McGeorge Law Review

Volume 7 | Issue 1 Article 7

1-1-1976

An Offer You Can't Refuse: The Current Status of Plea Bargaining in California

Lawrence A. Bennett
University of the Pacific; McGeorge School of Law

Comments

An Offer You Can't Refuse: The Current Status Of Plea Bargaining In California

Liberty and justice are not subjects for bargain and barter.[1]

In the past, the non-recognition of plea bargaining as an everyday fact of life in our criminal justice system has led to many problems, including the failure to develop an adequate procedure for the proper handling of pleas developed in this manner. Now that the philosophy of both the state and federal courts has changed in this respect,[2] much needed formal procedures should be designed and adopted. The federal government appears to be taking this step with the adoption of sweeping changes to the Federal Rules of Criminal Procedure.[3] In addition, in the past ten years a number of studies have been conducted which examine the criminal justice system and develop recommendations for improvement, with the topic of plea bargaining constituting a major component of these studies. The result of several of these has been the development of either "minimum standards" or "model statutes" of criminal procedure, three of these being issued in the last three years.[4] These studies

1. Shelton v. United States, 242 F.2d 101, 113 (5th Cir. 1957).

2. *See, e.g.*, Santobello v. New York, 404 U.S. 257 (1971); People v. West, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

3. *See* THE CHIEF JUSTICE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE (1974) Rule 11 at 25-36 (hereinafter cited as PROP. AMEND. TO FED. RULES CR. PROC.). (Unless otherwise indicated, references to the Federal Rules of Criminal Procedure will be to this report.) These rule changes were originally approved by the Supreme Court for adoption in August 1974, however, adoption was delayed by Congress for a year to allow time for further study. The new Rules were passed by Congress on July 31, 1975, and scheduled to take effect on December 1, 1975, except for Rule 11(e)(6), which became effective August 1, 1975. Certain minor changes were made by Congress to the format of Rule 11 as proposed by the Supreme Court, and these are discussed below. See notes 49, 52, 53, 56 and 148 *infra* and text accompanying. *See generally* H.R. 6799, 94th Cong., 1st Sess. (1975) at 4-7; Federal Rules of Criminal Procedure Amendments Act, Pub. L. No. 94-64, 89 Stat. 370, 371-72.

4. AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (1968) [hereinafter cited as and referred to as A.B.A. STANDARDS]; AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tentative Draft No. 5, 1972) [hereinafter cited as MOD. CODE PRE-ARR. PROC.]; NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, REPORT ON THE COURTS (1973) [hereinafter cited as and referred to as N.A.C.

were prompted in part by the fact that the Law Enforcement Assistance Administration requires all states to develop a comprehensive set of standards in order to receive future federal funding under the 1968 Omnibus Crime Control and Safe Streets Act.[5] In large part, however, these studies are also the result of a general feeling that the methods and techniques under which our system of criminal justice operates could be greatly improved. In this connection, a committee of the State Bar of California is currently studying the entire subject of plea bargaining.[6]

This comment will define plea bargaining and examine both the established constitutional requirements and the recent changes in federal statutory law. California statutory and case law will be discussed, along with the need for the adoption of some form of comprehensive scheme in California. Finally, specific problems in formulating a comprehensive plea bargaining scheme will be addressed, and the new Federal Rules and model statutes mentioned above will be examined as potential sources of solutions to these problems.

THE SUBSTANCE OF PLEA BARGAINING

A. *Definition and Scope of Plea Bargaining*

Plea bargaining may be defined as "the granting of certain concessions to the defendant in the event he pleads guilty."[7] While the debate continues between the advocates[8] and critics[9] of the plea bargaining process, the fact remains that it is firmly entrenched in our system of justice,[10] and unless the funds suddenly become available with which to conduct the vast number of trials which are now made unnecessary by

---

STANDARDS]; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE (Proposed Final Draft 1974) [hereinafter cited as UN. RULES CR. PROC.].

5. Edwards, *The A.B.A. Standards for Criminal Justice and the N.A.C. Standards and Goals: A Comparative Analysis*, 12 AM. CRIM. L. REV. 363 (1974).

6. *Annual Report of the Board of Governors*, 49 CAL. S.B.J. 607, 620 (1974).

7. Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509 (1972). The A.B.A. Standards make an issue of the word "bargain," substituting instead "plea discussion" and "plea agreement." A.B.A. STANDARDS, *supra* note 4, §3.1 at 61-62. In this comment the words are used interchangeably.

8. *See* Wheatley, *Plea Bargaining—A Case for its Continuance*, 59 MASS. L.Q. 31 (1974); A.B.A. STANDARDS, *supra* note 4; MOD. CODE PRE-ARR. PROC., *supra* note 4; UN. RULES CR. PROC., *supra* note 4.

9. *See* Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970); N.A.C. STANDARDS, *supra* note 4; STATE OF CALIFORNIA JOINT LEGISLATIVE COMMITTEE FOR REVISION OF THE PENAL CODE, THE CRIMINAL PROCEDURE CODE, at vii (Penal Code Revision Project Staff Draft).

10. "Plea bargaining has become an accepted practice in American criminal procedure, 'an integral part of the administration of justice in the United States,' . . . . 'The great majority of criminal cases are disposed of by pleas of guilty, and a substantial number of these pleas are the result of prior dealings between the prosecutor and the defendant or his attorney.'" People v. West, 3 Cal. 3d 595, 604, 477 P.2d 409, 413, 91 Cal. Rptr. 385, 389 (1970) (citations omitted).

this practice, it is likely to continue. This comment does not attempt to take a position on the propriety of plea bargaining, but accepts it as an everyday reality. The fact that the United States Supreme Court in *Santobello v. New York*[11] referred to plea bargaining as an "essential component of the administration of justice . . . to be encouraged,"[12] and that the California Supreme Court in *People v. West*[13] referred to it as " 'essential for the expeditious and fair administration of justice,' "[14] would seem to make the issue of propriety largely moot from a judicial point of view.

Accurate statistics on the scope or pervasiveness of plea bargaining are not available, partially due to the atmosphere of secrecy in which the practice has been conducted.[15] It is known that felony convictions based on guilty pleas (by definition the net result of all plea bargains) run between 67% and 93% in state courts,[16] and approximate 84% in federal courts.[17] There is no data kept on what percentage of these guilty pleas actually results from plea bargains, but one survey placed the figure in excess of 70% in some jurisdictions.[18] It would seem reasonable to conclude that at the present time, plea bargaining is a widespread, judicially acknowledged and most likely essential element of the criminal justice system. What procedure should be used to implement the practice and what limitations should be placed upon it are questions which will be considered later in this comment.

B. The Constitutional Requirements

Plea bargaining is not *per se* unconstitutional.[19] By definition, however, the process involves a guilty plea,[20] and this brings into play federal constitutional protections. The ramifications of a guilty plea are much more far-reaching than a confession since in pleading guilty, an accused waives all of the constitutional rights to which he would normal-

11. 404 U.S. 257 (1971).
12. *Id.* at 260.
13. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).
14. *Id.* at 604, 477 P.2d at 413, 91 Cal. Rptr. at 389.
15. *Id.* at 609, 477 P.2d at 417, 91 Cal. Rptr. at 393.
16. THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS at 9 (1967) [hereinafter cited as TASK FORCE REPORT]. The figure for California in 1972 was 71.5%. STATE OF CALIFORNIA, DEPARTMENT OF JUSTICE, BUREAU OF CRIMINAL STATISTICS, CRIME AND DELINQUENCY IN CALIFORNIA 1972, REFERENCE TABLES at 6.
17. 1974 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS at A-58.
18. Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 896-99 (1964). These figures are dated now, but this study is apparently the only attempt at empirical research that has been conducted in this field.
19. Santobello v. New York, 404 U.S. 257, 265 (1971) (Douglas, J., concurring).
20. See note 8 *supra* and text accompanying.

ly be entitled in a trial. Specifically, this waiver involves those rights guaranteed under the fifth and sixth amendments, including the right to remain silent, the right to a speedy trial by jury, the right to confront witnesses, and the right to be proven guilty beyond a reasonable doubt.[21] In addition, a defendant also waives any collaterally related non-jurisdictional defects.[22] In emphasizing the point, and stressing the seriousness of a guilty plea, the United States Supreme Court has stated that:

> A plea of guilty differs in purpose and effect from a mere admission or an extrajudicial confession; it is itself a conviction. Like a verdict of a jury, it is conclusive. More is not required; the court has nothing to do but give judgment and sentence.[23]

As with other constitutional rights, an accused may waive the safeguards referred to. However, the Court has held that to satisfy the constitutional requirement of due process,[24] any such waiver must be knowing, voluntary, and entered with a full understanding of the nature of the charge and the consequences of the plea.[25] The Court has stated that "[w]hat is at stake for the accused facing death or imprisonment demands the utmc solicitude of which courts are capable . . . "[26] and that a waiver of the important rights associated with a plea of guilty will not be presumed from a silent record.[27]

To determine the voluntariness of a guilty plea, the Court adopted the test suggested by Judge Tuttle of the Court of Appeals for the Fifth Circuit:

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

---

21. Santobello v. New York, 404 U.S. 257, 264 (Douglas, J. concurring); Boykin v. Alabama, 395 U.S. 238, 243 (1969); McCarthy v. United States, 394 U.S. 459, 466 (1969).

22. Collateral rights waived might relate to: an illegal search, illegal arrest, improperly obtained confession, improper identification practices, absence or ineffectiveness of counsel, running of the statute of limitations, improperly obtained indictment, and the rights to change of venue, bail, severance, speedy trial, public trial, and compulsory process. J. COOK, CONSTITUTIONAL RIGHTS OF THE ACCUSED-PRE-TRIAL RIGHTS, §105 at 545-51 (1972). *See also* People v. Archuleta, 16 Cal. App. 3d 295, 93 Cal. Rptr. 881 (1971).

23. Kercheval v. United States, 274 U.S. 220, 223 (1927).

24. *See* McCarthy v. United States, 394 U.S. 459, 466 (1969) (applying the due process clause of the 5th amendment); Boykin v. Alabama, 395 U.S. 238, 244-46 (1969) (Harlan, J., dissenting), (applying 14th amendment due process).

25. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 31 (1970); Boykin v. Alabama, 395 U.S. 238, 242 (1969); Kercheval v. United States, 274 U.S. 220, 223 (1927).

26. Boykin v. Alabama, 395 U.S. 238, 243-44 (1969).

27. *Id.* at 243.

> promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g., bribes)." (citation omitted)[28]

While it is clear that any form of coercion which destroys voluntariness is prohibited,[29] the line has not proved easy to draw. The court has refused to find a lack of voluntariness where the plea was accompanied by protestations of innocence,[30] where the plea was induced by fear of the death penalty if found guilty after a trial,[31] or where claims were made of a conflict of interest on the part of defense counsel representing others in a related proceeding.[32]

The Court added the additional requirement in *Santobello* that "when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such a promise must be fulfilled."[33] The Court indicated that as a remedy for a broken promise, the defendant was entitled to either specific performance of the bargain or the opportunity to withdraw the guilty plea.[34]

Other due process requirements established by the Court include the right to be represented by counsel during all proceedings involving a plea,[35] the right to be assisted by counsel in choosing whether to plead guilty,[36] and the requirement that the court personally address the accused to insure that the standards of voluntariness and understanding outlined above are met.[37] Failure of the record to indicate that this latter requirement has been met has been held to be reversible error.[38] Thus

---

28. Brady v. United States, 397 U.S. 742, 755 (1970).
29. Brady v. United States, 397 U.S. 742, 750 (1970); United States v. Jackson, 390 U.S. 570, 583 (1968); Marchibroda v. United States, 368 U.S. 487, 493 (1962).
30. North Carolina v. Alford, 400 U.S. 25 (1970).
31. Brady v. United States, 397 U.S. 742 (1970). It must still be shown that the plea was voluntarily and intelligently made. Compare with United States v. Jackson, 390 U.S. 570 (1968)—conviction based on the same statute reversed. The guilty plea in *Brady* was based as much on the fact that his co-defendant had plead guilty and agreed to testify for the prosecution as on any possible coercion from the unconstitutional statute.
32. Dukes v. Warden, 406 U.S. 250 (1972).
33. 404 U.S. 257, 262 (1971).
34. Mr. Justice Douglas was of the opinion that the defendant should be allowed whichever remedy he chooses, since under the circumstances of a particular case, justice may be better served by one rather than the other. *Id.* at 267 (Douglas, J., concurring).
35. Von Moltke v. Gillies, 332 U.S. 708, 723 (1948). For the suggestion that proof of the *adequacy* of counsel was established as a requirement by *Boykin, see The Supreme Court, 1968 Term,* 83 HARV. L. REV. 7, 187 (1969).
36. Williams v. Kaiser, 323 U.S. 471 (1945); Powell v. Alabama, 287 U.S. 45 (1932).
37. The court must "[canvas] the matter with the accused." Boykin v. Alabama, 395 U.S. 238, 244 (1969).
38. McCarthy v. United States, 394 U.S. 459, 472 (1969). Prior to *Boykin*, the California position was that the court need only advise the defendant of his right to counsel, but need not inform him of the consequences of the plea, as this was thought to be the responsibility of counsel. In re Tahl, 1 Cal. 3d 122, 129, 460 P.2d 449, 454, 81 Cal. Rptr. 577, 582 (1969).

far, the Court has declined to establish a specific set of inquiries which must be made of a defendant to eliminate any doubt that the essential constitutional requirements have been satisfied. At least two justices feel that the Court should spell out the constitutional limits of plea bargaining,[39] and it is possible that in the future the Court will require specific interrogatories to be used such as those established in *Miranda v. Arizona*[40] relating to self incrimination.

Federal Statutory Law Governing Plea Bargaining

In the federal court system, a trial judge is free to allow or completely prohibit plea bargains in the courtroom.[41] If the practice is permitted, the acceptance of guilty pleas and therefore plea bargains is governed by Rule 11 of the Federal Rules of Criminal Procedure,[42] coupled with the mandates of the United States Constitution.[43]

In its original form, Rule 11 required the court accepting a guilty plea to first determine that it was voluntary and made with an understanding of the nature of the charge.[44] The 1966 amendment, in addition to providing for pleas of *nolo contendere*, added the requirement that the court satisfy the "voluntariness" and "understanding" elements by personally addressing the defendant, and extended the scope of the defendant's required understanding to include the consequences of the plea.[45] Also added was a requirement that the court must satisfy itself that there was a factual basis for the plea. This latter element

> was not intended to allow courts another means of showing that a defendant understood the charges against him. Rather, its purpose, according to the Advisory Committee on Rules, is to protect defendants who understand the charge and who plead voluntarily, but who do not understand that their "conduct does not actually fall within the charge."[46]

---

39. Corpus Et Al. v. Estelle, Corrections Director, Et Al., 469 F.2d 646, 953, 956, 1075 (1972), *cert. denied*, 414 U.S. 932, 933 (1973) (Douglas, and Marshall, JJ., dissenting).

40. 384 U.S. 436 (1966).

41. 121 Cong. Rec. 5929-30 (1975) (remarks of Congressman Hagedorn).

42. Mr. Justice Harlan was of the opinion that the provisions of Rule 11 were applicable to the states. Boykin v. Alabama, 395 U.S. 238, 245 (1969) (Harlan, J., dissenting). See note 86 *infra* and text accompanying.

43. The Rules were originally adopted in 1946. Rule 11 has been subject to one prior amendment, in 1966. *See* Hoffman, *What Next in Federal Criminal Rules?*, 21 Wash. & Lee L. Rev. 1 (1964) for a discussion of the procedure for the formulation and adoption of federal rules.

44. Court decisions interpreting the meaning of this requirement are "legion." *Id.* at 9. *See, e.g.*, Von Moltke v. Gillies, 332 U.S. 708 (1948); Aiken v. United States, 296 F.2d 604 (4th Cir. 1961); Smith v. United States, 265 F.2d 99 (D.C. Cir. 1961).

45. Rule 11, Federal Rules of Criminal Procedure (As amended February 28, 1966) 18 U.S.C. Appendix at 4489 (1970).

46. Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. Rev. 514, 521 (1969). *See also* 2 Orfield, Criminal Practice Under the Federal Rules, §11:73 at 147 (1966).

The recent amendments significantly expand the scope of Rule 11. Most importantly, the amendments establish a procedure for handling plea agreements, removing any vestige of mystery or suspicion still connected with the practice.[47] In so doing, the amendments answer the doubts expressed by some courts as to whether the procedure followed under the old Rule 11 was certain to uncover a plea bargain, since failure to do so leaves the defendant with little remedy if the terms of the bargain are not adhered to.[48]

The new procedure for plea agreements is established in subdivision (e). Section (1) of subdivision (e) establishes the three acceptable concessions which the prosecuting attorney may make in negotiating a plea with the accused, and prohibits the court from participating in these discussions.[49] Subdivision (e) (2) calls for disclosure of any plea agreement on the record; the judge is then given the option to accept or reject the agreement, or postpone making a decision until the presentence report is received.[50] Subdivisions(e) (3) and (4) provide the procedure for the actual acceptance or rejection of the plea. The significant features are that if the agreement is accepted, the defendant learns immediately what the maximum sentence will be, and in the event the agreement is rejected, the defendant has an opportunity to withdraw the guilty plea. In this respect, the new procedure complies with the requirements of the *Santobello* decision.[51] Subdivision (e) (3) is noteworthy insofar as it limits the judge, if the agreement is accepted, to the actual

47. THE CHIEF JUSTICE OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE, ADVISORY COMMITTEE NOTE at 27 (1974) [hereinafter cited as ADVISORY COMMITTEE NOTE].

48. *See, e.g.*, Hilliard v. Beto, 465 F.2d 829, 831-32 (5th Cir. 1972).

49. The concessions which the prosecuting attorney may make in return for a guilty plea to the charged offense, or to a lesser or related offense are that he will: (1) move for dismissal of other charges; or (2) recommend or not oppose the imposition of a particular sentence, with the understanding that such recommendation shall not be binding upon the court (this latter phrase was added in the Senate); or (3) agree that a specific sentence is the appropriate disposition of the case (also added in the Senate). Federal Rules of Criminal Procedure Amendments Act, Pub. L. No. 94-64, §3, 89 Stat. 370, 371. The participation of the trial judge has been a topic of much controversy among legal writers. *Compare* Underwood, *Let's Put Plea Discussions—and Agreements—On Record*, 1 LOY. U.L.J. 1, 5 (1970) (advocating participation) *with* Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514, 525 (1969) *and* Thomas, *Plea Bargaining: The Clash Between Theory and Practice*, 20 LOY. L. REV. 303, 304 (1974) [hereinafter cited as Thomas] (advocating abstention). See also notes 120-125 *infra* and text accompanying.

50. Concurrent changes to Rule 32 would allow the judge, with the defendant's consent, to inspect the presentence report at any time before or after a plea is entered. This change represents a major step toward improving correctional policy, and answers the complaints of many writers. *See, e.g.*, Newman and NeMoyer, *Issues of Propriety in Negotiated Justice*, 47 DEN. L.J. 367, 401-04 (1970) [hereinafter cited as Newman and NeMoyer]; Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 297 (1972). See also notes 126-136 *infra* and text accompanying.

51. 404 U.S. 257 (1971). The other remedy provided for in Santobello, specific performance, would not apply in this type of situation, as the plea has not at this point been accepted by the court.

terms of the agreement.[52] Subdivision (e) (5) allows for better scheduling of criminal cases by allowing the court to establish a time limit within which the parties must arrive at an agreement. The remaining provision of Subdivision (e) forbids admission of a proposed but withdrawn guilty plea in any subsequent civil proceeding, but does allow admission of the statements in a perjury proceeding.[53]

In addition to recognizing the propriety of plea bargaining, the other main objective of the recent amendments was to clarify the advice which must be given to the defendant to insure that an informed plea is made.[54] The revised Rule 11(c) retains the requirements of its predecessor that the defendant must understand the nature of the charge to which he is pleading, but limits the required knowledge of the consequences of such a plea to require only a statement of the maximum and minimum sentences connected with the offense.[55] There are new requirements that the defendant be advised of his right against self-incrimination and of his rights to counsel, to a trial by jury, and to confront and cross-examine witnesses. In addition, there are warnings added by the Congress that the defendant may be questioned by the judge about the offense (with the risk of perjury for false statements), and about the finality of the plea.[56]

The requirement that the plea must be voluntary is expanded in subdivision (d) to include an inquiry as to whether the guilty plea is the result of a plea agreement, which allows the judge to insure that the plea was not induced by threats or improper promises,[57] and that the defendant receives the benefit of his bargain, in accordance with the mandates of *Santobello*. The new rules specify that the discussions with the accused regarding voluntariness and understanding must be conducted in open court, possibly with the intent of facilitating the making of a

52. The original amendment approved by the Supreme Court allowed the judge the option of imposing another sentence "more favorable to the defendant." The House was apparently concerned about having the prosecution's bargain "undermined by a lenient judge," and this change could be construed as a significant infringement on judicial discretion. 121 CONG. REC. 5642 (1975) (remarks of Congressmen Holtzman and Wiggins) and 5930 (1975) (remarks of Congressman Hagedorn).

53. Rule 11(e)(6), PROP. AMEND. TO FED. RULES CR. PROC., *supra* note 3, at 27. The provision with respect to perjury proceedings was added by Congress. *See* H.R. 6799, 94th Cong., 1st Sess. (1975) at 5.

54. The intent behind the rule change in this area was to incorporate the requirements of *Boykin*, 395 U.S. 238. ADVISORY COMMITTEE NOTE, *supra* note 47, at 28. The amendments also further refine the requirements for accepting pleas of *nolo contendere*, which are not discussed in this comment.

55. The revised Rules reject the concept that the court is *required* to outline the collateral consequences of a plea of guilty such as parole violation problems, registration as a sex offender, civil consequences of being a convicted felon, recidivist statutes, etc. For a discussion of the consequences of being a parolee subject to the Adult Authority in California, *see* Johnson, *Multiple Punishment and Consecutive Sentences: Reflections on the Neal doctrine*, 58 CAL. L. REV. 357, 379-89 (1970).

56. Rule 11(c)(4), (5), H.R. 6799, 94th Cong., 1st Sess. (1975) at 5.

57. ADVISORY COMMITTEE NOTE, *supra* note 47, at 30.

record, as required by *McCarthy v. United States.*[58] Subdivision (f) retains the requirement of a factual basis for the plea as previously encompassed in Rule 11, and subdivision (g) requires a verbatim record of the proceedings demonstrating, *inter alia,* the inquiry into the voluntariness and accuracy of the plea. The significance of the new Rules with respect to California law lies in the fact that as the most comprehensive statute governing plea bargains yet enacted, the Federal Rules may serve as a guide for modification of state laws. In addition, an argument can be made that these rules are or will be made binding on the states.[59]

THE PRESENT STATUS OF PLEA BARGAINING IN CALIFORNIA

It has been established in California, as in the federal courts, that a guilty plea is not invalid strictly because it is the product of plea bargaining.[60] Nevertheless, in his dissent in *In re Tahl,*[61] Justice Peters of the California Supreme Court called for a more precise and open handling of the motivating factor for most guilty pleas—plea bargains.[62] California law relating to guilty pleas and plea bargains has gone beyond the mere meeting of constitutional requirements, although it is less clearly defined than federal law under the new federal rules.

A. Statutory Law

The California Penal Code contains several sections relating to plea bargaining, most significantly Section 1192.5, which the California Supreme Court referred to one month after its enactment in November 1970, as an indication of "growing legislative recognition and approval of plea bargaining."[63] Section 1192.5 allows a defendant to condition his guilty plea upon any sentence that is within the court's power to impose, including the granting of probation or the complete suspension of the sentence—if this condition is accepted by the prosecuting attorney.[64] If so accepted, the trial court must at least consider the defendant's offer, and it has been held to be an abuse of discretion to arbitrarily refuse to do so.[65] The court must advise the defendant that it is not

58. 394 U.S. 459, 466-67 (1969).
59. See notes 84-86 *infra* and text accompanying.
60. *See* In re Hawley, 67 Cal. 2d 824, 433 P.2d 919, 63 Cal. Rptr. 831 (1967); In re Madrid, 19 Cal. App. 3d 996, 97 Cal. Rptr. 354 (1971).
61. 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969).
62. *Id.* at 138, 460 P.2d at 460-61, 81 Cal. Rptr. at 588-89.
63. People v. West, 3 Cal. 3d 595, 608, 477 P.2d 409, 416, 91 Cal. Rptr. 385, 392 (1970).
64. This procedure has been referred to as a "statutory plea bargain." People v. West, 3 Cal. 3d 595, 607, 477 P.2d 409, 416, 91 Cal. Rptr. 385, 392 (1970).
65. People v. Smith, 22 Cal. App. 3d 25, 99 Cal. Rptr. 171 (1971).

bound by the plea;[66] however, if the court wishes to impose a more severe sentence, the defendant must be allowed an opportunity to withdraw the plea,[67] and must be advised of this option by the court.[68] Under the terms of section 1192.5, any plea so withdrawn cannot be admitted into evidence in any type of civil or criminal proceeding against the defendant. This provision also calls for the court to make an inquiry of the defendant to "satisfy itself that the plea is freely and voluntarily made, and that there is a factual basis for such plea." Section 1192.5 was the successor to section 1192.3 (enacted in 1957), which only allowed a defendant to specify the punishment which a jury might impose, and did not contain any of the additional provisions outlined above. Section 1192.5 has been held not to apply to cases in which a defendant pleads not guilty and submits the matter of guilt or innocence to the trial court on the transcripts of the preliminary hearing.[69]

There are other California Penal Code provisions which have an effect on plea bargaining. Section 1192.1 allows a defendant to limit a guilty plea in the case of a crime divided into multiple degrees to a specified degree. When the prosecuting attorney agrees to this condition, and it is accepted by the court, the defendant may not be convicted of any higher degree of the crime. Section 1192.2 establishes the same procedure before a committing magistrate. Section 1192.4 provides for automatic withdrawl of a guilty plea entered pursuant to sections 1192.1 and 1192.2, and subsequent inadmissibility in any civil or criminal proceedings, similar to the provisions of section 1192.5 discussed above. Case law has construed section 1192.4 to include *offers* to plead guilty under the protection of this code section as well as actual pleas.[70] Prior to the passage of section 1192.4 in 1957, evidence of such pleas and offers to plead were admissible.[71] One California appellate decision has stated that the obvious purpose of these enactments "is to promote the public interest by encouraging settlement of criminal cases without the necessity of trial."[72]

---

66. "When the court does not inform the defendant, prior to acceptance of his plea, that its approval is not binding, the court may not withdraw its approval at the time set for hearing on the application for probation or pronouncement of judgment." Cacilhas v. Super. Ct., App. 110 Cal. Rptr. 661, 665 (1973) (hearing ordered January 10, 1974).

67. People v. Ramos, 26 Cal. App. 3d 108, 102 Cal. Rptr. 502 (1972).

68. People v. Johnson, 10 Cal. 3d 868, 519 P.2d 604, 112 Cal. Rptr. 556 (1974). This represents a change from prior case law under People v. Delles, 69 Cal. 2d 906, 447 P.2d 629, 73 Cal. Rptr. 389 (1968).

69. Martinez v. Super. Ct., 36 Cal. App. 3d 683, 111 Cal. Rptr. 678 (1973).

70. People v. Wilson, 60 Cal. 2d 139, 383 P.2d 452, 32 Cal. Rptr. 44 (1963); People v. Hamilton, 60 Cal. 2d 105, 383 P.2d 412, 32 Cal. Rptr. 4 (1963). *See* CAL. EVID. CODE §1153.

71. *Id.*

72. People v. Woltz, 222 Cal. App. 2d 340, 343, 35 Cal. Rptr. 160, 162 (1963).

B. Case Law

The California statutes relate only to pleading guilty to lesser degrees of an offense (1192.1, 1192.2), or to specifying the sentence upon which the plea is conditioned (1192.5). The California Supreme Court pointed out in *People v. West*,[73] however, that these statutory provisions serve as guidelines for plea bargains involving pleas to lesser offenses[74] —apparently referring to the statutory provisions for acceptance and rejection of the plea, inquiries on voluntariness and factual basis, and withdrawal and inadmissibility of the plea.[75] In addition, various decisions have specifically addressed the different aspects of plea bargaining and its product—guilty pleas.

Many cases have dealt with the applicability of the requirements of the U.S. Constitution. In *In re Tahl*[76] the California Supreme Court, after determining that the more demanding provisions of *Boykin v. Alabama* were only to be applied prospectively,[77] took a very conservative approach in specifying what must appear on the trial court record to satisfy the due process requirements in California.[78] The court rejected the notion that the required waiver could be based on a "reasonable presumption" that the defendant acted voluntarily and intelligently, and made it clear that inferences of such a waiver were no longer acceptable.[79] In the future the trial record must reflect on its face that the constitutional rights involved were "specifically and expressly enumerated [by the court, not by counsel] for the benefit of and waived by the accused [not by counsel] prior to the acceptance of his guilty plea."[80] The court went on to express the *caveat* that although the federal constitutional requirements could be met with something less than the procedure outlined, lower courts would be well advised to "err on the side of caution", and avoid the possiblity of convictions being reversed in subsequent challenges.[81] The rights requiring voluntary and intelligent waiver are those fifth and sixth amendment rights discussed above,[82] and in addition the record must reflect that the defendant was aware of the nature and consequences of the plea.[83]

---

73. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).
74. *Id.* at 608, 477 P.2d at 416-17, 91 Cal. Rptr. at 392-93.
75. See text preceding note 69 *supra*.
76. 1 Cal. 3d 122, 460 P.2d 449, 81 Cal. Rptr. 577 (1969).
77. *Id.* at 133-35, 460 P.2d at 456-58, 81 Cal. Rptr. at 584-86 (1969).
78. *See id.* at 130-33, 460 P.2d at 454-57, 81 Cal. Rptr. at 584-86 (1969).
79. *Id.* at 131, 460 P.2d at 455-56, 81 Cal. Rptr. at 583-84.
80. *Id.* at 132, 460 P.2d at 456, 81 Cal. Rptr. at 584.
81. *Id.*
82. See notes 21 and 22 *supra* and text accompanying.
83. In re Tahl, 1 Cal. 3d 122, 132, 460 P.2d 449, 456, 81 Cal. Rpt. 577, 584 (1969).

The net effect of this holding was to make the bulk of Rule 11 of the Federal Rules of Criminal Procedure (as then structured) binding in California.[84] The only element missing was the requirement of a "factual basis" for the plea, which was subsequently added by statute in California.[85] The significance of this lies in the sweeping amendments to Rule 11 which have been recently adopted. If the Supreme Court made the provisions of the present Rule 11 binding on the states, as Justice Harlan said the *Boykin* decision did,[86] it is at least possible that future versions of the rule would also be constitutionally mandated. Even if this is not the case, since the California Supreme Court made the essence of Rule 11 applicable to California (apparently voluntarily), it is possible that it would follow a similar course of action with respect to a new version of the rule. The uncertainty created by such considerations supports an argument for the adoption of a comprehensive scheme in California to clarify the current California policy relating to plea bargaining.

The remainder of California case law relating to plea bargaining was formulated in *West*.[87] After affirming the validity of the practice, the court went on to decry the ritualistic exercise of defendants pleading guilty while denying the plea was conditioned upon any sort of agreement with the prosecuting attorney,[88] and established the requirement that the plea bargain must be clearly incorporated in the record of the case, suggesting four possible ways this might be done.[89] Of great significance is the fact that the court went on to hold that the guilty plea could be to any reasonably related offense, and did not have to be one necessarily included in the crime charged.[90] In *People v.*

---

84. This was exactly the effect Mr. Justice Harlan indicated the *Boykin* decision had. 395 U.S. 238, 245 (1969) (Harlan, J., dissenting).

85. CAL. PEN. CODE §1192.5.

86. Mr. Justice Harlan's view was that the reversal in *Boykin* (based on the inadequacy of the record in showing a knowing and intelligent waiver of constitutional rights) made the procedures of Rule 11 "substantially applicable to the states as a matter of federal constitutional due process." Boykin v. Alabama, 395 U.S. 238, 247 (1969) (Harlan, J., dissenting).

87. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

88. *Id.* at 609, 477 P.2d at 417, 91 Cal. Rptr. at 393.

89. *Id.* at 610, 477 P.2d at 418, 91 Cal. Rptr. at 394. The methods suggested by the court are: (1) the bargain could be stated orally and recorded by the court reporter; (2) it could be set forth by the clerk in the minutes of the court; (3) a written stipulation could be filed by the parties stating the terms of the bargain; or (4) forms prepared by counsel or the court for the purpose of recording plea bargains could be utilized. See also In re Sutherland, 6 Cal. 3d 666, 669 n.3, 493 P.2d 857, 859 n.3, 100 Cal. Rptr. 129, 131 n.3 (1972).

90. People v. West, 3 Cal. 3d 595, 613, 477 P.2d 409, 420, 91 Cal. Rptr. 385, 396 (1970). In so doing, the court adopted the philosophy of A.B.A. Standard §3.1(b)(ii), defining a reasonably related offense as: (1) the same type of offense charged or (2) an offense which he may have committed during the course of conduct which led to the charge. The mere fact of pleading guilty is not enough, however, and the defendant must be able to have been convicted of either the offense to which he plead guilty or

Ramos,[91] the court endeavored to formulate the attitude which all parties involved in the plea bargaining process should possess:

> The idea behind court participation in plea bargaining is to spread the entire bargain on the table and make it part of the record. (citation omitted) Implicit in the concept is the requirement all participants must conduct themselves openly and with utmost fairness.[92]

With respect to remedies for broken promises, California law would appear to comport with the requirements of *Santobello*,[93] in that either withdrawal of the plea or specific performance of the bargain are granted as remedies. Where a promise to a defendant is breached by the prosecuting attorney, California has traditionally allowed the defendant to withdraw the guilty plea,[94] even after pronouncement of judgment.[95] Where the promise has been breached by the judge, California courts appear to grant an option of withdrawal of the plea or specific performance of the bargain,[96] even though this latter remedy is not mentioned in Section 1192.5 of the Penal Code.[97] In any event, it certainly seems that whatever remedy of state chooses to offer in this area should be clearly defined and capable of easy reference. It almost goes without saying that before the defendant can even begin to pursue either remedy, or before the state can adequately mount a defense to such a claim, a clear and detailed record of the proceedings in the trial court is requried.[98]

C. The Need for a Comprehensive Scheme in California

With the exception of the statutory provisions relating to pleas to a lesser degree of the charged offense[99] and specification of the sentence

---

the one he was originally charged with. *See* People v. Crumpton, 9 Cal. 3d 463, 507 P.2d 74, 106 Cal. Rptr. 770 (1973). Also, the conduct must be of a nature proscribed by the state. *See* In re Madrid, 19 Cal. App. 3d 996, 97 Cal. Rptr. 354 (1971); In re Scruggs, 15 Cal. App. 3d 290, 93 Cal. Rptr. 119 (1971).

91. 26 Cal. App. 3d 108, 102 Cal. Rptr. 502 (1972).

92. *Id.* at 111, 102 Cal. Rptr. at 504. (The court did not tell the defendant that pleading guilty might result in revocation of probation on a prior offense.)

93. *See generally* Fischer, *Beyond Santobello—Remedies for Reneged Plea Bargains*, 2 U. SAN FERN. V.L. REV. 121 (1973).

94. People v. Barajas, 26 Cal. App. 3d 932, 937, 103 Cal. Rptr. 405, 408 (1972). (Relief denied, however, since the defendant did not move to withdraw his plea in the trial court.)

95. People v. Wadkins, 63 Cal. 2d 110, 113, 403 P.2d 429, 432, 45 Cal. Rptr. 173, 176 (1965).

96. People v. Flores, 6 Cal. 3d 305, 308-09, 491 P.2d 406, 408, 98 Cal. Rptr. 822, 824 (1972); Martinez v. Super. Ct., 36 Cal. App. 3d 683, 686, 111 Cal. Rptr. 678, 680 (1973).

97. A complete comparison of these two remedies is beyond the scope of this comment, but in general it can be said that there are situations where withdrawal of the plea will not restore the status *quo ante*, and others where it is perfectly adequate.

98. The problems which can arise in the absence of such a record are illustrated in Martinez v. Super. Ct., 36 Cal. App. 3d 683, 111 Cal. Rptr. 678 (1973).

99. CAL. PEN. CODE §§1192.1, 1192.2.

to be imposed,[100] a substantial portion of the California law relating to plea bargaining is presently uncodified. Even though the California Supreme Court in *West* recommended using section 1192.5 as a model for these situations, a question naturally arises whether greater organization and formalization of the law in the form of a comprehensive scheme would not be beneficial for all parties involved in the criminal justice system. This more standardized approach would seem particularly beneficial to attorneys who handle only an occasional criminal matter. Certainly, in an area where personal rights and liberties are involved, the accused has much to lose,[101] and therefore the utmost in precision and exactness should be required to insure that the proceedings are fair and just beyond any question or doubt.

In referring to the procedures surrounding plea bargaining, one writer has stated: "Little statutory guidance has emanated from the states or federal government and confusion reigns in the courts."[102] While this probably overstates the case, particularly with respect to California,[103] nevertheless, this entire area of the law is generally characterized by a lack of statutory enactments and formalization. In 1969, Justice Mosk of the California Supreme Court wrote: "California law provides relatively few pronouncements, either legislative or judicial, regarding the acceptance of a guilty plea . . . ."[104] Although section 1192.3 was on the books at the time this statement was made, section 1192.5 and its interpretation and expansion in *West* were still a year away. One may still inquire, however, whether these later developments completely answer Justice Mosk's desire for more firmly established guidelines.

Much of the law relative to plea bargaining is new. It would not be unusual in such a rapidly developing area that a statute such as section 1192.5 would need amendment or replacement four years after its passage. It is not essential, however, that a comprehensive scheme be developed through statutory enactment. In fact, a recent article dealing with implementation of the A.B.A. Standards recommends adoption by court rule as the "quickest and most effective means" of initiating this type of change.[105]

Regardless of the implementation device, now that plea bargaining has been taken out of the shadows, social and public policy would seem

---

100. CAL. PEN. CODE §1192.5.
101. See text accompanying note 26 *supra.*
102. Gallagher, *A Voluntary Trap*, TRIAL Vol. 9, No. 3 at 23 (May/June 1973).
103. The recent revision of Rule 11 of the Federal Rules of Criminal Procedure would appear to answer any charge of lack of specificity in the federal court system.
104. In re Tahl, 1 Cal. 3d 122, 127, 460 P.2d 449, 452, 81 Cal. Rptr. 577, 580 (1969).
105. Wilson, *Implementation by Court Rule of the Criminal Justice Standards*, 12 AM. CRIM. L. REV. 323, 355 (1974).

to require a clear, definitive, easily accessible set of standards to which the practitioner can turn. In addition, in order to participate in the federal funding available under the Omnibus Crime Control and Safe Streets Act of 1968, each state must enact a comprehensive plan of law enforcement and criminal justice.[106] The Law Enforcement Assistance Administration, which administers these funds, is requiring each state to have a comprehensive set of standards established by fiscal year 1976.[107] Standards relative to plea bargaining constitute a logical and necessary part of such a plan.

This position can be supported by the fact that several bodies (other than the federal government) such as the American Bar Association, American Law Institute, National Conference of Commissioners on Uniform State Laws, and the National Advisory Commission on Criminal Justice Standards and Goals, have proposed models upon which to base a statutory scheme.[108] In an article calling for adoption of legislation based on the A.B.A. Standards, Justice Erickson of the Colorado Supreme Court has said that they will "bring accuracy and finality to pleas of guilty and will increase the respect and efficiency of our criminal justice system."[109] Former Justice Tom Clark has referred to the A.B.A. Standards as "the right thing at the right time."[110] To date, fifteen states have implemented the A.B.A.Standards—either partially or in their entirety—through legislation, formal court rules, or by judicial citation by the highest state court.[111] California law is not so dissimilar from the plea bargaining proposals contained in the Standards that the minor differences could not be easily resolved.[112] The next logical step would be to include all desirable procedures relative to plea bargaining and pleas of guilty in one comprehensive scheme.

Whether accomplished via statute, court rule, or judicial citation, one of the first steps in developing such a scheme must be to identify those areas of present law where deficiencies exist. Some of these areas will be identified in the next section, and recommendations for improvement, based on the sources previously discussed, will be made.

106. Edwards, *The A.B.A. Standards for Criminal Justice and the N.A.C. Standards and Goals: A Comparative Analysis*, 12 AM. CRIM. L. REV. 363 (1974) (citations omitted).

107. *Id.* at 363-64.

108. See note 4 *supra.*

109. Erickson, *The Finality of a Plea of Guilty*, 48 NOT. DAME LAW. 835, 849 (1973).

110. Clark, *The American Bar Association Standards for Criminal Justice: Prescription for an Ailing System*, 47 NOT. DAME LAW. 429 (1972).

111. AMERICAN BAR ASSOCIATION, SECTION OF CRIMINAL JUSTICE, ANNUAL REPORT OF THE CHAIRMAN 1973-74, 36-37.

112. THE JUDICIAL COUNCIL OF CALIFORNIA, COMPARATIVE ANALYSIS OF AMERICAN BAR ASSOCIATION MINIMUM STANDARDS FOR CRIMINAL JUSTICE WITH CALIFORNIA LAW at 123-38 (1974) [hereinafter cited as A.B.A.—CALIFORNIA MINIMUM STANDARDS]. The only significant differences arise in connection with Standards §§1.2, 1.6, and 3.3.

SPECIFIC PROBLEMS AND SUGGESTED SOLUTIONS

One of the inherent problems in dealing with the law affecting plea bargaining is that it is a newly developing area of the law, and agreement does not always exist on what the problems are, let alone how they should be addressed. There are, however, certain difficulties which have traditionally drawn the attention of writers in the area, and they will be discussed in this section. In addition, there are areas where California law is merely unclear or poorly defined, and these will also be discussed. It should be noted, however, that this is not intended to be an all-inclusive list of problems to be dealt with in a comprehensive plan, but merely an attempt to indicate what the more typical and compelling problems in the plea bargaining area are.

A. Allowable Concessions

Neither the statutes nor the case law in California spell out with precision exactly what concessions may be offered by a prosecutor to an accused in order to secure a guilty plea. Rule 11 (e) (1) of the revised Federal Rules of Criminal Procedure establishes three acceptable concessions which the prosecuting attorney may make in negotiating a plea with the accused, generally based on A.B.A. Standard 3.1(b). These concessions are a motion for the dismissal of other charges, a recommendation or the nonopposition of a particular sentence, or an agreement that a particular sentence is the appropriate disposition of the case. The Model Code of Pre-Arraignment Procedure[113] and the Uniform Rules of Criminal Procedure are generally in accord with this position, although the latter includes the provisions that "the sentence *or other disposition* [may] not exceed specified terms."[114] Apparently this clause was intended to encompass cases involving programs such as California's program for diversion of certain first-time drug offenders.[115]

Although not definitively stated in statutory form, California case law generally coincides with the A.B.A. position.[116] There are, however, other commonly granted concessions including: (1) recommendations for treatment other than imprisonment, such as commitment to a drug de-toxification program; (2) dismissal of additional or potential charges; (3) promises to take no additional affirmative action beyond the prosecution of the offense, such as sentencing recommendations; or (4) agreements to avoid prosecuting under statutes which either apply a

113. MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.3(1) at 65.
114. UN. RULES CR. PROC., *supra* note 4, Rule 443(a) at 173.
115. CAL. PEN. CODE §§1000-1000.4.
116. *See generally* A.B.A.—CALIFORNIA MINIMUM STANDARDS, *supra* note 112, at 135.

particular label to the convicted party, such as a sex offender, or increase the sentence, as in the case of robbery while armed with a firearm.[117] Fundamental fairness would seem to require that the concessions a prosecutor is willing to make should be clearly laid out—if not in a statewide statutory scheme, at least in every individual prosecutor's office.[118] To do otherwise penalizes the less experienced defendant or defense attorney to an inordinate degree, and exacerbates the problems of differential sentencing and discrimination discussed below.[119]

B. Judicial Participation

An area of great controversy among legal writers involves the participation of the judge in plea negotiations.[120] Rule 11(e)(1) of the revised Federal Rules specifically precludes the court from participating in plea negotiations, which generally follows the recommendation of most writers and drafters of model statutes.[121]

California law in this area is unclear, but it appears that there is nothing to prevent a trial judge from participating in the plea bargaining process.[122] The argument encouraging judicial participation hinges on the concept that any promise the prosecuting attorney makes without the prior concurrence of the court is illusory, since only the judge has the power to impose sentence, and this only leads to compounded problems later if the plea is not accepted by the court.[123] The opposing argument is that the participation of the judge, bringing to bear (whether intentionally or not) all the majesty of his office, exerts undue pressure on the accused (or his attorney) and thus destroys the requisite voluntariness. One California court has stated this view as follows: "Experience suggests that such judicial activity risks more, in terms of unintentional coercion of defendants, than it gains in promoting understanding and voluntary pleas. . . ."[124] The more compelling argument would seem to be that, under the plea bargaining system as currently structured, judicial participation in the bargaining process should not be condoned. There is nothing in this position, however, which prevents the judge

117. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 97-98 (1966); Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 772 (1973).

118. *See* MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.3(2) at 66; N.A.C. STANDARDS, *supra* note 4, 3.3 at 52.

119. See notes 152-157 and 166-171 *infra* and text accompanying.

120. See note 49 *supra* and text accompanying.

121. A.B.A. STANDARDS, *supra* note 4, §3.3 at 11; MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.3(1) at 65; N.A.C. STANDARDS, *supra* note 4, 3.3 at 59; UN. RULES CR. PROC., *supra* note 4, Rule 441(a) at 163.

122. A.B.A.—CALIFORNIA MINIMUM STANDARDS, *supra* note 4, §3.3 at 137-38.

123. Thomas, *supra* note 49, at 304.

124. People v. Williams, 269 Cal. App. 2d 879, 884, 75 Cal. Rptr. 348, 351 (1969).

from indicating prior to the commencement of negotiations the range in which he would accept a plea agreement, or from indicating, after an agreement has been proposed, his reasons for rejecting one.[125]

C. Correctional Approach

Another area of traditional concern is the lack of a correctional or rehabilitative approach to the plea bargaining process. It is almost a matter of common knowledge that our criminal justice system turns out an extremely cynical product, virtually immune to benefiting from the correctional process.[126] It is not difficult to understand how this can happen, since under present practice the defendant has probably never admitted the crime he actually committed,[127] was convicted of a crime he did not really commit, and is quite possibly serving a sentence completely unrelated to his crime, past record, the experience of other perpetrators of similar crimes, or his psychiatric or correctional needs. One approach to solving this problem is taken in Rule 32 of the revised Federal Rules.[128] This provision, a novel innovation unparalleled by any provision in California law, allows the judge, after securing the defendant's permission, to view the presentence report prior to the entry of a plea. Courts frequently criticize high mandatory minimum sentences, and allude to the sentencing flexibility of plea bargaining as one of its key attributes.[129] It is difficult to wholeheartedly endorse this position, however, if the judge is still operating in an "informational vacuum," since the prosecutor has already made his recommendation, and the defendant (and his attorney) are only concerned with securing as low a sentence as possible. The recommendation suggested in the revised Federal Rules goes beyond the position of the A.B.A. Standards, which calls only for the acceptance of a plea based on the condition that nothing adverse to the information provided by counsel appears in the presentence

125. MOD. CODE PRE-ARR. PROC., *supra* note 3, at 111 (Commentary on Article 350).

126. *See generally* Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT, *supra* note 16, at 112; Klein, *Habitual Offender Legislation and the Bargaining Process*, 15 CRIM. L.Q. 417 (1973) (quote from anonymous interview); N.A.C. STANDARDS, *supra* note 4, at 44 (citation omitted); Comment, *Judicial Supervision over California Plea Bargaining: Regulating the Trade*, 59 CAL. L. REV. 962, 968, 985-90 (1971); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 298-99 (1972).

127. "[Pleas resulting from plea bargains] do not represent a true acknowledgement and acceptance of guilt by the defendant—universally regarded as a first step toward rehabilitation—but are more likely viewed by him as an expedient manipulation of the system." Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT, *supra* note 16, at 112.

128. Rule 32(c)(1), PROP. AMEND. TO FED. RULES CR. PROC., *supra* note 3 at 67.

129. *See, e.g.*, People v. West, 3 Cal. 3d 595, 605, 477 P.2d 409, 414, 91 Cal. Rptr. 385, 390 (1970). Note, however, that a contra argument can be made that pleading guilty to a different offense than actually committed, even though "reasonably related," defeats the intent of society in establishing certain penalties for specific offenses.

report.[130] The advisory note to the proposed Federal Rules does an excellent job of stating the argument in favor of this change:

> It enables the judge to have all of the information available to him at the time he is called upon to decide whether or not to accept the plea of guilty and thus avoids the necessity of a subsequent appearance whenever the information is such that the judge decides to reject the plea agreement.[131]

The President's Commission on Law Enforcement and the Administration of Justice takes the same position,[132] as do the Uniform Rules of Criminal Procedure[133] and the Model Code of Pre-Arraignment Procedure,[134] although they do not require the defendants permission to be obtained before the presentence report may be ordered. The commentary on the Model Code stresses that "it is essential that [defense] counsel come to see the design of a rehabilitation program to meet their client's particular stituation as an important part of their responsibility."[135] Such an innovative approach would seem adaptable to California criminal practice, and could possibly alleviate some of the public criticism of the plea bargaining practice.[136]

D. Disclosure of the Plea Bargain

Another area of ambiguity in California law is the lack of any specific reference in statutory law to plea bargaining per se as a component of the criminal justice system. There is some danger in this, in that a court might not uncover the existence of a plea bargain, and might thereby leave the defendant with little remedy if the terms of the bargain are not adhered to.[137] Non-disclosure also tends to shield any abuses in the process which led to the bargain.[138]

In light of the California Supreme Court's recognition of the propriety of plea bargaining in *West*, there seems to be little reason for not granting outright recognition to the practice in any comprehensive scheme adopted by the California legislature or courts. This was one of the main motivating factors prompting the revisions to the Federal Rules,[139] which call for disclosure of the existence of any plea agreement

---

130. A.B.A. STANDARDS, *supra* note 4, §3.3(b) at 11-12.
131. ADVISORY COMMITTEE NOTE, *supra* note 47, at 69.
132. TASK FORCE REPORT, *supra* note 16, at 12.
133. UN. RULES CR. PROC., *supra* note 4, Rule 443(b) at 174-75.
134. MOD. CODE PRE-ARR. PROC., *supra* note 4, §§350.3(4) at 66, 350.5(2)(a)-(b)(3) at 72.
135. MOD. CODE PRE-ARR. PROC., *supra* note 4, at 112 (Commentary on Article 350).
136. See notes 172-179 *infra* and text accompanying.
137. *See, e.g.*, Hilliard v. Beto, 465 F.2d 829, 831-32 (5th Cir. 1972).
138. MOD. CODE PRE-ARR. PROC., *supra* note 4, at 74 (Note on Section 350.5).
139. See note 47 *supra* and text accompanying.

in open court,[140] thereby removing any lingering uncertainty still connected with the practice. Writers on the subject are unanimous in their belief that full disclosure is an essential ingredient of a sound plea bargaining procedure.[141]

E. Advice to the Defendant

Yet another area of California law which requires clarification is the advice which the trial judge must give to the defendant at the time a plea is entered. The constitutional requirements demand a showing that the guilty plea was knowing, voluntary, and entered with a full understanding of the nature of the charge and the consequences of the plea.[142] There is no precise delineation, however, regarding what must be contained in the trial court's discussion with the defendant to give some assurance that these goals will be met. As an example, there is presently no requirement that the court issue a warning listing the specific rights waived by a particular defendant in pleading guilty.[143] In the interest of "erring on the side of caution,"[144] it would seem wise for California to adopt a policy of having trial courts issue complete warnings regarding the consequences which may accompany a guilty plea in a given case.

One of the stated purposes for revising the Federal Rules was to clarify "the advice which the court must give to insure that the defendant who pleads guilty has made an informed plea,"[145] and the new rules do spell out with some precision the dialogue which must take place between the judge and the defendant to insure that the defendant is aware of the rights he is waiving. The Model Code of Pre-Arraignment Procedure and Uniform Rules of Criminal Procedure contain additional provisions which should be considered for inclusion in a comprehensive scheme in California. For example, these model codes call for advice to the accused that evidence obtained in violation of his constitutional rights may not be used against him.[146] In addition, they call for warnings about possibilities of consecutive sentences and limitations on parole eligibility.[147] The new Federal Rules, as amended in Congress

---

140. Rule 11(e)(2), PROP. AMEND. TO FED. RULES CR. PROC., *supra* note 3, at 26.
141. MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.51(1) at 72; N.A.C. STANDARDS, *supra* note 4, 3.2 at 50; UN. RULES CR. PROC., *supra* note 4, Rule 444(b)(2) at 181. *See* A.B.A. STANDARDS, *supra* note 4, §3.3 at 11-12.
142. See notes 24-32 *supra* and text accompanying.
143. See note 22 *supra* and text accompanying.
144. See note 81 *supra* and text accompanying.
145. ADVISORY COMMITTEE NOTE, *supra* note 47, at 27. See notes 54-56 *supra* and text accompanying.
146. MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.4(1)(d) at 69; UN. RULES CR. PROC., *supra* note 4, Rule 444(b)(1)(iv) at 177.
147. MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.4(1)(e)(ii) at 69; UN. RULES CR. PROC., *supra* note 4, Rules 444(b)(1)(ii), (iii) at 177.

do a better job of advising of the right to counsel,[148] although this would be made unnecessary by a provision such as that contained in the Uniform Rules, which requires the trial judge to verify that the defendant has received "adequate legal services."[149] The requirement of a factual basis for the plea, currently required in California, is considered desirable by all writers.[150] The Model Code of Pre-Arraignment Procedure adds the provision that admission of guilt by the defendant is not required for conviction.[151] The advantages of a precise listing of the discussions a judge is to have with an accused are to ensure uniform treatment of all criminal defendants, and to minimize the possibility of collateral attack by insuring that the required elements of "understanding," and "voluntariness" are dealt with in a thorough and open manner.

F. Differential Sentencing

Differential sentencing is the imposition of a more severe sentence for conviction as the result of a trial than from pleading guilty.[152] The obvious result of this practice is to discourage the exercise of the constitutional right to a trial by jury. An affirmative policy of differential sentencing is a denial of due process;[153] however, the line between an aggressive plea bargaining policy and at least the intimation of differential sentencing is a fine one. The classic answer to the problem is that while it is unacceptable to impose a heavier sentence for asserting the right to trial, it is permissible to give lighter sentences in the event of a guilty plea.[154] The A.B.A. Standards take this approach, listing several criteria which may be considered in determining sentence.[155] Both the N.A.C. Standards and the Model Code of Pre-Arraignment procedure specifically prohibit the practice of differential sentencing.[156]

An innovative solution which has been proposed calls for the judge, after he has had full access to the facts, to offer a defendant a choice of a

148. Rule 11(c)(2), (3), H.R. 6799, 94th Cong., 1st Sess. (1975) at 4-5.
149. UN. RULES CR. PROC., *supra* note 4, Rule 444(b)(1) at 177.
150. A.B.A. STANDARDS, *supra* note 4, §1.6 at 8; MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.4(3) at 70; N.A.C. STANDARDS, *supra* note 4, 3.7 at 60; UN. RULES CR. PROC., *supra* note 4, Rule 444(b)(3) at 182.
151. MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.4(4) at 70.
152. Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT, *supra* note 16, at 111.
153. Note, *The Legitimation of Plea Bargaining: Remedies for Broken Promises*, 11 AM. CRIM. L. REV. 771, 777 (1973).
154. United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).
155. A.B.A. STANDARDS, *supra* note 4, §1.8 at 8; *Accord*, Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499 (1972); *Contra*, N.A.C. STANDARDS, *supra* note 4, 3.8 at 64.
156. MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.3(a), (b) at 66; N.A.C. STANDARDS, *supra* note 4, 3.8 at 64.

specified sentence if he is found guilty at trial, or a sentence for a guilty plea, reduced by *standard factors* which apply in all cases of similar offenses.[157] Notwithstanding the admitted difficulty of developing these "factors," this is an approach which has some merit, and seems worthy of experimentation.

G. *Overcharging*

A practice as common as differential sentencing, and as infrequently the subject of collateral attack, is overcharging.[158] Overcharging can either be "vertical"—charging a more serious degree of the crime than supported by the evidence, or "horizontal"—charging additional crimes. It is a particularly despicable practice, because the main attention of a defendant in determining whether to waive his constitutional rights and enter a guilty plea should be focused on the maximum sentence likely in the jurisdiction, not the theoretical maximum.[159] Overcharging and other coercive practices[160] such as threatening a more severe sentence for pleading not guilty or threatening to charge a crime not ordinarily charged exist because much of the negotiation process leading to a guilty plea has traditionally taken place out of the public eye, and without any direct supervision by the court.[161] As Mr. Justice Douglas has said, "Plea bargaining . . . leaves with the prosecutor the power to set the price for the exercise of those [constitutional] rights."[162]

At a minimum, such tactics should be expressly forbidden, a position taken by both the N.A.C. Standards[163] and the Model Code of Pre-Arraignment Procedure.[164] It would seem that as an enforcement device, automatic reversal of any conviction obtained by the use of such practices should be imposed—under the same rationale that the exclusionary rule is utilized to supress evidence obtained by improper police conduct.[165]

---

157. Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 301 (1972).
158. MOD. CODE PRE-ARR. PROC., *supra* note 4, at 106 (Commentary on Article 350).
159. MOD. CODE PRE-ARR. PROC., *supra* note 4, at 106 (Commentary on Article 350).
160. *See* Thomas, *supra* note 49, at 310 for the suggestion that defense counsel can also exert a coercive influence.
161. "The greatest danger of the current practice lies in its secretiveness." People v. West, 3 Cal. 3d 595, 609, 477 P.2d 409, 417, 91 Cal. Rptr. 385, 393 (1970).
162. Corpus Et Al. v. Estelle, Corrections Director, Et Al., 469 F.2d 646, 953, 956, 1075 (1972), *cert. denied*, 414 U.S. 932, 933 (1973) (Douglas, and Marshall, JJ., dissenting).
163. N.A.C. STANDARDS, *supra* note 4, 3.6 at 57.
164. MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.3(3)(c) at 66.
165. Another solution to this problem which has been suggested involves a complete revision of the hearing-arraignment procedures, but a discussion of the merits of this proposal exceeds the scope of this comment. *See generally* Note, *Plea Bargaining: The Case for Reform*, 6 U. RICH. L. REV. 325 (1972); Note, *Restructuring the Plea Bargain*,

H. Discrimination Against Certain Types of Defendants

Under the plea bargaining system presently in use, certain types of defendants are the objects of a subtle yet nonetheless real form of discrimination in that they receive higher sentences than others charged with the same offense.[166] The neophyte offender, unaware of the subtleties of the system, is at a disadvantage compared to the ex-convict.[167] The defendant represented by inexperienced or inadequate counsel also suffers under the present system,[168] as does the individual charged with a highly visible or publicly notorious offense.[169]

To some extent, problems in this area can be solved by establishing uniform published procedures in every prosecutor's office, a recommendation made by both the National Advisory Commission and the Model Code of Pre-Arraignment Procedure.[170] The recommendation of the National Advisory Commission includes a prohibition against a prosecutor basing a decision of whether or not to seek a negotiated plea on how strong his case is. As the president's Commission on Law Enforcement has indicated, the "integrity of the system" is jeopardized when the prosecution is not called upon to submit its evidence to the test of a court trial.[171] Such provisions, while leaving prosecutors ample leeway to uphold the best interests of the people, go a long way toward achieving equal treatment for all criminal defendants.

I. Service to the Needs of Society

Perhaps the most serious charge which can be leveled at the present plea bargaining system is that it generates cynicism among the general public as well as among those who are subject to it.[172] Professor Donald Newman, perhaps the most distinguished author on the subject of plea bargaining,[173] lists four concerns which affect the formation of a positive public attitude. These center on the arguments that:

[1] The state becoming involved in bargaining with criminals over

---

82 YALE L.J. 286 (1972); Comment, *Profile of a Guilty Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas,* 17 WAYNE L. REV. 1195 (1971).

166. *See* Newman and NeMoyer *supra* note 50, at 389-90.

167. TASK FORCE REPORT, *supra* note 16, at 11. That a former offender should receive a more lenient sentence than the first offender is, of course, directly contrary to all concepts of correctional theory.

168. Comment, *Judicial Supervision over California Plea Bargaining: Regulating the Trade,* 59 CAL. L. REV. 962, 994 (1971).

169. *Id.* at 967.

170. MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.3(2) at 66; N.A.C. STANDARDS, *supra* note 4, 3.3 at 52.

171. TASK FORCE REPORT, *supra* note 16, at 10.

172. Newman & NeMoyer, *supra* note 50, at 396.

173. *See generally* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966).

> charges and sentences is inherently repugnant in a society dedicated to the rule of law . . . .
> [2] Plea bargaining makes a mockery of our system of justice . . . .
> [3] Because of the intrinsic "horse trading" or "settling out of court" nature of plea negotiations, an aura of disrespect for justice and for criminal procedure is produced not only among those involved but also among the public in general . . . .
> [4] There is public dissatisfaction with the relative lack of detail emerging from guilty plea convictions, particularly in cases where there is a high degree of public interest.[174]

The incident involving Senator Edward Kennedy is cited in support of this latter point, and certainly the case involving former Vice-President Spiro Agnew is in a similar vein.[175] Other authorities have alluded to this same problem,[176] and it seems imperative that public confidence in the criminal justice system be restored. Whenever the "crime problem" is discussed in the media, plea bargaining is a prime topic for discussion,[177] and it seems evident that a society that does not have complete confidence that its criminal processes are serving its best interests is indeed on a shaky foundation.

Like the other problems discussed in this section, the most important step toward alleviating the problem of public distrust would be to completely remove any vestige of secrecy surrounding the plea bargaining process and to "let the fresh light of open analysis expose both the prior discussions and agreements of the parties, as well as the court's reasons for its resolution of the matter."[178] A step toward this goal could be made by adoption of a provision in the Model Code of Pre-Arraignment Procedure which states that a plea shall not be adopted unless it is

> in the public interest in that it takes into account not only the benefit to the public in securing a prompt disposition of the case, but also the importance of a disposition that furnishes the public adequate protection and does not depreciate the seriousness of the offense or promote disrespect for the law.[179]

---

174. Newman & NeMoyer, *supra* note 50, at 396-99.
175. "[T]he Agnew situation . . . left a bad taste in the mouth of practically everyone but Mr. Agnew . . . ." COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES, COMMENTARY: PROPOSED AMENDMENTS FEDERAL RULES OF CRIMINAL PROCEDURE 93rd Cong., 2nd Sess. at 3 (1974) (letter from Adrian A. Spears, U.S. District Judge, to Representative Henry B. Gonzales).
176. TASK FORCE REPORT, *supra* note 16, at 9; Enker, *Perspectives on Plea Bargaining*, in TASK FORCE REPORT, *supra* note 16, at 111; N.A.C. STANDARDS, *supra* note 4, at 44.
177. *See, e.g.*, TIME Vol. 105, No. 27 at 20 (June 30, 1975).
178. People v. West, 3 Cal. 3d 595, 609, 477 P.2d 409, 417, 91 Cal. Rptr. 385, 393 (1970). See also Newman & NeMoyer, *supra* note 50, at 404.
179. MOD. CODE PRE-ARR. PROC., *supra* note 4, §350.5(2)(c) at 73. This provision is included in a suggested code section entitled *"Additional Action To Be Taken By The Court Where There Is Plea Agreement."*

CONCLUSION

In the past, many problems resulted from the clandestine atmosphere in which plea bargaining was conducted, most notably the failure to develop an adequate procedure for dealing with the guilty pleas which resulted from plea bargains. The plea bargaining process has come a long way, however, in gaining the recognition and respect of both practitioners and the courts—if not the general public. The next logical step in further refining this process is to develop a comprehensive scheme of plea bargaining law for California, drawing upon the best of our existing law and the suggestions of those groups who have developed models in the area. However, care should be taken to insure that the goal of early disposition of cases reflects more than "the defendant's natural desire for lenient treatment and the prosecutor's concern with managing his caseload."[180]

Lawrence A. Bennett

180. MOD. CODE PRE-ARR. PROC., *supra* note 4, at 112 (Commentary on Article 350).