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THE GUILTY PLEA PROCESS: EXPLORING THE ISSUES OF VOLUNTARINESS AND ACCURACY

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INTRODUCTION

The decade of the sixties witnessed an incredible amount of inquiry into the pretrial investigatory stages of the criminal process and the trial itself. But the guilty plea process and its impact have received little attention until recently. Even when the guilty plea process has been the subject of judicial scrutiny, attention has been focused only upon the most visible parts of the process—*i.e.,* representation by counsel and inquiry by the court into the circumstances surrounding the decision to plead guilty.[1] The minimal concern is especially perplexing in light of the fact that, of the number of criminal cases resulting in conviction, the plea of guilty remains by far the most frequent basis for conviction.[2] Indeed, as many as 85 to 90 percent of criminal prosecutions are concluded on the basis of guilty pleas,[3] and in some jurisdictions this figure runs as high as 95 percent.[4] Whatever the exact—or even approximate—number of convictions that results from guilty pleas, two things are clear: the number is significantly high, and the amount of concern directed toward the plea process is extremely disproportionate to

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1. Enker, *Perspectives on Plea Bargaining*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108 (1967) [hereinafter cited as Enker]. While reference is made in the text to the "most visible" portions of the plea process, no part of the process can really be characterized as "visible;" some are just less invisible than others. In this sense the guilty plea process is analogous to the iceberg, the majority of which is under water.

2. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 1-2 (1967) (adopted, as amended, by House of Delegates in 1968) [hereinafter cited as A.B.A. STANDARDS].

3. F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION 566 (1969) [hereinafter cited as REMINGTON]. *See* W. SCHAFER, THE SUSPECT AND SOCIETY 8 (1967). In *McCarthy v. United States,* 394 U.S. 459 (1969), the Supreme Court reported that in 1968, 86 percent of all convictions obtained in the federal district courts were the result of pleas of guilty or *nolo contendere. Id.* at 463 n.7.

4. A.B.A. STANDARDS 2.

the number of such cases. Granted that large numbers of defendants enter pleas of guilty, it becomes critically important to know why this occurs.[5]

Parameters of the Guilty Plea Process

The Significance of the Plea to the Defendant

The United States Supreme Court has underscored the gravity of the decision to be made by a defendant who seeks to plead guilty. Such a decision operates as a waiver of precious constitutional rights: 1) the fifth amendment privilege against self-incrimination, 2) the sixth amendment right to trial by jury and 3) the sixth amendment right to confront one's accusers.[6] Any waivers of these rights must be voluntary; but more than this, they "must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[7]

This places a heavy burden upon the trial court to learn whether the defendant is aware of what the plea connotes.[8] Addressing itself to this issue, the Supreme Court has attempted to impart the significance of accepting a guilty plea by describing its effect:

> A plea of guilty differs in purpose and effect from a mere admission or an extra-judicial confession; it is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.[9]

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5. There are a number of reasons why people plead guilty, some of which are known and identifiable, others of which are more subtle and consequently less likely to be detected. The following is only a partial list of the more obvious reasons:

> For some people, their breach of a State's law is alone sufficient reason for surrendering themselves and accepting punishment. For others, apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant and his counsel that a trial is not worth the agony and expense to the defendant and his family.

Brady v. United States, 397 U.S. 742, 750 (1970).

6. Boykin v. Alabama, 395 U.S. 238, 243 (1969). Each of these rights is now applicable to the states by reason of the fourteenth amendment. *See* Malloy v. Hogan, 378 U.S. 1 (1964) (privilege against self-incrimination); Duncan v. Louisiana, 391 U.S. 145 (1968) (right to trial by jury); Pointer v. Texas, 380 U.S. 400 (1965) (right to confrontation).

7. Brady v. United States, 397 U.S. 742, 748 (1970). Since a guilty plea operates as a waiver of each of the rights mentioned, the standard for waiver is concomitant with the standard for accepting a plea of guilty: "A guilty plea must be not only voluntary, but also knowing and understanding." Scott v. United States, 419 F.2d 264, 274 (D.C. Cir. 1969).

8. *See* Boykin v. Alabama, 395 U.S. 238, 244 (1969).

9. Machibroda v. United States, 368 U.S. 487, 493 (1962), *quoting* Kercheval v. United States, 274 U.S. 220, 223 (1927).

The American Bar Association in its Project on Minimum Standards for Criminal Justice has further elaborated on the substance of a plea of guilty:

> While a confession only relates a set of facts, and thus only requires knowledge of the factual situation, a plea is an admission of all the elements of the charge, and thus requires a sophisticated knowledge of the law in relation to the facts.[10]

Insofar as knowledge of the facts is concerned, the defendant is similarly situated whether he is making a confession or tendering a plea of guilty—in either event he typically has the greatest knowledge of the factual situation. But to place these facts into proper perspective with the law, he needs the advice of counsel. Indeed, if his plea is accepted and he has not had the benefit of advice of counsel, his plea is not "intelligent" or "understanding" and is void.[11]

Several recent decisions by the United States Supreme Court indicate that the Court is now very reluctant to grant relief to a defendant who offered his plea of guilty after conferring with counsel and receiving the adequate advice of counsel.[12] For example, in *Brady v. United States*[13] the Court said:

> [A]bsent misrepresentation or other impermissible conduct by state agents . . . a voluntary plea of guilty intelligently made *in the light of the then applicable law* does not become vulnerable because later judicial decisions indicate that the plea rested on a faulty premise.[14]

Similarly, the Court in *McMann v. Richardson*[15] said:

> In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack

10. A.B.A. STANDARDS 26. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Supreme Court said that a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.* at 466.

11. *See* Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956). *See also* Louisiana *ex rel.* Gwin v. Dees, 410 F.2d 321 (5th Cir.), *cert. denied* Gwin v. Henderson, 396 U.S. 918 (1969); Smith v. United States, 400 F.2d 860 (6th Cir. 1968).

12. North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); and Parker v. North Carolina, 397 U.S. 790 (1970).

13. 397 U.S. 742 (1970).

14. *Id.* at 757 (emphasis added). In this case, the Court concluded that a guilty plea was not void solely because it was tendered to mitigate the possibility of imposition of the death penalty, even though the decision seems to conflict with *United States v. Jackson*, 390 U.S. 570 (1968).

15. 397 U.S. 759 (1970).

on the ground that counsel may have misjudged the admissibility of the defendant's confession.[16]

The defendant's estimation of this situation is based largely, if not entirely, on his attorney's advice. Whether this advice stems from an erroneous, though reasonable, interpretation of then existing law, or whether it is correctly based on then existing law that is later invalidated by judicial decision, the result is the same—the defendant is bound by his plea.[17] Moreover, if there is a factual basis for the plea, he is bound even if he claims that he is innocent of the conduct charged but for some reason wishes to plead guilty.[18]

The Scope of the Process Itself

Assuming for the moment that with advice of counsel a defendant understands the consequences of his plea, what motivations, if any, prompt him to offer a plea of guilty?[19] To understand the motivations one must remember that an identifiable guilty plea process exists and remains as the mainstay of the system of criminal justice.[20]

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16. *Id.* at 770. The defendant was challenging the validity of his guilty plea on the basis that it stemmed from an illegally obtained confession. In explaining the result reached, the Court said:

> A more credible explanation for a plea of guilty by a defendant who would go on trial except for his prior confession is his prediction that the law will permit his admissions to be used against him by the trier of fact. At least the probability of the State's being permitted to use the confession as evidence is sufficient to convince him that the State's case is too strong to contest and that a plea of guilty is the most advantageous course.

Id. at 769.

17. *E.g.*, the Court in *McMann v. Richardson*, 397 U.S. 759 (1970) said:

> Whether a plea of guilty is unintelligent and therefore vulnerable when motivated by a confession erroneously thought admissible in evidence depends as an initial matter, not on whether a court would retroactively consider counsel's advice to be right or wrong, but on whether that advice was within the range of competence demanded of attorneys in criminal cases.

Id. at 770-71. Expanding on this, the Court continued:

> It is no denigration of the right to trial to hold that when the defendant waives his state court remedies and admits his guilt, *he does so under the law then existing;* further, he assumes the risk of ordinary error in either his or his attorney's assessment of the law and facts. Although he might have pleaded differently had later decided cases then been the law, he is bound by his plea and his conviction . . . .

Id. at 774 (emphasis added).

18. *See* North Carolina v. Alford, 400 U.S. 25 (1970). The trial court had heard a very convincing case presented against Alford and accepted his plea as an indication of his preference to have the case settled in this manner without trial.

19. Some of the more obvious reasons have been given previously. *See* notes 5 and 16 *supra.*

20. REMINGTON, *supra* note 3, at 566. Indeed, the United States Supreme Court acknowledged this fact in *United States v. Jackson*, 390 U.S. 570, 581-85 (1968).

The plea process *formally* begins with the arraignment, at which time the defendant is charged with a particular offense and wherein he must make a response to the charge.[21] The process really begins, however, before the accused makes a formal appearance in court. Informal discussions ("plea bargaining," "plea negotiations") usually take place between the defense counsel and the prosecutor in an effort to reach an agreement whereby the accused may enter a plea of guilty in exchange for certain concessions.[22]

Plea agreements take many forms. The most common form occurs when the prosecutor agrees to reduce the charge to an offense less serious than that initially charged in exchange for the defendant's agreement to plead guilty to the lesser offense.[23] Realistically, the defendant is seeking to reduce the maximum sentence to which he will be exposed. To this extent, the same result is achieved when the prosecutor drops some of the counts in a multi-count indictment or agrees not to charge the defendant as an habitual offender.[24] The prosecutor's bargaining power and the range of penal provisions from which he may choose are very great in the granting of *charge* concessions.[25]

Another form of plea agreement is an agreement by the defendant to plead guilty to the offense charged in exchange for the prosecutor's promise to recommend leniency in sentencing or specifically to recommend

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21. REMINGTON 565.

22. A.B.A. STANDARDS 3.

23. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 10 (1967) [hereinafter cited as TASK FORCE REPORT]. A charge reduction was the substance of the plea agreement made in *North Carolina v. Alford,* 400 U.S. 25 (1970).

24. TASK FORCE REPORT 10-11. The Supreme Court's analysis of the decision-making process through which a defendant arrives at his decision to plead guilty is incongruous. In *United States v. Jackson,* 390 U.S. 570 (1968), the Supreme Court said that a statutory scheme that made a defendant choose between exercise of the right to trial by jury on the one hand and the risk of the death penalty on the other placed a constitutionally impermissible burden on the defendant. The statutory scheme was such that if a defendant pleaded guilty, the maximum sentence the judge could give him was life imprisonment. However, if he insisted on a jury trial by pleading not guilty and was thereafter convicted, upon the jury's recommendation he could receive the death penalty. But in *Parker v. North Carolina,* 397 U.S. 790 (1970), the Court, faced with a similar statutory scheme, said the defendant's otherwise valid guilty plea merely stemmed from his desire to limit the maximum sentence to which he could be exposed. The same result and reasoning are also found in *Brady v. United States,* 397 U.S. 742 (1970).

Justice Brennan was very upset over the Court's action in *Parker,* arguing that its holding undermined the prior determinations of *Jackson* concerning the voluntariness of guilty pleas. He felt that under *Parker* a plea of guilty would never be vitiated except in very unrealistic situations. Parker v. North Carolina, 397 U.S. 790, 800 & n.2 (1970) (dissenting opinion). *See* note 75 *infra* and accompanying text.

25. TASK FORCE REPORT 11.

a light sentence or probation. Unlike charge concessions, however, the prosecutor's power here is limited. He can only make recommendations to the judge; the judge alone determines what the sentence actually will be.

Judges treat recommendations differently, some giving them varying degree of weight and others feeling obligated to accept them, believing that acceptance of recommendations is an essential part of the plea process.[26] Some courts have regarded as improper the practice of granting greater leniency in sentencing to defendants who have pleaded guilty than to those who have been convicted at trial. Such a practice, the judges feel, places an impermissibly heavy burden on defendants to waive their right to trial by jury and to plead guilty instead.[27] In *Scott v. United States,*[28] the court gave the following account: "The trial judge . . . stated at the sentencing hearing, 'If you had pleaded guilty to this offense, I might have been more lenient with you.' The stark import of this comment is that the defendant paid a price for demanding a trial."[29] On the other hand, an argument can be made for more lenient treatment for defendants who plead guilty, for such a move by an offender may be the first step in the rehabilitative process and is indicative of the defendant's desire to purge his guilt and to seek the earliest application of the process of rehabilitation.[30]

Whatever a particular judge's practices may be, however, they are likely to be known to the prosecutor and defense counsel and perhaps to the defendant himself.[31] Even in the absence of a specific "bargain" between the prosecutor and the defendant or his counsel, a defendant may enter a plea of guilty because of his reliance on prevailing practices and

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26. *Id.*

27. Note, *Guilty Plea Bargaining: Compromise by Prosecutors to Secure Guilty Pleas,* 112 U. PA. L. REV. 865, 869 (1964) [hereinafter cited as *Guilty Plea Bargaining*]. *See, e.g.,* United States v. Jackson, 390 U.S. 570 (1968).

28. 419 F.2d 264 (D.C. Cir. 1969).

29. *Id.* at 269.

30. *Guilty Plea Bargaining* 869. But the idea that a plea of guilty represents the penitence of the accused and is therefore the first step in the rehabilitory process has been negated as well. *See* Scott v. United States, 419 F.2d 264, 271 & n.33 (D.C. Cir. 1969). The problem is that acceptance of the notion that a guilty plea connotes contrition leads to an unacceptable corollary, *i.e.,* that insistence upon a jury trial suggests a lack of contrition. After all, "[t]he adversary process is a fact-finding engine, not a drama of contrition in which a prejudged defendant is expected to knit up his lacerated bonds to society." Scott v. United States, 419 F.2d 264, 270 (D.C. Cir. 1969). One writer has suggested that the guilty plea process resembles "the purchase of a rug in a Lebanese bazaar" more than it does "the confrontation between a man and his soul." Rosett, *The Negotiated Guilty Plea,* 374 THE ANNALS 70, 75 (1967).

31. TASK FORCE REPORT 11.

the justified assumption that he will be treated with greater leniency because he has pleaded guilty.[32]

The kind or degree of concessions, or whether any will be granted at all, depends to a large extent on how the prosecutor views his role. He may view his role as being that of a legislator mollifying the harshness of the law not only for this defendant but for all defendants.[33] Many prosecutors, however, vigorously disavow the propriety of allowing personal opinion to enter into their plea bargaining judgment. They view their role as administrators as far more basic and realistic, motivated by a desire to handle heavy case loads in the most efficient, expedient and effective manner consistent with the ends of justice. However the prosecutor may view his role, in reality, a "routine" plea agreement is practically nonexistent.[34]

Without a doubt, plea bargaining is a pervasive process[35] that has become a very real and necessary part of the administration of criminal justice[36] to such a degree that the effective administration of the system *depends* on a continuous flow of guilty pleas.[37] Viewed in the abstract, a system whereby most defendants plead guilty possesses certain virtues.

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32. *Id.* at 9. The court in *Scott v. United States,* 419 F.2d 264 (D.C. Cir. 1969), underscores the prevalence of the practice: "[E]mpirical evidence supports the proposition that judges do sentence defendants who have demanded a trial more severely." *Id.* at 269. The court continued:

> Indeed, if the custom is sufficiently well known, actual bargaining may be unnecessary: enough defendants will be cowed into guilty pleas simply by the force of their lawyers' warnings that defendants convicted after demanding a trial receive long sentences.

Id. at 272.

33. Alschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. CHI. L. REV. 50, 53 (1968). "Plea negotiations concerning charges provide an opportunity to mitigate the harshness of a criminal code or to rationalize its inconsistencies and to lead to a disposition based on an assessment of the individual factors of each crime." TASK FORCE REPORT 11.

34. Alschuler, *The Prosecutor's Role in Plea Bargaining,* 36 U. CHI. L. REV. 50, 52-54 (1968). "[T]he prosecutor must determine on a case-by-case basis the concessions that he will offer to guilty-plea defendants. . . . In practice, the benefits of a guilty plea are personalized for each defendant." *Id.* at 53.

The reluctance of prosecutors to permit personal opinion to enter into the decision-making process may stem from the disdain shared and encouraged by most of the legal profession for any form of emotional involvement. The lawyer's self-image—created and cultivated in the legal educational process—is one of the rational, coldly scientific being. *See* J. POLIER, THE RULE OF LAW AND THE ROLE OF PSYCHIATRY 2 (1968); Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education,* 37 U. CIN. L. REV. 91, 131 (1968). Without considering whether this is an appropriate criticism, it does explain the prosecutor's preference to view himself as an administrator, detached from any personal evaluations.

35. *See Guilty Plea Bargaining* 870 & n.21.

36. TASK FORCE REPORT 10.

37. REMINGTON, *supra* note 3, at 567. *See* United States v. Jackson, 390 U.S. 570 (1968).

In the first instance, the value of expediency is clear. The argument is made that courts could not bear the immense burden of trying all of the cases on their dockets. The dockets are crowded under the present system, and even a sizeable increase in the number of cases tried would mean a redistribution of time, talent and money which, with these valuable commodities spread so thin, would inevitably mean a diminution in the quality of justice.[38] Standing alone, however, the virtues of efficiency and speed hardly suffice as an adequate justification for the continued dependence on a large number of defendants pleading guilty.

Much more is involved than mere economy. On the one hand the guilty plea process seeks to achieve certain correctional goals in the interest of fitting an appropriate punishment to the particular circumstances of the act or the individual.[39] Thus, when an offender pleads guilty, he assures that correctional measures will be applied right away. His plea also avoids any delay in disposition of other cases and therefore increases the probability that corrective measures will be applied as soon as possible to other offenders. In addition, by pleading guilty an offender presumably acknowledges his guilt, indicating that he is prepared to accept responsibility for his behavior.[40]

At the same time, the guilty plea process seeks to relieve both the prosecutor and the defendant from some of the hazards and failings of the trial process.[41] Moreover,

> it preserves the meaningfulness of the trial process for those cases in which there is a real basis for dispute; it furnishes defendants a vehicle to mitigate the system's harshness, whether that harshness stems from callous infliction of excessive punishment or from the occasional inequities inherent in a system of law based upon general rules; and it affords the defense some participation in and control over an unreviewable process that often gives the appearance of fiat and arbitrariness.[42]

It is important, in this sense, to preserve the value, usefulness and integrity of the trial process. If the right to trial is asserted in every case where there is no substantial issue of guilt, our attention will be

38. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967).

39. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 52 (1968).

40. A.B.A. STANDARDS, *supra* note 2, at 2. *But see* note 30 *supra* (questioning whether a defendant's tender of a guilty plea represents penitence on his part).

41. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967).

42. Enker, *supra* note 1, at 117.

misdirected. Our concern will be directed away from the more appropriate subject of correctional treatment and rehabiliation toward the matter of guilt itself which, since guilt is not seriously in question, might incline courts—and juries as well—to become more skeptical of the defense.[43] This alone may be justification for the continuation of the guilty plea process.

Clouding the validity of a system that encourages a large number of guilty pleas, however, is a growing concern over whether plea bargaining is a proper, legitimate practice in the first place, and, if it is, under what circumstances it is proper and legitimate.[44] To be sure, in the administration of criminal justice few practices are surrounded by greater feelings of uneasiness and suspicion, feelings provoked largely because of the almost complete invisibility of the process.[45] The low visibility of the guilty plea process lends uncertainty to the efficacy of the system because a part of the exchange made for charge or sentence concessions is the defendant's promise to deny that his plea is the result of a bargain stemming from any sort of inducement.[46] Seldom is any "bargain" disclosed, even though all parties—often the judge included—know that an agreement has been reached. A formal ritual is observed whereby the judge inquires whether the plea has been induced by promises or coerced by threats; but the prosecutor and defendant, resembling two black porters dancing on a railroad platform in some 1940's musical comedy, ritualis-

43. TASK FORCE REPORT 11. It may be a truism to say that the trial process should be reserved for those cases in which there are real and substantial issues between the accused and the state. Entwined with this is the problem of differential treatment of those who plead guilty and those who plead not guilty and are convicted at trial, with the former being treated with greater lenience than the latter. This assertedly is justified on the basis that the man who pleads guilty is penitent, while the man who pleads not guilty but subsequently is convicted obviously is not penitent. The court in *Scott v. United States,* 419 F.2d 264 (D.C. Cir. 1969), offers the following answer:

> One difficulty with this argument is that no court or commentator has explained why a defendant's insistence upon his self-incrimination privilege is not also evidence of a lack of repentance. Or his insistence that evidence unconstitutionally seized should not be admitted.
>
> . . . .
>
> There is a tension between the right of the accused to assert his innocence and the interest of society in his repentance. But we could consider resolving this conflict in favor of the latter interest only if the trial offered an unparalleled opportunity to test the repentance of the accused. It does not. . . .
>
> . . . A man may regret his crime but wish desperately to avoid the stigma of a criminal conviction.

Id. at 270-71.

44. REMINGTON 569.

45. TASK FORCE REPORT 9.

46. REMINGTON 569. The disavowal that any inducements have been made to secure the plea has been referred to as a "pious fraud," obviously upon the court, but also upon the entire system of justice. Enker, *supra* note 1, at 111.

tically perform their dance of denial that any agreement or inducement has occurred. In this manner the process goes on, remaining both informal and invisible and making judicial review of the propriety of the bargain difficult and often impossible.[47]

Plea agreements involving sentence concessions are even less visible than those involving charge concessions. The credibility of the process is affected because the prosecutor can only promise to recommend an appropriate sentence to the judge; actual sentencing power belongs exclusively to the judge. The success of the agreement thus depends on the judge's acceptance of the recommendation.[48] Invisibility may produce an anomolous situation:

> The judge, the public, and sometimes the defendant himself cannot know for certain who got what from whom in exchange for what. The process comes to look less rational, more subject to chance factors, to undue pressures, and sometimes to the hint of corruption. Moreover, the defendant may not get the benefit he bargained for. There is no guarantee that the judge will follow the prosecutor's recommendations for lenient sentence. In most instances the defendant does not know what sentence he will receive until he has pleaded guilty and sentence has been imposed. If the defendant is disappointed, he may move to withdraw his plea, but there is no assurance that the motion will be granted, particularly since at the time he tendered his guilty plea, he probably denied the very negotiations he now alleges.[49]

The invisibility of the process lends itself to much unnecessary collateral attack on guilty pleas. A formerly reticent defendant, experi-

47. TASK FORCE REPORT 9. Regarding the difficulties on review, see *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970). The process has been decried: "There is no justification for a courtroom charade in which the judge asks whether a plea has been induced by any promises, and the defendant replies that it has not, when all the actors realize that quite the contrary is true." Scott v. United States, 419 F.2d 264, 274 & n.56 (D.C. Cir. 1969).

The propriety of plea bargaining is further complicated by the existence of a large gray area in which the prosecutor on the one hand can "threaten" to do all that he properly may do, and on the other hand can "promise" to be a great deal more lenient than he otherwise could be. The inquiry by the court into the basis of the plea is not likely to uncover whether such a bargain has been made. REMINGTON 569.

48. Enker 111.

49. TASK FORCE REPORT 9-10. This again emphasizes that the success of the agreement depends on the judge's acceptance of the recommendation. After all, the defendant's interest primarily is "in controlling the exercise of sentencing discretion, not in a lawsuit over a motion to withdraw his guilty plea because of disappointment over the sentence later imposed." Enker 111.

encing a belated change of heart (reflection prompted, no doubt, by the very nature of penal confinement), now vigorously will assert abuses in the negotiation whose existence was very carefully denied when the opportunity for disclosure was afforded.[50] The difficulties upon review are patent:

> Most such allegations are, probably correctly, suspect. But a system that requires the defendant to deny the negotiations at the very moment he tenders his guilty plea contains potential for overreaching and unfairness. Under such circumstances, it becomes extremely difficult to sift the valid from the false allegations.[51]

Low visibility, therefore, accounts for the small amount of judicial inquiry into the process. The answer, as will be discussed later, appears to be to make the process more visible, to push it into the open, to transform it from a tacitly permitted process into one explicitly accepted. Judicial acceptance of the process will be concomitant with increased concern over its regulation "to assure that neither public nor private interests are sacrificed."[52] One court has put the issue rather well:

> The important thing is not that there shall be no "deal" or "bargain," but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced.[53]

This expresses an admirable standard; it admits of the validity of a system in which a steady flow of guilty pleas is desired and encouraged for reasons discussed earlier. At the same time, it asserts the need for a greater element of regulation over the system which is expressed here as the need to understand the basis, *i.e.,* the motivation, behind the defendant's decision to plead guilty. The simple truth, however, is that because of the low visibility of the present process, the methods used by

50. Enker 111. As the Supreme Court said in *Brady v. United States,* 397 U.S. 742 (1970), "judgments may be made that in the light of later events seem improvident, although they were perfectly sensible at the time." *Id.* at 756-57. The Court was referring to the standard that a plea be intelligently entered. Such a standard, the Court said, "does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering into his decision." *Id.* at 757.

51. Enker 111.

52. TASK FORCE REPORT 10.

53. Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964), *cert. denied,* 381 U.S. 953 (1965), *quoted in* TASK FORCE REPORT 10.

courts usually fail to uncover the basis of the guilty plea.[54] Perhaps it would be well at this point to examine the tools by which courts measure the efficacy of guilty pleas and to determine why they are ineffective.

ACCEPTANCE OF THE PLEA—THE STANDARDS

The Voluntariness Standard

In *Machibroda v. United States*,[55] the Supreme Court said: "A guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void."[56] This case clearly prescribes voluntariness as the test to be used in determining the validity of a guilty plea.[57] Yet, the voluntariness standard has been characterized as "exceedingly ambiguous."[58] It admits of very little accord with reality. An analogous requirement in the trial process would be a requirement that the trial be fair. Neither term satisfactorily imparts an appreciation or understanding of the complexity of the conviction process.[59] The ambiguity may be further illustrated:

> The choice to plead guilty rather than face the rack is voluntary in the sense that the subject did have a choice, albeit between unpleasant alternatives. The defendant who decides to plead guilty and seek judicial mercy also makes a choice between what are to him two unpleasant alternatives. If we call the first choice involuntary and the second voluntary, what we are really saying is that we are convinced that in the first case almost all persons so confronted will choose to admit their guilt but that the defendant's decision is based on more personal and subjective factors in the second instance.
>
> We are also saying that we approve of judicial mercy but disapprove of the rack. In other words, "voluntariness"

54. REMINGTON 569; D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 30 (1966) [hereinafter cited as NEWMAN].

55. 368 U.S. 487 (1962).

56. *Id.* at 493. In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Court said: "It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary." *Id.* at 242. Included in the voluntariness test, therefore, is the requirement that the plea be intelligent and knowing. This simply means that the defendant must realize and understand the nature and the consequences of his plea. *See* notes 7-18 *supra* and accompanying text.

57. This determination is constitutionally required. *See* McCarthy v. United States, 394 U.S. 459, 465 (1969).

58. Enker 116.

59. NEWMAN 8. This may be an unfair analogy, however, because we are talking about processes of inordinately different dimensions, both from quantitative and qualitative points of view. To the extent that it emphasizes the ambiguity of the voluntariness standard, however, the analogy is appropriate.

> expresses not merely judgment of fact but an ethical evaluation.[60]

For example, threats of physical violence (the rack) certainly would invalidate a guilty plea, but more subtle forms of compulsion pose equally serious hazards.[61] The process is complicated when less and less forceful pressures are brought to bear on the defendant and the inducements seem less improper. Obviously, this calls for more critical distinctions to be made between those inducements—and pleas—that are proper and those that are not.[62] The task is burdensome:

> [I]t is difficult to distinguish the psychological experience of a defendant who is induced to plead guilty by a prosecutor's or judge's promise of sentencing leniency from that of a defendant who is induced to plead guilty by his desire to begin service of his sentence immediately so that he will be released sooner. There is danger that so long as we adhere to the terminology of voluntariness, our very inability to distinguish these cases will lead us to hold involuntary all pleas induced by any considerations beyond the defendant's sense of guilt and readiness to admit it publicly.[63]

In brief, there is danger that we will become insensitive to the practical realities of the plea bargaining process.

The Supreme Court, however, has steadfastly adhered to voluntariness as the relevant standard.[64] The first indication that something significant might be happening in the area of guilty pleas occurred in *United States v. Jackson*,[65] wherein the Supreme Court held section 1201(a) of the Federal Kidnaping Act unconstitutional insofar as it compelled a defendant to choose between exercise of the constitutional right to trial by jury and risk of imposition of the death penalty.[66] Such

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60. Enker 116 (footnote omitted).

61. REMINGTON 568. It was the more subtle forms of compulsion that led the courts to adopt more protective safeguards to strengthen the privilege against self-incrimination. *See, e.g.*, Miranda v. Arizona, 384 U.S. 436 (1966); Spano v. New York, 360 U.S. 315 (1959).

62. Enker 116.

63. *Id.*

64. *See* North Carolina v. Alford, 400 U.S. 25 (1970); Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). *E.g.*, the Court in *North Carolina v. Alford* said: "*Jackson* established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." 400 U.S. at 31.

65. 390 U.S. 570 (1968).

66. By pleading guilty, a defendant waived, *inter alia*, his right to a jury trial, but

a choice, the Court felt, was impermissible.[67] This seemed to be leading to a more subtle, delicate concept of voluntariness.

However, in the more recent cases of *North Carolina v. Alford,*[68] *Brady v. United States*[69] and *Parker v. North Carolina,*[70] the Court in situations similar to *Jackson* reached opposite results. In perhaps the most striking of these cases, *North Carolina v. Alford,* the defendant entered a plea of guilty to second degree murder after having been charged with first degree murder. He said that he was innocent, but that he nevertheless wished to plead guilty and that he knew the consequences of his plea. He testified specifically that the reason for his plea of guilty was his fear of the death penalty.[71] In all three cases, the Court held that the pleas were voluntarily and intelligently given, that they merely represented decisions by these defendants to mitigate the possibility that they might receive the death penalty.[72] The Court, in *North Carolina v. Alford,* said:

> *Jackson* established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.[73]

Moreover, in *Brady v. United States* the Court accepted the following formulation of the voluntariness standard:

> '[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises

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in so doing he avoided the possibility of the death penalty, because the death sentence could be imposed only upon recommendation of the jury. On the other hand, if the defendant elected to exercise his right to trial by jury he ran the risk that upon conviction the jury might recommend the death sentence.

67. 390 U.S. at 572.

68. 400 U.S. 25 (1970).

69. 397 U.S. 742 (1970).

70. 397 U.S. 790 (1970).

71. 400 U.S. at 28 & n.2. North Carolina law provided that upon a plea of guilty to first degree murder the penalty was life imprisonment, but upon a jury verdict of guilty of first degree murder the penalty was death *unless* the jury recommended life imprisonment. The penalty for second degree murder was 2 to 30 years imprisonment. *Id.* at 27 n.1.

72. *See, e.g.,* Brady v. United States, 397 U.S. 742, 755 (1970).

73. 400 U.S. at 31.

> that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).'[74]

Justice Brennan expressed great concern over the Court's action in the *Parker* and *Alford* cases, feeling that they had done great damage to the Court's traditional method of analysis:

> [T]he Court apparently holds that never, except perhaps in highly unrealistic hypothetical situations, will the constitutional defects identified in *Jackson* vitiate a guilty plea. In so holding, the Court seriously undermines the rational underpinnings of *Jackson* and departs broadly from our prior approach to the determination of the voluntariness of guilty pleas and also confessions.[75]

The Requirements of Accuracy

Whatever else these cases may indicate, they reveal that the voluntariness requirement is an illusory standard, serving to obscure the more exact requirement that the plea be accurate.[76] There is concern that while in a sense a plea of guilty may be voluntary (in that it is not the product of coercion or enticement), it may be inaccurate.[77] For example, a defendant may "voluntarily" admit (without getting into the truthfulness of his admission) that he acted in a particular manner; but does the act to which he seeks to plead guilty actually constitute the crime with which he is charged?[78] The accuracy standard demands that

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74. 397 U.S. at 755, *quoting with approval* Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (*en banc*), *rev'd on confession of error on other grounds,* 356 U.S. 26 (1958).

75. Parker v. North Carolina, 397 U.S. 790, 800 & n.2 (1970) (dissenting opinion). *See* North Carolina v. Alford, 400 U.S. 25, 39-40 (1970) (dissenting opinion).

76. NEWMAN 9-10.

77. REMINGTON 570. At the present time, a great deal of uncertainty and confusion exists as to the *scope* of inquiry into the accused's knowledge of the consequences of his plea before it is accepted. Inquiries into the voluntariness of the plea often have not revealed prior events that perhaps evoked the plea of guilty. Only recently has any need been recognized to look into the *accuracy* of the defendant's plea. A.B.A. STANDARDS, *supra* note 2, at 4.

78. In *People v. West,* 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970), the California Supreme Court examined the propriety of a trial court's acceptance of a plea of guilty to a lesser offense where the lesser offense was not charged and was not necessarily included in the definitional scope of the greater offense. The defendant in this case was charged with possession of marijuana, but he pleaded guilty to a lesser offense (opening or maintaining a place for selling, giving away or using of a narcotic) in exchange for the prosecutor's agreement not to prosecute him on the possession charge. The court concluded that acceptance of the plea was proper since the lesser offense, though not strictly included in the greater, was " 'reasonably related to defendant's conduct.' " 3 Cal. 3d at 613, 477 P.2d at 420, 91 Cal. Rptr. at 396. This case illustrates, of course, the accuracy problem—*i.e.,* whether a defendant should be allowed to plead guilty

there be a factual basis for the plea. Rule 11 of the Federal Rules of Criminal Procedure, for example, makes the following requirement:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. . . . *The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.*[79]

Rule 11 refers not only to accuracy, but also to voluntariness and understanding as well. It is difficult to separate these issues.[80] At any rate, the Advisory Committee on Rules has made the following assessment regarding the accuracy of pleas under Rule 11:

> The court should satisfy itself . . . that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, *e.g.,* protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.[81]

What does all of this mean? In one particular case,[82] the defendant, charged with first degree murder, sought to enter a plea of guilty to second degree murder. Upon inquiry, however, it was learned that the defendant had no recollection of his actions. The trial court refused to accept the plea because the defendant could not possibly acknowledge guilt of an act of which he had no memory. On appeal, the trial judge's action was affirmed, the court holding that under Rule 11, acceptance of the plea is discretionary with the judge.[83]

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without an examination into the actual conduct which he admits. The question becomes even more critical when, as in *North Carolina v. Alford*, 400 U.S. 25 (1970), the defendant's plea is accompanied by his statement that he is innocent.

79. FED. R. CRIM. P. 11 (as amended February 28, 1966) (emphasis added).

80. *Guilty Plea Bargaining, supra* note 27, at 873. In *McCarthy v. United States*, 394 U.S. 459 (1969), *e.g.,* the Supreme Court tied all of the issues together when it concluded that a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." *Id.* at 466.

81. FED. R. CRIM. P. 11, Notes of Advisory Committee on Rules.

82. Maxwell v. United States, 368 F.2d 735 (9th Cir. 1966).

83. *Id.* at 738-39.

One must note in this case, however, that the colloquy between the court and the defendant—and the offer of the plea—took place after the conclusion of the government's case in chief, at a time when the court should have been apprised of sufficient evidence to show that the defendant was guilty of an offense at least as serious as the one to which he sought to plead. Under these circumstances perhaps the judge should have accepted the plea. Indeed, such was the case in *North Carolina v. Alford,*[84] where the defendant's plea of guilty to second degree murder was attended by his denial of commission of the murder. A plea of guilty usually rests upon an acknowledgment of guilt, or at least the plea subsumes such an acknowledgment. Without more, this situation would have evinced a clear dispute between the defendant and the state, and his protestation of innocence would have negatived his guilty plea. But the court had heard a very convincing case presented against Alford and accepted his plea as an indication of his preference to have the case settled in this manner without a trial.[85]

The accuracy standard seems to demand that the defendant indeed be guilty of the offense to which he seeks to plead guilty. The judge, in accepting a plea of guilty, should therefore fully satisfy himself as to the defendant's guilt in order to protect in the record the basis for acceptance of the plea.[86] Perhaps Rule 11 solves his problem by requiring only that there be a factual basis for the plea. If in the opinion of the trial judge this requirement is met, as was the case in *North Carolina v. Alford,* then the trial judge in his discretion may accept the plea. Rule 11 does not solve the problem, however, of the defendant who wishes to plead guilty for reasons other than his actual guilt.[87]

The American Bar Association's Standards Relating to Pleas of Guilty includes a provision identical to a portion of Rule 11:

> Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without

84. 400 U.S. 25 (1970).

85. *Id.* at 31-32. The Court, in effect, adopted the rule set forth in *Maxwell v. United States,* 368 F.2d 735 (9th Cir. 1966), *i.e.,* that acceptance of the plea is discretionary with the trial judge. 400 U.S. at 38 n.11. The Court points out in *Alford* that state and lower federal courts are divided on the issue of whether a plea can be accepted when, at the same time the plea is offered, the defendant protests his innocence. 400 U.S. at 33-34. *Cf.* FED. R. CRIM. P. 11.

86. *See* Boykin v. Alabama, 395 U.S. 238 (1969).

87. Perhaps such a defendant should be allowed to make this judgment for himself, and if he still wishes to plead guilty, the court can accept his plea if it feels it is in the interest of justice to do so. *See* State v. Kaufman, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879) (dictum) and other cases cited in North Carolina v. Alford, 400 U.S. 25, 33-34 (1970).

> making such inquiry as may satisfy it that there is a factual basis for the plea.[88]

Voluntariness and accuracy are treated as two separate issues in the Standards, and the commentary to the above section suggests that while a guilty plea may in all respects be voluntary, it nevertheless may be inaccurate:

> The defendant may not completely understand what mental state and acts constitute commission of the offense charged, and it may be that his conduct is not as serious as that charged or that he has a valid defense to the charge. A guilty plea may be entered by a psychiatrically disturbed person; unlike a trial of a criminal case, the brief guilty plea process affords the judge little opportunity to detect incompetency unless the defendant is obviously retarded or grossly psychotic. A clearly rational defendant may enter a false plea in the hope of achieving some goal, as where an innocent defendant is seeking to protect another person.[89]

The Standards offer a separate section dealing with the issue of voluntariness:

> The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The court should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.[90]

The commentary to this section explains its underlying objective:

> The above standard is based upon the assumption that

88. A.B.A. STANDARDS, *supra* note 2, § 1.6 at 30.

89. *Id.* at 31. Of course, the *effective* assistance of counsel should help cure any problem relating to the defendant's uncertainty about the nature of his act or its relationship to the law. *See* notes 7-18 *supra* and accompanying text.

90. *Id.* § 1.5 at 29.

> it is preferable for the in-court inquiry to give visibility to the plea discussions-plea agreement process. . . . Such inquiry will disclose whether there is reason for the court to caution the defendant of the court's independence from the prosecutor. . . . This caution will prevent the defendant from being able to challenge his plea later on the ground that he thought the court's awareness of the promises made at the time the plea was received meant that they were then and there accepted by the court.[91]

The problem, however, is that plea bargaining itself compounds the issues of voluntariness and accuracy.[92] While the assumption is that a person ordinarily does not plead guilty unless he is guilty, one must realize at the same time that a person may consent to plead guilty irrespective of whether he is *in fact* guilty.[93] Where inducements are tendered, the efficacy of the guilty plea inevitably is weakened to a degree by the possibility that an innocent defendant might exchange the risk of conviction and stiff sentence for a promise of leniency or might plead guilty to "get it over with."[94] We have already indicated that the inquiry conducted by the court seldom discloses whether any inducements have been offered to secure the plea.[95] This adds to the difficulty of sorting out the valid from the invalid claims when the question of improper inducements comes up for the first time on review.[96]

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91. *Id.* at 29-30.

92. NEWMAN 9.

93. *Id.* at 22.

> It is undoubtedly true that the great majority of defendants who enter a plea of guilty are guilty either of the offense charged or of a more serious offense. However, the risk that a plea which is obtained without resort to threats or other improper inducements and which is entered with full understanding of the possible consequences might nonetheless be inaccurate remains a matter of concern.

A.B.A. STANDARDS 31. *See* notes 5 and 16 *supra.*

94. NEWMAN 28. In this sense, inducement presents a different issue from coercion. With inducement the real concern is whether the defendant is actually guilty of the crime to which he has pleaded. This is not true, however, where coercion is the improper element, for in this event the conviction almost always will be overturned or the plea refused regardless of the guilt or innocence of the defendant. The reasoning behind the distinction is that the risk of inaccuracy is much greater where the plea stems from coercion, and coercion is inherently improper. *Id.* at 28, 30. *See* Machibroda v. United States, 368 U.S. 487 (1962); Shupe v. Sigler, 230 F. Supp. 601 (D. Neb. 1964).

95. A.B.A. STANDARDS 4; NEWMAN 30; REMINGTON 569.

96. Enker 111; NEWMAN 41-42. The point is well illustrated by the case of *United States v. Cariola,* 323 F.2d 180 (3d Cir. 1963), wherein the petitioner in 1962 asked the court to set aside a guilty plea entered in 1932 on the basis that he did not understand the consequences of his plea at the time it was entered. He had entered a plea of guilty to a "technical violation" of the Mann Act, obviously receiving a charge concession —a reduction in the charge—in exchange for his plea. Only after the conviction became

The real issue is whether the offering of the inducement is proper in the first place,[97] which gives rise to the question of whether plea bargaining, even if it is conducive to consensual, accurate pleas, should be a practice that is allowed at all.[98] If we conclude that plea bargaining as a process viewed abstractly is acceptable, then the issue ought to be twofold: first, whether the promise, honored or not, brought about the plea of guilty in such a way as to overshadow the defendant's will and to deprive his decision of its requisite voluntary character;[99] and, second, whether the plea is accurate, *i.e.*, whether there is a factual basis for the plea.[100] Until plea bargaining and the guilty plea process become more visible, however, these issues will not be flushed out, and the propriety of the process, as well as the appropriateness of the inducements (granted the propriety of the process) will be difficult to review.

Toward a More Effective Plea Process

The American Bar Association's Standards Relating to Pleas of Guilty presupposes that our system will continue to rely upon guilty pleas as a means of disposition, not merely because disposition by plea is more expedient, but also because certain values, particularly correctional values, are served.[101] The proposed standards seek to secure the propriety of plea bargaining by endorsing its acceptance and making it more visible and subject to greater judicial control.[102] Given legislative and judicial accept-

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a source of embarrassment to him many years later did he seek to have the plea set aside. The circumstances surrounding the giving of this plea were particularly obscured by time, but this case is typical of so many others in which, for one reason or another, the issue of propriety of plea negotiations is not raised until after conviction, when dissatisfaction has set in. *See* note 50 *supra*.

97. Newman 29. Some courts in fact have viewed the practice of offering inducements as illegitimate whether the bargain was honored or not. *See, e.g.*, Shupe v. Sigler, 230 F. Supp. 601 (D. Neb. 1964). *Contra* People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

98. Newman 9. *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970), answers this question in the affirmative.

99. Newman 39. *See, e.g.*, Shelton v. United States, 246 F.2d 571, 579 (5th Cir. 1957), *rev'd on confession of error*, 356 U.S. 26 (1958). After all, the "voluntariness of [a defendant's] plea does not depend upon whether he was the victim of a false promise." The question rather is: "Did the promise, even if fulfilled, induce the plea and deprive it of the character of a voluntary act?" Bailey v. MacDougall, 392 F.2d 155, 159 (4th Cir. 1968). The Supreme Court, however, has rejected this sort of "but for" test where instead of a promise from the prosecutor we have an inducement in the form of a statutory scheme that assures that upon a plea of guilty the death penalty will be avoided. Brady v. United States, 397 U.S. 742, 750 (1970).

100. *See* A.B.A. Standard § 1.6 at 30, 1; Fed. R. Crim. P. 11 and Notes of the Advisory Committee on Rules.

101. A.B.A. Standards 2. *See* notes 38-43 *supra* and accompanying text.

102. *Id.* at 29-33.

ance of the plea bargaining process, higher visibility will be assured, especially when aided by greater inquiry into the circumstances underlying the plea—particularly inquiry into its factual basis:

> First and foremost, inquiry ensures that the defendant actually committed a crime at least as serious as the one to which he is willing to plead. Secondly, investigation into the factual basis of guilty pleas acts to increase the visibility of charge reduction practices, a common form of plea agreement. In addition, these inquiries provide a more adequate record of the conviction process; this record minimizes the chances of a defendant successfully challenging his conviction later. . . . Finally, increased knowledge about the circumstances of the defendant's offense provides the court with a better assessment of defendant's competency, his willingness to plead guilty, and his understanding of the charges against him.[103]

To facilitate more detailed inquiry by the court, the defendant should be freed from the necessity of disavowing that any agreement has been made. He should be allowed—indeed, encouraged—to acknowledge frankly in open court that negotiations have occurred and the circumstances under which he has agreed to plead guilty. The judge then can review the agreement with greater thoroughness and make it a matter of record. It has even been suggested that the terms of the agreement be set forth in writing and entered into the record.[104] In whatever fashion,

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103. *Id.* at 32-33 (citation omitted). *Accord,* NEWMAN 21. An excellent synopsis of the type of inquiry that should be conducted by the judge is found in TASK FORCE REPORT, *supra* note 23, at 13.

104. People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970). The California court was of the opinion that since plea bargaining itself had met with a degree of approval, there was no present need or justification for concealment of the process. Rather, the court said,

> the basis of the bargain should be disclosed to the court and incorporated in the record. We should exhume the process from stale obscurantism and let the fresh light of open analysis expose both the prior discussions and agreements of the parties, as well as the court's reasons for its resolution of the matter.

3 Cal. 3d at 609, 477 P.2d at 417, 91 Cal. Rptr. at 393.

The President's Crime Commission also suggested that the agreement be made a matter of record and that the memorandum contain the following:

> an agreed statement of facts of the offense, the opening positions of the parties, the terms of the agreement, background information relevant to the correctional disposition, and an explanation of why the negotiated disposition is appropriate . . . . Use of a memorandum is preferable to relying entirely upon judicial questioning, because it should encourage more thoughtful negotiations and a more complete consideration of the agreement by the judge.

TASK FORCE REPORT 12.

In addition, see the argument for making plea agreements a part of the record in Underwood, *Let's Put Plea Discussions—and Agreements—on Record,* 1 LOYOLA U.L.J. 1 (1970).

the agreement should be revealed, resulting in a more complete examination of the plea negotiations and greater formalism in the process itself.[105]

This requires, of course, greater participation by the judge since it calls for an in-depth inquiry "more precise and detailed than the brief and perfunctory question-and-answer sequence that has been common in some courts."[106] The increased role of the judge, however, carries some limitations with it. Because the judge is regarded by the defendant as being in a position of power, he is capable of wielding a great deal of influence—unwittingly or intentionally—over the defendant. Despite his most sincere interest in a defendant, he may exercise a subtle, yet coercive, influence that may cause a defendant to plead guilty. The judge, because he is the very person who should satisfy himself that the plea is accurate and voluntarily given, should never be involved directly in the plea negotiations.[107] Plea negotiations should be confined to the prosecutor and defense counsel.[108]

Serious doubt exists whether a defendant should be allowed to plead guilty without having received the advice of counsel.[109] A defendant has too many interests at stake to proceed on his own without effective representation. For one thing, counsel is in a much better position to evaluate the weight of the prosecutor's case. Counsel also can place the facts into proper perspective with the law—something which is vital to the accuracy of a plea but with which laymen may experience difficulty. In addition, counsel can impart to the defendant an understanding of the

105. NEWMAN 21.

106. TASK FORCE REPORT 13.

107. *Guilty Plea Bargaining, supra* note 27, at 891-92. The judge's role is not that of participant, but rather that of an impartial examiner, so that he is ill-suited to engage directly in plea discussions. TASK FORCE REPORT 13. He is at his best when serving as an arbiter, choosing between competing alternative solutions proposed by the parties themselves. Rosett, *The Negotiated Guilty Plea,* 374 THE ANNALS 70, 79 (1967).

An example of a judge overreaching his function in accepting a plea is found in *Rogers v. State,* 243 Miss. 219, 136 So. 2d 331 (1962). The court there said:

> This case is unique because the person charged with inducing the plea of guilty with promises and persuasion is the judge who accepted the plea and whose duty it was to see that the plea was voluntary. Because of the nature of the judicial function and the power and prestige of a circuit judge, any acts or words of his containing promises, or tending to persuade, have a much greater significance than acts or words of others.

243 Miss. at 228-29, 136 So. 2d at 335.

108. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967).

109. *See* Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956). The judge's responsibility in inquiring into the basis of a guilty plea is even greater when the defendant has waived the right to counsel and makes his plea without the aid of counsel. Thompson, *The Judge's Responsibility on a Plea of Guilty,* 62 W. VA. L. REV. 213, 218 (1960). *See* Van Moetke v. Gilles, 332 U.S. 708, 722-24 (1947).

consequences of entering a plea of guilty.[110]

Certainly judges are more assured where a defendant is adequately represented by counsel that a plea is accurate;[111] if the judge has any doubts about the accuracy of the plea, the concurrence of counsel in the plea helps to resolve those doubts. In addition, where a defendant is represented by an attorney, the judge is more confident that the defendant's rights (which are waived by entry of the plea) and his alternatives have been explained to him. Consequently, the judge, by inquiring into the basis of the plea, serves as a secondary safeguard to secure the voluntariness and accuracy of the plea.[112]

Any plea agreement reached should be in the public interest, which means that the scope of the discussions should be limited to correctional objectives.[113] This reflects on still another responsibility of the judge:

> The judge also must decide that the agreed disposition is fair and appropriate in light of all the circumstances. The judge should determine that the disposition is consistent with the sentencing practices of the jurisdiction and that the prosecutor did not agree to an inadequate sentence for a serious offender.[114]

CONCLUSION

What all of this really indicates is an increased role not only for the

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110. *Guilty Plea Bargaining* 888-89. *See* TASK FORCE REPORT 12.

111. *See, e.g.,* Brady v. United States, 397 U.S. 742, 756 (1970).

112. NEWMAN 13-14.

113. The President's Crime Commission described this function as follows:

> Discussions between prosecutor and defense counsel should deal explicitly with dispositional questions and the development of a correctional program for the offender. A plea negotiation is fundamentally a negotiation about the correctional disposition of a case and is, therefore, a matter of moment to both the defendant and the community.

TASK FORCE REPORT 12.

As Enker has pointed out, however, defense counsel may have difficulty assimilating the public's interests along with those of his client:

> [D]efense counsel, perhaps in part because of legitimate skepticism over the availability of meaningful correctional treatment and of doubts as to the fairness of such programs, seem to regard their duty to the client solely in terms of obtaining for him as lenient a sentence as possible. Perhaps a broader view of the lawyer's role should include within the counseling function the duty to attempt to make the client aware of the fact that he has a problem and of his need for some correctional program.

Enker 111.

114. TASK FORCE REPORT 13. However, the "public interest . . . need not necessarily mean a longer sentence; it may include identification of the sources of defendant's problems and the development and suggestion of a program of correctional treatment that is relevant to these problems." Enker 111.

judge but for the prosecutor and defense counsel as well. Such a procedure as discussed herein will be more time-consuming, but it should help to reduce the number of collateral attacks on guilty pleas, thereby becoming in the long run a process assuring judicial economy.[115] Moreover, it will tend to flush out any issues relating to the propriety of the negotiations at the time the plea is entered rather than to cause them to arise for the first time at a later date.[116] The present trend is toward securing for the guilty plea process a more searching examination into all matters relating to the decision to plead guilty,[117] toward transforming rhetoric into reality:

> The important thing is not that there shall be no 'deal' or 'bargain,' but that the plea shall be a genuine one, by a defendant who is guilty, one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced.[118]

While this expresses the ideal, it is far from reality. So much more is needed. There are increasing signs, *e.g.*, that plea bargaining is becoming a more formalized process.[119] But as long as the practice remains for the most part "in the limbo of dubious legality,"[120] it will continue to function beneath our level of visibility, and will elude efforts to make it an accepted, legitimate part of our criminal process. The suggestions offered in this article are not a panacea, nor were they offered as such. They will not solve all of the problems of plea bargaining, but they are calculated to improve it. In this sense they constitute not an end, but an experiment, a trial that we cannot afford *not* to attempt, and only by experimenting will we know where to go from here.[121]

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115. TASK FORCE REPORT 13.

116. This would minimize occurrence of situations such as that in *United States v. Cariola*, 323 F.2d 180 (3d Cir. 1963), in which the court was asked in 1962 to vitiate a guilty plea given in 1932. Indeed, the time differential may account in part for the enigmatic result in *Brady v. United States*, 397 U.S. 742 (1970), in which the Supreme Court refused to set aside a guilty plea offered in 1959.

117. NEWMAN 21.

118. Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964), *cert denied*, 381 U.S. 953 (1965), *quoted in* TASK FORCE REPORT 10. This language is worth repeating here because it sums up in a simple but forceful manner the objective that we ought to be seeking in the plea process.

119. *See* note 104 *supra*.

120. People v. West, 3 Cal. 3d 595, 608, 477 P.2d 409, 417, 91 Cal. Rptr. 385, 393 (1970).

121. "[E]xperience with a plea bargaining system in which negotiations are open, visible, and subject to judicial scrutiny should help to identify the risks involved in the system, and indicate the need for and direction of further change." TASK FORCE REPORT 13.