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Converging Criminal Justice Systems: Guilty Pleas and the Public Interest

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CONVERGING CRIMINAL JUSTICE SYSTEMS: GUILTY PLEAS AND THE PUBLIC INTEREST

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It is becoming increasingly apparent to criminal justice scholars that single-theory models of criminal procedure—whether termed inquisitorial or adversarial—are being stretched beyond their capacity by the phenomena they are designed to control. Virtually everywhere, formal systems of charge and adjudication cannot possibly be enforced in accordance with the premises underlying them. There are simply too many offenses, too many offenders, and too few resources to deal with them all. One result of this overload has been a steady movement towards a convergence of legal systems—towards borrowing from others those institutions and practices that offer some hope of relief.

In this transnational effort to cope with system overload, two issues have emerged as more than ordinarily significant. The first is the desirability of abandoning the principle of obligatory prosecution, so common in Continental Europe, and turning instead to the exercise of prosecutorial discretion. The second is the question of whether the ban on guilty pleas and plea bargains should be lifted, as in adversarial systems.

In Germany, where the concept of obligatory prosecution once reigned supreme, prosecutorial discretion is now recognized, efforts are being made to regulate its exercise, and plea bargains have made a limited appearance.[1] In Italy, where guilty pleas had never existed and plea bargaining was anathema, the adversary trial has been introduced along with the guilty plea and the explicit grant of sentencing concessions for such pleas.[2] Even more dramatic is the debate now raging in Central and Eastern Europe, as nations turn away from Soviet-influenced "inquisitorial" systems, about whether to build anew along Anglo-American lines—by abandoning principles of obligatory prosecution and recogniz-

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1. Joachim Herrmann, *Bargaining Justice—A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 756 (1992).

2. Lawrence J. Fassler, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 COLUM. J. TRANSNAT'L L. 245, 246-47 (1991); Stephen P. Freccero, *An Introduction to the New Italian Criminal Procedure*, 21 AM. J. CRIM. L. 345, 372-75 (1994).

ing guilty pleas and plea bargaining.[3] At the same time, many nations using accusatorial systems have been looking in the direction of the European continent for guidance on how to reconcile discretion and plea bargaining with basic principles of legality.[4] In sum, as each criminal justice system seeks the uniquely appropriate solution to its dilemmas, earlier reservations about the propriety of prosecutorial discretion, guilty pleas, and plea bargains are being overwhelmed by principles of utility.

There is little doubt that when "borrowing" occurs across national and systemic lines, there is a great risk that stereotypes will be imported, without appreciating the distinctive relation of the borrowed practice to the premises of the system in which it has evolved and the living context in which it has taken its form. Indeed, it is commonly assumed that such borrowings are, at best, risky and, at worst, calamitous. For example, Europeans looking to borrow from American institutions may bring prosecutorial discretion across the waters as if it were entirely unrestrained in the United States. Similarly, plea bargains and guilty pleas may be introduced on the assumption that they connote total abdication to the parties of control of the criminal case.

I should like to move past the stereotypes and consider how cases that receive less than the full adjudicative process should be handled, whether in the United States or elsewhere. More particularly, in a world that recognizes guilty pleas and invites plea bargaining, what initiatives should be taken to protect the public interest in systems nominally given over, for the most part, to party initiative and party control? I hope to demonstrate that the judiciary must play a special role in moderating such systems, that in the United States we have laid the foundation for such a role, and that the inquisitorial tradition can strengthen that foundation in nations beginning anew to address the issue of guilty pleas. It would be a cruel irony if reformers in inquisitorial systems were to abandon a supervisory role for the judiciary on these matters at the very moment when the American system, at last, recognizes that it must draw on the inquisitorial themes latent in its own criminal procedure.[5]

3. *See generally* Janet Key, *Old Countries, New Rights*, 80 A.B.A. J. 68 (May 1994) (written as part of the American Bar Association's Central and East European Law Initiative (CEELI)).

4. *See, e.g.*, Richard S. Frase, *Comparative Criminal Justice as a Guide to American Law Reform: How Do the French Do It, How Can We Find Out, and Why Should We Care?*, 78 CAL. L. REV. 539, 542-43 (1990); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 318 (1995); LEONARD H. LEIGH & LUCIA ZEDNER, ROYAL COMMISSION ON CRIMINAL JUSTICE (GREAT BRITAIN), A REPORT ON THE ADMINISTRATION OF JUSTICE IN THE PRE-TRIAL PHASE IN FRANCE AND GERMANY (1992).

5. Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 STAN. L. REV. 1009 (1974).

I. PUBLIC TRIAL, PUBLIC CONFIDENCE AND GUILTY PLEAS

Before turning to the American law of guilty pleas, it is necessary to set out some basic principles. Criminal statutes do not exist in a vacuum. They are part of an operational context which includes how they will be interpreted and administered and how the public will react to the words of the statutes and to their administration. The media are a part of that context and have the power to magnify manifold the significance of events. Much of the effectiveness of law enforcement depends upon the symbolic role played on the public stage by the occasional case selected for prosecution. That case sends a strong message to potential violators, reinforcing both the legal norm and the habits of obedience that form a law-abiding population.

The primary vehicle for sending such messages is the contested public trial. In its very detail and drama—in the examination and cross-examination of witnesses and the adversarial sifting of facts and legal issues—the trial becomes a morality play which impresses upon the public that the law is being enforced and that justice is being fairly administered. The Supreme Court has often stressed this relation between public trial and public confidence in the administration of justice.[6] A public trial assuages retributive impulses and minimizes resort to self-help. It channels victims (and those who can identify with them) into a process that affirms substantive and procedural legal norms. It enables members of the public to learn of defects in the system so that they may turn to political action to correct the defects.[7]

Guilty pleas drive a gaping hole through these assumptions. If too few contested trials occur, there is a real risk that the larger public will not be taught the moral lessons on which a system of criminal law depends. By agreeing to such pleas, the parties abandon not only their own rights but also their roles as surrogates for a larger public interest. The defendant abandons not only the right to hear the evidence against him, the right to confront his accusers, and the right to a jury, but also the right to a public trial before that jury. And public prosecutors abandon the public's interest in a public trial.

For most of our history, bargaining by the parties for the "waiver" of such rights was virtually prohibited by the formal legal system. In legal theory, such pleas were presumptively unlawful because they tended to nullify the criminal law and because they seemed inherently coercive. Yet such bargains occurred regularly in "the shadows" because they served so many practical purposes. For defendants, the pleas mitigated the severity of the criminal code. For prosecutors and judges, they provided quick and final dispositions. Promises by prosecutors and judges to

6. See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980), and cases and authorities cited therein.

7. *See, e.g., id.* at 570-72; State v. Dunne, 590 A.2d 1144, 1149-50 (N.J. 1991) (discussing the relation between jury trials and public confidence).

induce waivers by guilty pleas were routinely made, acted on, and implemented. In open court, however, judges feigned ignorance, and the public was treated to ritual (and false) recitations by defendants and prosecutors that nothing had been promised—no dismissals or reduction of charges and no sentencing advantages.

In the early 1970s, the Supreme Court concluded that a system overwhelmed by the volume of crime and by limited resources needed a safety valve.[8] The parties were treated as "free" to waive their rights and to bargain with one another about the conditions of waiver. At the same time, the Court recognized that such a system would present a high degree of risk that defendants might be coerced and that prosecutors might neglect the public's interest in criminal law enforcement.[9] While legitimating the practice, therefore, the Court placed upon trial judges the obligation to assure that such pleas would be fair to defendants and would be consistent with the public interest.[10]

II. REVIEWING GUILTY PLEAS IN THE PUBLIC INTEREST

The Federal Rules of Criminal Procedure are fairly typical of the regulatory pattern that emerged in the United States soon afterwards. Under the Rules, judges need not permit bargaining—now commonly styled plea negotiations and plea agreements—and they need not accept guilty pleas.[11] But if they do (and most now do), then the court must play a compensatory role to protect the public interest. The court must assure that the plea is voluntary, that it has a factual basis, and that it accords with the "sound discretion of the court."[12]

A. VOLUNTARINESS

At first view, the issue of voluntariness seems to be a straightforward one that should be left to the parties. If the defendant wants to plead guilty and the public prosecutor has no objection, that would seem to be the end of the matter. But such an approach would oversimplify what on reflection is much more complex. Nowhere is it regarded as sufficient, without more, that the parties have reached an agreement. Judges have an affirmative obligation to police the guilty plea and with it the bargaining process. The judge must determine that the defendant's plea is genuinely voluntary—that is, that the defendant understands the charge and its consequences, or the defenses he is waiving, and that he has not been

8. *See, e.g.*, Santobello v. New York, 404 U.S. 257, 260-61 (1971); Brady v. United States, 397 U.S. 742 (1970); *see also* ABRAHAM S. GOLDSTEIN, THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA 35-39 (1981).

9. Bordenkircher v. Hayes, 434 U.S. 357 (1978).

10. *See generally* GOLDSTEIN, *supra* note 8.

11. FED. R. CRIM. P. 11; *Santobello*, 404 U.S. at 262.

12. FED. R. CRIM. P. 11; *see generally* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 21.1-.6 (2d ed. 1992).

improperly threatened by the prosecutor.[13] Yet it is not enough for the judge to put questions to the defendant and get "correct" answers, as had long been the practice. The judge must now be alert to the fact that ritual answers often pay lip service to legality while actually undercutting it.

The inquiry into voluntariness must be made by the judge with full appreciation of the fact that the plea occurs in a suspect context and structure. Within that structure, judges should not treat the parties as impartial enough to assure a wider public that their agreement takes adequate account of the public interest. Defendants are likely to be less concerned with principles of legality than with functional realities, such as getting the charge or the sentence reduced to tolerable levels. And what defendants regard as tolerable—what they may be willing to "waive" in the way of factual and legal defenses—may have little or nothing to do with the public interest in deterrence, corrections, or lawful methods of investigation and prosecution. Even innocent defendants may be willing to abandon their defenses if the stakes are high enough and the probabilities of conviction are great enough.

Prosecutors, too, cannot be relied on to protect the public interest because they have their own agendas, both personal and administrative. They may be "overcharging" because witnesses may have become incredible or are no longer available; they may be using a serious charge for which there is no substantial evidence in order to induce pleas to lesser charges; they may be asserting correctional considerations that might best be left to the judge as bases for reducing charges; or they may be abusing their power to cumulate offenses and potential sentences.

It is at this point that judicial discretion enters the picture. Though most judges acquiesce in the plea tendered by the defendant, they can (and should) reject the plea if it is contrary to "the interest of the public in the effective administration of criminal justice."[14] That power should, of course, be exercised only in exceptional cases, after taking into account the usual prerogatives of the parties—the prosecutor's broad discretion and the defendant's control of his own defense. In the end, however, the judge's residual reviewing role is critically important in making the parties accountable and in reducing the forfeiture of public as well as private rights.

B. THE JUDGE'S DISCRETION

A near consensus now exists on the criteria to be applied by the judge in determining whether to accept or reject a guilty plea. A plea violates the public interest when: (1) it is unfair to the defendant; (2) it involves

13. *See* Henderson v. Morgan, 426 U.S. 637, 647 (1976); United States v. Adams, 961 F.2d 505, 510 (5th Cir. 1992); United States v. Johnson, 546 F.2d 1225, 1226-27 (5th Cir. 1977).

14. AMERICAN BAR ASSOCIATION, STANDARDS RELATING TO PLEAS OF GUILTY §§ 1.8(a), 3.3(c) (1968) [hereinafter ABA STANDARDS]; *see* Donald G. Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 54.

an abuse of prosecutorial discretion; or (3) it infringes seriously on the judge's sentencing domain without serving a countervailing prosecutorial purpose.[15] Virtually none of the cases dispute the trial judge's broad authority to reject guilty pleas on these grounds. Courts differ, however, in the deference they pay to the district attorney as the person best situated to define the public interest. For some courts, the interests of society are "subsumed within the prosecution interest;"[16] the question "is not what the judge would do if he were the prosecuting attorney, but whether he can say that the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to make it an abuse of prosecutorial discretion."[17] For other courts, the prosecutor is viewed as a partisan, like the defendant, and only the court is regarded as capable of guarding the public interest.[18]

Judges have rejected guilty pleas because the plea did not provide for a severe enough sentence;[19] because it did not inform the public of the "real offense";[20] because it would not deter either the individual charged or members of the general public;[21] or because the anticipated public reaction to a guilty plea would be unfavorable.[22] The "public confidence" theme has become an increasingly important element in the exercise of judicial discretion, particularly in high visibility cases. For example, in cases involving corporate defendants in the context of white collar crime, judges have rejected pleas that would have permitted the corporate defendant to plead guilty to one count in exchange for dismissing all counts against the individual defendant.[23] In one case, the court stated, "Public confidence in the administration of justice will be eroded if it is perceived that . . . an individual who operates illegally through a corporation can escape prosecution altogether and retain the fruits of his ill gotten gains by having the corporation 'take the rap.'"[24] In another case dealing with a corporate employee who perpetrated fraud against the United States, the court noted, "[W]hat concerns me is what message we are sending to

15. United States v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973); *see also* United States v. Maddox, 48 F.3d 555, 558-59 (D.C. Cir. 1995); United States v. Robertson, 45 F.3d 1423, 1436-39 (10th Cir. 1995); United States v. Carrigan, 778 F.2d 1454, 1461-62 (10th Cir. 1985); United States v. Miller, 722 F.2d 562, 563 (9th Cir. 1983); United States v. Escobar Noble, 653 F.2d 34, 36-37 (1st Cir. 1981); State v. Blanchard, 409 A.2d 229, 234 (Me. 1979); State v. Matulonis, 230 N.W.2d 347, 351 (Mich. Ct. App. 1975); State v. Perez, 457 N.W.2d 448, 453 (Neb. 1990).

16. Lowell B. Miller, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L.J. 241, 246 (1974).

17. *Ammidown*, 497 F.2d at 622.

18. United States v. Cruz, 539 F. Supp. 231, 235 (D.P.R. 1982); State v. Menucci, 514 N.E.2d 758, 762 (Ohio C.P. 1986); State v. Roubik, 404 N.W.2d 105, 107 (Wis. Ct. App. 1987).

19. United States v. Greener, 979 F.2d 517, 519 (7th Cir. 1992); United States v. Bean, 564 F.2d 700, 703 (5th Cir. 1977).

20. *Bean*, 564 F.2d at 703.

21. *Roubik*, 404 N.W.2d at 107.

22. *Id.*; *see also* United States v. Stamey, 569 F.2d 805 (4th Cir. 1978).

23. *See, e.g.*, United States v. Carrigan, 778 F.2d 1454, 1457 (10th Cir. 1985); United States v. Freedberg, 724 F. Supp. 851, 853 (D. Utah 1989).

24. *Freedberg*, 724 F. Supp. at 853 n.2.

the public and to the taxpayers . . . [if] we are not going to prosecute him when there is this much involved."[25] Again, in a case involving "violent confrontations between Caucasians and Indians," the trial judge insisted that the background of violence, augmented by intense public controversy about whether the white defendant should have been charged with a more serious crime, made it necessary to have the facts "publicly aired."[26]

The public confidence issue takes on special significance when an "equivocal" guilty plea is tendered—one in which the defendant asserts his innocence even as he formally concedes his guilt.[27] The Supreme Court has held that such a plea may be made and accepted, provided there is evidence in the record that can support a judgment of guilt.[28] But there is nothing that "obliges the court to accept [such] a guilty plea," and many judges have exercised their discretion not to do so.[29] In the court's view, "[a] conviction affects more than the court and the defendant; the public is involved. . . . [T]he public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail."[30] A trial court, accepting such a plea, could be faced with doubts that would raise "the specter that . . . [the defendant] was pleading to one crime in order to assuage his guilt for a different, uncharged crime."[31] Moreover, permitting such a plea could make the defendant "difficult to deal with in a correctional setting"[32] where he might "contend that he had been railroaded by the system."[33]

An equivocal plea of guilty invites suspicion about the processes of justice. And that suspicion, inevitably, does serious damage to the symbolic, deterrent, and correctional functions of criminal law.[34] The only way to eliminate that suspicion would be to reject equivocal guilty pleas in felony cases, as has long been the rule in our military courts.[35] Bearing in mind the distinctive function of a public trial, it seems clear that defendants who assert their innocence should have their guilt proved in a public trial. If that trial turns out to be speedier than most because the defendant does not contest the government's case, the cause of efficiency will be served at the same time as public confidence is enhanced.

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25. *Carrigan*, 778 F.2d at 1458.
26. State v. Leisy, 295 N.W.2d 715, 718 (Neb. 1980).
27. Gilmore v. Zimmerman, 793 F.2d 564, 564-66 (3d Cir. 1986).
28. North Carolina v. Alford, 400 U.S. 25, 37-38 (1970). *But see* United States v. Matthews, 16 M.J. 354, 362 (C.M.A. 1983); Ross v. State, 456 N.E.2d 420, 422-23 (Ind. 1983).
29. United States v. Bednarski, 445 F.2d 364, 365-66 (1st Cir. 1971).
30. *Id.* at 366; *see also* United States v. Biscoe, 518 F.2d 95, 96 (1st Cir. 1975); Commonwealth v. Dilone, 431 N.E.2d 576, 579 (Mass. 1982).
31. United States v. Cox, 923 F.2d 519, 525-26 (7th Cir. 1991).
32. United States v. Gomez, 822 F.2d 1008, 1011 (11th Cir. 1987), *cert. denied*, 484 U.S. 1028 (1988).
33. State v. Pringle, 336 N.W.2d 675 (Wis. Ct. App. 1983); *see also* State v. Jackson, 366 A.2d 148, 150 (R.I. 1976).
34. *Bednarski*, 445 F.2d at 366.
35. *See Matthews*, 16 M.J. at 362.

C. "FACTUAL BASIS"

In the federal courts and in most states, the plea must have a "factual basis." In the words of Rule 11 of the Federal Rules of Criminal Procedure, the trial court must make "such inquiry as shall satisfy it that there is a factual basis for the plea."[36] "[T]he prosecutor must present evidence to the subjective satisfaction of the district court . . . that a defendant committed the offense to which he is pleading guilty."[37]

This simple provision conceals from view one of the most troublesome issues associated with plea bargaining. Must the guilty plea accurately reflect the crime committed by the defendant? Or is it sufficient if the plea is made to an offense less serious than the "real offense," albeit one which has some basis in the facts of the defendant's crime? Where the facts show rape, for example, may a plea be accepted to indecent assault? Where the facts show armed robbery, may a plea be accepted to larceny?

The cases provide a surprising range of answers. In the federal courts, the usual answer is that the prosecutor has an unreviewable discretion to select the initial charge;[38] that he must obtain the judge's approval for a reduction or alteration in the charge;[39] and that the prosecutor's recommendation is usually accepted as long as the lesser offense is "reasonably related" to the original charge.[40] A small number of states, however, take a more conservative view, holding that a defendant may plead guilty only to the crime of which he is in fact guilty. For example, if the defendant was an accomplice, he may not plead guilty to a charge that he was a principal.[41] The same is true in England. If the facts support the offense originally charged, then a guilty plea to a less serious offense is usually rejected.[42]

There is a third group of courts that do not seem to be concerned at all with the actual conduct of the defendant. "A bargained guilty plea to a lesser crime," noted one judge, "makes unnecessary a factual basis for the particular crime confessed."[43] In these states, defendants have even been permitted to plead guilty to a hypothetical crime.[44] For example, pleas

36. FED. R. CRIM. P. 11(f); *see* ABA STANDARDS, *supra* note 14, § 1.6; *see also* United States v. Johnson, 546 F.2d 1225, 1226-27 (5th Cir. 1977); John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88 (1977).

37. United States v. Antone, 753 F.2d 1301, 1305 (5th Cir.), *cert. denied*, 474 U.S. 818 (1985). It must be the same type of offense or part of the same course of conduct which led to the original charge. People v. West, 477 P.2d 409, 420 (Cal. 1970).

38. *See, e.g.*, Wayte v. United States, 470 U.S. 598, 607 (1989); Bordenkircher v. Hayes 434 U.S. 357, 364 (1978).

39. State v. Sanders, 309 N.W.2d 144, 145 (Iowa Ct. App. 1981); Jones v. State, 505 S.W.2d 903, 907 (Tex. Crim. App. 1974).

40. Arizona v. Norris, 558 P.2d 903, 904 (Ariz. 1976).

41. *Jones*, 505 S.W.2d at 906-07.

42. JOHN F. ARCHBOLD, JR., PLEADING, EVIDENCE AND PRACTICE IN CRIMINAL CASES § 4-47a (Stephen Mitchell et al. eds., 48th ed. 1988 & Supp. 1991); *see also* R. v. Soanes, 32 Cr. App. R. 136, 138 (1948).

43. People v. Clairborne, 280 N.E.2d 366, 367 (N.Y. 1972).

44. *See, e.g.*, People v. Waits, 695 P.2d 1176, 1178-79 (Colo. Ct. App. 1984), *aff'd in part, rev'd in part*, 724 P.2d 1329 (Colo. 1986); Downer v. State, 543 A.2d 309, 311 (Del.

have been accepted to the nonexistent offense of attempted manslaughter.[45] And pleas have been made to daytime burglary when the offense occurred at night.[46] The keys to these decisions are: (1) that the plea "was sought by defendant and freely taken as part of a bargain which was struck for . . . [his] benefit;"[47] and (2) that the sentencing consequences seem appropriate to the conduct.[48]

Yet if the plea to an unreal reduced charge (or to a hypothetical offense) is accepted by the judge—as it is in most cases—the crime of which the defendant stands convicted has little or no relation to what he actually did and has a distorting effect on the criminal justice system. The criminal conviction becomes a suspect unit of analysis for counting crimes, for making restitution awards, for parole, and for sentencing guidelines. In the absence of an accurate plea, officials find themselves searching for the "real" offense concealed behind the fictional plea in an attempt to restore the proper fit between the sanction and the charge, between the sentence and the purpose of sentencing—whether it is "just deserts," restitution, rehabilitation, or vengeance. As a result, the public comes to assume that convictions for lesser offenses invariably mask greater ones.

The guilty plea, as now administered in the United States, feeds a pervasive sense of unreality both inside the criminal justice system and in the public observing that system. If the plea is to be successfully imported elsewhere, a first priority must be to do abroad what we have not yet done in the United States: develop a proper and accurate relationship between the facts of the offense, the legally defined offense, and the sentence.

D. A Public Trial for Especially Public Matters?

Are there circumstances when the trial court should refuse to permit a guilty plea and should, instead, insist on a public trial? The issue has taken on increasing importance because ever more cases are testing and straining public confidence in our processes of justice. Women's groups complain that pleas to lesser offenses are accepted too casually in rape cases and that wife-battering cases are not prosecuted at all. Minority groups insistently demand that allegations of police brutality be fully aired and readily voice their suspicions that disparate standards are being applied under the cover of prosecutorial discretion. Most people are convinced that white collar offenders get away with the proverbial "slap on

1988); People v. Isreal, 335 N.E.2d 53, 56 (Ill. App. Ct. 1975); People v. Genes, 227 N.W.2d 241, 243 (Mich. Ct. App. 1975); People v. Johnson, 181 N.W.2d 425, 429 (Mich. Ct. App. 1970); People v. Francis, 341 N.E.2d 540, 543 (N.Y. 1975); People v. Griffin, 166 N.E.2d 684, 686-87 (N.Y. 1960).

45. People v. Foster, 225 N.E.2d 200, 202 (N.Y. 1967).

46. *See* Donald J. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 99-104 (1966).

47. *Foster*, 225 N.E.2d at 202.

48. *See generally Genes*, 227 N.W.2d at 241; *Johnson*, 181 N.W.2d at 425.

the wrist" through the use of plea bargaining. In such highly charged contexts, should the parties be permitted to deny the public of the educative and the deterrent role that attaches to a contested and visible public trial?

It is obvious that, in many such cases, the public has a greater than ordinary interest in knowing the full facts of the case. The same is true when a crime involves a sensational public figure (either as defendant or victim). In such cases, "rumors and suspicions that there is 'more than meets the eye' abound . . . the sparse information contained in the charge and the monosyllabic guilty plea"[49] offers too little information to allay those suspicions. Indeed, in cases like the killing of Martin Luther King or President Kennedy, or the more recent police beating of Rodney King or the killing of Yankel Rosenbaum, "more is at stake than one-to-one justice between State and accused or accused and victim . . . . Anything short of complete disclosure in such cases inflames public cynicism about our system of justice to a dangerous point."[50] At one time, in some places, such concerns led to prohibitions of guilty pleas in capital cases. That rule is still followed in the military justice system and in a small number of states.[51]

The public interest in a public trial, though rarely articulated, is implicit in the position taken everywhere that judges have virtually complete discretion to refuse a guilty plea. In exercising that discretion, judges should take into account the risk of public misunderstanding and cynicism about guilty pleas. I do not mean to suggest that a guilty plea can never satisfy the public's need for information and that all cases must go to public trial. The plea does, after all, produce a formal judgment of conviction based upon a charge of a crime, which usually recites the essential facts consti-

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49. Donald J. Newman & Edgar C. NeMoyer, *Issues of Propriety in Negotiated Justice*, 47 DENV. L.J. 367, 398-99 (1970).

50. Donald J. Newman, *The Agnew Plea Bargain*, 10 CRIM. L. BULL. 85, 89-90 (1974). But compare this to Jack M. Kress's viewpoint:

> Spiro Agnew was a charismatic politician who inspired fervent admirers and emotional critics. His trial could well have become the most divisive event in recent American history. . . . [I]t is unthinkable that this nation should have been required to endure the anguish and uncertainty of a prolonged period in which the man next in line of succession to the Presidency was fighting the charges brought against him by his own Government.

Jack A. Kress, *The Agnew Case: Policy, Prosecution and Plea Bargaining*, 10 CRIM. L. BULL. 80, 84 (1974) (quoting Elliot Richardson).

51. *See, e.g.*, Peel v. State, 150 So. 2d 281, 293 (Fla. Dist. Ct. App. 1963), *cert. denied*, 380 U.S. 986 (1965); State v. Watkins, 194 S.E.2d 800, 809-10 (N.C.), *cert. denied*, 414 U.S. 1000 (1973) (a statute now authorizes such pleas, N.C. GEN. STAT. § 15A-2001 (Michie 1992)). The only jurisdictions that now prohibit guilty pleas to capital crimes are Louisiana, L.A. CODE CRIM. PROC. ANN. art. 557 (West. 1981), *discussed in* State v. Fabre, 525 So. 2d 1222, 1228 (La. Ct. App. 1988), and the military courts, 10 U.S.C. § 845, art. 45 (1994).

Professor Beattie says that guilty pleas were allowed in capital cases at common law but were "actively discouraged" by trial judges. J.M. BEATTIE, CRIME AND THE COURTS IN ENGLAND, 1660-1800, at 336 (1986). In a period when most felonies were capital offenses, judges often wished to avoid the death sentence and such a record could provide a basis for doing so. *Id.*

tuting the elements of the crime. But guilty pleas, especially when reached after negotiations, too often appear to the public as the product of collusion or corruption. Some process is needed to reassure the public that due process is being rendered. If the trial judge determines that the public interest requires a public airing of the facts culminating in a criminal charge, he should do one of two things: (1) he should reject the plea and insist on the prosecution putting its witnesses on record, with the defendant either challenging those witnesses or acquiescing in what they have said; or (2) if he decides to accept a guilty plea, he should follow the English practice and require a presentation, in open court, of the testimony of the principal witnesses and such stipulations of fact as make a contested trial inappropriate.[52]

III. CONCLUSION

A defendant's guilty plea is the occasion when the small proportion of charges that have survived the discretion of police and prosecutor must at last play their part in serving the deterrent, educative, and symbolic roles of criminal law. We cannot expect the calculus of pleasures and pains, which lies at the root of a criminal justice system, to do its work if the messages meant to emanate from the rare criminal case are not communicated to a larger public.

The world-wide movement towards the guilty plea makes it timely to fashion a process of judicial review that will take account of the public function of trial and conviction and, at the same time, counteract the aura of coercion and collusion associated with plea bargaining. The judicial hearing on the guilty plea can become such a process by drawing on both inquisitorial and accusatorial traditions. The judge should be able to tease apart, case by case, whether the prosecutor's decisions—in negotiating a plea or dismissing or reducing charges—are based on matters that should be left primarily to the prosecutor (such as doubts about proof or resources or investigative feasibility and priority) or whether the judge's special competence is involved (as in sentencing or in assuring the public that justice is being fairly administered or that the symbolic function of criminal law can be served without a trial).

52. HALSBURY'S LAWS OF ENGLAND 823 (4th ed. 1990).