

A PROPOSAL FOR REFORM OF THE PLEA BARGAINING PROCESS

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Prosecutorial efforts to induce guilty pleas play a central role in the administration of criminal justice. In most jurisdictions prosecutors grant special concessions—usually dismissals of certain charges or reduced sentence recommendations¹—to defendants who enter guilty pleas and thus waive their constitutional right to a trial before a judge or jury.² This “plea bargaining” practice disposes of a remarkably high percentage of cases.³

Despite commentators’ arguments in favor of abolishing plea bargaining,⁴ the Supreme Court recently acknowledged its validity in *Brady v. United States*.⁵ The defendant in *Brady* was charged with kidnapping and faced a possible maximum penalty of death upon conviction by a jury.⁶ By pleading guilty he reduced the maximum possible sentence to life imprisonment.⁷ In a subsequent action he sought to invalidate his plea on the grounds that it was induced both by his fear of the death penalty and by the prosecutor’s representations concerning reduction of sentence and clemency. With regard to the latter claim, the Court noted:

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¹ See generally D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 78-90 (1966) [hereinafter cited as NEWMAN]; Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 866, 898 (1964).

² See NEWMAN 78-80.

³ One commentator has estimated that roughly 90% of all convictions result from guilty pleas. NEWMAN 3. Limited statistical information makes a precise calculation difficult. See PRESIDENT’S COMM’N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967) [hereinafter cited as TASK FORCE REPORT].

⁴ See Alschuler, *The Prosecutor’s Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

⁵ 397 U.S. 742 (1970).

⁶ The federal kidnapping statute, 18 U.S.C. § 1201(a) (1964), provides as follows:

Whoever knowingly transports in interstate or foreign commerce, any person who has been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall be punished (1) by death if the kidnaped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

⁷ *Id.* See generally *United States v. Jackson*, 390 U.S. 570 (1968).

We decline to hold . . . that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.

. . . .

. . . [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind which affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.⁸

The Court also recognized that plea bargaining is essential to effective utilization of "scarce judicial and prosecutorial resources."⁹ Prosecutors in large cities are confronted with an increasing backlog of cases. The available judges, trial assistants, and courtrooms are barely adequate to handle the workload generated by a system in which only a small minority of cases are actually litigated.¹⁰ Although some defendants may plead guilty solely for reasons of conscience, a large number undoubtedly enter their pleas primarily in expectation of prosecutorial concessions.¹¹ Removal of the incentive to plead guilty would place an intolerable strain on the system.¹²

The advisability of attempting to provide sufficient resources to eliminate the need for guilty pleas is doubtful. As Professor Enker has pointed out:

Even if the money were readily available, it would still not be clear that we could call upon sufficient numbers of competent personnel. A lowering of standards in order to man the store adequately may well result in poorer justice. It may also divert both funds and personnel from other segments of the

⁸ 397 U.S. at 751, 753.

⁹ *Id.* at 752.

¹⁰ See H. LUMMUS, *THE TRIAL JUDGE* 43-46 (1937); TASK FORCE REPORT 80; Polstein, *How to "Settle" a Criminal Case*, 8 *PRAC. LAW.* 35, 37 (1962); Note, *supra* note 1, at 881.

¹¹ See Dash, *Cracks in the Foundation of Criminal Justice*, 46 *ILL. L. REV.* 385, 395-97 (1951); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 *J. CRIM. L.C. & P.S.* 780, 783-85 (1956); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 *YALE L.J.* 204, 210 (1956).

¹² In response to a questionnaire distributed by the *University of Pennsylvania Law Review* in November 1963, 53 of 62 prosecutors stated that the percentage of guilty pleas would decrease if plea bargaining were eliminated. Note, *supra* note 1, at 899. *But see* *Scott v. United States*, 419 F.2d 264, 278 (D.C. Cir. 1969) (dictum) ("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.").

criminal process, such as corrections work, where they are arguably more needed.¹³

Reducing the number of guilty pleas would also additionally burden both witnesses and jurors.¹⁴

Accepting the premise that prosecutorial encouragement of guilty pleas is a necessary feature of our present system of justice, it is important to formulate guidelines which retain the advantages yet minimize the undesirable consequences of plea bargaining. This Article will describe some of the practices presently utilized to induce guilty pleas, point out the salient problems with these practices, and offer suggestions for improvement.

I. PLEA BARGAINING IN PHILADELPHIA AND NEW YORK

Several studies have described the general characteristics of plea bargaining, identifying the differing approaches of prosecutors and the types of bargains made.¹⁵ To provide a slightly new perspective, I will discuss various aspects of plea bargaining as it is conducted in the Philadelphia and New York district attorneys' offices. Because these offices are reputedly among the finest in the country, their plea bargaining practices should reflect a high level of prosecutorial efficiency and responsibility. The discussion of the Philadelphia prosecutor's office is based on personal observations made while serving as an assistant prosecutor in that office from 1966 to 1968, and on interviews conducted in March and April 1970 with members of the office and with Philadelphia defense attorneys. The discussion of New York plea bargaining practices is based entirely on interviews conducted in April and May 1970 with William F. Keenan, Chief of the New York Homicide Division, and with several New York defense attorneys.

A. Philadelphia

In Philadelphia, guilty pleas dispose of approximately thirty-five percent of all felony and misdemeanor cases. This figure is somewhat misleading because many cases recorded as "waivers" (trials before a judge without a jury) can be more accurately characterized as "slow

¹³ Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT 108, 112 [hereinafter cited as Enker]. See also ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 2 (Tent. draft 1967) [hereinafter cited as ABA STANDARDS].

¹⁴ See Enker 112. The existing system already places too great a strain on witnesses and jurors. See TASK FORCE REPORT 90-91 (noting inadequate or non-existent facilities for witnesses and jurors; repeated trips to court, unnecessary but for lack of notice of trial postponements; and minimal pay for jurors).

¹⁵ E.g., NEWMAN 78-104; Aischuler, *supra* note 4, at 52-85; Note, *supra* note 1, at 866-70, 896-908.

pleas of guilty." That is, the defendant's counsel facilitates the presentation of evidence and implicitly or explicitly admits that the defendant is guilty of some offense, but does not enter a formal plea. Were all of these cases classified as guilty pleas, the figure would probably rise to above fifty percent.

1. Office Policy

Like most prosecutors, the Philadelphia district attorney has not established any formal rules or procedures governing plea bargaining.¹⁶ He and his top assistants have developed general policies, however, which are communicated to other assistant prosecutors in office meetings and intra-office memos, and through a general process of osmosis. For example, absent exceptional circumstances,¹⁷ office policy forbids sentence concessions to induce pleas in certain "very serious" cases where society's interest in obtaining an appropriate sentence is deemed paramount. No systematic attempt is made to designate which cases belong in this category but, according to District Attorney Arlen Specter, the cases most likely to be considered "very serious" are those in which the crime indicates that the defendant presents a serious and continuing threat of violence.¹⁸ Thus, sentence concessions are forbidden in cases involving the brutal rape of a stranger or an armed robbery in which the victim is injured. On the other hand, plea bargaining is condoned in dealing with crimes of passion. The theory is that such crimes are unlikely to be repeated and thus society's interest may be adequately served by the imposition of a substantially shorter sentence than the defendant would probably receive following a trial and conviction.¹⁹

Philadelphia office policy also opposes granting concessions merely because a case might result in an acquittal. According to First Assistant District Attorney Richard Sprague, the primary purpose of plea bargaining is to save time and clear the dockets. If the trial prosecutor has a weak case which may be tried without delay, no major concessions should be offered.²⁰

Within this basic framework, each trial prosecutor has broad discretion regarding the concessions to be made to induce a plea. The

¹⁶ In response to the 1963 questionnaire, note 12 *supra*, 47 of 67 prosecutors stated that their office had established no formal procedures. Note, *supra* note 1, at 900.

¹⁷ Exceptional circumstances would include, for example, a case in which the prosecution has insufficient evidence to go to trial. For a discussion of this situation, see text accompanying note 25 *infra*.

¹⁸ Interview with Arlen Specter, District Attorney of Philadelphia, in Philadelphia, Mar. 25, 1970.

¹⁹ Cf. Specter, Book Review, 76 YALE L.J. 604, 606-07 (1967).

²⁰ Interview with Richard A. Sprague, First Assistant District Attorney, in Philadelphia, Mar. 25, 1970.

trial prosecutor is in the best position to assess the nature of his case and to form an opinion on the defendant's probable future danger to the community, and thus his determination of an appropriate plea bargain is usually final. He is expected to consult with a superior before agreeing to a plea only in the more serious cases,²¹ and then his opinion is given great weight. The manner in which the trial prosecutor disposes of his cases generally receives rather cursory review.²² When a guilty plea is entered, his sentence recommendation may be scrutinized, but seldom is the evidence available to him at the time of the plea independently examined. When no guilty plea is entered, top assistants do not evaluate the trial prosecutor's efforts to induce a plea.

2. Actual Practice

Because Pennsylvania judges generally have a great deal of flexibility in sentencing,²³ prosecutorial concessions usually involve sentence recommendations rather than dismissal or reduction of charges.²⁴ To induce a guilty plea, the assistant prosecutor may promise to make a specific sentence recommendation or, in some cases, to make no sentence recommendation or not to oppose probation. The judge is generally not a party to this arrangement. In rare cases, however, the defendant will refuse to enter a plea unless he receives assurance that the judge will not impose a sentence exceeding the assistant prosecutor's recommendation. While the assistant prosecutor's sentence recommendation is not binding, Philadelphia judges generally adhere to it. The concessions offered by Philadelphia prosecutors, therefore, have the effect of limiting the maximum sentence which the defendant will receive.

The assistant prosecutor's bargaining power and the tactics he employs to induce a guilty plea depend largely on whether the case has been designated "major" or "non-major" and, if "non-major," on whether the defendant is out on bail or in jail.

Nearly all cases, except those involving major felonies or excessive violence, are designated "non-major" and listed for trial in a "bail room" if the defendant is free on bail or in a "jail room" if he has been

²¹ This would include all of the "very serious" cases previously discussed, text accompanying notes 17-19 *supra*, as well as a fairly large number of other "major" cases. For the definition of a "major" case, see text preceding note 28 *infra*.

²² Review generally occurs in an office meeting at which assistant prosecutors are asked to give brief descriptions of case dispositions.

²³ For most crimes, Pennsylvania judges have discretion to impose any sentence from probation up to the maximum sentence prescribed by the legislature. See generally *Commonwealth ex rel. Lockhart v. Myers*, 193 Pa. Super. 531, 540, 165 A.2d 400, 405 (1960), *cert. denied*, 368 U.S. 860 (1961).

²⁴ Dismissal or reduction of charges is a common plea bargaining practice in other jurisdictions. See NEWMAN 78-104; Enker 108-10.

unable to make bail. On any given day, an assistant prosecutor will have approximately ten cases listed for trial in his court room. This volume of cases in the "list room" generally prevents the prosecutor from initiating plea bargaining before the trial date, and an absent witness, missing piece of evidence, or dilatory defense counsel frequently hampers the immediate disposal of a case on the day of trial. The prosecutor will thus generally be willing to offer substantial concessions to induce a guilty plea and thereby dispose of the case at that time.²⁵ But if a case is ready for trial, the prosecutor is less likely to offer concessions either to save time or to discount the possibility of acquittal because list room trials are brief and generally result in guilty verdicts.

Several factors enhance the prosecutor's bargaining position when the defendant is in custody. If the prosecutor believes that the defendant has already been incarcerated for a sufficient period of time and is willing to recommend a "time-in" sentence, the defendant will invariably agree to plead guilty to obtain immediate freedom.²⁶ Even if the prosecutor does not agree to a "time-in" sentence, an incarcerated defendant, frightened and demoralized by the prospect of an indefinite period of confinement, may be willing to enter a plea and accept a fixed period of imprisonment. Finally, in a "jail room" case, the prosecutor deals almost exclusively with an assistant voluntary defender. Because the defender will probably work with the prosecutor again and will be interested in maintaining a good relationship, he may often be highly receptive to guilty plea negotiations.²⁷

The prosecutor's bargaining position is weaker if the defendant is free on bail and he must make substantially greater concessions to induce a guilty plea. Bailed defendants will naturally be reluctant to enter a plea which will result in loss of freedom. Unlike the defendant in prison, the bailed defendant can only profit by postponement of his case. Over time, evidence may disappear, memories may fade, and the defendant may be able to build a record of good behavior to help him

²⁵ Assistant prosecutors generally wish to avoid having cases continued at their request. But the methods employed to secure immediate disposition do not always take the form of guilty pleas. Often defense counsel will agree to the stipulation of certain testimony in exchange for prosecutorial concessions. Such stipulations may or may not be equivalent to a "slow plea of guilty."

²⁶ For example, if the defendant has been awaiting trial for 58 days, the judge, pursuant to a "time-in" sentence agreement, may impose a sentence of 58 days to 23 months. Under this sentence, the judge has authority to release the defendant from prison immediately and place him on probation for the remainder of the 23 months.

²⁷ The defender has a more immediate interest in reaching an accommodation than does the prosecutor. Most voluntary defenders agree that their primary objective is to secure the release of their clients as quickly as possible. The assistant prosecutor's desire to dispose of cases is tempered by his responsibility for obtaining appropriate sentences. Also, an assistant prosecutor may feel relatively free to sacrifice the efficient disposal of cases on a given day if he believes this will lead to some future prosecutorial benefit (such as showing defense counsel that he "means what he says").

at sentencing. Furthermore, a bailed defendant is likely to be represented by a private attorney who deals infrequently with the prosecutor. The private attorney will thus have little incentive to develop a good working relationship with the assistant prosecutor and can concentrate on obtaining the best possible result for his client.

"Major cases" include the four main felonies (homicide, rape, robbery, and arson), other serious cases such as extortion by a public official or extremely aggravated assault and battery, and cases requiring special attention because of complex legal or factual issues. Because a major trial prosecutor is expected to prepare each case carefully, he is assigned his relatively few cases at an early stage of the proceedings. In theory, then, he has an opportunity to negotiate a guilty plea well before the trial date. But in practice, major trial prosecutors generally do not conduct serious plea negotiations in one case while trying another. As a result, plea negotiations are often deferred until the day the case is listed for trial.²⁸

The major trial prosecutor's willingness to offer concessions often depends largely on factors unrelated to the seriousness of the case or its probable trial time. For example, his pending work load may be quite important. If he has several cases listed for trial at approximately the same time, he will be anxious to obtain pleas in some of them in order to ease his schedule and improve the condition of the dockets.

Contrary to office policy, likelihood of conviction is generally very important in determining what concessions will be offered to induce a plea. While some trial prosecutors enjoy the challenge of a difficult case, most will offer substantial concessions rather than risk losing a jury trial. Moreover, as one member of the office candidly stated, each prosecutor's attitude towards the trial of a weak case depends on "his position in the office at the time of the trial."²⁹ Assistant prosecutors in the major trial division feel that they are evaluated more on their ability to win jury trials than to dispose of cases efficiently. An assistant prosecutor who has just been assigned to the major trial division or who has recently lost one jury trial may offer substantial concessions in a case which he believes would be difficult to win before a jury rather than jeopardize his position in this prestigious division by a jury trial loss.

Some major trial prosecutors admit that their interest in a case influences the type of concessions they will offer to induce a plea. As

²⁸ Interviews with various major trial prosecutors, in Philadelphia, Mar. 24-26, 1970 (anonymity requested); interview with former major trial prosecutor Alan J. Davis, in Philadelphia, Mar. 25, 1970.

²⁹ Interview with major trial prosecutor, in Philadelphia, Mar. 24, 1970 (anonymity requested).

one assistant prosecutor stated, "When I get a case that looks interesting and I think I can win it, I don't want to encourage a guilty plea. I joined the district attorney's office so that I could try that kind of case to a jury."³⁰

The same assistant also noted that he would be more willing to offer concessions to induce a plea if he considered the defendant's counsel personally objectionable.³¹ Other prosecutors suggested that they would be more likely to offer substantial concessions to attorneys they found consistently honest and cooperative.³² In addition, many admitted that they are willing to increase the concessions offered to induce a plea when the defense attorney's skill decreases the chances of conviction.³³

Of course, major trial prosecutors assign considerable importance to the nature of their case in determining sentence concessions. But in assessing the seriousness of a case, most prosecutors do not rely solely on such objective factors as the type of crime committed and the defendant's age and prior criminal record. More than two thirds of the Philadelphia major trial prosecutors stated that their personal evaluation of the defendant is an important determinant of sentence recommendations.³⁴ This subjective evaluation naturally introduces into the plea bargaining process an additional element of uncertainty and further opportunity for arbitrariness.

B. *New York*

The New York Supreme Court Bureau³⁵ disposes of an extremely high percentage of felony cases by guilty pleas. Of the 1,404 cases prosecuted from January 1, 1970 to April 29, 1970, 45 were disposed of by jury trial, 8 by trial before a judge, and 1,351 (96.2 percent) by guilty pleas.³⁶

³⁰ Interview with assistant prosecutor, in Philadelphia, Mar. 26, 1970 (anonymity requested).

³¹ As the prosecutor explained, "I don't want to spend two weeks in court with an obnoxious defense counsel." *Id.*

³² Interviews with various major trial prosecutors, in Philadelphia, Mar. 24-26, 1970 (anonymity requested).

³³ *Id.*

³⁴ Twelve of 17 Philadelphia major trial prosecutors subscribed to this statement. Only one stated that he would give this factor little or no significance. These results are based on a questionnaire submitted to the major trial prosecutors on Mar. 25, 1970 and returned to me by Michael J. Rotko, Chief of Litigation, on May 12, 1970.

³⁵ The New York Supreme Court Bureau is the branch of the New York district attorney's office which prosecutes felony cases.

³⁶ Interview with William Keenan, Chief of the New York City Homicide Division, in New York City, Apr. 28, 1970 [hereinafter cited as Keenan Interview].

1. Office Policy

The need to induce guilty pleas is much greater in New York than in Philadelphia. According to Homicide Chief William Keenan, the New York Supreme Court Bureau must dispose of approximately 5,000 felony cases annually.³⁷ Due to limited courtroom and other administrative resources, only 150 to 175 of these cases can be tried to a jury. Defense attorneys do not readily agree to nonjury trials,³⁸ and thus a very large number of defendants must be persuaded to plead guilty.

Concessions are offered to induce pleas in most cases but, according to Chief Keenan, the extent of these concessions depends primarily upon the defendant's age, his prior criminal record, the type of crime he is charged with, and the strength of the state's case.³⁹ The nature of the crime committed is most important. Top prosecutors strongly support the view that their limited resources should be conserved for the trial of cases involving particularly serious offenses. As in Philadelphia, the seriousness of a case depends on various factors, particularly the defendant's probable future danger to the community.

After preliminary arraignment, each case is assigned to an assistant prosecutor for trial,⁴⁰ who must dispose of his cases with reasonable speed to retain his position as a major trial prosecutor.⁴¹ Prosecutors with substantial trial experience have complete discretion to strike whatever guilty plea bargains they deem appropriate, and top assistants review their decisions only briefly.⁴² Despite the freedom given individual prosecutors, office policy favors uniform plea bargaining practices. Chief Keenan asserts that this goal is substantially achieved because, by sharing experiences with other assistant prosecutors, judges, and defense counsel, each assistant develops a common understanding of the appropriate concessions to offer in each case.⁴³

³⁷ *Id.*

³⁸ Defense attorneys' reluctance is explained in part by the fact that the New York prosecutor's office will not reward a defendant for merely waiving his right to a jury trial. To receive significant prosecutorial concessions, the defendant must agree to plead guilty.

³⁹ Keenan Interview. The New York office does have more detailed written rules governing plea bargaining than the Philadelphia office. They are available only to attorneys in the office.

⁴⁰ *Id.* Homicide cases may be assigned to a prosecutor prior to arraignment. *Id.*

⁴¹ *Id.*

⁴² *Id.* After a New York assistant prosecutor has disposed of a case (whether by guilty plea or otherwise), he is required to fill out a printed form and submit it to District Attorney Frank S. Hogan. When properly filled out, this form contains information concerning the defendant's age, background, and prior record, the type of crime, the use of force or weapons, the extent of injuries to the victim, and the amount of property taken. Space is also available for additional comments by the assistant prosecutor.

⁴³ Keenan Interview.

2. Actual Practice

Plea bargaining practices in New York differ from those in Philadelphia in two important respects. First, as noted earlier, because more guilty pleas must be entered in New York, the concessions offered to defendants are concomitantly increased.⁴⁴ Second, the New York trial judge plays a far more important role in the bargaining process than does his Philadelphia counterpart. According to Martin Erdman of the New York Legal Aid Society, most New York defense attorneys will not enter a plea unless they are certain what the judge will do. In some cases the assistant prosecutor and defense counsel may seek judicial approval of a tentative plea arrangement.⁴⁵ The judge generally agrees to accept the plea and either to impose the sentence requested⁴⁶ or to permit withdrawal of the plea if he finds a more severe sentence warranted. In other cases New York judges actively participate in negotiations and often suggest appropriate plea bargains.

For the most part, however, New York plea bargaining practices parallel the Philadelphia practices rather closely. Despite the office policy in favor of uniformity, New York defense counsel have noticed a marked disparity in concessions offered by individual prosecutors.⁴⁷ As in Philadelphia, the type of bargain defense counsel can strike depends in part on his relationship with the assistant prosecutor and on whether his client is in jail.⁴⁸ Finally, in deciding upon appropriate prosecutorial concessions, the strength of the state's case is far more important in practice than it is in theory.⁴⁹ According to Martin Erdman, "Prosecutors in this city hate to have a defeat on their record. When they think they have a weak case, they'll go to great lengths to avoid a trial."⁵⁰

⁴⁴ Martin Erdman of the New York Legal Aid Society cites as an example a case where the defendant has killed another man in a barroom altercation, but has a colorable claim of self-defense. In exchange for a plea of guilty, the prosecutor would likely reduce the charge from murder to attempted manslaughter and his sentence recommendation from 15 years to life imprisonment to 2 to 3 years imprisonment. Interview with Martin Erdman, New York Legal Aid Society, in New York City, Apr. 28, 1970 [hereinafter cited as Erdman Interview]. In a comparable case in Philadelphia, the assistant prosecutor would not reduce the charge below manslaughter and would recommend a sentence of 5 to 10 years imprisonment.

⁴⁵ Erdman Interview; Keenan Interview; interviews with various defense counsel, in New York City, May 5, 1970 (anonymity requested).

⁴⁶ The New York assistant prosecutors formerly relied more on charge reductions than on sentence recommendations in plea bargaining. This was primarily due to restrictions on the judges' sentencing discretion. Today, however, New York judges generally have discretion to impose any sentence from probation to the legislatively prescribed maximum. Current plea bargaining efforts are thus more concerned with sentence concessions. See generally Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

⁴⁷ Interviews with various defense counsel, in New York City, May 5, 1970 (anonymity requested).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Erdman Interview.

II. PROBLEMS WITH THE PRESENT PRACTICES

The trial prosecutor's unchecked discretion is perhaps the most undesirable feature of the plea bargaining process, and the major part of this section will be given over to a catalogue of the potential harm to society in general as well as to the prosecutor's office resulting from this lack of restraint.⁵¹ Then the role of the judge in the bargaining process will be briefly assessed.

A. *The Trial Prosecutor's Unchecked Discretion*

Professor Davis has discussed the problems likely to arise when an administrative agency's powers are not properly defined and controlled.⁵² In the present situation, these problems are magnified because each individual trial prosecutor is free to apply plea bargaining policies he considers appropriate and to change these policies from case to case:⁵³ the potential for arbitrariness and inequality of treatment is indeed great.⁵⁴ Furthermore, if a defendant perceives that his ability to strike a favorable plea bargain depends on his counsel's effective manipulation of the system or on a particular trial prosecutor's attitude, his natural reaction will be cynicism and disrespect for the law.⁵⁵

The low visibility of the present plea bargaining system also creates problems for the prosecutor's office. Plea bargaining should be employed in a manner calculated to maximize the efficient use of available trial resources. The absence of enforceable bargaining standards, however, enables individual prosecutors to reject or accept guilty plea arrangements for reasons unrelated to considerations of office efficiency. The prosecutor's personal desire to try a case may preclude entry of a guilty plea in an otherwise appropriate situation.

⁵¹ Society at large and the prosecutor's office do not necessarily have conflicting goals, but they may often have conflicting priorities. Society is interested both in securing protection and in providing criminal defendants with fair and even-handed treatment. The prosecutor's primary objective is to provide efficient protection for society. In Professor Packer's terms, society's values will tend more toward those incorporated in the Due Process Model while the prosecutor's will tend more toward those incorporated in the Crime Control Model. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 149-73 (1968).

⁵² K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 52-141 (1969).

⁵³ Cf. *id.* 88 (discussion of the harm done when "policy-making power is exercised by individual policemen").

⁵⁴ See generally *id.* 142-44.

⁵⁵ [A] real vice in the procedure may be that it often gives the defendant an image of corruption in the system, or at least an image of a system lacking meaningful purpose and subject to manipulation by those who are wise to the right tricks. Cynicism, rather than respect, is the likely result. Enker 112. Correctional authorities are convinced that defendants who feel that they have not been fairly convicted and sentenced often develop a disrespect for the law which makes it difficult for them to accept responsibility for their actions and begin self-rehabilitation. See NEWMAN, *supra* note 1, at 44-47, 226-28; J. BENNETT, *A Prison Director's Views on the Public Defender*, in *OF PRISONS AND JUSTICE*, S. Doc. No. 70, 88th Cong., 2d Sess. 364, 364-65 (1964).

Conversely, the prosecutor's need to protect his litigation record may lead to unwise acceptance of pleas.

The prosecutor's unrestrained discretion may also reinforce his tendency to take advantage of the relatively ineffective bargaining position of defendants unable to make bail. This practice plays a significant part in perpetuating inequality between the rich and the poor in the criminal process. The jailed defendant, because he is often unable to prepare his defense adequately, may plead guilty in exchange for minor prosecutorial concessions.⁵⁶ In addition, as Professor Foote has observed: "It is plausible, at least, that denial of pretrial liberty provides a psychological inducement to plead guilty which would be absent if the defendant were at liberty pending trial."⁵⁷ Our commitment to the principle of equal treatment for poor criminal defendants, expressed in *Griffin v. Illinois*,⁵⁸ is subverted when prosecutors take advantage of the jailed defendant's vulnerable position in conducting plea negotiations.⁵⁹

Vesting trial prosecutors with complete responsibility for plea bargaining also creates administrative burdens and may frustrate possibilities for rehabilitation of defendants. Because trial prosecutors, especially major trial prosecutors, tend to devote full attention to the case currently on trial or the next case on the docket, they usually postpone any attempt to negotiate a guilty plea until the day of trial. The delay in the entry of the plea results in inefficiency because witnesses must make unnecessary trips to court and because it is difficult to estimate the number of trial courtrooms needed at any given time. But more important, it is generally agreed that punishment or treatment of criminals has maximum deterrent and rehabilitative effect if imposed on the offender as soon as possible after commission of the crime.⁶⁰ When the prosecutor's failure to negotiate a guilty plea results in a delay in the imposition of sentence, the beneficial effect of the sentence is reduced.

Prosecutorial inducement of guilty pleas in weak cases also poses potentially serious problems. When a New York or Philadelphia assistant prosecutor has a case which he believes is weak, he will fre-

⁵⁶ See Comment, *Bail: The Need for Reconsideration*, 59 NW. U.L. REV. 678, 681 (1964).

⁵⁷ Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959, 961 (1965).

⁵⁸ 351 U.S. 12 (1956). See also *Douglas v. California*, 372 U.S. 353, 355 (1963); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

⁵⁹ For a full discussion of the unequal treatment afforded defendants who are unable to raise bail, see Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1126-64 (1965). To deal with the problem of unequal plea bargaining treatment, a major change in the structure of the bail system may be needed.

⁶⁰ See, e.g., *Brady v. United States*, 397 U.S. 742, 752 (1970).

quently offer large concessions to induce a guilty plea. For example, a Philadelphia major trial prosecutor related that in one case he reduced his guilty plea sentence recommendation by two thirds in order to induce a defendant who had a forty percent chance of acquittal to forego trial.⁶¹ According to Martin Erdman, New York prosecutors often reduce their sentence recommendations by at least fifty percent if they believe that there is a fifty percent chance of a hung jury, and by a great deal more if they believe that there is a fifty percent chance of acquittal.⁶² If the chances of acquittal are greater, the practice in both offices is to offer at least proportionately higher concessions.

Granting disproportionate sentence concessions in weak cases may mean that an inordinate number of strong cases go to trial.⁶³ An effective allocation of limited prosecutorial resources would probably send only uncertain—neither ascertainably weak nor strong—cases to trial. Moreover, society may not receive adequate protection when defendants are given disproportionate sentence concessions in exchange for pleas of guilty. Finally, as many commentators have noted, this prosecutorial practice may compel innocent defendants to plead guilty.⁶⁴

Prosecutors argue that appropriate precautions are taken to guard against the possibility that an innocent defendant will plead guilty. Chief Keenan asserts that all New York assistant prosecutors understand that they must dismiss the charges against a defendant if they are not morally certain of his guilt.⁶⁵ Martin Erdman, however, states that in certain cases, particularly those in which the prosecutor is relying primarily on identification evidence, an innocent defendant may well plead guilty in exchange for a reduced charge or sentence con-

⁶¹ Interview with assistant district attorney, in Philadelphia, Mar. 26, 1970 (anonymity requested).

⁶² Erdman Interview.

⁶³ See Alschuler, *supra* note 4, at 72; Enker, *supra* note 13, at 112. Of course, substantial concessions should not be made when the defendant is clearly guilty. In such cases, defendants will probably enter guilty pleas in exchange for relatively minor concessions.

⁶⁴ See Alschuler, *supra* note 4, at 60-61; Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 177 (1964); Comment, *supra* note 11, at 220-21.

There have also been strong expressions of judicial concern over plea bargaining which encourages innocent defendants to plead guilty. See, e.g., *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting); *Bailey v. MacDougall*, 392 F.2d 155, 158 n.7 (4th Cir.), *cert. denied*, 393 U.S. 847 (1968): "Plea bargaining that induces an innocent person to plead guilty cannot be sanctioned. Negotiation must be limited to the quantum of punishment for an admittedly guilty defendant."

Professor Enker warns that the emotional nature of this problem may lead to overstatement. He points out that we do not have conclusive empirical evidence concerning how often innocent defendants enter guilty pleas, and suggests that "the significant question is not how many innocent people are induced to plead guilty but is there a significant likelihood that innocent people who would be (or have a fair chance of being) acquitted at trial might be induced to plead guilty?" Enker, *supra* note 13, at 113.

⁶⁵ Keenan Interview.

cession.⁶⁶ Mr. Erdman further states that in these cases defense counsel may be obliged to acquiesce in a plea bargain even though he is not convinced of his client's guilt.⁶⁷ The defense counsel's duty is to obtain the optimal disposition of his case, not to determine his client's innocence or guilt. Even if his client is innocent, counsel may urge acceptance of a plea to a reduced charge carrying a short sentence rather than risk a trial in which the defendant may receive a much longer prison term.⁶⁸

B. *The Judge's Role in Plea Bargaining*

For the most part, judges have not contributed to the smooth functioning of the plea negotiation process. The Philadelphia office's experience with judicial participation in plea bargaining suggests that its value to the prosecutor is doubtful. Prior to 1969, assistant prosecutors and defense counsel would occasionally meet with judges to explore the possibility of a guilty plea.⁶⁹ In these pretrial conferences the judge would encourage⁷⁰ the parties to explore areas of agreement. According to First Assistant District Attorney Sprague, the meetings were not very fruitful because neither the assistant prosecutor nor the defense counsel was willing to "talk turkey." The judge's presence actually inhibited meaningful negotiation and decreased the chances of reaching a plea bargain.⁷¹

In New York, active judicial participation has facilitated the negotiation of plea bargains. But such participation may have serious disadvantages. When a judge suggests to a defendant, either directly or through his counsel, that he should plead guilty, the coercive effect of this suggestion is likely to be overwhelming.⁷² Moreover, the judge

⁶⁶ Erdman Interview.

⁶⁷ *Id.*

⁶⁸ See Alschuler, *supra* note 4, at 61.

⁶⁹ This procedure was discontinued after the Pennsylvania Supreme Court, in *Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 (1969), held that any judicial participation in plea negotiations is inconsistent with due process.

⁷⁰ The meetings were generally called by the judge at the request of defense counsel under rule 311 of the Pennsylvania Rules of Criminal Procedure. This rule provides for a pretrial conference to be held by counsel in the presence of a judge. The ostensible purpose of the pretrial conference is to consider means by which the trial of a criminal case may be simplified.

⁷¹ Interview with Richard Sprague, First Assistant District Attorney, in Philadelphia, Mar. 25, 1970.

⁷² See *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966) (holding that "a guilty plea predicated upon a judge's promise of a definite sentence . . . does not qualify as a free and voluntary act"); *United States v. Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963) (holding involuntary a plea of guilty made by defendant after the trial judge communicated to defense counsel the sentence he would impose if the defendant were convicted following jury trial); *Commonwealth v. Evans*, 434 Pa. 52, 57, 252 A.2d 689, 691 (1969) ("The unquestioned pressure placed on the defendant because of the judge's unique role inevitably taints the plea regardless of whether the judge fulfills his part of the bargain."). *But see United*

may jeopardize his role as an impartial arbiter of justice if he participates in plea negotiating. For example, if a judge urges a defendant to plead guilty in exchange for a two-year sentence and the defendant rejects this arrangement, it would certainly be difficult for the judge to preside over the trial impartially. The judge would be aware of the defendant's probable guilt and would naturally desire to vindicate his initial judgment that the defendant's guilt would be established. At the very least, these factors would tend to sway the judge from his position of neutrality.⁷³ Finally, active judicial participation in plea bargaining may unfavorably color the defendant's view of the system. To the defendant, the judge becomes an adversary or at least a compromiser rather than an embodiment of his guarantee to a fair trial and an impartial sentence.⁷⁴

III. A PROPOSAL FOR THE PROSECUTOR'S OFFICE

Because courts have been reluctant to impose judicial control on prosecutorial plea bargaining practices,⁷⁵ impetus for solving the problems described above must come from the prosecutors themselves.

A. Suggested Procedure

One major change in the structure of the prosecutor's office would eliminate many of the problems caused by current plea bargaining practices. Several assistant prosecutors should be given responsibility for negotiating guilty pleas with defense counsel at the earliest possible stage in the proceedings.⁷⁶ In Philadelphia, for example, one assistant prosecutor could be chosen to negotiate pleas in homicide cases, one to negotiate pleas in other major cases, and two or three to negotiate pleas in the list room cases.⁷⁷ These "executive prosecutors" should

States *ex rel.* Rosa v. Follette, 395 F.2d 721, 725 (2d Cir.), *cert. denied*, 393 U.S. 892 (1968) (judicial participation does not of itself render the guilty plea involuntary). See generally Note, *supra* note 1, at 891-92; Comment, *Official Inducements to Plead Guilty*, *supra* note 64, at 180-83.

⁷³ Recognizing these problems, Professor Enker has suggested that the trial be scheduled before a different judge. Enker, *supra* note 13, at 117. But even if this suggestion were adopted, the possibility would remain that the second judge would be adversely affected by his knowledge "that the defendant had declined a plea agreement tendered by another judge." ABA STANDARDS, *supra* note 13, at 74.

⁷⁴ See generally Comment, *supra* note 11, at 219-20; 19 STAN. L. REV. 1082, 1089 (1967).

⁷⁵ See generally Enker, *supra* note 13, at 108.

⁷⁶ In Philadelphia, plea discussions could beneficially take place immediately after the defendant's indictment. By this time, defense counsel has generally been able to investigate the case sufficiently, and the executive prosecutor would possess the police investigation report and any observations made by the assistant district attorney who represented the Commonwealth at the preliminary hearing.

⁷⁷ The Detroit prosecutor's office apparently has implemented a procedure similar to the one advanced here. One assistant prosecutor's "sole job is to screen cases just prior to arraignment with the express purpose of obtaining guilty pleas to reduced charges." NEWMAN, *supra* note 1, at 80.

be among the most able and experienced in the office. They would have full responsibility for evaluating the facts of all cases assigned to them, deciding what sentence recommendations should be made upon conviction following trial, and determining to what extent a recommendation should be reduced upon the entry of a guilty plea. Their recommendations should be based solely on criteria relating to the defendant's criminal background, the crime committed, and the strength of the state's case. Factors such as the assistant prosecutor's relationship with defense counsel and whether the defendant is free on bail should be completely excluded from consideration.

In cases appropriate for plea bargaining, the executive prosecutor would contact defense counsel at an early stage in the proceedings and either reach a plea agreement immediately⁷⁸ or arrange a meeting to explore the possibility of an agreement. In these conversations with defense attorneys, the executive prosecutor should make it clear that he is offering a bargain as good as, if not better than, any he will be likely to offer at a later time. If no plea is negotiated, the executive prosecutor should assign the case to a trial prosecutor with instructions concerning the range of proper sentence recommendations, the range of concessions to be given upon a forthcoming plea, and the reasons for these recommendations.⁷⁹ The trial prosecutor would have to state persuasive reasons for any departure from the recommendations.⁸⁰

Implementation of these procedures would produce several improvements over the present system. By devoting himself exclusively to plea bargaining, the executive prosecutor should develop a rich background of experience useful in resolving the more difficult questions. He should prove a more efficient and objective plea negotiator because he will not be engaged in the trial of other cases and because possible

⁷⁸ The executive prosecutor in charge of list room cases should be able to arrange many dispositions by telephone. In many of these cases, he can appropriately agree to a recommendation of probation in exchange for a guilty plea. Most enlightened authorities recommend increased use of probation in cases which are not especially serious. See, e.g., N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 119-23 (1969).

⁷⁹ The allowable range of concessions should be sufficiently flexible to enable the trial prosecutor to consider information unavailable to the executive prosecutor. In rare cases, the trial prosecutor should be allowed a wide measure of discretion. For example, if the chief Commonwealth witness is an alcoholic, the trial prosecutor should be permitted to gauge the witness' condition on the day of trial before committing himself to a specific course of action. The trial prosecutor should also be allowed to offer additional concessions to induce a plea in uncompromised list room cases when the state is unable to go to trial. To insure that the trial prosecutor accords equal treatment to similarly situated defendants, however, the executive prosecutor should carefully prescribe the additional concessions to be given in this situation.

⁸⁰ To justify a bargaining concession not authorized by the executive prosecutor, the trial prosecutor would generally have to demonstrate that he acted on the basis of relevant information unavailable to the executive prosecutor. For example, if a close relationship between the defendant and an alleged rape victim is brought to light, the trial prosecutor would be expected to modify the executive prosecutor's recommendations accordingly.

conflict between office policies and his personal goals will be minimized. In addition, placing the authority for plea negotiation in fewer, more responsible hands would encourage uniform treatment of defendants. Finally, under the proposed procedure plea discussions would be initiated earlier, thus facilitating quick disposition of cases.⁸¹

One apparent disadvantage with the proposed procedure is the executive prosecutor's relative inability to examine witnesses and defendants in his assigned cases. Philadelphia major trial prosecutors are expected to interview witnesses prior to trial in all cases,⁸² but the executive prosecutor in charge of major trials would be unable to schedule such extensive meetings. In most cases, however, the executive prosecutor's failure to meet with witnesses will not substantially impede evaluation of his cases. Investigation reports prepared by the police generally give a full description of the evidence which can be produced against the defendant. When a witness' statement to the police differs significantly from his testimony at the preliminary hearing, this may be noted on the police report by the assistant prosecutor representing the state at the preliminary hearing.⁸³ While this information may prove inadequate in some cases,⁸⁴ major trial prosecutors agree that, in general, examination of witnesses facilitates litigation but does not significantly affect their determination of appropriate sentence concessions.⁸⁵ In any event, the slight impairment of the executive prosecutor's ability to evaluate cases will be more than compensated for by the time savings resulting from reduction of pretrial meetings.⁸⁶

The executive prosecutor's inability to see particular defendants would make it impossible for him to rely on a personal evaluation of the defendant in determining sentence concessions. Elimination of this subjective factor will improve the quality of plea bargaining. Under the present system, a trial prosecutor is particularly unqualified to evaluate the defendant's character because, in addition to lacking any special expertise, his judgment may be distorted by his close personal

⁸¹ In addition to easing congested dockets, earlier disposition of cases would result in shorter detention of defendants suitable for probation.

⁸² In many cases, however, Philadelphia major trial prosecutors do not meet their witnesses until the day the case is listed for trial. Whether an extensive pretrial interview takes place at that time will depend on how quickly the trial begins.

⁸³ In Pennsylvania, any defendant charged with commission of a misdemeanor or felony is entitled to a preliminary hearing. See PA. R. CRIM. P. 119, 120. In other states, however, the defendant's right to a preliminary hearing is more limited. See, e.g., KAN. STAT. ANN. § 62-805 (1964).

⁸⁴ For a description of one such case, see Alschuler, *supra* note 4, at 68.

⁸⁵ Interviews with various trial prosecutors, in Philadelphia, Mar. 24-26, 1970 (anonymity requested).

⁸⁶ The executive prosecutor's inadequate knowledge should not prejudice the defendant because in most cases defense counsel will be able to bring to his attention any information favorable to the defendant.

involvement with the case. Moreover, elimination of personal evaluation of defendants should encourage uniformity of treatment. In any case, the sentencing judge's relative lack of personal involvement in the case, and his probable access to reports compiled by experts who have examined the defendant, places him in a far better position to make judgments about the defendant's character.

At least three other possible objections to the proposed plan may arise. First, it has been suggested that most prosecutor's offices simply do not have sufficient manpower to place several experienced men in primarily administrative positions.⁸⁷ But this objection overlooks the savings in manpower the proposed reallocation of prosecutorial resources should achieve. If a substantial percentage of cases can be compromised by executive prosecutors at an early stage in the proceedings, the prosecutor's office will need fewer trial attorneys.

It has also been suggested that the proposed change in the structure of the prosecutor's office would be damaging to office morale. Alan J. Davis, formerly a top assistant in the major trial division of the Philadelphia office, suggests that this would occur in two ways: "First, few capable and experienced prosecutors would be willing to have their work limited exclusively to the tedious job of reviewing cases and negotiating pleas. Second, the trial prosecutors would resent this scheme as an encroachment on their authority."⁸⁸ Both of Davis' points are valid to a degree. The increased pay and prestige which should attach to the executive prosecutor positions, however, will provide some incentive for experienced prosecutors. And, at least in Philadelphia, some experienced prosecutors would be willing to assume the administrative positions described, even without additional pay, if they believed doing so would be helpful to the overall operation of the office.⁸⁹

Davis' second point is more difficult. Many trial prosecutors feel that they should have the right to make all decisions concerning disposition of their cases. One Philadelphia major trial prosecutor stated that he would resign from his job if stripped of authority to negotiate guilty pleas in cases assigned to him.⁹⁰ But the recalcitrance

⁸⁷ Interview with Michael J. Rotko, Chief of Litigation, Philadelphia district attorney's office, in Philadelphia, Mar. 23, 1970.

⁸⁸ Interview with Alan J. Davis, in Philadelphia, Mar. 25, 1970.

⁸⁹ Two experienced major trial prosecutors stated that they would be willing to take the position for up to one year. Interview with Victor J. DiNubile, Jr., in Philadelphia, Mar. 24-25, 1970 (second prosecutor requested anonymity). It might be possible for various highly skilled trial prosecutors to assume executive prosecutor positions, on a rotating basis, for a six-month or one-year period. Such a plan would have the added advantage of keeping the executive prosecutors in relatively close touch with the problems confronting trial prosecutors.

⁹⁰ Interview with assistant prosecutor, in Philadelphia, Mar. 24, 1970 (anonymity requested).

of some prosecutors should not be allowed to bar an otherwise beneficial change. Major trial prosecutors will naturally be reluctant to give up a portion of their power; but virtually unchecked power has indeed caused many of the problems in the present system of plea bargaining. Moreover, implementation of the executive prosecutor system would enable trial prosecutors to concentrate on litigating cases, which they presently perceive to be their primary function, and release them from their role as "dealers in bargain justice."

Finally, it may be objected that the proposed procedure will necessitate greater prosecutorial concessions to induce guilty pleas. Because negotiations will take place at an early stage in the proceedings, the defendant will not be faced with the prospect of an immediately impending criminal trial and will thus be less willing to enter a plea. This objection should not be overemphasized. According to one prominent Philadelphia defense attorney, most defendants are guided by their attorneys in deciding whether or not to enter a plea.⁹¹ In most cases, an experienced defense attorney is able to determine what would be an appropriate plea bargain quite early in the proceedings.⁹² Thus, if the prosecutor's offer is really in the defendant's best interest, an early plea should be forthcoming.

On balance, then, the problems resulting from implementation of the proposed procedure will be more than compensated for by substantial, long-run benefits for both society and the prosecutor's office.

B. *Limits on the Executive Prosecutor's Discretion*

To insure effective plea bargaining, the district attorney must maintain some control over the executive prosecutor's exercise of discretion. Each office should thus formulate plea bargaining policies⁹³ and provide executive prosecutors with fairly detailed guidelines of the criteria to be applied in determining appropriate concessions. While such guidelines should not attempt to cover every conceivable situation, they should give some indication of bargaining priorities. Among the questions which should be answered are: What cases should not be compromised? What rules should be applied when the prosecutor's case is weak? What effect, if any, has a defendant's connection with organized crime? What criteria should be applied in deciding the

⁹¹ Interview with defense attorney, in Philadelphia, Mar. 25, 1970 (anonymity requested).

⁹² Defense counsel should be able to make this judgment soon after the preliminary hearing. All he need do is investigate his defense and hear the evidence presented by the state at the hearing.

⁹³ Professor Davis has observed that "the chief hope for confining discretionary power [is] . . . much more extensive administrative rule-making . . ." K. DAVIS, *supra* note 52, at 55.

sentence concessions a defendant will receive for turning state's evidence? Since the guidelines would be promulgated only to the executive prosecutors, the district attorney should be relatively free to answer these questions candidly and in some detail.⁹⁴

In applying office policies to new situations, the executive prosecutors must, of course, be afforded some discretion. Also, if an executive prosecutor perceived that a plea bargaining policy established by the district attorney is not leading to effective utilization of trial resources, he should have some latitude to reinterpret the policy. But, although the executive prosecutors will often be required to exercise discretion, they should also be required to submit their work to rather close scrutiny in order to safeguard the district attorney's control over plea bargaining. The executive prosecutor should file a brief report of each case stating what concessions, if any, were offered, and why. More detailed reports would be required only when the executive prosecutor confronted a unique plea bargaining situation or initiated a shift in prosecutorial policy. Such reports should enable the district attorney to determine both the extent of compliance with the plea bargaining guidelines and the need for modification of the guidelines.

*C. Policies To Be Applied by the Executive Prosecutors
When the State's Case Is Weak*

In formulating plea bargaining guidelines, the district attorney should accord special attention to the rules to be applied when the state's case is weak. The rules should reflect a sensitivity to the probable guilt or innocence of the defendant, and not merely a consideration of relative chances of acquittal or conviction. Four variations of a hypothetical case will illustrate several of the problems which should be considered. In the hypothetical, defendant and an accomplice are charged with robbery and burglary after allegedly breaking into a dwelling house, threatening a babysitter with a gun, and taking a substantial amount of money and valuables.

Variation 1. The defendant's accomplice, after making a full, substantiated confession implicating the defendant, flees the jurisdiction and cannot be found. Without the accomplice's testimony, the state has insufficient evidence to establish a prima facie case. *Variation 2.* The only evidence the state can produce is the babysitter's identification of the defendant. It is undisputed that she saw the robbers only briefly in poor light and that she originally gave the police a rather sketchy description. The prosecutor is not at all sanguine about the

⁹⁴The prosecutor should make public, however, a general statement of the office's bargaining policies. See text accompanying notes 122-26 *infra*.

chances of a conviction based on this evidence. *Variation 3*. The evidence is the same as that in *variation 2*, except that the defendant confesses, giving a full account of the crime with details only the perpetrator could know. The confession, however, is inadmissible because obtained in violation of the requirements of *Miranda v. Arizona*.⁹⁵ *Variation 4*. Two hours after the robbery, police find the stolen goods and the gun in the defendant's apartment. But there is about a sixty percent chance that the evidence will be excluded because obtained in violation of the fourth amendment.

Faced with the problem posed in *variation 1*, most prosecutors would share the view of a Philadelphia major trial prosecutor who said, "In this situation, I'd take a plea to anything I could get."⁹⁶ This position is legitimate. Although defendant is clearly guilty, without a plea the case will probably continue to clog the docket until dismissed for failure to prosecute. It is certainly preferable that the defendant be given some rehabilitative treatment, even if only a short period of probation.

In *variations 2, 3, and 4*, the prosecutor is prepared to try the case but the chances of a conviction are small. As noted earlier, the practice in both New York and Philadelphia is to offer greater concessions in weak cases. The stated policy of the Philadelphia office, however, is against the practice.⁹⁷ If the prosecutor does not offer special concessions to induce pleas in weak nonserious cases, many defendants will have a strong incentive to go to trial and their election to do so would seriously burden limited trial resources. Even in weak serious cases, a prosecutor could legitimately offer increased inducements, reasoning that society probably receives better protection if all guilty defendants receive some punishment and rehabilitative treatment than it does if some receive the "appropriate" punishment and rehabilitative treatment while others are allowed to go free.⁹⁸

An objection may be made, on an equal protection theory, to plea bargaining guidelines which give effect to the strength of the state's case. A defendant against whom the state has a strong case may argue

⁹⁵ 384 U.S. 436 (1966).

⁹⁶ Interview with assistant prosecutor, in Philadelphia, Mar. 26, 1970 (anonymity requested).

⁹⁷ It may be argued, in support of the Philadelphia position, that litigation is most appropriate in cases where the outcome is uncertain. See Alschuler, *supra* note 4, at 72; Enker, *supra* note 13, at 112. But, as noted earlier, the Philadelphia office does have a policy of litigating "very serious" cases regardless of the certainty of outcome.

⁹⁸ Uncertainty as to what constitutes "appropriate" punishment or rehabilitative treatment precludes anything more than speculation on this point. Evidence indicates, however, that increased incarceration may be counterproductive. See N. MORRIS & G. HAWKINS, *supra* note 78, at 110-44. If this is the case, sacrificing maximum sentences for some offenders to obtain some treatment for all offenders may better protect society's interests.

that he is discriminated against because he is denied the opportunity to strike an equally favorable guilty plea bargain. But the defendant in the weak case does not receive preferential treatment if the prosecutor's concessions do no more than accurately reflect the uncertainties of litigation. He receives a more attractive offer than the defendant in a strong state case only because he is relinquishing a greater chance of obtaining an acquittal. On balance, a policy of attempting to induce guilty pleas by offering concessions which do no more than accurately discount the uncertainties of litigation seems appropriate.⁹⁹

In applying this policy, however, a sharp distinction should be drawn between cases like *variation 2* and those like *variation 3*. In *variation 2*, the defendant's guilt is truly doubtful because the type of eyewitness testimony involved is notoriously unreliable.¹⁰⁰ Thus, if the prosecutor offers strong concessions to induce a plea, an innocent defendant may be pressured into admitting a crime.¹⁰¹ To avoid this undesirable result, office policy should prohibit plea discussions in this type of case unless initiated by the defendant. Even then, the executive prosecutor should offer no substantial concessions until the defendant produces evidence which convincingly demonstrates his guilt. For this proposal to work, of course, it will be necessary to preclude use at trial of any statements made by the defendant during plea negotiations.¹⁰² In *variation 3*, the strength of the evidence eliminates any substantial risk that an innocent defendant will be induced to plead guilty.¹⁰³ In such cases, the executive prosecutor should be instructed to initiate plea discussions and to offer concessions which accurately reflect the uncertainties of litigation.¹⁰⁴

It may be argued, however, that since the prosecutor's decision to initiate plea discussions is prompted by an illegally obtained confession, any resulting guilty plea is the unlawful fruit of that confession.¹⁰⁵

⁹⁹ Cf. *Scott v. United States*, 419 F.2d 264, 276-77 (D.C. Cir. 1969) (dictum).

¹⁰⁰ See, e.g., E. BORCHARD, *CONVICTING THE INNOCENT* (1961).

¹⁰¹ This is, of course, different from the situation where a defendant guilty of one crime pleads guilty to a lesser offense of which he is innocent. The latter situation does not present serious problems because the label placed on a defendant's conduct is generally not important; only the sentence he receives is significant.

¹⁰² In some jurisdictions, statutes forbid introduction of evidence pertaining to a defendant's offer to plead guilty. See, e.g., CAL. PENAL CODE § 1192.4 (1970). The ABA study takes the position that such evidence should not be admissible. ABA STANDARDS, *supra* note 13, at § 3.4, at 77.

¹⁰³ The problem with this analysis is that it will occasionally be very difficult for the executive prosecutor to determine whether the defendant's guilt is truly doubtful. If the executive prosecutor initiates plea bargaining and is told by defense counsel that the defendant is innocent, the executive prosecutor should cease discussion.

¹⁰⁴ As noted earlier, however, under no circumstances should the prosecutor's concessions do more than reflect the uncertainties of litigation.

¹⁰⁵ See generally Pitler, "The Fruit of the Poisonous Tree" Revisited and Shepherded, 56 CALIF. L. REV. 579 (1968).

But the executive prosecutor is not using the confession to place the defendant at a disadvantage;¹⁰⁶ rather, he is offering the defendant a choice between litigating his case and settling it on favorable terms.¹⁰⁷

In *variation 4*, the sole evidence against the defendant was obtained as a result of police conduct which is probably illegal. Professor Alschuler has argued that when the prosecution induces guilty pleas in cases of this type, the deterrent impact of the exclusionary rule on illegal police conduct is diminished.¹⁰⁸ He reasons that the police may feel that a search of dubious legality is preferable to no search at all because the evidence obtained, although inadmissible at trial, may be helpful in inducing a guilty plea.¹⁰⁹ But police officers are generally more interested in their arrest record than in the ultimate disposition of their cases.¹¹⁰ If the officer believes that his choice is between no search and one leading to a successful arrest, his conduct will probably not be affected by the exclusionary rule. Moreover, in most situations the officer, lacking expert legal knowledge, will believe that there is some chance that the evidence obtained can be properly introduced at the defendant's trial. Thus, in the situation posed by Professor Alschuler, the officer has an incentive to make an illegal search regardless of the possibility of a guilty plea. In my judgment, the slight and rather speculative deterrent impact to be gained by prohibiting plea bargaining in this situation would be more than offset by the resulting strain on our system.¹¹¹ Therefore, in *variation 4*, the prosecutor may

¹⁰⁶ If the police failed to give the defendant the warnings required by *Miranda*, counsel will almost certainly be aware that the confession is inadmissible. If defense counsel is ignorant in this respect, the executive prosecutor should not attempt to induce a guilty plea on the strength of the illegal evidence.

¹⁰⁷ Indeed, the defendant in *variation 2* might have a basis for complaint because, unlike the defendant who confessed, he was not offered a chance to settle his case on favorable terms. The best answer to this complaint is that the proposed procedure is necessary to prevent innocent people from pleading guilty.

¹⁰⁸ Many exclusionary rules are designed, at least in part, to discourage illegal conduct by insuring that this conduct will not contribute to successful prosecution. Under the guilty-plea system, however, unconstitutional behavior frequently does contribute to successful prosecution.

Alschuler, *supra* note 4, at 82.

¹⁰⁹

Only a thorough-going demonstration that illegal conduct will be unproductive seems likely to influence his [the police officer's] behavior An officer should be discouraged from thinking, "I know that it is probably illegal to enter this apartment; but the prosecutor may nevertheless be able to make something of the case. He seems able to get some kind of guilty-plea from almost every defendant, and I can therefore be reasonably confident that the defendant will be convicted of something."

Id. 83.

¹¹⁰ See A. NIEDERHOFFER, *BEHIND THE SHIELD* 53 (1967); J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 219-20 (1966).

¹¹¹ Professor Amsterdam, while acknowledging the basic wisdom of the exclusionary rule, notes that important societal interests may be sacrificed if it is employed "beyond the confines of necessity." Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 389 (1964) (footnotes omitted):

In every litigation in which exclusion is in issue, a strong public interest in deterring official illegality is balanced against a strong public interest in

properly offer concessions to induce the defendant to plead guilty rather than assert his search and seizure claim at trial.¹¹²

IV. THE ROLE OF THE COURTS

The proposals offered thus far have been directed at prosecutorial plea bargaining practices. But the judge's role in plea bargaining must also be examined. To date, the judge's involvement has tended towards one of two undesirable models: either the trial judge actively participates in the bargaining process, or he blinds himself to the realities of plea bargaining and engages in the ritual of asking the defendant whether prosecutorial concessions have played a part in inducing his guilty plea.¹¹³ Although a judge should remove himself from the bargaining process to protect his role as an impartial arbiter, he should also recognize that many guilty pleas occur as a result of prosecutorial concessions. When receiving pleas, the judge should impose safeguards which protect defendants without unreasonably jeopardizing the prosecutor's efficiency in disposing of cases.

Limiting the judge's sentencing discretion in cases involving bargained pleas would promote these dual ends. The trial judge should be bound either to impose a sentence no greater than that recommended by the prosecutor or to permit the defendant to withdraw his plea. This requirement would protect defendants by assuring them that the prosecutor's recommendation sets an absolute ceiling on the sentence which may be imposed if their plea is accepted; it would promote prosecutorial efficiency because defendants would naturally be more willing to enter into plea agreements.

Trial judges must also minimize the possibility that innocent defendants will enter guilty pleas.¹¹⁴ Although all federal judges and most

convicting the guilty. As the exclusionary rule is applied time after time, it seems that its deterrent efficacy at some stage reaches a point of diminishing returns, and beyond that point its continued application is a public nuisance.

¹¹² In both New York and Pennsylvania, the defendant may litigate a search and seizure claim in a pretrial hearing. If the defendant loses on this claim, he may then enter a guilty plea. In Pennsylvania, by entering the plea the defendant waives his right to appeal an adverse ruling on the pretrial motion. In New York, however, the defendant may appeal an adverse ruling even after entering a plea. Of course, the prosecutor may offer the defendant special concessions if he will plead guilty and forego his pretrial claim.

¹¹³ See *United States v. Jackson*, 390 F.2d 130, 138 (7th Cir. 1968) (Kiley, J., dissenting):

"[P]lea bargaining" is commonly practiced covertly. After the guilty plea is negotiated by the prosecutor and defense counsel and agreed to by the defendant, defendant follows the rubric of telling the court no promise has induced the plea, and while this game is played the prosecutor and defense counsel mutely corroborate the defendant's false statement. Often a court knows of the negotiations and yet plays its part in the rubric by asking the question about any promise, knowing that the answer will be false.

¹¹⁴ See *Brady v. United States*, 397 U.S. 742, 758 (1970) (dictum).

state judges must inquire into the "factual basis" of a guilty plea,¹¹⁵ many consider this requirement satisfied merely by asking the defendant whether he is in fact guilty of the crime charged. But an affirmative answer to this question may only be a reaffirmation of the defendant's genuine desire to enter a plea. Rather than engage in this meaningless ritual, judges should require the defendant to detail the circumstances of his alleged crime. While this device is not infallible, it should give the judge some insight into the actual guilt or innocence of the defendant. In addition, the judge should examine all of the evidence against the defendant.¹¹⁶ If, upon examining this evidence and hearing the defendant, the judge seriously doubts the defendant's guilt,¹¹⁷ he should either refuse to accept the plea or at least strongly urge the defendant to go to trial.¹¹⁸

Judges must also assume greater responsibility for evaluating prosecutorial plea bargaining policies. Professor Davis has criticized "the complete lack of supervision of the typical city or county prosecutor."¹¹⁹

The top prosecutors of federal, state, and local governments
are typically subject to little or no checking either by higher

¹¹⁵ Federal judges are given this responsibility by rule 11 of the Federal Rules of Criminal Procedure, which provides that a court may not enter judgment upon a plea of guilty "unless it is satisfied that there is a factual basis for the plea." Several states have adopted a similar requirement. See *People v. Perine*, 7 Mich. App. 292, 151 N.W.2d 876 (1967); *State v. Johnson*, 279 Minn. 209, 156 N.W.2d 218 (1968). An Alabama statute requires the trial judge to hear witnesses produced by the prosecutor and the defendant, or those summoned by the judge, and to accept a guilty plea only if he believes the defendant guilty beyond a reasonable doubt. ALA. CODE tit. 15, §264 (1958). VA. CODE ANN. §19.1-192 (1950) provides: "Upon a plea of guilty in a felony case, tendered in person by the accused after being advised by counsel, the court shall hear and determine the case without the intervention of a jury" For a general discussion of the federal and state law on this issue, and the American Bar Association's recommendation, see ABA STANDARDS, *supra* note 13, at §1.6, at 30-34.

In *Boykin v. Alabama*, 395 U.S. 238 (1969), the Supreme Court held that it was a violation of due process "for the trial judge to accept petitioner's guilty plea without an affirmative showing [on the record] that [the plea] was intelligent and voluntary." *Id.* at 242. Justice Harlan, dissenting, interpreted this holding to mean that "the prophylactic procedures of Criminal Rule 11 are substantially applicable to the States as a matter of federal constitutional due process." *Id.* at 247. If this is the correct interpretation of *Boykin*, state judges may be required by the Constitution to inquire into the factual basis for a plea.

¹¹⁶ Note, *supra* note 1, at 885, criticizes this approach on the ground that it "ignores the distinction between the guilty plea procedure and the trial procedure, and apparently directs the court to engage in an abridged trial to determine actual guilt, something that even a formal trial only inaccurately accomplishes." But the procedure contemplated would not constitute an "abridged trial" because in most cases the judge could make his determination on the basis of the police report and other material submitted to him by the prosecutor. Only in exceptional cases would witnesses need to be called.

¹¹⁷ A more precise standard should not be attempted. Since the judge is examining the evidence in a relatively informal manner, he is not in a position to make a more concrete determination of guilt. Cf. ABA STANDARDS, *supra* note 13, at §1.6, at 33.

¹¹⁸ If the defendant prefers to plead guilty even though he has a defense which might be successful, the judge should probably not forbid entry of a plea. See *McCoy v. United States*, 363 F.2d 306, 307 (D.C. Cir. 1966) (dictum).

¹¹⁹ K. DAVIS, *supra* note 52, at 207.

officers or by reviewing courts, no matter how seriously they have abused their powers and no matter how flagrant the injustice.¹²⁰

He invites courts to reconsider their traditional reluctance to review various aspects of the prosecutorial function, including plea bargaining.¹²¹ To facilitate judicial scrutiny, consideration should be given to requiring the prosecutor to issue publicly a formal statement of his policies.¹²² The defendant should have the right to challenge a bargaining standard on the ground that, as applied to him,¹²³ it is contrary to public policy. Either side should be permitted to appeal the judge's ruling on this claim. Adoption of this proposal would promote the uniform application of plea bargaining rules and would also give the highest courts of a state the opportunity to evaluate prosecutorial policies.¹²⁴

Finally, trial judges should endeavor to assure defendants of uniform plea bargaining treatment.¹²⁵ To insure that the prosecutor's policies are being applied uniformly, trial judges, before accepting a plea, should require a fairly detailed statement of the reasons supporting the sentence concessions.¹²⁶ If the judge believes that the prosecutor is dealing less leniently than customary with a particular defendant, he may impose a sentence less severe than the prosecutor's recommendation; if he believes the prosecutor is excessively generous, he may refuse to accept the plea.

¹²⁰ *Id.*

¹²¹ *Id.* 213.

¹²² *Cf. id.* 58 (emphasis in original):

The important part of the basic judicial purpose is to protect against unguided discretionary power to decide individual cases, whenever meaningful guides are feasible. From the standpoint of justice to the individual party, guides created by the administrators can be about as effective as guides imposed by a statute. Accordingly, *I propose that the courts should continue their requirement of meaningful standards, except that when the legislative body fails to prescribe the required standards the administrators should be allowed to satisfy the requirement by prescribing them within a reasonable time.*

¹²³ The problem of when a defendant has standing to challenge a particular administrative standard raises intricate issues beyond the scope of this paper. For a general discussion of the problem, see 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 22.01-22.18 (1958).

¹²⁴ One problem with this proposal is that the prosecutor, as the chief law enforcement officer of a city and often an elected official, may believe that he cannot politically afford to acknowledge that he deals leniently with many offenders. Thus, a requirement that he place his sentencing policies on record might lead him to formulate unreasonably tough policies. To avoid this undesirable situation, perhaps the prosecutor should be required to give a general formulation of priorities rather than a concrete delineation of rules. This type of statement would preserve the prosecutor's flexibility while giving the courts some assistance in checking his exercise of discretion.

¹²⁵ See ABA STANDARDS, *supra* note 13, at § 3.1(c), at 68.

¹²⁶ *Cf.* K. DAVIS, *supra* note 52, at 103-06.

But how may the judge protect a defendant who refuses to plead guilty because he believes he has not been offered concessions equal to those offered similarly situated defendants? If the defendant is allowed to apply to the court for relief prior to trial, the undesirable consequence will be early judicial intrusion into the bargaining process. But if the defendant does not raise the point until after trial and conviction, the societal benefits from effecting a guilty plea bargain are lost, since trial resources will have been consumed and the uncertainties of litigation put to rest. In my judgment, the appropriate procedure is to allow the defendant to raise the point after trial but prior to sentencing. When a defendant raises a claim of unequal plea bargaining treatment, the judge should require the prosecutor to produce evidence illustrating the policy generally followed in cases similar to the defendant's. If the judge finds that the prosecutor's failure to offer certain sentence concessions was a clear deviation from normal policy, he should impose a sentence in keeping with the prosecutor's normal guilty plea sentence recommendation. This procedure would both provide redress to defendants who can establish unfair treatment and, by providing this redress after a possibly time-consuming trial, give prosecutors an additional incentive to apply their guilty plea bargaining rules uniformly.

CONCLUSION

Guilty plea bargaining will remain integral to the administration of criminal justice. This Article has attempted to identify the major problems with present plea bargaining practices and to propose means for alleviating these problems without sacrificing prosecutorial efficiency.

The plea bargaining practices in New York and Philadelphia are detrimental to society's interests. The wide discretion allowed individual prosecutors leads to disparate treatment of similarly situated defendants and, inevitably, to disrespect for the law. The disadvantaged position of indigent defendants is exacerbated by the practice of offering greater concessions to defendants on bail. And, the individual prosecutor's desire to avoid defeat may lead to offering concessions which induce innocent defendants to enter guilty pleas.

Both the district attorney and the courts must meet these problems. Prosecutors must seriously commit themselves to developing fair plea bargaining policies. The executive prosecutor system proposed herein should facilitate application of plea bargaining policies attuned to the often competing needs of the prosecutor's office and society. Trial judges must recognize that plea bargaining does occur and endeavor both to scrutinize the prosecutor's policies and to guarantee certain minimum safeguards to defendants.