Australian Courts of Law*. Oxford: Oxford University Press, 2004.
- Cresswell, John W, and Vicki L Plano Clark. *Understanding Mixed Methods Research. Designing and Conducting Mixed Methods Research*. Thousand Oaks, CA: Sage, 2006.
- "Criminal Law- Police Powers and Procedure." In *Queensland Justice of the Peace and Local Authorities Journal*, edited by J.J. Walsh, 150-54. Brisbane: The Law Book Co., 1930.
- Devlin, Patrick Baron. *The Criminal Prosecution in England*. New Haven: Yale University Press, 1958.
- Dixon, David. *Law in Policing: Legal Regulation and Police Practices*. Oxford: Clarendon Press, 1997.
- . "Questioning Suspects: A Comparative Perspective." *Journal of Contemporary Criminal Justice* 26, no. 4 (2010): 426-40.
- Douglas, Heather, and Suzanne Davina Harbidge. *Criminal Process in Queensland*. Pymont, NSW: Lawbook Co, 2008.
- Douglas, Roger. "Pre-Trial Withdrawals: Trial, Bargain, or Pseudo-Bargain?". *Australian & New Zealand Journal of Criminology* 16, no. 4 (1983): 210-23.
- Edgely, Michelle. "Preventing Crime or Punishing Propensities-a Purposive Examination of the Preventative Detention of Sex Offenders in Queensland and Western Australia." *University of Western Australia Law Review* 33, no. 2 (2007): 351-86.

- Edney, Richard, and Mirko Bagaric. *Australian Sentencing: Principles and Practice*. Melbourne: Cambridge University Press, 2007.
- Emsley, Clive. *Crime and Society in England: 1750-1900*. 2nd ed. London: Longman, 1996.
- . *Crime and Society in Twentieth Century England*. Harlow, UK: Pearson, 2011.
- Ericson, Richard V. "Rules in Policing: Five Perspectives." *Theoretical Criminology* 11, no. 3 (2007): 367-401.
- Featherstone, Lisa, and Andy Kaladelfos. *Sex Crimes in the Fifties*. History Series. Carlton, VIC: Melbourne University Publishing, 2016.
- Feeley, Malcolm M. "Legal Complexity and the Transformation of the Criminal Process: The Origins of Plea Bargaining." *Israel Law Review* 31 (1997): 183-222.
- . "Plea Bargaining and the Structure of the Criminal Process." *The Justice System Journal* 7, no. 3 (1982): 338-54.
- . *The Process Is the Punishment: Handling Cases in a Lower Criminal Court*. New York: Russell Sage Foundation, 1979.
- Feld, Francine, Andrew Hemming, and Thalia Anthony. *Criminal Procedure in Australia*. Chatswood, NSW: LexisNexis Butterworths, 2015.
- Ferdinand, Theodore N. *Boston's Lower Criminal Courts, 1814-1850*. Newark, NJ: University of Delaware Press, 1992.
- . "Criminality, the Courts, and the Constabulary in Boston." *Journal of Research in Crime and Delinquency* 17, no. 2 (1980): 190-208.
- Field, David. "Plead Guilty Early and Convincingly to Avoid Disappointment." *Bond Law Review* 14, no. 2 (2002): 2.
- Finnane, Mark. "All Very Civil." In *Judging for the People*, edited by Simon Smith, 171-92. Crows Nest, NSW: Allen & Unwin, 2016.
- . "Controlling the 'Alien' in Mid-Twentieth Century Australia: The Origins and Fate of a Policing Role." *Policing and Society* 19, no. 4 (2009): 442-67.
- . "Phillip's Brief: The Third Degree." *Criminal Law Journal* 41 (2017): 295-97.
- . *Police and Government: Histories of Policing in Australia*. Melbourne: Oxford University Press, 1994.

- . "Police Corruption and Police Reform: The Fitzgerald Inquiry in Queensland, Australia." *Policing and Society* 1, no. 2 (1990): 159-71.
- . "The Politics of Police Powers: The Making of Police Offences Acts." In *Policing in Australia: Historical Perspectives*, edited by Mark Finnane. Sydney: University of New South Wales Press, 1987.
- Finnane, Mark, and Stephen Garton. "The Work of Policing: Social Relations and the Criminal Justice System in Queensland 1880-1914 Part 2." *Labour History*, no. 63 (1992): 43-64.
- . "The Work of Policing: Social Relations and the Criminal Justice System in Queensland 1880-1914: Part 1." *Labour History*, no. 62 (1992): 52-70.
- Finnane, Mark, Andy Kaladelfos, Alana Piper, Yorick Smaal, Robyn Blewer, and Lisa Durnian, et al. "The Prosecution Project Database." 2016.
- Finnane, Mark, and John Myrtle. "An Exercise in Police Co-Operation? The Origins of the Conference of Australian Police Commissioners." *Australian Journal of Politics & History* 57, no. 1 (2011): 1-16.
- Finnane, Mark, and Alana Piper. "The Prosecution Project: Understanding the Changing Criminal Trial through Digital Tools." *Law and History Review* 34, no. 4 (2016): 873-91.
- Fisher, George. "Plea Bargaining's Triumph." *The Yale Law Journal* 109, no. 5 (2000): 857-1086.
- . *Plea Bargaining's Triumph: A History of Plea Bargaining in America*. Stanford: Stanford University Press, 2003.
- Fitzgerald, Gerald Edward. "Report of a Commission of Inquiry Pursuant to Orders in Council: Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct." Brisbane: The Queensland Government, 1989.
- Flynn, Asher. "Bargaining with Justice: Victims, Plea Bargaining and the Victims' Charter Act 2006 (Vic)." *Monash University Law Review* 37, no. 3 (2011): 73-96.
- . "Carl Williams: Secret Deals and Bargained Justice: The Underworld of Victoria's Plea Bargaining System." *Current Issues in Criminal Justice* 19, no. 1 (2007): 120-26.
- . "Plea-Negotiations, Prosecutors and Discretion: An Argument for Legal Reform." *Australian & New Zealand Journal of Criminology* 49, no. 4 (2016): 564-82.

- . "Secret Deals & Bargained Justice: Lifting the Veil of Secrecy Surrounding Plea Bargaining in Victoria." PhD thesis, Monash University, 2009.
- . "Sentence Indications for Indictable Offences: Increasing Court Efficiency at the Expense of Justice? A Response to the Victorian Legislation." *Australian & New Zealand Journal of Criminology* 42, no. 2 (2009): 244-68.
- Flynn, Asher, and Arie Freiberg. "Plea Negotiations: An Empirical Analysis." In *Trends & Issues in Crime and Criminal Justice*, 1-13: Australian Institute of Criminology, 2018.
- Ford, Lisa. "The Pig and the Peace: Transposing Order in Early Sydney." In *Law and Politics in British Colonial Thought: Transpositions of Empire.*, edited by Shaunnagh Dorsett and Ian Hunter, 169-86. New York: Palgrave Macmillan, 2010.
- Ford, Lisa, and David Andrew Roberts. "'Mr Peel's Amendments' in New South Wales: Imperial Criminal Reform in a Distant Penal Colony." *The Journal of Legal History* 37, no. 2 (2016): 198-214.
- Friedman, Lawrence M. "Plea Bargaining in Historical Perspective." *Law & Society Review* 13, no. 2 (1979): 247-59.
- Friedman, Lawrence M. , and Robert V. Percival. *The Roots of Justice: Crime and Punishment in Alameda County California, 1870-1910*. Chapel Hill, NC: University of North Carolina Press 1981.
- Fry, T. P. "Admissibility of Statements Made by Accused Persons." *Australian Law Journal* 11, no. 10 (1938): 425.
- Glueck, Sheldon, and Eleanor Touroff Glueck. *500 Criminal Careers*. New York: A.A. Knopf, 1930.
- Godfrey, Barry. "Changing Prosecution Practices and Their Impact on Crime Figures, 1857-1940." *The British Journal of Criminology* 48, no. 2 (2008): 171-89.
- Grabosky, Peter N. *Sydney in Ferment: Crime, Dissent and Official Reaction, 1788 to 1973*. Canberra: Australian National University Press, 1977.
- Gregory, Helen. *The Queensland Law Society Inc: 1928-1988 : A History*. Brisbane: The Queensland Law Society, 1991.
- Griffith, Cerian Charlotte. "The Prisoner's Counsel Act 1836: Doctrine, Advocacy and the Criminal Trial." *Law, Crime and History* 4, no. 2 (2014 2014): 28-47.
- Griffith, Gareth. "The Office of Attorney General in New South Wales." *Legal History* 11 (2007): 79-104.

- Hagger, Jean, and Tina Montanelli. *Consolidated Index to the Checklists of Royal Commissions, Select Committees of Parliament and Boards of Inquiry Held in the Commonwealth of Australia, Queensland, New South Wales, South Australia, Tasmania and Victoria, 1856-1960*. Library Publication. Vol. 19, Bundoora, VIC: La Trobe University Library, 1980.
- Haldane, Robert. *The People's Force: A History of the Victoria Police*. Carlton, VIC: Melbourne University Press, 1986.
- Haller, Mark H. "Plea Bargaining: The Nineteenth Century Context." *Law & Society Review* 13, no. 2 (1979): 273-79.
- Heumann, Milton. "Back to the Future: The Centrality of Plea Bargaining in the Criminal Justice System." *Canadian Journal of Law and Society* 18, no. 2 (2003): 133-42.
- . "A Note on Plea Bargaining and Case Pressure." *Law & Society Review* (1975): 515-28.
- Histed, Elise. "The Introduction and Use of the Grand Jury in Victoria." *The Journal of Legal History* 8, no. 2 (1987): 167-77.
- Hitchcock, Tim, and William J. Turkel. "The Old Bailey Proceedings, 1674–1913: Text Mining for Evidence of Court Behavior." *Law and History Review* 34, no. 4 (2016): 929-55.
- Johnston, W Ross. "Bischof, Francis Erich (Frank) (1904–1979)." Australian National University, <http://adb.anu.edu.au/biography/bischof-francis-erich-frank-9513/text16747>.
- . *History of the Queensland Bar*. Brisbane: Bar Association of Queensland, 1979.
- . *The Long Blue Line: A History of the Queensland Police*. Bowen Hills, QLD: Boolarong Publications, 1992.
- Jonakait, R.N. *The American Jury System*. New York: Yale University Press, 2006.
- Kassin, Saul M, Steven A Drizin, Thomas Grisso, Gisli H Gudjonsson, Richard A Leo, and Allison D Redlich. "Police-Induced Confessions: Risk Factors and Recommendations." *Law and Human Behavior* 34, no. 1 (2010): 3-38.
- Kennedy, GA. "Royal Commission into Whether There Has Been Corrupt or Criminal Conduct by Any Western Australian Police Officer: Final Report Volume 2 ". Perth: Government of Western Australia., 2004.
- Kercher, B. *An Unruly Child: A History of Law in Australia*. St. Leonards, NSW: Allen & Unwin, 1995.

- Kercher, Bruce. "Why the History of Australian Law Is Not English: Second Alex Castles Lecture in Legal History, October 2000." *Flinders Journal of Law Reform* 7 (2004): 177.
- Kidston, R.R. "The Office of Crown Prosecutor (More Particularly in New South Wales)." *Australian Law Journal* 32 (1958): 148-54.
- King, Peter. *Crime, Justice, and Discretion in England, 1740-1820*. Oxford: Oxford University Press Oxford, 2000.
- Lane, Desmond. "Case Notes R V Shannon: What Every Defendant Should Know." *Monash University Law Review* 7 (1980): 52-59.
- Langbein, John H. "The Criminal Trial before the Lawyers." *The University of Chicago Law Review* 45, no. 2 (1978): 263-316.
- . *The Origins of Adversary Criminal Trial*. Oxford: Oxford University Press, 2003.
- . "Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources." *The University of Chicago Law Review* 50, no. 1 (1983): 1-136.
- . "Torture and Plea Bargaining." *University of Chicago Law Review* 46, no. 1 (1978): 3-22.
- . "Understanding the Short History of Plea Bargaining." *Law & Society Review* 13, no. 2 (1979): 261-72.
- Langbein, John H., Renee Lettow Lerner, and Bruce P. Smith. *History of the Common Law: The Development of Anglo-American Legal Institutions*. New York: Aspen, 2009.
- Leo, Richard A. "The Third Degree and the Origins of Psychological Interrogation in the United States." In *Interrogations, Confessions, and Entrapment*, edited by G. Daniel Lassiter, 37-84. New York: Kluwer Academic, 2004.
- Lewis, Colleen, Janet Ransley, and Ross Homel. "The State We Were In." In *The Fitzgerald Legacy: Reforming Public Life in Australia and Beyond*, edited by Colleen Lewis, Janet Ransley and Ross Homel, 1-21. Bowen Hills, QLD: Australian Academic Press, 2010.
- Little, Craig B, and Christopher P Sheffield. "Frontiers and Criminal Justice: English Private Prosecution Societies and American Vigilantism in the Eighteenth and Nineteenth Centuries." *American Sociological Review* 48, no. 6 (1983): 796-808.
- Lucas, Geoffrey Arthur George, Desmond Gordon Sturgess, and Dynes Malcolmson Becker. "Report of Committee of Inquiry into the Enforcement of Criminal Law in Queensland." Brisbane: The Queensland Government, 1977.

- Mack, Kathy, and Sharyn Roach Anleu. "Sentence Discount for a Guilty Plea: Time for a New Look." *Flinders Journal of Law Reform* 1 (1997): 123-43.
- Mack, Kathy, and Sharyn Roach Anleu. "Choice, Consent and Autonomy in a Guilty Plea System." In *Criminal Justice in Diverse Communities*, edited by Andrew Goldsmith and Mark Israel, 75-95. Annandale, NSW: The Federation Press, 2000.
- . *Pleading Guilty: Issues and Practices*. Melbourne: Australian Institute of Judicial Administration., 1995.
- Mack, Kathy, and Sharyn Roach Anleu. "Resolution without Trial, Evidence Law and the Construction of the Sexual Assault Victim." In *Feminist Perspectives on Evidence*, edited by Mary Childs and Louise Ellison, 127-48. London: Cavendish Publishing, 2000.
- Mackenzie, Geraldine. "The Guilty Plea Discount: Does Pragmatism Win over Proportionality and Principle." *Southern Cross University Law Review* 11 (2007): 205-23.
- . *How Judges Sentence*. Sydney: Federation Press, 2005.
- Mason, Jennifer. "Mixing Methods in a Qualitatively Driven Way." *Qualitative Research* 6, no. 1 (2006): 9-25.
- Mather, Lynn M. "Comments on the History of Plea Bargaining." *Law & Society Review* 13, no. 2 (1979): 281-85.
- McConville, Mike. "The Origins of the Institutionalised Guilty Plea in the United States: Some Lessons from History." *Derecho PUCP*, no. 49 (1995): 87-97.
- McConville, Mike, and Chester Mirsky. *Jury Trials and Plea Bargaining: A True History*. Portland, OR: Hart Publishing, 2005.
- . "Lawyering for the Poor in New York City's Criminal Courts." *Holdsworth Law Review* 12 (1987): 22-58.
- . "The Rise of Guilty Pleas: New York, 1800-1865." *Journal of Law and Society* 22, no. 4 (1995): 443-74.
- McGowen, Randall. "The Bank of England and the Policing of Forgery, 1797–1821." *Past & Present* 186, no. 1 (2005): 81-116.
- . "Managing the Gallows: The Bank of England and the Death Penalty, 1797–1821." *Law and History Review* 25, no. 2 (2007): 241-82.
- McGuire, F.M. "Plea Bargaining: Its Significance in the Australian Criminal Justice System- a Postscript." *The Queensland Lawyer* 7, no. 4 (1985): 71-107.

- . "Plea Bargaining: Its Significance in the Australian Criminal Justice System. Part 1." *The Queensland Lawyer* 6, no. 1 (1981): 1-12.
- . "Plea Bargaining: Its Significance in the Australian Criminal Justice System. Part 2." *The Queensland Lawyer* 6, no. 2 (1981): 47-72.
- . "Plea Bargaining: Its Significance in the Australian Criminal Justice System. Part 3." *The Queensland Lawyer* 6, no. 3 (1981): 102-15.
- Mitchell, Dame Roma. *The Web of Criminal Law*. edited by Australian Broadcasting Commission Sydney: Australian Broadcasting Commission, 1975.
- Moglen, E. "Taking the Fifth: Reconsidering the Origins of the Constitutional Privilege against Self-Incrimination." *Michigan Law Review* 92, no. 5 (1994): 1086-130.
- Moley, Raymond. "The Vanishing Jury." *Southern California Law Review* 2 (1928): 97.
- Morris, Norval. *The Habitual Criminal*. London: Longmans, Green and Co, 1951.
- Moynihan, Hon Martin. "Review of the Civil and Criminal Justice System in Queensland." edited by Department of Justice and Attorney-General. Brisbane: Queensland Government, 2008.
- Nagin, Daniel S, David P Farrington, and Terrie E Moffitt. "Life-Course Trajectories of Different Types of Offenders." *Criminology* 33, no. 1 (1995): 111-39.
- New South Wales Law Reform Commission. "Encouraging Appropriate Early Guilty Pleas." Sydney: New South Wales Law Reform Commission, 2014.
- Newman, Donald J. "Pleading Guilty for Considerations: A Study of Bargain Justice." *The Journal of Criminal Law, Criminology, and Police Science* 46, no. 6 (1956): 780-90.
- Padgett, John F. "The Emergent Organization of Plea Bargaining." *American Journal of Sociology* 90, no. 4 (1985): 753-800.
- Papke, David Ray. "Law, Cinema, and Ideology: Hollywood Legal Films of the 1950s." *UCLA Law Review* 48, no. 1473 (2001): 1473-93.
- Parkinson, Patrick. *Tradition and Change in Australian Law*. 4th ed. Sydney: Thomson Reuters, 2010.
- Payne, Jason, and Antonette Gaffney. "How Much Crime Is Drug or Alcohol Related? Self-Reported Attributions of Police Detainees." In *Trends & Issues in Crime and Criminal Justice*: Australian Institute of Criminology, 2012.
- Pernanen, Kai. "Alcohol and Crimes of Violence." In *Social Aspects of Alcoholism*, edited by Benjamin Kissin and Henru Begleiter, 351-444. NY: Plenum, 1976.

- Phipson, Sidney Lovell. *The Law of Evidence*. 6 ed. London: Sweet & Maxwell, 1921.
- . *Manual of the Law of Evidence: For the Use of Students*. 3rd ed. London: Sweet and Maxwell, 1921.
- . *Phipson's Manual of the Law of Evidence*. edited by D.W. Elliott. 8th ed. London: Sweet & Maxwell, 1959.
- Piper, Alana. "To Judge a Thief: How the Background of Thieves Became Central to Dispensing Justice, Western Australia, 1921-1951." *law&history* 4, no. 1 (2017): 113-44.
- Piper, Alana, and Lisa Durnian. "Theft on Trial: Prosecution, Conviction and Sentencing Patterns in Colonial Victoria and Western Australia." *Australian & New Zealand Journal of Criminology* 50, no. 1 (2017): 5-22.
- Piper, Alana, and Mark Finnane. "Access to Legal Representation by Criminal Defendants in Victoria, 1861-1961." *UNSW Law Journal* 40, no. 2 (2017): 638-63.
- . "Defending the Accused: The Impact of Legal Representation on Criminal Trial Outcomes in Victoria, Australia 1861–1961." *The Journal of Legal History* 38, no. 1 (2017/01/02 2017): 27-53.
- Plater, David. "The Development of the Prosecutor's Role in England and Australia with Respect to Disclosure: Partisan Advocate or Minister of Justice?". *University of Tasmania Law Review* 25, no. 2 (2006): 111-55.
- "Police Interrogation." In "The Queensland Justice of the Peace and Local Authorities' Journal," 54, (1960): 121-25.
- Prenzler, Tim. "The Evolution of Police Oversight in Australia." *Policing and Society* 21, no. 3 (2011): 284-303.
- Punch, Keith. *Introduction to Social Research: Quantitative and Qualitative Approaches*. 2nd ed. London: Sage Publications, 2005.
- Ramsey, Carolyn B. "The Discretionary Power of Public Prosecutors in Historical Perspective." *The American Criminal Law Review* 39, no. 4 (2002): 1309-93.
- Re, Loretta. "Eyewitness Identification: Why So Many Mistakes." *Australian Law Journal* 58, no. 9 (1984): 1-12.
- Rice, James D. "The Criminal Trial before and after the Lawyers: Authority, Law, and Culture in Maryland Jury Trials, 1681-1837." *The American Journal of Legal History* 40, no. 4 (1996): 455-75.

- Ringland, Clare, and Lucy Snowball. "Predictors of Guilty Pleas in the NSW District Court." 1-8. Sydney: NSW Bureau of Crime Statistics, 2014.
- Roach Anleu, Sharyn. *Law and Social Change*. 2nd ed. London: Sage Publications, 2009.
- Roach Anleu, Sharyn, and Kathy Mack. "Intersections between in-Court Procedures and the Production of Guilty Pleas." *Australian & New Zealand Journal of Criminology* 42, no. 1 (2009): 1-23.
- . "Magistrates, Magistrates Courts, and Social Change." *Law & Policy* 29, no. 2 (2007): 183-209.
- . "Pleading Guilty and Professional Relations in Australia." *The Justice System Journal* 22, no. 2 (2001): 155-84.
- . "The Social Construction of Ethical Plea Negotiations." In *Sociological Sites/Sights, The Australian Sociological Association (TASA)*. Flinders University, Adelaide: Flinders University, 2000.
- Roulston, R.P, and P.G. Ward. "The Sydney Project on Sentencing." Paper presented at the Judicial Seminar on Sentencing, Sydney, 1969.
- Ryan, William Harold. *The Queensland Policeman's Manual*. Brisbane: Queensland Government, 1925.
- Sallmann, Peter A., and John E. Willis. "Taking Sentencing Seriously." *Australian & New Zealand Journal of Criminology* 17, no. 3 (1984): 133-48.
- Seifman, Robert D. "Plea Bargaining in Victoria-Getting the Judges' Views." *Criminal Law Journal* 6, no. 2 (1982): 69-88.
- Seifman, Robert D, and Arie Freiberg. "Plea Bargaining in Victoria: The Role of Counsel." *Criminal Law Journal* 25, no. 2 (2001): 64-72.
- Shanahan, M. J. "100 Years of the Public Defender in Queensland." In *History Program*, edited by Supreme Court of Queensland Library: Supreme Court of Queensland Library, 2016.
- Shanahan, M. J., Reginald Francis Carter, J. J. Costanzo, A. Hoare, A. J. Rafter, and S. Ryan. *Carter's Criminal Law of Queensland*. 21st ed. Chatswood, NSW: LexisNexis Butterworths, 2016.
- Sharpe, J.A. *Crime in Early Modern England 1550-1750*. 2nd ed. London: Longman, 1999.

- Short, Frederick Hugh, and Francis Hamilton Mellor. *The Practice on the Crown Side of the King's Bench Division of His Majesty's High Court of Justice*. 2nd ed. London: Stevens & Haynes, 1908.
- Smaal, Yorick. "The 'Leniency Problem': A Queensland Case Study on Sentencing Male Same-Sex Offences, 1939–1948." *Women's History Review* 21, no. 5 (2012): 793-811.
- Smith, Bruce P. "The Emergence of Public Prosecution in London, 1790-1850." *Yale Journal of Law & the Humanities* 18, no. 1 (2013): 2.
- . "Plea Bargaining and the Eclipse of the Jury." *Annual Review of Law and Social Science* 1 (2005): 131-49.
- Smith, John. *The Queensland Policeman's Manual*. Brisbane: Queensland Government, 1953.
- Smith, Simon. "The Shaping of the Legal Profession." In *Judging for the People*, edited by Simon Smith, 71-96. Crows Nest, NSW: Allen & Unwin, 2016.
- Steinberg, Allen. "From Private Prosecution to Plea Bargaining: Criminal Prosecution, the District Attorney, and American Legal History." *Crime & Delinquency* 30, no. 4 (1984): 568-92.
- . *The Transformation of Criminal Justice, Philadelphia, 1800-1880*. Chapel Hill, NC: University of North Carolina Press, 1989.
- Stenning, Philip C. *The Modern Prosecution Process in New Zealand*. Wellington, NZ: Victoria University Press, 2008.
- Stevenson, Nina. "Criminal Cases in the NSW District Court: A Pilot Study." In *The Criminal Injustice System*, edited by John Basten, Mark Richardson, Chris Ronalds and George Zdenkowski, 106-45. Clayton, Victoria: Australian Legal Worker's Group, 1982.
- Stewart, Felicity, and Dennis Byles. "Guilty Pleas in the Higher Courts: Rates, Timing, and Discounts." Melbourne, 2015.
- Szymanski, Ann-Marie. "Stop, Thief! Private Protective Societies in Nineteenth-Century New England." *New England Quarterly* (2005): 407-39.
- Taylor, Greg. "The Grand Jury of South Australia." *The American Journal of Legal History* 45, no. 4 (2001): 468-516
- Tombs, Jacqueline. "Prosecution: In the Public Interest?" Paper presented at the Prosecutorial Discretion Seminar: Australian Institute of Criminology, Canberra, 1984.

- Torre, Andrew, and Darren Wraith. "The Demand for Sentence Discounts: Some Empirical Evidence." *Criminal Law Journal* 37, no. 3 (2013): 193-201.
- Train, Arthur Cheney. *The Prisoner at the Bar: Sidelights on the Administration of Criminal Justice*. 3rd ed. New York: Scribner, 1924.
- Tyulkina, Svetlana, and George Williams. "Preventative Detention Orders in Australia." *University of New South Wales Law Journal* 38, no. 2 (2015): 738-55.
- Vogel, Mary E. *Coercion to Compromise: Plea Bargaining, the Courts and the Making of Political Authority*. Oxford: Oxford University Press, 2007.
- . "The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860." *Law & Society Review* 33, no. 1 (1999): 161-246.
- Walker, Nigel. *Aggravation, Mitigation, and Mercy in English Criminal Justice*. London: Blackstone Press, 1999.
- Warner, Kate. "Sentencing Review 2003-2004: Part II." *Criminal Law Journal* 29, no. 1 (2005): 46-54.
- Wells, Gary L., and Elizabeth A. Olson. "Eyewitness Testimony." *Annual Review of Psychology* 54, no. 1 (2003): 277-95.
- Westling, Wayne T. "Plea Bargaining: A Forecast for the Future." *Sydney Law Review* 7 (1973): 424-32.
- Wharton, Francis. *Evidence in Criminal Issues*. 10th ed. Philadelphia: May and Brother, 1912.
- Willis, John E. "Sentencing Discount for Guilty Pleas." *Australian & New Zealand Journal of Criminology* 18, no. 3 (1985): 131-46.
- Wood, James Roland T. "Royal Commission into the New South Wales Police Service: Final Report." Sydney, 1997.
- Wood, John Carter. "'The Third Degree': Press Reporting, Crime Fiction and Police Powers in 1920s Britain." *Twentieth Century British History* 21, no. 4 (2010): 464-85.
- Woods, Gregory D. *A History of Criminal Law in New South Wales: The Colonial Period, 1788-1900*. Annandale, NSW: Federation Press, 2002.
- Wren, Elizabeth, and Lorana Bartels. "Guilty, Your Honour: Recent Legislative Developments on the Guilty Plea Discount and an Australian Capital Territory Case Study on Its Operation." *Adelaide Law Review* 35, no. 1 (2014): 361-84.

Wundersitz, Joy, Ngaire Naffine, and Fay Gale. "The Production of Guilt in the Juvenile Justice System: The Pressures to 'Plead'." *The Howard Journal of Criminal Justice* 30, no. 3 (1991): 192-206.