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# Plea Bargaining: An Unnecessary Evil

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# PLEA BARGAINING: AN *UN*NECESSARY EVIL

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## I. INTRODUCTION

The United States Supreme Court has acknowledged that plea bargaining would not exist in what it called an "ideal world."[1] Similarly, the Wisconsin Supreme Court recognizes that, in the words of the current Chief Justice, Nathan S. Heffernan, the practice does not "offer exact justice to the state and the defendant"[2] and "can tend to subvert the ends of justice rather than to advance them."[3] As I point out in *Escape of the Guilty*,[4] plea bargaining is a double evil: it encourages crime by weakening the credibility of the system on the one hand and, on the other, it tends to extort guilty pleas from the innocent. Nevertheless, an overwhelming majority of those in the criminal justice system accept plea bargaining as an "important component of this country's criminal justice system."[5] The natural question is "Why?" The answer is a combination of "myth" and "expediency."

Most defenders of plea bargaining believe that without it an already overburdened criminal justice system would grind to a halt. Thus, for example, the Wisconsin Supreme Court has recognized that "plea bargaining is accepted pragmati-

* Judge, Circuit Court of Milwaukee County, Wisconsin; Author, ESCAPE OF THE GUILTY (Dodd, Mead & Co. 1986). 

1. Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977).

2. Armstrong v. State, 55 Wis. 2d 282, 287, 198 N.W.2d 357, 359 (1972).

3. Pontow v. State, 58 Wis. 2d 135, 142, 205 N.W.2d 775, 779 (1973).

4. R. A. FINE, ESCAPE OF THE GUILTY (1986).

5. *Bordenkircher*, 434 U.S. at 361-62; *Blackledge*, 431 U.S. at 71.

cally as a device to speed litigation . . . ."[6] As we shall see, however, this "system would become clogged" rationale is a myth. Plea bargaining has been successfully abolished when those in the system have wanted to make a ban work: in Alaska; in New Orleans, Louisiana; in Oakland County (Pontiac) Michigan; in Ventura County, California; and, in a petri dish example, in New Philadelphia, Ohio. Stripped of the only reason for which courts have tolerated the practice, plea bargaining stands naked against the winds of justice.

"Plea bargaining" is that bushel basket of practices whereby a prosecutor agrees to:

— charge a crime or crimes less seriously than the facts warrant, and/or

— reduce a charge or charges already issued, and/or

— dismiss a charge or charges already issued, and/or

— not issue additional charges, and/or

— make a sentence recommendation all in return for a guilty or a no contest plea. It includes what has variously been described as "charge bargaining" and "sentence bargaining" as well as "plea bargaining." Importantly, however, whatever form the leniency takes, the leniency is payment to a defendant to induce him or her not to go to trial. The guilty or no-contest plea *is* the *quid pro quo* for the concession; there is no other reason. Thus, plea bargaining does *not* encompass those situations where the facts of a particular case may justify a lenient sentence, a dismissal, or reduction. Obviously, for example, if a case initially charged as "first degree murder" is discovered to be, in reality, "manslaughter," reducing the charge to "manslaughter" is *not* plea bargaining but justice. By the same token, consideration to a defendant may be warranted, in appropriate cases, to get his or her help in catching or convicting a "bigger fish" or to avoid the trauma of a trial for a particularly fragile victim.[7] Again, this is *not*

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6. *Armstrong*, 55 Wis. 2d at 287, 198 N.W.2d at 359.

7. The "spare the victim" excuse for leniency raises difficult questions, some of which the Wisconsin Supreme Court has addressed in the context of a child abuse case:

> Were the district attorney to decide not to call the child as a witness, the district attorney may protect the child's emotional interest in not being forced to face the alleged abuser and accuse the abuser of criminal acts, but may inflict a greater harm on the child by allowing the alleged abuser to go free and by demonstrating to the child that the state of Wisconsin does not place a high enough value on the

plea bargaining but — if appropriate — justice for society and for the victim.

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child's suffering to bring to justice the person alleged to have caused the suffering.

State v. Gilbert, 109 Wis. 2d 501, 507, 326 N.W.2d 744, 747 (1982). Prosecutors must avoid the trap of using expressed concern for a victim's sensibilities as a mere rationalization for inappropriate concessions.

Recently, a young woman in California wrote to me of her ordeal. Those in the criminal justice system had used the "spare the victim" excuse as one of the reasons to permit her rapist to escape just punishment:

> I was raped in my apartment one night in July of 1986. Although the rapist wore a nylon stocking over his face, I recognized him as the man who had managed the apartment building where I lived some years before. He was arrested two days later, and I picked him out of a line-up without any problems. The police also obtained substantial physical evidence against the man. In fact, the detective in charge of the case told me that out of the approximately 600 rape cases he had investigated, mine was the most "solid" he had come across.
>
> In addition, the rapist had a long history of sexual abuse crime, and at the time he raped me, he was on probation for child molestation. (Actually, he molested his five year old daughter, but the charge had been reduced to "Lewd and Lascivious Conduct with a Child under 14," for which the Court placed him on 90 days probation!).
>
> I have provided details because I think they help to explain my shock and anger at what happened next. Two weeks later, I received a subpoena which ordered me to appear in court. . . . I arrived at the courthouse early. I was scared and nervous, and I had no ideas what to expect. I was instructed to sit in a small room until the D.A. had time to see me, and I was informed that the pretrial hearing was scheduled for 10 a.m. The D.A. "found time" to see me two *very long* hours later. As we were going over my statement, he received a phone call which made him extremely happy, and which infuriated me. In the D.A.'s words, "[the rapist] accepted our deal."
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> Although I requested him to explain the details of the plea bargain several times, he avoided the question, but he did explain that plea bargaining was necessary because if every case had to go to trial, the courts would be back-logged for years, especially considering the high crime rate in the area (Oakland, California). He also explained that even if we went to trial, and the rapist was found guilty, some liberal judge may sentence him to less than what "we got" from the plea bargain (I found this irrelevant and illogical). Finally, he told me that I should be "happy" that he had "spared me the pain of going to trial." I was amazed that a man whom I had not met at the time this "bargain" was planned, had the extra-sensory power to know that I would be "pained" by going to trial. In short, I felt cheated, and I still am very angry. Not only was I completely ignored, but the rapist got a good deal."
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> My frustration increased geometrically as I confronted the courts. One judge told me that I should "try to understand the poor guy because he was the product of a broken home, alcoholic parents, and a poor childhood." That same judge told me I should be "grateful that he didn't hurt me!" When I spoke at the sentencing, the judge told me I should "just forget the whole thing," and that I should have no trouble getting my life back together since I'm so young (I'm 25). I find it hard to quantify the contempt I feel for those men.

One of the excuses often advanced for plea bargaining is that "half a loaf is better than none" when the evidence is weak, and that it is better to "get a dangerous person off of the streets for a short time" than risk an acquittal. This argument was punctured by Dan Hickey, a chief prosecutor in Alaska both before and after that state abolished plea bargaining in 1975:

> It is, in essence, a *meaningless gesture* to take in a whole lot of bad cases that can't be proved and bargain them out for meaningless dispositions. It is no solution to crime in this country to run someone through the process to get some kind of conviction which, more often than not, is for something much less than they were accused of and which results in something which really doesn't mean anything in terms of real punishment.[8]

Charging a rape as "disorderly conduct,"[9] for example, under the aegis of a "half a loaf is better than none" theory disables justice as the victim wonders, and the criminal gloats, at the law's impotence.

## II. THE ARGUMENTS AGAINST PLEA BARGAINING

The criminal law protects society in three major ways: deterrence, isolation, and rehabilitation. We attempt to deter persons from committing crimes with the threat of punishment, and rehabilitate those, who for one reason or another, have not been deterred. If deterrence and rehabilitation both fail, there is no alternative but to isolate the offender from the rest of society through long-term incarceration.

### *A. Plea Bargaining Weakens Deterrence*

The very essence of deterrence is credibility. As I point out in *Escape of the Guilty*, we keep our hands out of a flame because it hurt the very *first* time (not the second, fifth, or

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Letter from Jane Doe to Judge Ralph Adam Fine (Mar. 9, 1987).

I have quoted the woman's letter at some length for two reasons. First, it shows that at least some victims are tougher and have more resolve than many in the criminal justice system believe. Second, I hope its eloquence will sway some of those who may be skeptical of *Escape of the Guilty*'s warning that plea bargaining is rotting the law's integrity.

8. *60 Minutes* (CBS television broadcast, Jan. 18, 1987) (emphasis added).

9. R. A. FINE, *supra* note 4, at 51-54.

tenth time) we touched fire. If deterrence is to work, we must, in the words of noted Norwegian law professor and criminologist, Johannes Andenaes, make "the risk of discovery and punishment" outweigh "the temptation to commit crime."[10] Yet, plea bargaining destroys this needed credibility. A good example is what happened in two states with strict gun laws.

Massachusetts and Michigan have both tried to control the unlawful use of guns. Starting in April of 1975, someone carrying a handgun without a license in Massachusetts faced a mandatory one year in jail. Michigan's anti-gun law went into effect in 1977 and required that an additional two years be tacked on to any felony sentence if the defendant was carrying a gun at the time of the crime. Prosecutors and judges in Massachusetts took the law seriously and it worked. However, the Michigan story, as Harvard Professor James Q. Wilson relates, was different:

> Many judges would reduce the sentence given for the original felony (say, assault or robbery) in order to compensate for the add-on. In other cases, the judge would dismiss the gun count. Given this evasion, it is not surprising that the law had little effect in the rate at which gun-related crimes were committed.[11]

As a 1973 report of the U.S. National Advisory Commission on Criminal Justice Standards and Goals concluded:

> Since the prosecutor must give up something in return for the defendant's agreement to plead guilty, the frequent result of plea bargaining is that defendants are not dealt with as severely as might otherwise be the case. Thus plea bargaining results in leniency that reduces the deterrent impact of the law.[12]

Deterrence is, of course, further weakened as the criminal brags about his deal and spreads word throughout the community that the law has no teeth. Dean Roscoe Pound of the Harvard Law School, who studied plea bargaining in the 1920's, called it a "license to violate the law"[13] and, over a

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10. ANDENAES, PUNISHMENT AND DETERRENCE (1974).

11. Wilson, *Thinking About Crime*, ATLANTIC MONTHLY, Sept. 1983, at 79.

12. Church, *In Defense of Bargain Justice*, 13 LAW & SOC'Y REV. 509, 517 (1979) (quoting 1973 U.S. NAT'L ADVISORY COMM'N. REPORT).

13. R. POUND, CRIMINAL JUSTICE IN AMERICA, 184 (1930).

by the American Bar Association[23] and would, obviously, preclude many plea bargain arrangements.

Nevertheless, plea bargaining often involves fiddling with the facts.[24] As a prosecutor told two researchers working under a National Institute of Mental Health grant: "A lot of fictions are entered into. For instance, with the elements. In order to get within a lesser included offense, people kind of fudge the facts a bit. I've seen some people plead guilty . . . to attempted possession of narcotics, and I think that is pretty hard to do!"[25]

What is the "spree" criminal to think when it is "bargain day" at the courthouse: four armed robberies for the price of one? What is an impressionable young man to think when, after smashing up a stolen car, he is allowed to plead guilty to the reduced charge of "joy riding?"[26] As one commentator has recently written, plea bargaining "often destroys the integrity of the criminal justice system by allowing defendants to appear to be convicted of crimes different from the ones they actually committed."[27]

One of the biggest fictions connected with plea bargaining is the practice of permitting a defendant to plead "guilty" while simultaneously proclaiming his or her innocence. Although authorized by *North Carolina v. Alford*[28] — which was, significantly, a death penalty case — it is an *Alice in Wonderland* expediency that vitiates public confidence in the criminal justice system. Simply put, if we want defendants to respect the law, we must enforce it with justice and honesty.

### *C. Plea Bargaining Tends to Extort Guilty Pleas*

A 1967 report issued by the President's Commission on Law Enforcement put the issue squarely: "There are also real dangers that excessive rewards will be offered to induce pleas or that prosecutors will threaten to seek a harsh sentence if

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23. *See supra* note 18.

24. R. A. FINE, *supra* note 4, at 49-55, 68-71, 101, 107-08.

25. Hagan & Bernstein, *The Sentence Bargaining of Upperworld and Underworld Crime in Ten Federal District Courts*, 13 LAW & SOC'Y REV. 467, 470 (1979).

26. *See supra* notes 15-17 and accompanying text.

27. McDonald, *Judicial Supervision of the Guilty Plea Process: A Study of Jurisdiction*, 70 JUDICATURE 203-09 (1987).

28. 400 U.S. 25 (1970).

the defendant does not plead guilty. Such practices place unacceptable burdens on the defendant who legitimately insists upon his right to trial."[29]Six years later, the National Advisory Commission of Criminal Justice agreed:

> Underlying many plea negotiations is the understanding — or threat — that if the defendant goes to trial and is convicted he will be dealt with more harshly than would be the case if he had pleaded guilty. An innocent defendant might be persuaded that the harsher sentence he must face if he is unable to prove his innocence at trial means that it is to his best interest to plead guilty despite his innocence.[30]

The case that sanctions this type of extortion is *Bordenkircher v. Hayes*,[31] where the Supreme Court permitted a prosecutor to "up the ante" in order to obtain a guilty plea on a bad check charge. This is how the prosecutor put it when he questioned Hayes about it at a later hearing:

> Isn't it a fact that I told you at[the initial bargaining session] that if you did not intend to plead guilty to five years for this charge and . . . save the court the inconvenience and necessity of a trial and taking up this time that I intended to return to the grand jury and ask them to indict you based upon these prior felony convictions?[32]

An indictment as a repeater would subject Hayes, if convicted on the bad check charge, to a mandatory life term. Nevertheless, Hayes exercised his constitutional right to a jury trial and, true to his word, the prosecutor obtained the repeater indictment. Hayes was convicted and sentenced to the mandatory life term. In affirming the conviction the Supreme Court explained that there was no "punishment or retaliation so long as the accused [was] free to accept or reject the prosecution's offer."[33] The Court wrote:

> Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. . . . Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to

29. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMIN. OF JUST., THE CHALLENGE OF CRIME IN A FREE SOCIETY 135 (1967).

30. U.S. NAT'L ADVISORY COMM'N OF CRIMINAL JUSTICE, COURTS 43 (1973).

31. 434 U.S. 357 (1978).

32. *Id.* at 358 n.1.

33. *Id.* at 363.

> prosecutorial persuasion, and unlikely to be driven to false self-condemnation.[34]

Those in the system *do* have "their own reasons for wanting to avoid trial" and, unfortunately, those reasons usually have very little to do with "justice."

### 1. Advantages for Prosecutors

Prosecutors want to avoid trial for a number of reasons. Perhaps the most important reason in the context of an analysis of plea bargaining is that trials are hard work and many prosecutors have heavy case loads. A case that is "dealt away" is seen as a case that does not have to be tried. An experienced assistant district attorney in Milwaukee County once admitted to me that plea bargaining was a "concession to the burned out" prosecutor that "keeps us on the job for ten or fifteen years when we might otherwise burn out after two to three."[35]

### 2. Advantages for Defendants

Defendants also want to avoid trial for a number of reasons. Those who are clearly guilty fear that once the judge hears all the grisly details from the victims the resulting sentence will be more severe than if the judge had heard a dispassionate statement of the facts from the lawyers. Additionally, defendants may fear that the prosecutor will recommend, and the judge will impose, a more severe sentence just because — in the words of the *Hayes* prosecutor — they both had to endure "the inconvenience and necessity of a trial." Finally, of course, defendants are usually getting great plea bargained deals. In fact, one excellent and tenacious defense lawyer once told me, on the record, that he was removing his client's case from my court[36] because he had worked out a "great plea bargain" with the prosecutor, which he did not think I would accept. When I asked for specifics, he replied that he did not want to tell me the deal because "[y]ou'd be so grossed out."[37]

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34. *Id.* (citations omitted).

35. R. A. FINE, *supra* note 4, at 72.

36. Wisconsin is one of the few states that permits a criminal defendant to peremptorily bump a judge from his or her case. *See* State v. Holmes, 106 Wis. 2d 31, 315 N.W.2d 703 (1982); WIS. STAT. § 971.20 (1985-86).

37. R. A. FINE, *supra* note 4, at 109.

3. Advantages for Defense Lawyers

Many defense lawyers in the private bar rarely, if ever, take criminal cases to trial; they plead their clients guilty. That is the only way some of them can earn a living given the fact that they usually represent people who have either very little money or none at all. In the latter case, the lawyers are paid by government programs and the fees are such that taking a case to trial is usually not economical. In the former case, a client and his family may be able to come up with a few thousand dollars. That is a handsome fee for an hour or so of bargaining and a quick guilty plea; it is nothing for a jury trial and the needed investigation and preparation. As Professor Albert W. Alschuler has pointed out:

> There are two basic ways to achieve financial success in the practice of criminal law. One is to develop, over an extended period of time, a reputation as an outstanding trial lawyer. In that way, one can attract as clients the occasional wealthy people who become enmeshed in the criminal law. If, however, one lacks the ability or the energy to succeed in this way or if one is in a greater hurry, there is a second path to personal wealth — handling a large volume of cases for less-than-spectacular fees. The way to handle a large volume of cases is, of course, not to try them but to plead them.[38]

A Boston lawyer he interviewed put it this way: "A guilty plea is: a quick buck."[39] An attorney in Alaska was a little more genteel and told National Institute of Justice researchers: "Criminal law is not a profit-making proposition for the private practitioner unless you have plea bargaining."[40] The simple fact is, as sociologist Abraham S. Blumberg pointed out in a 1967 article entitled *The Practice of Law As Confidence Game*, many criminal defense lawyers find it more advantageous to cooperate with prosecutors and judges who press for guilty pleas than to zealously represent their clients. After all, they must deal with them on a day to day basis. The

38. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1182 (1975).

39. M. RUBINSTEIN, S. CLARKE & T. WHITE, ALASKA BANS PLEA BARGAINING 39 (National Institute of Justice 1980) [hereinafter M. RUBINSTEIN].

40. *Id.*

client, on the other hand, is a transitory figure who is usually — and quite literally — gone tomorrow.[41]

4. Defendants Are Vulnerable to Extortion

While the Supreme Court assumed that defendants would be "advised by competent counsel," what advice can even an eager and idealistic lawyer give someone in Paul Hayes' position, assuming the financial aspects of the case did not chill his or her willingness to take it to trial? Simply put, there is little protection for the defendant who maintains his or her innocence in the face of threats from an "up the ante" prosecutor.

Assume, for a moment that Hayes was innocent. If he had pled guilty because of the prosecutor's threat, that would have been precisely the type of "false self-condemnation" the Court said could not happen. Although the Court opined that defendants were "protected by other procedural safeguards," there are none in any court where the judge permits the prosecutor to "up the ante" on a defendant who refuses to cave in and forego his constitutional right to a jury trial. Hayes was punished by having his exposure increased to a mandatory "life" sentence the moment he asserted his innocence and demanded that jury trial. Indeed, since a guilty person had the choice between a sure five years or a sure life sentence, it can be argued with some success that *only* an innocent person would have rejected the prosecutor's deal.

In my three years of presiding full time over criminal cases (in the Juvenile, Misdemeanor, and Felony divisions of the circuit court), at least three persons later adjudged to be *not guilty* attempted to plead guilty either because their lawyer wanted them to, they feared an "up the ante" recommendation from the prosecutor, or they wished to "get the matter over with." Importantly, the facts fully supported the acquittals. An example of what *Hayes* hath wrought can be seen from an incident I relate in *Escape of the Guilty*.

A Milwaukee county prosecutor initially offered a woman accused of inflicting superficial wounds on her husband a nine-month misdemeanor charge of "battery."[42] When she re-

41. *See* Blumberg, *The Practice of Law As Confidence Game: Organizational Cooptation of a Profession*, 1 LAW & SOC'Y REV. 15 (June 3, 1967).

42. WIS. STAT. §§ 940.19(1), 939.51(3)(a) (1985-86).

fused to plead guilty, he — according to affidavits filed in the case — charged her with the five-year felony of endangering safety by conduct regardless of life.[43] When she refused to plead guilty after the preliminary examination, the prosecutor — again, according to affidavits filed in the case — "upped the ante" to the twenty-year felony of attempted first degree murder.[44] When challenged in a "prosecutorial vindictiveness" motion, the prosecutor dropped the case entirely.[45]

Significantly, when the United States Supreme Court first had an opportunity to discuss the legitimacy of plea bargaining as a tool of criminal justice in 1970, it approved the practice but cautioned against "the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty."[46]

A finely tuned criminal justice system will punish the guilty and leave the innocent unmolested. We have already seen how plea bargaining lets many criminals escape a "just" punishment. Since the 1978 decision in *Hayes*, the innocent have been at risk as well.[47] Indeed, in the November 7, 1983, issue of the *National Law Journal*, one legal commentator argued that guilty pleas should not be used as evidence in civil lawsuits because of the tainting effects of plea bargaining:

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43. *Id.* at §§ 941.30, 939.50(3)(d).

44. *Id.* at §§ 940.01, 939.32(1)(a), 939.50(3)(a).

45. R. A. FINE, *supra* note 4, at 79-83.

46. Brady v. United States, 397 U.S. 742, 751 n.8 (1970).

47. Herbert J. Stern, a former United States District Court Judge in New Jersey and a former United States Attorney has catalogued the horrors:

> We have developed a system of bargain and sale. Defendants are induced to plead guilty by specific promises of benefit or threats of harm. Prosecutors, aided and abetted by judges, are permitted to elicit courtroom confessions by techniques that would turn our stomachs if they were employed in the station house.
>
> Defendants may be threatened with the possibility that more serious charges will be brought against them unless they waive their sixth amendment rights and plead guilty to lesser ones. Wives who refuse to plead may be threatened with increased penalties for their co-defendant husbands. In places like New York, defendants are permitted to plead to hypothetical crimes, to crimes which never occurred, even to "logically impossible" crimes, all to make the sale possible and move the docket along. We have even sunk to the level of permitting defendants to plead guilty while professing their innocence.

Stern, Book Review, 82 COLUM. L. REV. 1275, 1283 (1982) (citations omitted) (reviewing A. GOLDSTEIN, THE PASSIVE JUDICIARY (1981)).

"Since a defendant may plead guilty for numerous reasons unrelated to actual guilt, convictions stemming from such pleas offer little assurance of reliability."[48]

To an innocent person, even probation is a constant reminder of an unfair criminal justice system. To a guilty person, unjustified leniency is a spur to further criminal activity. In short, plea bargaining is an evil that doubly compromises our criminal justice system: the guilty smirk at its impotence; the innocent are rubbed raw by its haste.

## III. PLEA BARGAINING IS UNNECESSARY

David L. Bazelon, the former Chief Judge for the United States Court of Appeals for the District of Columbia, in a decision written a year before *Brady v. United States*,[49] recognized that plea bargaining was not the imperative that all seemed to assume:

> The arguments that the criminal process would collapse unless substantial inducements are offered to elicit guilty pleas have tended to rely upon assumption rather than empirical evidence. In many jurisdictions lacking sophisticated resources for criminal investigations, a large proportion of suspects apprehended are caught virtually red-handed. The argument 'But what if everyone did not plead guilty?' has force only to the extent that a sizable proportion of defendants have some motivation to plead innocent. If the defendant does have some hope of acquittal, the right to a trial assumes overarching importance. If he does not, there is some presumption that most men will not indulge in a meaningless act.[50]

Some six years after Judge Bazelon wrote those words, his prediction was tested when Alaska's Attorney General, Avrum M. Gross, abolished plea bargaining statewide. Appointed Attorney General in December of 1973, Alaska's unique centralized criminal justice system gave Gross control over all of the state's district attorneys. His new policy was announced in a memorandum dated July 3, 1975, and was addressed to "all district attorneys." With exceptions for unu-

48. Thau, *How Lawyers Can Benefit From Trends in Collateral Estoppel*, NAT'L L.J., Nov., 1980 at 22, 26 n.5.

49. 397 U.S. 742 (1970).

50. Scott v. United States, 419 F.2d 264, 278 (D.C. Cir. 1969) (footnotes omitted).

sual circumstances, permission for which "will be given sparingly," there was to be no sentence concessions or charge reductions in exchange for guilty pleas. Sentencing recommendations and charge reductions could still be made, but *only if* they were warranted by the facts and were not used "simply to obtain a plea of guilty."

Before Gross' plea bargaining ban in August of 1975, the practice was as endemic in Alaska as anywhere else. As one judge related, it was part of the defense lawyer's job to go to the district attorney "to see what could be worked out."[51] Often, a lot "could be worked out." An assistant district attorney told how one of his colleagues had eleven cases set for trial in one week: "He hadn't even looked at one of the files. He dealt them all out on the last day, and he was proud of himself. I'm afraid we were giving away the farm too often. It was a little difficult to sleep at night."[52] This same prosecutor then put it all in context:

> The whole system became ridiculous. We were giving away cases we plainly should have tried. We often said to ourselves, 'Hell, I don't want to go to trial with this turkey; I want to go on vacation next week.' We learned that a prosecutor can get rid of everything if he just goes low enough.[53]

In 1980, the National Institute of Justice sponsored a study of the Alaskan experiment. It concluded that, despite all the dire predictions by the naysayers, the plea bargaining ban was successful and "guilty pleas continued to flow in at nearly undiminshed rates. Most defendants pled guilty even when the state offered them nothing in exchange for their cooperation."[54]

Additionally, contrary to all expectations, the cases were processed more quickly without plea bargaining than they were before its abolition. The National Institute of Justice report puts it this way: "Supporters and detractors of plea bargaining have both shared the assumption that, regardless of the merits of the practice, it is probably necessary to the efficient administration of justice. The findings of this study sug-

51. M. RUBINSTEIN, *supra* note 39, at 2.
52. *Id.* at 11.
53. *Id.* at 12.
54. *Id.* at 80.

gest that, at least in Alaska, both sides were wrong."[55] Indeed, the disposition times for felonies in Anchorage fell from 192 days to just under ninety. In Fairbanks, the drop was from 164 days to 120, and in Juneau, the disposition time fell from 105 days to eighty-five.

Avrum Gross is no longer Alaska's Attorney General. Yet, his reformation of that state's criminal justice system survives. It survives because those working in the system realize things are better now. An Alaskan prosecutor probably said it best: "Much less time is spent haggling with defense attorneys. . . . I was spending probably one-third of my time arguing with defense attorneys. Now we have a smarter use of our time. I'm a trial attorney, and that's what I'm supposed to do."[56] Another attorney was even more upbeat: "My job is fun now, and I can sleep nights."[57]

Three other jurisdictions have also ended their reliance on plea bargaining: Ventura County, California, a community of 700,000 just north of Los Angeles; Oakland County (Pontiac) Michigan, a community not unlike Milwaukee County; and New Orleans, Louisiana. There too, the bans have worked. Indeed, in what I have earlier called a "petri dish example" of how those with resolve can end the plea bargaining habit, Municipal Judge Edward Emmett O'Farrell of New Philadelphia, Ohio, has successfully abolished the practice in his jurisdiction for drunk driving cases. Although the defense bar tried to overwork him with cases during his first year, he stood firm.[58] In 1986, only *ten* persons accused of drunk driving took their cases to a jury: 322 pled guilty even though Judge O'Farrell imposes fifteen days in jail for a first offense, ninety days in jail for a second offense, and a year in jail for a third offense. Alcohol related traffic fatalities in his community fell from twenty-one in 1982, to three in 1984, two in 1985, and four in 1986, showing that a staunch policy of non-bargained justice does deter crime.

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55. *Id.* at 102-03.

56. *Id.* at 46.

57. Rubinstein & White, *Alaska Bans Plea Bargaining*, 13 LAW & SOC'Y REV. 367, 371 (1979).

58. Judge O'Farrell had 179 jury trials in 1982.

### A. We Should Abolish Plea Bargaining

Plea bargaining exists only because it is thought to be essential to the efficient functioning of the criminal justice system: "Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system."[59]

The experiences of Alaska, Ventura County, Oakland County, New Orleans and Judge O'Farrell prove that it is *not* essential. Perhaps Judge Stern put it best when he compared the system of plea bargaining to a "fish market" that "ought to be hosed down."[60]

We do not need plea bargaining — we should not tolerate it. Abolition, however, will require work and dedication. As Robert C. Erwin, then Associate Justice of the Alaskan Supreme Court, told Professor Alschuler in a June, 1976 interview:

> A no-plea-bargaining policy forces the police to investigate their cases more thoroughly. It forces prosecutors to screen their cases more rigorously and to prepare them more carefully. It forces the courts to face the problem of the lazy judge who comes to court late and leaves early, to search out a good presiding judge, and to adopt a sensible calendaring system. All of these things have in fact happened here."[61]

They can happen everywhere as well, if those in the system only try. As Judge Stern told me, recalling his days as a federal prosecutor, "It worked for me, and I tell you, it would work for anybody."[62]

### B. A Proposal

First, there should be no reduction of a charge unless the prosecutor can demonstrate, and the judge can specifically find on the record, that:

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59. Bordenkircher v. Hayes, 434 U.S. 357, 361-62 (1978); Blackledge v. Allison, 431 U.S. 63, 71 (1977).

60. Stern, *supra* note 47, at 1283.

61. Alschuler, Book Review, 46 U. CHI. L. REV. 1007, 1029 n.81 (1979) (reviewing C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE (1981)).

62. R. A. FINE, *supra* note 4, at 111.

(1) There are facts that were unknown to the prosecutor at the time the charge was issued that make a new charge more appropriate;[63] or

(2) There are other circumstances that may militate against going to trial.[64]

Second, the prosecutor should certify, on the record, that the charging decision was not based on a defendant's willingness to plead guilty but on his or her independent evaluation of the facts, including any circumstances that may militate against going to trial.

Third, the prosecutor should certify, on the record at sentencing, that the recommendation, if any, is based on the prosecutor's independent evaluation of the facts and not a *quid pro quo* for a guilty plea, except where there are other circumstances that may militate against going to trial.

## IV. CONCLUSION

Plea bargaining is a blot on our criminal justice system. It encourages crime and demoralizes victims and society. Abolition will restore a long-absent respect for the criminal justice system.[65] Not long ago, a woman told me how an acquaintance of hers bragged that he was going to beat a serious drug charge. "Did you do it?" she asked. "Sure," was his cocky reply. "Then why," she asked, "do you think you should be able to get away with it?" His response was simple: "Because I can." We teach society a dangerous lesson when people believe that they "should" get away with crime because they "can."

On the average, there is a murder in this nation every twenty-eight minutes, a rape every six minutes, an armed robbery every sixty-three seconds, and a burglary every ten seconds.[66] Millions of Americans are terrorized by crime and the fear of crime. Many — especially the elderly — have be-

63. *See* State v. Kenyon, 85 Wis. 2d 36, 270 N.W.2d 160 (1978).

64. *Id.*

65. One small step in the right direction in Wisconsin was the Supreme Court's rejection of a proposal that would have, in effect, permitted judges to participate in the bargaining process. In the Matter of the Amendment of Rules, 128 Wis. 2d 422, 383 N.W.2d 486 (1986) (percuriam).

66. U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS FOR THE UNITED STATES, 1985, 6 (1986).

come prisoners in their own homes as they hide from the predators who roam our communities with impunity. Abolition of plea bargaining will be a major step in restoring peace and dignity to the lives of our people. We will then have a system that, at the very least, *tries* to offer "exact justice" not only for the prosecution and the defense but for victims and society as well.

Some will say that we cannot afford true justice and that our prisons are already bursting from overcrowding. Yet, on a per-serious-crime basis, we only imprison criminals at two-thirds the rate we did in 1960.[67] Additionally, we spend only .6% of our federal, state, and local budgets on court services and only .7% of those budgets on corrections.[68] The cost of crime — in tears as well as dollars — is infinitely greater. We short change our citizens when we settle for a criminal justice system that gives them much crime but little justice. The expediency-based practice of plea bargaining has done precisely that. Our people deserve better.

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67. BUREAU OF JUST. STATISTICS BULL., PRISONERS IN 1984, 6 - 8 (U.S. Dep't of Just. 1985). Indeed, an analysis of the per-serious-crime imprisonment rate over the years shows a chilling relationship between the ferocious explosion of violent crime we have recently experienced and the lenient policies of the mid-1960s and 1970s. In 1960, there were 6.3 prison admissions per 100 crimes. In 1965, the rate fell to 4.5. By 1970, it dipped to 2.3 and remained below 3 per 100 serious crimes until 1981, when it rose to 3.5. *Id.*

Some who advocate a return to leniency point out that our prison populations have risen as of late and the number of prisoners per 100,000 of population has never been higher. The only *meaningful* measure of incarceration however, is that which compares the lock-up rate with the number of crimes being committed. Despite the large number of prisoners in this country, we have yet to reach the rate of incarceration per serious crime we had in 1960.

As I point out in *Escape of the Guilty*, approximately two-thirds of all persons incarcerated for the *first* time learn their lesson and never return to prison. R. A. FINE, *supra* note 4, at 248. Others, however, will remain a danger as long as they are free or until old age has weakened their criminality. Thus, 61% of those admitted to prison in 1979 were repeaters and, ominously, 46% percent of them would have *still* been in prison on an earlier sentence at the time of their new crime if they had not been released on parole. *Id.* "The message is clear, deter those who can be deterred; incarcerate those who cannot." *Id.* Sadly, efforts at rehabilitation — the concept that fathered the leniency — have generally not worked to protect society. *Id.* at 40-41, 164-66, 247-49.

68. BUREAU OF JUSTICE STATISTICS, CRIME AND JUSTICE FACTS 19 (1986).