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ISSUES OF PROPRIETY IN NEGOTIATED JUSTICE

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Due in part to both the "Warren Court" and the public's conception of "law and order," a heightened interest in the field of criminal justice has recently emerged. One of the chief concerns arising from this increased interest is the propriety of plea bargaining — a practice that is probably the dominant form of non-trial adjudication in our system of criminal justice today. Professors Newman and NeMoyer discuss this practice of negotiated justice from many different perspectives. The authors accurately pinpoint the many present and potential abuses of the practice which have been justly condemned by critical observers of the criminal justice system. The authors do, however, feel that a compromise can be reached that not only will retain this admittedly efficient practice but also will solve the serious propriety concerns that now cloud the practice of negotiated justice. If the state removes the practice from the shadows within which it now operates and bases its charge and sentence concessions on the proper motivations, the authors feel that the practice of plea bargaining can continue and survive.

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INTRODUCTION

NEGOTIATED criminal convictions and the processes by which they are accomplished have recently received increased attention by courts, researchers, bar associations, and other observers of and commentators on the criminal justice system.[1] What has emerged from the research and from the kinds of cases which have reached appellate

[1] Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967); AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *Pleas of Guilty* (approved draft, 1968) [hereinafter cited as ABA PROJECT]; L. HALL, Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE, 924-1000 (3d ed. 1969); D. NEWMAN, CONVICTION-THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966) [hereinafter cited as D. NEWMAN]; PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, *Disposition Without Trial* (1967) [hereinafter cited as TASK FORCE REPORT].

court levels is a picture of American courtroom justice which is substantially different from that of the adversary process epitomized by the jury trial. Although the guilty plea process in general, and the negotiated plea in particular, are highly adversary processes in many cases, they operate in a manner that is *sub rosa,* largely invisible, and without the ground rules that place constraints on the formal battle of contested cases in the courtroom. The great issues and conflicts in modern American criminal law, ranging from the *Miranda* warnings to disputes over different tests of insanity, are rendered largely irrelevant by guilty pleas. Ironically, the significance of the leading criminal decisions of the Warren court may be primarily the extent to which their possible application can be threatened by a defendant attempting to reach a compromise with the State.

Plea negotiation has long been familiar to initiates of the criminal court: an elite, if you will, made up of offenders (particularly recidivists who have gone the route before), prosecuting attorneys, experienced defense counsel, and trial court judges. And the army of court attendants — clerks, bailiffs, jailers, police, and probation staff — also have been cognizant of plea negotiation in practice if not in theory. Recently, however, the world of the negotiated plea has come to the awareness of outsiders, including legal scholars, appellate court judges, sociologists, and various bar commissions and committees. This is not to say that such practices were unknown to these persons, but rather that these practices were not attended to directly and frankly or considered to be of any particular major consequence.

Yet the guilty plea, particularly where it is overtly negotiated, describes a form of criminal justice that may well be the dominant form of adjudication in virtually all jurisdictions.[2] Negotiated justice — suspects and defendants "dealing" with the state — has wide perimeters; including such practices as police exercising leniency with informants, parole board "negotiating" releases with prisoners, and probation and parole officers bargaining with their charges where revocation is possible.[3] Yet, the focus of negotiated justice and its major impact on our ideological foundations occurs at stages where

[2] ABA PROJECT, *supra* note 1, at 1, states that "in some localities as many as 95 percent of the criminal cases are disposed of in this way [pleas of guilty]"; TASK FORCE REPORT, *supra* note 1, at 9, indicates a guilty plea percentage of 87 percent in trial courts of general jurisdiction in states in which such information was available.

[3] For a general treatment of negotiation at points other than the plea of guilty see Cressey, *Negotiated Justice,* 5 CRIMINOLOGICA 5 (1968), and Scheff, *Negotiated Reality: Notes on Power in the Assessment of Responsibility,* 16 SOCIAL PROBLEMS 3 (1968). For a descriptive analysis of factors relevant to the granting or denial of parole see Dawson, *The Decision to Grant or Deny Parole: A Study of Parole Criteria in Law and Practice,* 1966 U. WASH. L.Q. 243-85; and for an analysis of revocation discretion, see Hunt, The Revocation Decision: A Study of Probation and Parole Agents Discretion, 1964 (unpublished MSW thesis, University of Wisconsin), *partly reproduced in* REMINGTON, NEWMAN, KIMBALL, MELLI & GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION 912-19 (1969).

the prosecutor and the court are involved and where the citizen becomes the convicted offender. The protections of the criminal trial are, after all, one of our cultural hallmarks, and the propriety of bargaining for pleas of guilty where the right to trial is given up raises important questions, questions which go to the very underpinnings of criminal justice in our society.

I. THE PURPOSES OF NEGOTIATED PLEAS

Since there has been much recently written about this topic, it is perhaps unnecessary to go into great detail about the relative merits of guilty plea contracts for both the state and the accused. It is sufficient to emphasize that from the point of view of the state, the guilty plea system is by far the most efficient way of achieving and maintaining a high conviction rate. It is quick, cheap, and relatively effortless. Furthermore, it is effective in the sense that it assures conviction, a result that is always uncertain at trial no matter how carefully the state's case is prepared. Whether it is effective in larger perspective, *i.e.*, the successful rehabilitation of offenders who are so convicted, is another matter, the answer to which is not quite so clear.

For example, it has been claimed that a long range effect of bargain justice is cynicism, not reform, and that it leads to sentence disparity, not uniform treatment.[4] But from the point of view of the state, the guilty plea, whether it is negotiated or not, avoids all the sticky questions of law that have so recently confronted the Supreme Court. In most jurisdictions the plea is a waiver of all prior defects: There is no test of whether a search was legal or illegal; there is no test of whether the *Miranda* warning was properly given; and there is no test of whether the evidence gathered by the state even proves a prima facie case of guilt against the defendant, unless there is a pre-trial (pre-plea here) hearing. In most jurisdictions permitting the guilty plea, the police, the prosecutor, and, at least until the present time, the trial judge, are generally off the hook.[5]

It is important to note, however, that the advantages of the guilty plea to the state are not simply matters of efficiency and avoidance

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[4] *See* Dash, *Cracks in the Foundation of Criminal Justice,* 46 ILL. L. REV. 385 (1951). *See also* Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice,* 23 LAW & CONTEMP. PROB. 495 (1958); Remington & Newman, *The Highland Park Institute on Sentence Disparity,* 26 FED. PROB. 3 (March 1962); Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence,* 66 YALE L.J. 204, 222 (1956). *See generally* Seminar and Institute on Disparity of Sentences, 30 F.R.D. 401 (1962); D. NEWMAN, *supra* note 1, at 42-44, 99-104, 210-16, 230.

[5] The chance of successfully challenging a guilty plea by appeal has traditionally been extremely remote, but today the number of potential successes of such appeals may be on the increase. *See generally* Kaufman v. United States, 394 U.S. 217 (1969); Case v. Nebraska, 381 U.S. 336 (1965); Fay v. Noia, 372 U.S. 391 (1963); Townsend v. Sain, 372 U.S. 293 (1963); L. HALL, *supra* note 1, at 12; C. WRIGHT, FEDERAL PRACTICE & PROCEDURE (CRIMINAL) §§ 589-91 (1969).

of any challenge to enforcement methods and the quantum of evidence. There is potentially in every plea an element of equity that full prosecution, maximum charging, and maximum sentencing after a trial may preclude. By downgrading charges and/or by granting probation, the conscientious prosecutor and judge may act to individualize justice by making sensible distinctions between defendants who, although technically guilty of the same criminal conduct, do not deserve either the same record or the same mandatory sentence. Furthermore, plea negotiation and sentencing leniency act to support other parts of the criminal justice system. Leniency in charging or sentencing may be an effective reward for police informers or for cooperative state's witnesses without whom more serious cases could not be developed. Charge reduction and plea negotiation *may* select for the probation staff those offenders most likely to respond to treatment in the community, whereas full enforcement and maximum conviction might put inappropriate offenders in correctional institutions to their long-range detriment and at great loss to their families and the community at large. In short, the avoidance of rigidity and slot-machine justice — in addition to matters of efficiency and the avoidance of challenge to enforcement methods and quantum of evidence — constitute at least one side of the state's case in plea negotiation.

The advantages of plea negotiation from the point of view of the defendant are, of course, reasonably obvious. He receives a sentence less severe than that allocated by the legislature for his actual criminal conduct. Or, and this is a factor of independent importance, he may receive a label that is neither as harsh nor as damaging as that which would normally attach to his conduct. Having a record of conviction for a misdemeanor is almost always better than having a felony record; likewise, conviction for assault has a somewhat less negative connotation that conviction for forcible rape. Furthermore, the defendant and his family sometimes benefit or at least suffer minimum reputational harm from the relative anonymity of the guilty plea process. A defendant who goes through a trial, even if he is eventually acquitted, often finds details of his private life and allegations of his criminal proclivities spread daily throughout his community. The guilty plea, however, is quick and generally not as newsworthy as the full-scale trial where all the evidence is laid out, the case of Senator Edward Kennedy notwithstanding.

Certain defendants, particularly those who have long prior records or who otherwise are not able or eligible to be placed on bail, have still another advantage in "copping-out." The long but customary delay in scheduling trial in most jurisdictions means that these persons will

spend a relatively long period of time in detention pending trial,[6] and most offenders with any prior experience prefer to do time in a prison (a facility for convicted persons) rather than in a lock-up or jail (a facility for persons awaiting trial). Hence, where the possibility of an eventual prison sentence is fairly likely anyway, a quick arraignment and a guilty plea will move the defendant rather rapidly from the jail into the prison environment which, on the average, is more comfortable, cleaner, safer, and less given to the long weeks of idleness, characteristic of pre-trial lock-ups.

A point often overlooked is the possible benefit of wide-spread plea bargaining to those defendants who now elect to stand trial. Should plea negotiation be somehow curtailed, with a corresponding increase in the number of trials, it could well have the effect of judges and juries taking a more cavalier attitude towards the rights of defendants. A flood of trials, particularly with a greater likelihood of guilty persons demanding them since they gain nothing by a guilty plea, could well erode the presumption of innocence which is stronger if the event, namely a demand for trial, is comparatively rare.

II. TYPES OF PLEA NEGOTIATION

There are at least two major forms of plea negotiations whose propriety is of current concern. One type, the "implicit bargain," is present in practically all guilty pleas and has to do with differential sentencing leniency shown to the pleader over the defendant (perhaps with the same prior record and accused of the same crime) who has demanded trial. The pervasiveness of this practice is clear[7] and amounts to encouraging a steady flow of guilty pleas, reducing the congestion of trial calendars in metropolitan areas, and in each case, rural or urban, avoiding the effort and uncertainty of trial.

Trial judges are the chief proponents and often the sole initiates of such practices.[8] In the ordinary case the defendant has not overtly made any bargain with the prosecutor or the court but has entered his plea in hope of a sentencing break. In effect, he throws himself on the

[6] For the impact on defendants and the subsequent outcome of their cases, see Ares & Sturz, *Bail and the Indigent Accused*, 8 CRIM. & DEL. 12 (1962); LaFave, *Alternatives to the Present Bail System*, 1965 U. ILL. L. FORUM 8; Paulsen, *Pre-Trial Release in the United States*, 66 COLUM. L. REV. 109 (1966); Rankin, *The Effect of Pre-trial Detention*, 39 N.Y.U.L. REV. 641 (1964); Note, *A Study of the Administration of Bail in New York City*, 106 U. PA. L. REV. 693 (1958).

[7] CROSS, PARADOXES IN PRISON SENTENCES, 22-24 (1965); LUMMUS, THE TRIAL JUDGE (1937); D. NEWMAN, *supra* note 1, ch.4; Ohlin & Remington, *supra* note 4, at 500-07; Pilot Institute on Sentencing, 26 F.R.D. 231, 285-89 (1959); *see* Comment, *supra* note 4.

[8] While trial judges in the past have often been the sole initiates of "implicit" plea negotiation, recent legislative developments have added a new and not yet fully understood dimension to this process. Laws have been passed which provide for differing sentence alternatives, depending on whether the conviction was obtained by a full scale trial or a plea of guilty. This "implicit" plea negotiation on the part of the legislature raises not only propriety questions but also constitutional issues of the highest order. *See* § III (B) *infra*.

mercy of the court; and the court, fully attuned to its own workload and faced with the inevitable uncertainty of any trial, responds by showing mercy of a greater measurable extent to those who plead than to those who are convicted following a full-scale trial.

The other major type of bargaining and the one most commonly alluded to when the negotiated plea is discussed involves the overt trading of the guilty plea for prior concessions of charge reduction, dismissals of other charges, or sentence recommendations for leniency from the state.

Both types of negotiation, implicit and overt, have significant implications for the daily administration of criminal justice. Moreover, each raises important questions of propriety.

III. Concern For the Propriety of Plea Negotiation

The guilty plea process, including both the implicit bargain and the practice of negotiated convictions, can be evaluated from a number of different perspectives. Few deny the efficiency of guilty pleas; some are bothered about their possible inaccuracy. That is, there is some concern that the administrative merits of pleading guilty are so attractive to some defendants, particularly to those who have been convicted previously, that innocent people will admit to crimes they did not in fact commit. This is one level of concern, and various states (as well as the U.S. Supreme Court) have revised rules in regard to pleading procedure.[9] Some have attempted to build certain safeguards into the arraignment proceeding, such as requiring the judge, prior to his acceptance of the plea, to investigate to the point where he becomes satisfied in his own mind that the defendant is in fact guilty of the crime charged or, assuming charge reduction, guilty of no crime *less* serious than the one to which he is pleading.[10]

Another basic concern with pleas and plea negotiation, however, does not relate specifically to whether they accurately separate the guilty from the innocent but to whether attendant practices of differential sentencing and overt bargaining for charge reduction are proper forms of justice per se. Even if it were demonstrated that all defendants who pleaded guilty were in fact guilty of criminal conduct, an independent question of the propriety of bargaining to elicit pleas remains. The issue becomes sharply drawn between those who see no distinction between inducement and coercion in negating the voluntary consent of the defendant to plead guilty and those who do see a difference.

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[9] For example, Fed. R. Crim. P. 11, as amended in 1966 requires the judge to address the defendant personally to determine if the plea is being made voluntarily and the defendant understands the consequences of his plea. It also requires the judge to satisfy himself that there is a factual basis for the plea of guilty. *See* 15 Ala. Code Tit. § 264 (1958); Va. Code Annot. §§ 19.1-192, 19.1-193 (1960).

[10] *See also* ABA Project, *supra* note 1, § 1.6.

A. *The Conflict and Its Advocates*

The basis of the conflict extends throughout the entire system of criminal justice. There are many devices and techniques for obtaining confessions which are considered improper *per se*, even if independent evidence proves the person guilty of the criminal conduct. For example, coercion or threat of coercion — the third degree — is repugnant in our ideology not only because it may lead to untrustworthy confessions, but because such brutality is intrinsically improper in a democratic society. There are, in short, enforcement procedures and techniques which, as Justice Frankfurter put it, "shock the conscience;"[11] and some, at least, are excluded on due process as well as other constitutional grounds from our law enforcement techniques. There is, however, no specific list of totally improper, as distinguished from wholly proper, enforcement methods or devices. There is a good deal of controversy and conflict about many techniques. For example, in the encouragement of crime by police (the behavior precursive to the inducement of entrapment), the majority position of most appellate courts permits such encouragement unless the police act to induce crime in an otherwise "innocent" defendant.[12] The minority position[13] is that police encouragement of crime, even in those who are not "innocent," is in itself repugnant. Questions of propriety extend to post conviction and post sentencing treatment of offenders as well and are not limited solely to eighth amendment matters of cruel or unusual punishment. There appears to be increasing awareness of prisoners' rights, including requirements for at least some degree of procedural regularity and due process in those decisions made about prisoners while under sentence.[14]

The same propriety issue is now clearly drawn in respect to inducement of pleas of guilty, either by means of traditional leniency given for the plea itself or as a result of a deal after overt bargaining. The propriety question about plea negotiation, as at many other points in the process, is whether an *inducement*-based system is any more proper than one which rests on *coercion,* which is clearly contrary to our system of government. Is a promise by a prosecutor to "recommend" probation really any different from a threat to "throw the book" at a defendant

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[11] Rochin v. California, 342 U.S. 165, 172 (1952).

[12] The majority position is stated in Sorrells v. United States, 287 U.S. 435 (1932) and also incorporated in the ALI MODEL PENAL CODE § 2.13 (proposed official draft, 1962).

[13] The minority position was stated by Justice Frankfurter in his concurring opinion in Sherman v. United States, 356 U.S. 369 (1958).

[14] Johnson v. Avery, 393 U.S. 483 (1969); United States v. Muniz, 374 U.S. 150 (1963); Cleggett v. Pate, 229 F. Supp. 818 (N.D. Ill. 1964). *See* Barkin, *The Emergence of Correctional Law and the Awareness of the Rights of the Convicted,* 45 NEB. L. REV. 669 (1966); Kimball & Newman, *Judicial Intervention in Correctional Decisions: Threat and Response,* 14 CRIM. & DEL. 1 (1968); PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, CORRECTIONS, *The Legal Status of Convicted Persons,* 82 (1967); Note, *Constitutional Rights of Prisoners: The Developing Law,* 110 U. PA. L. REV. 985 (1962).

if he pleads not guilty? Is the dropping of a charge in an indictment to a lesser count, particularly to an "illogical" lesser offense,[15] in exchange for a guilty plea a proper practice when the prosecutor, court, and defendant know that the defendant committed a more serious crime and that the evidence in fact supports conviction on the higher offense?

While as yet there are only a few identifiable members and spokesmen among those who propose and those who oppose plea bargaining, perhaps this is because it is a new conflict, relatively speaking, litigated only rarely on the appellate court level, not yet spoken to directly by the United States Supreme Court, and only recently the focus of scholarly attention. The array of opponents versus proponents, the extensiveness of case law on both sides of the issue, and well articulated arguments for or against such practices are by no means as common nor easily available as similar debates about more familiar criminal justice concerns, such as wiretapping, the consequences of the exclusionary rule, or the effects of the *Miranda* warnings. Nevertheless, battle lines about the propriety of plea negotiation are being drawn, and it might reasonably be expected to become a more common basis of dispute as more cases reach higher courts and more data is accumulated. With the vast majority of criminal cases being terminated today by guilty pleas,[16] it is an issue, the importance of which, cannot be denied.

Debate over the propriety of plea negotiation rests upon multiple considerations, but the major conflict is between those who advocate recognition (and possible control) of plea negotiation on the grounds of expediency and those who see it as a distortion of our criminal justice ideology. In the latter viewpoint, plea negotiation is intrinsically improper and, furthermore, is dangerous and corrupting in its eventual consequences. The argument that plea bargaining is efficient, even "necessary," carries no weight against the fundamental impropriety of the state "dealing" with criminals by inducing pleas.

Those who take the opposite tack, namely that such dealing is not *necessarily* improper, rest their case in good part on the administrative realities of current adjudication practices. In fact, they argue that the "sociology" of our criminal justice world makes negotiation — expressed or implicit — normative. There is good evidence that negotiation is widespread and there are many who claim that without it the criminal justice system would simply bog down (the assumption being that many more trials would result — a researchable assumption in itself).[17] Assuming this bog down and accepting negotiated justice as not simply

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[15] For a discussion of "illogical" charges, see D. NEWMAN, *supra* note 1 at 99-104.

[16] *See* note 2 *supra.*

[17] LUMMUS, THE TRIAL JUDGE 46-47 (1937); Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense,* 7 PRAC. LAW. 25, 31 (May 1961). *See also* United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960).

a minor variation of American justice but a major characteristic of it, the argument goes that independent considerations of propriety are not only irrelevant but are really ridiculous. The thing to do is get with it, to recognize plea bargaining, to legitimatize the norm, to make visible what is now an invisible process, and, in short, to bring into the open, with appropriate sanctions and controls, what are presently common and indeed inevitable practices no matter how much they deviate from the hypothetical postures of our criminal justice ideals.

From this pragmatic perspective, it can be argued that the only thing bad about plea bargaining is that it is *sub rose* and uncontrolled. It is not really corruptive like bribery, nor should it act to convict the innocent or even to harm the guilty. In fact, the leniency of plea bargaining benefits both the state and the accused, and no one is threatened or hurt. Therefore, as with many conflicts between ideal and real, one can resolve the dilemma by simply recognizing the way things are and attempting to exert *proper* control over it.

Further, it can be argued that there is really nothing wrong in such an approach. Who is to say that full enforcement, maximum charging, and the full dress trial system are any better, fairer, more just, or more accurate than the system of plea negotiation as it operates in most district attorneys' offices and courtroom hallways? Indeed, perhaps it can be demonstrated that the negotiation system is in many ways more equitable and more just than its maximum implementation counterpart. Legislatures which define crimes and affix penalties to them are necessarily distant from individual defendants; and, by the nature of their tasks, they find it necessary to generalize, so that underlying the sentences in written law is the implicit assumption that all burglars are pretty much alike. Any distinctions between cases can be accommodated by whatever sentencing discretion is given the trial judge. Legislatures deal with offense and offender categories and not individual violators. They forbid forcible rape and assign a penalty to an anonymous collection of persons who may in fact be convictable of that crime. Prosecuting attorneys and judges, however, deal not in abstractions but with individual people and with single cases, all with a myriad of aggravating and mitigating circumstances. The flexibility created by charge reduction and sentencing leniency allows, or can allow, the system to operate more equitably.

The supporters of plea agreement practices generally argue control as strongly as recognition. Negotiation must be made visible, be circumscribed, and be made to follow certain practices and procedures as well as to serve the efficiency needs of the court system. There are, of course, inherent dangers in the exercise of negotiation discretion just as there are inherent dangers in any type of administrative decisionmaking. The line between the use of charge reduction to individualize justice

and the use of charge reduction to perpetuate racial or economic bias is a fine one, and one that is not tested or testable as long as the practice remains relatively invisible to the general public, higher courts, and the legislature itself. Formal recognition of the propriety of plea negotiation and close adherence to guidelines for its practice will, it is assumed, provide necessary checks on unbridled, and possibly bad, adjudicatory discretion. Supporters of recognizing and tolerating (indeed encouraging) plea agreements inevitably see distinctions between proper and improper plea negotiation practices.

It might be worth noting at this point that the dichotomous categories for opposition or support of plea negotiation are not as readily amenable to the standard labels which commonly become attached to certain other criminal justice issues. In short, it is not necessarily a battle between "liberals" and "conservatives", nor is it necessarily a dispute between pragmatists and purists. There are strange bedfellows on each side of the debate over the propriety of negotiated justice. This is not to say that the positions cannot be categorized: One is clearly pragmatically oriented and the other more idealistic. But even here the distinction is not perfectly clear cut. For example, one who argues that plea bargaining is normative, functional, efficient, and perhaps impossible to eliminate could easily be labeled pragmatic. At the same time, he may intersperse within his position the argument that within our system of justice this is the only way that equity and fairness can be built into what would otherwise be a sort of strict construction, slot-machine administration of justice. To this extent, he is idealistic. He sees plea bargaining as just, even though it deviates from some commonly expressed sentiments about conviction based on fully tested evidence which has resulted from maximum enforcement efforts, full charging, and strict adherence to the legislative intent that proscribes certain conduct and affixes certain sentences.

On the other hand, the so-called purist says, in effect, that the only proper form of justice is compliance with the legislative authority that defines substantive criminal conduct and appropriate limits of sentence. Such compliance involves a moral obligation placed on the court to be simply a fact-finder on charges accurately brought by the prosecutor — that is, charges consistent with the actual criminal conduct of the violator and supported by sufficient and appropriately obtained evidence. Although this form of strict construction appears based on an idealized image of the relationship of legislature and court, the proponent may have some pragmatic motivations. He may see the ultimate consequences of plea negotiation as developing cynicism and disrespect for law not only among those offenders who are processed by bargain justice but also among the general public. Furthermore, while disdaining plea negotiation as intrinsically corruptive, he may at the same time point

out that one of the negative consequences of differential bargaining opportunities is sentence disparity which, in turn, has serious implications for the rehabilitative efforts of correctional facilities.[18] Starting from a posture expressed in idealistic terms, *i.e.,* plea negotiation is intrinsically bad, such arguments may rapidly incorporate the negative pragmatic effects of bargaining on the long-range consequences of our system of criminal justice, both in terms of those processed through it and the image it presents to the general public.

The issue of propriety of negotiation practices cannot be resolved simply by claiming a basis of kindness and the individualization of justice any more than it can be resolved on the basis of efficiency. In and of itself, the issue remains tenacious, plaguing and somewhat unsettling in a broad view of our system of criminal justice. No matter how efficient and no matter how benevolently intended, there seems somehow to be something wrong with labeling (and sentencing) a person as a burglar or petty thief when that person is, in fact, guilty of armed robbery. Inaccurate labeling and lenient sentencing are the issues, and the hangups, that are currently confronting courts, scholars, and other observers of our system of justice.

The American Bar Association, through its Committee on Minimum Standards for Criminal Justice, has attempted to resolve the dilemma of plea bargaining. In its model draft of standards relating to *Pleas of Guilty* the committee recognized the propriety of the plea agreements:

> In cases in which it appears that the interest of the public in the effective administration of criminal justice (as stated in Section 1.8) would thereby be served, the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. He should engage in plea discussions or reach a plea agreement with the defendant only through defense counsel, except when the defendant is not eligible for or does not desire appointment of counsel and has not retained counsel.[19]

And the committee attempted to control such bargaining by: (1) providing that "similarly situated defendants" be given equal plea bargaining opportunities;[20] (2) forbidding the trial judge from participating in initial plea discussions;[21] (3) providing bargaining only with and through defense counsel;[22] and (4) requiring the trial judge to make an explanation in the formal record of the arraignment if he departs

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[18] It is one thing for correction administrators to cope with individuals sentenced by different judges to different lengths of time for committing the same crimes; but it becomes an even more complicated and difficult thing to deal with persons under sentence when some, actually guilty of armed robbery, are serving a term for burglary whereas others, guilty of armed robbery, are serving longer terms for convictions as charged. *See generally* D. NEWMAN, *supra* note 1 at 43, 215, 230.

[19] ABA PROJECT, *supra* note 1, § 3.1(a).

[20] *Id.* § 3.1(c).

[21] *Id.* § 3.3(a).

[22] *Id.* § 3.1(a).

from previously agreed upon concessions between prosecution and defense.[23]

While the ABA Committee goes a long way toward solving the propriety issue by at least recognizing and attempting to control the practice, the issue is by no means completely settled. Because of the complexity of the process and the concerns that surround it, an examination of the specific types of plea bargaining and how they relate to the propriety issue is in order.

B. *The Propriety of "Implicit" Plea Negotiation*

An issue which has come to the forefront of judicial debate is whether or not it is proper for a trial court judge to impose a more lenient sentence on a defendant who pleads guilty than on a counterpart who is convicted after a full trial. The argument for this practice (and there is ample evidence to show that it is common[24]) is usually stated in the negative — that is, the confessing and pleading defendant is given leniency — rather than the reverse — that the defendant who demanded trial was treated more harshly. There is a sound basis for stating the issue in this manner. Judges who have threatened defendants with long prison sentences unless they pleaded guilty have had the convictions reversed and, in the process, have been chastized by appellate courts for having "coerced" the guilty plea by threats of severity.[25] The more subtle framing of the commonly stated position today is not that a defendant who demands his full constitutional rights to a trial is treated severely simply because of the effort and cost of the trial, but rather that the defendant who has "cooperated" and by his plea of guilty has shown "repentence" is a more deserving candidate for leniency.[26] Since, in any event, the maximum term imposed on the defendant convicted after trial is within statutory authorization, the practice of differential leniency falls, with some exceptions, clearly within established judicial sentencing discretion to distinguish between defendants in dispersing sentences. There is then supposedly no threat to or added punishment for the defendant who demands trial; there is merely a break for the person who has "thrown himself on the mercy of the court."

However, there seem to be clear exceptions to this rationale when dealing with "legislative plea bargaining," *i.e.*, when the legislature

[23] *Id.* § 3.3(b).

[24] *See* note 7 *supra.*

[25] Euziere v. United States, 249 F.2d 293 (10th Cir. 1957); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963), *remanded for retrial,* 377 U.S. 463 (1964). *But see* Kent v. United States, 272 F.2d 795 (1st Cir. 1959), where threats of a prosecutor were considered insufficient to void conviction by plea. *See also* Comment, *The Coerced Confession Cases in Search of a Rationale,* 31 U. CHI. L. REV. 313 (1964).

[26] *See, e.g.,* People v. Darrah, 33 Ill. App. 2d 175, 210 N.E. 2d 478 (1965); Pilot Institute on Sentencing, *supra* note 7; King, *Criminal Procedure from the Viewpoint of the Trial Judge,* 25 CONN. B. J. 202, 205 (1951); Comment, *supra* note 4, at 209-10 (1956).

provides for the possibility of a higher penalty upon conviction after a full trial than upon conviction by a plea of guilty. This becomes a very serious and complex matter in cases where conviction after trial could result in a death sentence but where such penalty is not statutorily permitted if the defendant is convicted by a plea of guilty. The United States Supreme Court in *U.S. v. Jackson,*[27] held invalid the death penalty provision of such a statutory arrangement. In striking down the provision, Justice Stewart noted that "[t]he inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. . . . Whatever might be said of Congress' objectives, they cannot be pursued by means that needlessly chill the exercise of basic constitutional rights."[28] Stewart went on to say:

> It is no answer to urge, as does the Government, that federal trial judges may be relied upon to reject coerced pleas of guilty and involuntary waivers of jury trial. For the evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.[29]

Subsequently, two cases (each involving defendants who were convicted before the *Jackson* decision) reached the Court in which the appellants claimed that their respective guilty pleas were invalid because they were coerced by fear of the death penalty which could be imposed if they chose to plead not guilty and were convicted. However, in both cases, *Parker v. North Carolina*[30] and *Brady v. United States,*[31] the Court held the pleas to be valid. In an opinion that discussed at length the *Jackson* decision, the Court distinguished these pleas on the basis of other evidence that, in the Court's opinion, rendered these pleas voluntary despite the legislative punishment scheme. It seems the "impermissible burden" referred to in *Jackson* was not enough to invalidate the otherwise voluntary pleas of Parker and Brady. The Court in *Brady* commented:

> A contrary holding would require the States and Federal Government to forbid guilty pleas altogether, to provide a single invariable penalty for each crime defined by the statutes, or to place the sentencing function in a separate authority having no knowledge of the manner in which the conviction in each case was obtained. In any event, it would be necessary to forbid prosecutors and judges to accept guilty pleas to selected counts, to lesser included offenses, or to reduced charges. The Fifth Amendment does not reach so far.[32]

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[27] 390 U.S. 570 (1968).
[28] *Id.* at 581, 582.
[29] *Id.* at 583.
[30] 397 U.S. 790, (1970).
[31] 397 U.S. 742, (1970).
[32] *Id.* at 753.

In combined dissenting (to *Parker*) and concurring (with *Brady*) opinions, however, Mr. Justice Brennen, commenting on plea bargaining as it applies to the situation in *Jackson, Parker* and *Brady,* wrote:

> The Court attempts to submerge the issue of voluntariness of a plea under an unconstitutional capital punishment scheme in a general discussion of the pressures upon defendants to plead guilty which are said to arise from, *inter alia,* the venerable institution of plea bargaining. The argument appears to reduce to this: because the accused cannot be insulated from *all* inducements to plead guilty, it follows that he should be shielded from *none.*
>
> The principal flaw in the Court's discourse on plea bargaining, however, is that it is, at best, only marginally relevant to the precise issues before us. There are critical distinctions between plea bargaining as commonly practiced and the situation presently under consideration — distinctions which, in constitutional terms, make a difference. Thus, whatever the merit, if any, of the constitutional objections of plea bargaining generally, those issues are not presently before us.
>
> We are dealing here with the legislative imposition of a markedly more severe penalty if a defendant asserts his right to jury trial and a concomitant legislative promise of leniency if he pleads guilty. This is very different from the give-and-take negotiation common in plea bargaining between the prosecution and defense, which arguably possess relatively equal bargaining power. No such flexibility is built into the capital penalty scheme where the government's harsh terms with respect to punishment are stated in unalterable form.[33]

Apart from death penalty cases, there is some evidence to show that this practice of differential leniency is supported by many trial judges. For example, the *Yale Law Journal* sent a questionnaire inquiring about the plea-leniency relationship to all 240 federal judges and received responses from 140 of them. Sixty-six percent of the respondents considered the defendant's plea "a relevant factor in local sentencing procedure," and the majority of them rewarded the defendant pleading guilty with a less severe sentence than his counterpart who had trial.[34] At a number of judicial sentencing institutes, particularly among federal judges, the issue of whether the guilty plea, in and of itself, should have independent significance in sentence determinations was considered. The majority viewpoint at one such conference was that the guilty plea should be considered a factor in showing leniency for a number of different reasons:[35] (1) state costs are saved by the guilty plea; (2) the chance of jury acquittal is waived by the pleading defendant, thus assuring conviction of the guilty; (3) it is necessary to encourage the practice of pleading guilty in order to efficiently process ever-increasing numbers of criminal cases; (4) "the realization of wrong-doing," evidenced by the pleading defendant, was seen as a "step toward rehabilitation" and not as a position exhibited by one

[33] 397 U.S. 790, 808-09 (1970) (emphasis by the Court).

[34] Comment, *supra* note 4, at 222.

[35] Pilot Institute on Sentencing, *supra* note 7, at 287-89.

who stood trial and who, in fact, may have perjured himself if he took the stand in his own defense and was convicted anyway.

This was not the only position taken by sentencing judges. Some said that it was simply wrong to penalize the defendant who exercised his constitutional rights to a trial as against one who waived that right. Their argument was that differential leniency, no matter how rationalized, had this effect. There was also a middle of the road position which based the propriety issue on whether or not the defendant who demanded trial entered a reasonable or a frivolous defense. If his defense were frivolous, then it was agreed that differential sentencing was proper; but if his defense were reasonable, then it was thought that he should receive a sentence no more severe than his counterpart who pleaded guilty.[36] After the conference a committee of judges composed what it called a "Decalogue of Sentencing," and one of the points made therein was the following:

> That the court is justified in giving a lesser sentence upon a plea of guilty than it would give on a plea of not guilty, upon conviction for the same offense after a trial in which the testimony of the accused is proved to be false or in which there is some other circumstance chargeable to the accused evincing a lack of good faith.[37]

One of the difficulties of getting at the propriety issue which may be inherent in differential sentencing leniency is that the practice is virtually invisible. There is no overt negotiation nor claim of it. If the person who has had trial is sentenced within proper statutory bounds, there is no cruel or unusual punishment issue involved. Since judges rarely explain such differences, equal protection arguments are hard to make.

However, a rather interesting case occurred some years ago in the United States Court of Appeals for the Seventh Circuit.[38] In this case, there were four codefendants involved in a crime, three of whom pleaded guilty; the other, Wiley, demanded trial. The defendant, Wiley, who was tried and convicted, had on the record at least, a less serious criminal background than any of his codefendants. Furthermore, his part in the crime was peripheral (he was the driver of a car) compared with his partners. However, he not only received a more severe sentence than any of his three codefendants, but the judge made it clear that the sentence was longer because he had asked for a trial. Indeed, the defendant had requested consideration of probation, but the judge stated that it was his "standing policy" to refuse probation to defendants who demanded trial.[39] In fact, he went on to say that had the defendant demanded a jury trial instead of a bench trial, his sentence probably

[36] *Id.* at 287.

[37] *Id.* at 379-80.

[38] United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

[39] United States v. Wiley, 267 F.2d 453, 455 (7th Cir. 1959).

would have been even longer.[40] On appeal Wiley contended that it was error for the judge to preclude probation following trial, and the court of appeals agreed, remanding the cause for consideration of probation.[41] Then the trial judge held a hearing and denied probation; Wiley again appealed.[42] On this appeal the court of appeals threw out the sentence because the trial judge had punished the defendant for exercising, in good faith, his right to a trial.[43]

In a recent case reaching the United States Court of Appeals for the District of Columbia,[44] the propriety of plea concessions was again raised in a complicated case in which there was both overt plea negotiation and the separate issue of differential leniency shown to a pleading defendant where there was no prior agreement in this regard. In this particular case a defendant named Scott was convicted after trial for robbery and sentenced to prison for a term of five to fifteen years. A codefendant changed his plea to guilty at the completion of the government's case. The appellate court found the conviction of Scott free from error but took under consideration the events surrounding his sentencing, eventually affirming the conviction but remanding the case for resentencing.[45] The issues which gave the court pause in the sentencing procedure involved, among other things, the statement of the trial judge to Scott: " 'Now the Court didn't believe your story on the stand, the Court believes you deliberately lied in this case. If you had pleaded guilty to this offense, I might have been more lenient with you.' "[46] At this point the case looks quite similar to the issue in the *Wiley* case. However, the circuit court noted that a new tangent to the issue was raised when, during the sentencing hearing, the trial judge read a letter submitted by the appellant. The letter was from the appellant's attorney to the appellant, and it referred to a discussion the lawyer had had with the judge's law clerk. In the letter the attorney reported that in the clerk's opinion "there was only one way to get a light sentence from Judge _____ and that was to confess that you did the robbery, to apologize four or five times and to say that you were willing to turn over a new leaf."[47] The clerk was then called to the witness stand by the trial judge and stated: "It has always been

[40] *Id.* at 458.

[41] United States v. Wiley, 267 F.2d 453 (7th Cir. 1959).

[42] United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

[43] *Id.* at 504. On remand, the trial judge stated that he had information outside the record which indicated that the criminal background of the defendant in question was actually more known than the evidence in the official documents showed. At resentencing, he again imposed a three-year sentence on the defendant but, bowing to the mandate of the Court of Appeals, suspended execution of the sentence. United States v. Wiley, 184 F. Supp. 679 (N.D. Ill. 1960).

[44] Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969).

[45] *Id.*

[46] *Id.* at 267.

[47] *Id.*

my opinion that you view sentencing differently when someone admits guilt than maintaining innocence."[48] The circuit court noted that the judge himself then reacted to these issues by saying: "I hope sometime I hear some defendant say, 'Judge, I am sorry, I am sorry for what I did.' That is what I have in mind."[49]

In analyzing the issues involved in this particular sentencing, Judge Bazelon of the D.C. Circuit Court, who wrote the majority opinion, stated:

> The Supreme Court has offered little guidance concerning which constitutional rights can tolerate some chilling effects and which cannot. Perhaps the right to a trial, like the self-incrimination privilege but apparently unlike the right to a jury, belongs in the latter camp. But until the Supreme Court speaks, the practice of differential sentencing should be evaluated with some attention paid to the nature of the price extracted from those who plead innocent and why it is exacted.
>
> Two arguments inevitably appear whenever differential sentencing is discussed. The first is that the defendant's choice of plea shows whether he recognizes and repents his crime. One difficulty with this argument is that no court or commentator has explained why a defendant's insistence upon his self-incrimination privilege is not also evidence of a lack of repentence. Or his insistence that evidence unconstitutionally seized should not be admitted.
>
> Repentence has a role in penology. But the premise of our criminal jurisprudence has always been that the time for repentence comes after trial. The adversary process is a fact-finding engine, not a drama of contrition in which a prejudged defendant is expected to knit up his lacerated bonds to society.
>
> There is a tension between the right of the accused to assert his innocence and the interest of society in his repentence. But we could consider resolving this conflict in favor of the latter interest only if trial offered an unparalleled opportunity to test the repentence of the accused. It does not. There is other, and better, evidence of such repentence. The sort of information collected in presentence reports provides a far more finely brushed portrait of the man than do a few hours or days at trial. And the offender while on probation or in prison after trial can demonstrate his insight into his problems far better than at trial.[50]

At a later point Judge Bazelon commented:

> The second argument for differential sentencing is necessity. Most convictions, perhaps as many as 90 per cent in some jurisdictions, are the product of guilty pleas. Unless a large proportion of defendants plead guilty, the argument runs, the already crowded dockets in many jurisdictions would collapse into chaos.
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> . . . .
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> Thus, to the extent that the appellant here received a longer sentence because he pleaded innocent, he was a pawn sacrificed to induce other defendants to plead guilty. Since this is so, to consider the price he paid for the exercise of his right without regard for the process of which it is but one instance would be to ignore reality.[51]

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[48] *Id.*

[49] *Id.*

[50] *Id.* at 270-71.

[51] *Id.* at 271, 272.

The cases of *Wiley* and *Scott* both point up the necessity for judges to explain differential sentencing in the negative: reward the pleader rather than punish the defendant who stands trial. It seems from the comments of the various sentencing institutes that this rationale is proper and will be accepted by the appellate courts. The Supreme Court has also seen fit to sanction (albeit dictum) this reward theory in *Brady v. United States*.[52]

C. *The Propriety of the Overtly Negotiated Plea*

The implicit bargain, the showing of leniency to the confessing and presumably "repenting" defendant is one thing; overt negotiation for charge reduction or a promise of sentence leniency in exchange for a guilty plea is another matter. In the first place, it is open and adversary in its own right. It is not simply a form of normative practice intrinsic to administrative efficiency. Whatever its degree of adversariness, the contest occurs out of court without whatever controls are provided by trial. Yet overt negotiation is common practice almost everywhere, particularly in those jurisdictions where there are mandatory sentences for certain classes of crimes.

The basic legal issue of propriety of overt plea negotiation is superficially simple but becomes complex when set against administrative reality. The propriety question is normally phrased as follows: whether guilty pleas which are induced by promises of state concessions in charge or sentence are any more trustworthy or any less repugnant than those engendered by threat or coercion. Some of the more specific problem areas associated with overt bargaining are discussed below.

1. The Contested Bargain

Unlike the situation with regard to alleged coercion, the general position of appellate courts reviewing cases involving induced pleas (usually on appeal from a denial of a motion to withdraw the plea) has been that they have viewed the situation as one of whether the promise made by the appropriate state official (commonly held to be either the prosecutor or the judge but normally *not* including the police or the defendant's own counsel[53]) was, in fact, honored after the defendant fulfilled his part of the bargain by pleading guilty. If the bargain was not kept — that is, if the state reneged on its promise — appellate courts have commonly allowed plea withdrawals, presumably on the grounds that the state used fraud and trickery in obtaining the guilty plea and

[52] 397 U.S. 742, 751 (1970).

[53] People v. Smith, 120 Cal. App. 2d 531, 261 P.2d 306 (1953); *cf.* Swanson v. United States, 304 F.2d 865 (8th Cir. 1962); Bryarly v. Howard, 165 F.2d 576 (7th Cir. 1948).

that these practices are not really significantly different from threat and coercion.[54]

The issue becomes sharper, though no more simple to answer, in instances of induced pleas where in fact the state honors its bargains; yet defendants challenge the "voluntariness" of their own guilty pleas on grounds of inducement. Since such defendants have presumably benefited by the contractual relationship — that is, they have received reduced charges, dismissed counts, or sentences less than the criminal court would warrant — it seems improbable that many such cases would reach the appellate level since, in effect, there is no injured party.

However, one such case did reach the United States Circuit Court of Appeals for the Fifth Circuit,[55] and the conflicts, confusions and uncertainties presented by it are still bothering American criminal justice. The petitioner, Shelton, moved to have his one-year sentence vacated on the ground that his guilty plea was induced by the promise of a one-year sentence by the prosecutor. In the first *Shelton* decision it was held that the guilty plea was involuntary because it was induced, even though it was conceded that the grounds for the inducement were fulfilled.[56] In the majority opinion, Judge Rives stated: "Justice and liberty are not the subjects of bargaining and barter."[57] However, in a dissent, Judge Tuttle distinguished between "proper" and "improper" bargaining, basing his major argument for upholding Shelton's conviction on the administrative necessity of plea negotiation. Judge Tuttle said in part:

> [A]lthough no man should be allowed to bargain away his life or liberty, it is not apparent why any innocent person would plead guilty if not subjected to or threatened with illegal pressures (including exhaustive inquisitions or threats to "frame" evidence of a more serious charge), mislead by promises not to be fulfilled, or induced by promises inherently improper, merely because he receives assurances that such a plea may lead to punishment less severe than that which he would receive if unjustly (but fairly) convicted. . . .
> . . . It is generally known that the great bulk of criminal cases are disposed of by pleas of guilty made after some discussion between the defendant and/or his counsel and the prosecuting attorney in which the latter frequently makes some commitment as to the sentence he will recommend or as to other charges or prosecutions he will drop; if this were not so, or if this court held that it may not be so, there would be few inducements for any person to plead guilty. . . .
>
> In the present case it appears from the record and from his own appearance before us that the petitioner was an intelligent man, fully able to comprehend the alternatives open to him and the value of the

[54] *See* Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 876-78 (1964). *See also* Machibroda v. United States, 368 U.S. 487 (1962); Dillon v. United States, 307 F.2d 445 (9th Cir. 1962); *In re* Valles, 364 Mich. 471, 110 N.W.2d 673 (1961); FRANK, CORAM NOBIS § 3.01(d) (1953).

[55] Shelton v. United States, 242 F.2d 101 (5th Cir. 1957), *rev'd on rehearing*, 246 F.2d 571 (5th Cir. 1957), *rev'd on confession of error of Solicitor General*, 356 U.S. 26 (1958).

[56] Shelton v. United States, 242 F.2d 101 (5th Cir. 1957).

[57] *Id.* at 113.

> prosecutor's promises. It also appears that the prosecutor in good faith tried to live up to his commitments and to a very large extent was successful in his efforts .... Nor can it be said that any of the promises were inherently improper for the offer to help obtain the dismissal of federal prosecutions in other districts does not differ fundamentally from the usual practice whereby a prosecutor agrees to nolle prosequi all except the charges in which the plea is to be entered.[58]

In an en banc rehearing of the *Shelton* case, the minority position (of Judge Tuttle) in the first decision became the majority opinion.[59] Judge Tuttle wrote:

> In light of the full record, showing that the accused was not only willing but anixous to have his plea accepted by the court, and the present claim of involuntariness after he has fully enjoyed the benefit of the dismissal of an additional count in the Atlanta indictment and the nolle prossing of the 'more serious federal indictment' (as characterized by Shelton) in Miami — the reinstatement of which is now barred by statutes of limitations — and the imposition of the sentence *requested by him* in the principle case, cannot deprive the plea thus given of its character of voluntariness.[60]

Judge Rives joined by Judge Brown dissented, saying, in part:

> The very statement of that practice [referring to Judge Tuttle's earlier reference to the frequency and administrative importance of plea negotiation] however, concedes that such promises or commitments *are inducements* for the accused to plead guilty. Such inducements in any particular case may be sufficient to elicit an untrue plea of guilty. The prevalence of that practice demonstrates the importance, indeed the imperative necessity, for the court itself to determine that the plea is so voluntarily made as to furnish reliable and trustworthy testimony that the accused is in fact guilty. . . .
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> . . . .
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> . . . We err greviously when we allow ourselves to be diverted by other inquiries, such as whether the accused made a good bargain and whether the bargain was kept; the sole inquiry should remain, was the plea of guilty made under such circumstances as to constitute it reliable and trustworthy evidence of the accused's guilt of the offense with which he was charged.[61]

The *Shelton* case eventually reached the Supreme Court which issued a per curiam decision, stating only "[u]pon consideration of the entire record and confession of error by the Solicitor General that the plea of guilty may have been improperly obtained, the judgment of the United States Court of Appeals for the Fifth Circuit is reversed and the case is remanded to the District Court for further proceedings."[62] In a subsequent case, *Brown v. Beto*,[63] the Fifth Circuit considered the Supreme Court's per curiam action as neither an approval

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[58] *Id.* at 115, 116.

[59] Shelton v. United States, 246 F.2d 571 (5th Cir. 1957).

[60] *Id.* at 573 (emphasis by the court).

[61] *Id.* at 579, 580 (emphasis by the court).

[62] Shelton v. United States, 356 U.S. 26 (1958).

[63] 377 F.2d 950 (5th Cir. 1967).

nor a disapproval of either Judge Tuttle's or Judge Rives' view on plea bargaining.[64]

2. Judicial Involvement in Plea Negotiation

A question has arisen in a number of cases as to whether plea bargaining in which the sentencing judge is directly involved may be improper, even if it is conceded that bargaining between prosecutor and defense is proper.[65] In *United States* ex rel *Elksnis v. Gilligan,*[66] District Judge Weinfeld stated in part:

> [A] bargain agreement between a judge and a defendant, however free from any calculated purpose to induce a plea, has no place in a system of justice. It impairs the judge's objectivity in passing upon the voluntariness of the plea when offered. As a party to the arrangement upon which the plea is based, he is hardly in a position to discharge his function of deciding the validity of the plea — a function not satisfied by routine inquiry, but only, as the Supreme Court has stressed [citation omitted], by a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.[67]

While alluded to above, an interesting caveat to the judges "hands off" role in plea negotiation was more explicitly dealt with by Judge Bazelon in the *Scott* decision:

> In announcing the rule that the trial judge should neither participate directly in plea bargaining nor create incentives for guilty pleas by a policy of differential sentences, we must at the same time point out that the trial judge cannot ignore the plea bargaining process. A guilty plea must be not only voluntary, but also knowing and understanding. If the defendant has decided to admit his guilt because of a commitment from the prosecutor, it is essential for the validity of his plea that he have a full and intelligent understanding of the nature and extent of that commitment.[68]

The ABA standards relating to pleas of guilty attempt to correct the possibility of an attack like that in *Elksnis* by excluding the judge as a participant in the actual negotiation process.[69] The reasons given by the ABA Committee are as follows: (1) judicial participation in the discussions can create the impression in the mind of the defendant that he would not receive a fair trial were he to go to trial before this judge; (2) judicial participation in the discussions makes it difficult for the judge objectively to determine the voluntariness of the plea when it is offered; (3) judicial participation to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report; and, (4) the risk of not going along with the disposition apparently desired by the judge may seem so great

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[64] *Id.* at 954.

[65] *Id.* at 956-57.

[66] 256 F. Supp. 244 (S.D.N.Y. 1966).

[67] *Id.* at 255.

[68] Scott v. United States, 419 F.2d 264, 274 (D.C. Cir. 1969).

[69] ABA PROJECT, *supra* note 1, § 3.3 (a).

to the defendant that he will be induced to plead guilty even if innocent.[70]

3. Equal Opportunity to Bargain

However the general issue of the propriety of plea negotiation is viewed, and whether one limits it by restricting the appropriate participants (such as by excluding the judge) or testing it against its fulfillment in practice, there are still other dimensions of propriety which arise and plague some appellate courts. For example, while the ABA Minimum Standards state that similarly situated defendants should be given an equal opportunity for plea negotiation,[71] some cases have recently arisen in which denial of knowledge of, or opportunity for, bargaining and, therefore, failure to benefit from such dealings were appealed on denial of equal protection grounds. In *Dorrough v. United States,*[72] the appellant contended that he did not fully understand the nature of the charges against him, because the offense with which he was charged contained a lesser included offense with a significantly lower mandatory penalty, and he claimed that it was incumbent upon the trial court to fully advise him of this fact. The majority opinion rejected this argument, but Circuit Judge Goldberg in his dissent stated:

> It would be uncandid also to fail to mention that upon learning of a lesser included offense, the defendant might announce to the prosecution that he would consent to plead guilty only to the lesser offense, in the hope that the prosecution would allow him to plead rather than go through the risk and bother of a trial. Plea bargaining, at present, must be recognized as part of our system.[73]

In *Newman v. United States,*[74] a case arising almost simultaneously with *Dorrough* but in the D.C. Circuit, the equal protection issue was more sharply drawn. The issue presented on appeal was whether it was a denial of appellant's constitutional rights for the U.S. Attorney to consent to a guilty plea tendered by appellant's codefendant for a lesser included offense under the indictment, while refusing to consent to the same plea for the appellant. Both defendants were indicted for house breaking and petty larceny. One of the defendants, Anderson, negotiated through counsel with the U.S. Attorney and obtained an agreement allowing Anderson to plead guilty to the misdemeanors of petty larceny and attempted house breaking. The U.S. Attorney, however, declined to consent to the same plea for Newman. In denying Newman's appeal, Circuit Judge Burger (now Chief Justice of the United States Supreme Court) said in part:

> To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task;

[70] *Id.* § 3.3(a) (commentary).
[71] *Id.* § 3.1(c).
[72] 385 F.2d 887 (5th Cir. 1967), *aff'd on En Banc rehearing,* 397 F.2d 811 (5th Cir. 1968).
[73] 385 F.2d 887, 898 (5th Cir. 1967).
[74] 382 F.2d 479 (D.C. Cir. 1967).

> of course, this concept would negate discretion. Myriad factors can enter into the prosecutor's decision. Two persons may have committed what is precisely the same legal offense but the prosecutor is not compelled by law, duty or tradition to treat them the same as to charges. On the contrary, he is expected to exercise discretion and common sense to the end that if, for example, one is a young first offender and the other older, with a criminal record, or one has played a lesser and the other a dominant role, one the instigator and the other a follower, the prosecutor can and should take such factors into account; no court has any jurisdiction to inquire into or review his decision.
>
> It is assumed that the United States Attorney will perform his duties and exercise his powers consistent with his oaths and while this discretion is subject to abuse or misuse just as is judicial discretion, deviations from his duty as an agent of the Executive are to be dealt with by his superiors.[75]

How this discretion is exercised — *i.e.,* the motivation of the prosecutor in his bargaining role — is apparently an important element of the whole process. In *People v. Byrd,*[76] Judge Levin, using his concurring opinion to take to task the whole process of plea negotiation, made the following points:

> Unlike the private litigant who is encouraged to negotiate amicable adjustment of differences, the prosecutor has a duty to exercise the discretion his office vests in him strictly on the merits. The state of his or the court's docket has nothing to do with the propriety of a particular charge reduction for a particular offender. Justice is not "individualized" by making charge concessions available almost universally as long as the offender pleads guilty. The only "individualization" is that those who plead guilty do so to some other, lesser charge and those who stand trial must answer for the greater offense. To defend this on the ground it is "individualization of justice" is an obvious distortion of terms.
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> . . . .
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> Defenders of plea bargaining cite as examples of laudable "individualization" through plea bargaining, particular cases where noxious charges have been reduced to less stigmatic ones. However, if such individualization is deemed desirable it could be achieved without exacting a plea in return for the reduction in charge, indeed, without any negotiation with the defendant. It is hard to see how such discretionary decisions are furthered by — or even how they can survive — the plea bargaining system. If the reward of charge reduction is to continue to serve as an inducement to guilty pleas, the prosecutor may but infrequently hand out such reductions, even where his view on the merits would warrant or demand it, *unless* the benefitted defendant pleads guilty.
>
> I do not mean to be understood as saying prosecutors do not, in particular cases, exercise their discretion on the merits and permit accused persons to stand trial on reduced charges. But, to the extent prosecutors become dependent upon plea bargaining, and thus implicitly devoted to maintaining the bargaining system, they become less free in the exercise of their discretion.[77]

Other than questions of judicial participation and equal plea oppor-

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[75] *Id.* at 481-82.

[76] 12 Mich. App. 186, 162 N.W.2d 777 (Ct. App. 1968).

[77] *Id.* 162 N.W.2d at 784, 787 (emphasis by the court).

tunities, there is even more basic, idealistic opposition to the negotiation of justice.

4. Bargaining as Intrinsically Improper

Judge Rives' statement in the first *Shelton* case that "[j]ustice and liberty are not the subject of bargaining and barter,"[78] expresses the intrinsic impropriety issue very clearly. In a Pennsylvania case[79] the court used even stronger language. In that case, defense counsel approached the judge hoping to obtain a sentence promise prior to entry of a guilty plea for his client and, having assumed he had received such a promise, later attempted to withdraw the plea after the defendant was sentenced to death. The lawyer claimed that a bargain was made and unfulfilled. This elicited a statement from the sentencing court which, in commenting upon the practice of an attorney approaching a judge prior to the plea, referred to such conduct as "not becoming a member of the bar."[80] The appellate court agreed with the trial court's refusal to allow withdrawal of the plea, calling the defense counsel's conduct "indefensible and outrageous."[81]

There have been other sporadic expressions by appellate judges about the impropriety of plea bargaining regardless of its advantages. But by far the most detailed and elaborate recent analysis of the process, with a final conclusion that plea negotiation is inherently and intrinsically improper, was written by Judge Levin concurring in the *Byrd* decision. He said:

> The negotiated guilty plea is, nevertheless, fundamentally unsound. Besides the fact that it is inconsistent with established standards, those regarding the exercise of discretion by public officers and those surrounding the administration of justice generally, it is turning what used to be an accusatorial-adversary judicial system into an inquisitorial-administrative process. It encourages practices in which neither the profession nor the judiciary can take pride and establishes precedents which are bound to affect the administration of justice adversely in other areas. It destroys the integrity of the conviction record with the result that neither the parole board nor, upon commission of another offense, a subsequent sentencing judge knows whether one originally charged with X and allowed to plead guilty to X-1, X-2 or attempted X or Y was really guilty of the more serious charge.
>
> If the negotiated charge concession is not justified by the merits, then the injury is to society. If a charge concession justified by the merits can only be obtained by waiver of a jury trial, then it is the defendant who is unjustly importuned, it is the constitutional right which is tarnished. If the concession is illusory rather than real, e.g., a reduction in charge but no reduction in sentence, the trial judge sentencing just as he would on the greater offense, then, frequently, the defendant has been misled into giving up his right to a trial.

[78] 242 F.2d 101, 113 (5th Cir. 1957).

[79] Commonwealth v. Scoleri, 415 Pa. 218, 202 A.2d 521 (1964).

[80] *Id.* 202 A.2d at 526.

[81] 415 Pa. 218, 228, 202 A.2d 521, 526 (1964).

A plea of guilty uninfluenced by official pressure (overt or covert) or promise (explicit or implicit) is, of course, perfectly proper. But the administration of criminal justice has become so dependent upon a large volume of guilty pleas and the profession (prosecutorial and defense) and some courts so widely encourage offenders to believe they have something to gain by pleading guilty, that it is to be doubted whether many who plead guilty do so without harboring the hope that they will receive some leniency.

The present state of affairs was brought about by willingness to reduce standards of justice to conform to the resources made available for its administration. I suggest the time has come for the judiciary to start moving in the other direction, and to insist on a return to first principles as quickly as possible. It will, of course, take years, if not decades, to accomplish the elimination of *negotiated* pleas. The necessary increase in prosecutorial staff and judicial facilities cannot be brought about within a short period of time.

The public must be made aware that, under present budgets, most felons are permitted to plead guilty to a charge substantially less than the crime of which they are guilty. We are all concerned with the significant increase in crime. Yet many who are apprehended are too soon back on the streets because of concessions that would not be considered if facilities for prosecution and adjudication were more adequate. Police officers bring in an accused person and the prosecutor is confronted with the choice of allowing him to plead guilty to a lesser offense or waiting for months and sometimes years to bring him to trial, by which time witnesses may have lost interest, memories may have faded, and for those and other reasons prosecution is difficult, if not impossible, all of which aids defense counsel in exacting concessions which otherwise would not be at all appropriate and which no prosecutor would otherwise consider.

The judiciary need not accept the inadequate budgets allowed for the administration of justice. Ours is a co-equal branch of government. Those charged with the administration of justice may properly insist on appropriations sufficient to enable prosecutors and courts to enforce the laws that the legislature and local units of government enact. I respectfully urge that we not continue to denigrate the judicial system by attempting to organize the administration of criminal justice around an ever declining prosecutorial and judicial budget per case.

The calendar problem is, of course, real. The administration of criminal justice has become so dependent upon plea bargaining that it could not be eliminated *instanter* by decree. To do so would be to inundate our presently over-taxed prosecutorial and judicial facilities. This, of course, is a matter for realistic concern — as is the fundamental soundness of a system of justice whose very ability to function is said to depend on the practices described.

The problem is not unlike that of segregated schools in that it is too ingrained to be eliminated forthwith. I suggest that we proceed to its eventual elimination.[82]

IV. DIMENSIONS OF THE CONCERN FOR THE IMPROPRIETY OF PLEA BARGAINING

Negotiation for pleas of guilty, particularly overt bargaining for a plea when there is a reasonable likelihood that the person could be

[82] People v. Byrd, 12 Mich. App. 186, 162 N.W.2d 777, 796-97 (1968) (emphasis by the court).

convicted of a higher crime or be given a more severe sentence, raises propriety concerns on a number of different levels. In addition to the concerns with respect to the overt bargain discussed above, there are larger, more far-reaching concerns about the plea negotiation process in general that must be resolved if the process is to continue to exist within our criminal justice system. These broad considerations can be classified as either concern for the proper dispensation of justice or as concern for a positive public attitude.

A. *Concern for the Proper Dispensation of Justice*

These concerns generally go to specific, undesirable side effects that may be a byproduct of plea negotiation. Included within this category are the fears that plea negotiation might increase the possibility of convicting the innocent, introduce inequalities into adjudication and sentencing practices, avoid the testing of many legal issues, and promote "quick justice."

1. Plea Negotiation Might Increase the Possibility of Convicting the Innocent

While there have been some steps taken by the United States Supreme Court in its decisions[83] and in its revision of the Rules of Federal Criminal Procedure,[84] by various states in altering their arraignment requirements,[85] and by recommendations of such groups as the ABA's Minimum Standards Committee on Pleas of Guilty[86] — all of which compel judges to inquire into the factual nature of the crime before accepting a plea — the fact remains that inducements can be so attractive to some defendants, particularly recidivisits with long prior records, that they might be willing to plead guilty in order to avoid trial on a higher charge.[87] The trustworthiness issue is not fully satisfied by the requirement of factual inquiry by the judge or even by such elaborate procedures as post plea-of-guilty hearings which are the practice in some jurisdictions,[88] and pretrial screens (such as the preliminary hearing). Even by means of carefully prescribed requirements for both the quantity and quality of evidence, it is conceivable that one who is innocent can be convicted even after availing himself of all the safeguards of the trial system. It is believed that the number of innocent persons so convicted is very small, just as it is hoped that the percentage of innocent defendants who plead guilty is also small. Either possibility is certainly reprehensible to the underlying ideology of our system of

[83] *See* notes 90, 91 *infra.*

[84] *See* note 9 *supra.*

[85] *Id.*

[86] *See* ABA PROJECT, *supra* note 1.

[87] Comment, *supra* note 4, at 220-21.

[88] D. NEWMAN, *supra* note 1, at 19-20.

justice. Many judges take the position, therefore, that the possibility of an innocent person pleading guilty should be given prime consideration in arraignment proceedings. The ABA's tentative draft on standards relating to *The Prosecutor's Function* provides that "[a] prosecutor may not properly participate in a deposition by plea of guilty if he is aware that the accused persists in denying guilt or the factual basis for the plea, without disclosure to the court."[89] It is interesting to note that this proposed standard apparently does not preclude a prosecutor from accepting a plea of guilty, where he has evidence to substantiate to his own satisfaction of the guilt of the defendant even though the defendant maintains his innocence, provided that the court is aware of the defendant's persistence in denying guilt.

Two recent United States Supreme Court decisions, *McCarthy v. United States*[90] and the followup case of *Boykin v. Alabama*,[91] have been interpreted to make the provisions of Rule 11 of the Federal Rules of Criminal Procedure[92] applicable to all states. Among other things, these decisions are interpreted to now make it a requirement for the judge to personally address the defendant and to satisfy himself that there is a factual basis for the guilty plea. This would not eliminate the possibility of convicting the innocent pleader, but hopefully would reduce it.

2. The *Sub Rosa* Existence of Plea Negotiation Introduces Inequalities into Adjudication and Sentencing Practices

There is a question of whether it is possible to work out equal bargaining opportunities for all defendants. For example, those defendants who know of negotiation possibilities have an intrinsic charging and sentencing advantage over those who are strangers. Further, if the existence of plea negotiation is known only to a segment of the bar and if a defendant retains or is assigned counsel who is familiar with such practices, then there is a built-in inequality in the system against the defendant who is either without counsel or without counsel who is familiar with plea negotiation.

To combat such problems, a section of the ABA proposed standards, *The Prosecutor's Function*, provides: "(a) The prosecutor should make known a general policy of willingness to consult with defense counsel concerning disposition of charges by plea."[93] In effect, the ABA provision would require the prosecutor to give notice of the practice, so that its availability would be common knowledge to all defendants,

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[89] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *The Prosecutor's Function*, § 4.2 (tent. draft, 1970).

[90] McCarthy v. United States, 394 U.S. 459 (1969).

[91] Boykin v. Alabama, 395 U.S. 238 (1969).

[92] *See* note 9 *supra*.

[93] ABA PROJECT, *supra* note 1, § 3.1(c).

rich or poor, resident or stranger. Furthermore, the ABA proposal also requires defense counsel under certain conditions to explore the possibility of negotiation: Proposed Standard 6.1 of *The Defense Function* provides: "(b) When the lawyer concludes, on the basis of full investigation and study, that under controlling law and the evidence a conviction is probable, he should so advise the accused and seek his consent to engage in plea discussions with the prosecutor, if such appears desirable."[94] In discussion thereafter, it is suggested that if a lawyer lacks sufficient personal experience, he should consult experienced colleagues.[95]

The negotiating skill of the attorney may also contribute to sentence disparity;[96] for perhaps a large part of sentence disparity is the result of disparity in charging and plea negotiation. This is particularly critical to both defendants and the community as it applies to the choice of probation or imprisonment. In theory, persons selected to serve their sentences in the community under supervision are chosen on the basis of characteristics which call for low risk of recidivism and a chance for successful community adjustment as law-abiding citizens. If, indeed, probation is given as payment for plea bargaining, selection is then based in part on skill in negotiation rather than on the other more acceptable criteria. Granted, it may be that few dangerous or otherwise serious offenders can actually deal for probation; nevertheless, selection by negotiation leads to an insidious corruption of the probation service.

3. The Existence of Plea Negotiations Avoids the Testing of Many Legal Issues That Are Now Cloudy

How effective is the exclusionary rule if defendants do not even raise it because they decide to plead guilty? How effective are the other constitutional rights so carefully safeguarded at trial if they are waived by as many as 90 percent of the defendants passing through the courts? How *operationally* important are such defenses as insanity or entrapment if they are rarely raised? On these grounds alone — that is, that plea negotiation avoids the articulation and refinement of legal defenses

[94] ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *The Defense Function*, § 6.1(b) (tent. draft, 1970).

[95] *Id.* § 6.1(b) (commentary). It is suggested that Legal Aid and Public Defender offices could serve as sources of potential assistance. This points up an interesting opinion that some experienced courtroom observers have voiced, namely, that persons represented by a public defender are sometimes better off than those defended by retained attorneys. The issue, of course, is not one of superior legal skills in a formal sense, but one of savvy in the ways of the criminal courts, the prosecutor's office, and the hallways of the courthouse. It is ironic perhaps, that legal ability necessary to properly defend a client at trial is not necessarily the same as the knowledge and ability required for plea negotiation. There can be little doubt that the Public Defender's Offices in most jurisdictions are aware of plea negotiations and have a fair idea of a going rate for most charges, and therefore those lawyers are able to get their clients at least as good a deal as most other similarly situated defendants.

[96] For a discussion of the effects of sentence disparity on correctional objectives, see note 18 *supra*.

and concepts — it is considered by some to be an improper form of criminal procedure.[97] If police practice illegal searches and questioning and if the defendants, who have their rights so infringed upon, plead guilty in the majority of such instances, the police will not be as effectively deterred from such illegal acts. If wrongful enforcement practices are not brought to light and if their concomitant defenses are not used, a dynamic changing procedural law will be slow to develop.

4. Justice Can Be Too Quick

One quite proper legal and common administrative concern of criminal justice is that its wheels grind too slowly. Excessive delay in prosecution, trial, and sentencing are issues that are extremely bothersome in our system of justice and, of course, are in themselves pressures which support the plea negotiation system. Justice delayed is truly justice denied in many instances. On the other hand, while it is true that justice can be too slow, there is the inverse question of whether it can be too speedy. "Quick justice" convictions in which defendants are arrested, waive all their rights, plead guilty, and are sentenced and transported to prison all in the course of a single day, while not common, occurs frequently enough to be bothersome and are seen as intrinsically improper.[98] The guilty plea system, including plea bargaining, opens the real possibility of excessive speed in contrast to reflective and careful adjudication.

B. *Concern for a Positive Public Attitude*

The issues in this category, unlike those listed above, generally focus on the effect of plea negotiation on the public's view of our criminal justice system. These considerations involve claims that plea negotiation is inherently repugnant; that it makes a mockery of our system of justice; that it fosters disrespect for justice; and that it creates public dissatisfaction because of the relative lack of details emerging from guilty plea convictions.

1. The State Becoming Involved in Bargaining With Criminals Over Charges and Sentences Is Inherently Repugnant in a Society Dedicated to the Rule of Law

Plea bargaining provides almost unbridled discretion on the part of prosecutors and trial court judges to avoid legislative sentencing mandates, and to encapsulate the adjudicatory and charging stages of the process, so that it is simply a pro forma step in the mass production of suspects from the streets to the prisons. In addition, there are some

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

[98] *See* DeMeerleer v. Michigan, 329 U.S. 663 (1947), *rev'g* People v. DeMeerleer, 313 Mich. 548, 21 N.W.2d 849 (1946); State *ex rel* Burnett v. Burke, 22 Wis. 2d 486, 126 N.W.2d 91 (1964).

prosecutors, especially those newly elected or appointed, who would prefer not to negotiate or "deal" with alleged criminals or their representatives. There are also some defense counsel who, for one reason or another, have poor relationships with local prosecutors and, consequently, are at a disadvantage in negotiating on behalf of their clients. The fact that such inequalities exist and that personalities of officials can affect uniform disposition of cases inherently detracts from a system involving widespread negotiation of pleas in a society dedicated to the rule of law and not to the rule of men.

There have been some recent allegations that plea bargaining, either implicit or explicit, is not only repugnant but also violates both the fifth and sixth amendments to the Constitution. In fact, the authors of a recent note in the *Harvard Law Review* concluded:

> Well aware of the need for legislative response to a judicial decision that invalidates plea bargaining, judges have avoided analyzing the constitutionality of the practice. The bar, which has actively participated in plea bargaining, has attempted to dress it in procedural niceties and has manufactured weak or faulty justifications for it. But neither the lack of an assured legislative response nor the bar's substantial involvement in the practice should affect the legal profession's evaluation of it. Lawyers and judges more than other citizens are under an obligation to maintain the criminal process in conformity with the Constitution. To restore the defendant's fundamental trial rights to their traditional preeminence, plea bargaining should be declared unconstitutional.[99]

2. Plea Bargaining Makes a Mockery of Our System of Justice

The facade of the typical arraignment session — where the defendant customarily denies that any promises have been made to him while all in attendance know full well that promises have indeed been made in exchange for his plea — is likely to produce a high degree of cynicism in both the participants and observers of the system. Today, however, some judges are changing their inquiries about promises or inducements, limiting their questions to whether any promises have been made to the defendant *regarding sentencing*. Sentencing promises by the prosecutor or others are apparently viewed as a possibly wrongful usurpation of the judge's powers whereas other bases of negotiation, such as charge reduction, are ignored as strictly within the ambit of the prosecutor's discretion. The issue here, as with the unhonored bargain,[100] is not inducement per se but inducement that crosses lines of authority. Yet as long as there is no recognition of the entire range of plea arrangements, but rather an avoidance of the issue, even to a pretense that

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[99] Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1411 (1970). *See also* Griffiths, *Ideology in Criminal Process or a Third Model of the Criminal Process*, 79 YALE L. J. 359 (1970). *See* note 61 *supra*, § 4.1(a).

[100] *See* § III (C)(1) *supra*.

negotiation does not occur, the in-court ritual of guilty plea arraignments will be viewed by many as a mockery of justice.

3. Because of the Intrinsic "Horse-Trading" or "Settling Out of Court" Nature of Plea Negotiation, an Aura of Disrespect For Justice and For Criminal Procedure Is Produced Not Only Among Those Involved But Also Among the Public in General

It might be paraphrased that "it is not *what* you do that determines your charge and sentence but *whom* you know." Some observers have commented that plea negotiation is really no different from a "fix" which is usually taken to mean a form of corruption involving monetary bribery or the trading of favors for bending the law to benefit certain violators.[101] The *sub rose* nature of some plea negotiation contributes to the aura of corruption that tinges this practice as it now exists. All that a defendant may know is that he has paid his attorney a certain set sum, and in return the lawyer has been able to obtain some sort of "deal" which results in a lesser charge or sentence (or both) than he expected when arrested. It has been suggested that some attorneys permit this misapprehension of a "fix" to exist in order to justify fees. In short, they do not disabuse the client of his belief that the court, police officers, and/or the prosecuting attorney have been "taken care of" in order to obtain the lesser charge or the lenient sentence.[102]

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

The relatively anonymous guilty plea proceeding, with nothing but the formal words of the charge admitted, may have many advantages for the reputation of the defendant and his family and may receive general support on these grounds.[103] In cases of great public interest however, this anonymity is not necessarily viewed in the same way. Where public figures are involved, either as perpetrators or victims, there often is a demand for more information, while rumors and suspicions that there is "more than meets the eye" abound. For example, the guilty plea of Senator Edward Kennedy to the traffic charge following his automobile accident in which a young girl was killed was viewed by many Americans as an inadequate termination of the case. In fact, the pressure for further explanation was so great that the Senator went on national television to explain his position. Much the

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[101] *See* Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 395 (1951). *See also* Shelton v. United States, 242 F.2d 101, 113 (5th Cir. 1957); Wight v. Rindskoph, 43 Wis. 344, 354 (1877).

[102] TASK FORCE REPORT, *supra* note 1, App. A at 12.

[103] *See* § I *supra*.

same situation applies to the apparently negotiated guilty plea entered by James Earl Ray in connection with the murder of Dr. Martin Luther King. Here again, the sparse information contained in the charge and the monosyllabic guilty plea hardly satisfied those who are more concerned about the full details of the murder of a notable public figure.

V. Compromise: Distinguishing between Proper and Improper Bargains

The grounds discussed above and probably others are commonly offered as reasons for assessing the practice of plea negotiation as an improper form of charging, adjudication, and sentencing in our system of criminal justice. Even if one agrees with any or all of the bases of the impropriety of such practices (either in general or in particular cases which might "shock the conscience"), the question remains of whether it is administratively feasible — or even whether it is at all possible — to abolish plea negotiation or, as Judge Levin put it, to "begin now gradually to eliminate plea bargaining."[104]

A position can be taken that if plea bargaining is improper per se, then there can be no compromise with it. The administrative consequences would not necessarily mean that all defendants be tried but simply that the guilty plea in itself would be an irrelevant factor in sentencing and that inducement of guilty pleas, under any circumstances, would be outlawed.[105] Those holding this position would not see it to be a question of controlling or limiting plea bargaining any more than there would be a question of controlling or limiting the third degree. In brief, if plea negotiation is equated with coercion, then no adjustment is possible.

At the present time, however, total rejection of plea negotiation and of the implicit sentence bargaining in all guilty pleas is not the majority position among commentators, including appellate courts, on nontrial adjudication. It is more common to distinguish, both factually and philosophically, plea negotiation from coercion and to at least attempt to spell out conditions under which bargaining might properly be used and conditions under which it would be considered improper *per se*. This ability to distinguish between (and control) the *proper* versus the *improper* exercise of charging and sentencing concessions to pleading defendants might well be a sensible solution to matters of propriety in plea bargaining situations.

This type of analysis is not new to criminal justice issues. For example, in the matter of search where there is insufficient evidence

[104] People v. Byrd, 12 Mich. App. 186, 162 N.W.2d at 798.

[105] Judge Levin advocated this position in *People v. Byrd*, and his comments attack the notion that a charge concession in exchange for a guilty plea is "individualization" of justice. See his comments on this subject in the text, § III (C)(3) *supra*.

to arrest a single suspect or to obtain a search warrant (as in roadblock searches), the late Supreme Court Justice Robert Jackson attempted to distinguish the relative propriety of such "collective" searches on the basis of the seriousness of the criminal conduct desired to be thwarted or prevented, *i.e.,* the motivation of the state. He stated that he would possibly tolerate a roadblock search if the life of a kidnapped child were involved but would not tolerate the same procedure if the purpose was simply the recovery of a few bottles of untaxed whiskey and the apprehension of a bootlegger.[106]

It may well be that some propriety issues in plea negotiation can be resolved on the same or similar grounds, *i.e.,* on the *motivation* for the bargain and the type of situation in which it occurs. For example, courts are sometimes confronted with cases in which charges, while technically correct, somehow seem inappropriate given the entire circumstances of the case and the characteristics of the perpetrator or the victims. For example, in a forcible rape where the victim is random, where violence is used, and where injury to the victim occurs, it would seem to be inappropriate to reduce the charge to a lesser offense simply to get a guilty plea. Not all rapes, however, follow this pattern. Sometimes a defendant is charged with rape when the victim is in fact a semiprostitute who on the particular evening in question refused to respond to advances as was her common practice. The defendant used force to obtain what he had been led to expect; and, somehow, it seems inappropriate that both his criminal record and sentence be exactly the same as the rapist in the first instance, where the victim was chosen at random, was otherwise innocent, and was injured. This type of situation in which there are significant variations in the circumstances surrounding legally identical crimes is commonly faced by prosecutors and courts, and it acts to confound the issue of the propriety of plea negotiation, by entwining it within the ambit of the discretion exercised by both prosecutors and judges, but hopefully in ways that result in a system of equitable and just charging and sentencing.

In regard to the *improper* exercise of the practice, one could also base the propriety concern on the *motivation* for plea bargaining on the part of the state. For example, it could be argued that plea negotiation is intrinsically improper if the sole purpose of the state is to induce a guilty plea under one or a combination of three conditions: (1) solely because the evidence held by the state is weak or inadmissible and conviction at trial is doubtful, (2) solely to avoid court crowding and overwork, or (3) solely because of fear on the part of the prosecutor of the skill of the defense counsel. There is some interesting evidence that these factors are relevant considerations in the state's current motivation for negotiating with defendants. The *University of*

[106] Brinegar v. United States, 338 U.S. 160, 183 (1949).

Pennsylvania Law Review asked a group of chief prosecuting officials from various states to indicate the considerations that motivated their bargaining decision.[107] The most frequently listed consideration in striking a bargain was the lack of strength of the state's case; some 85 percent of the prosecutors who responded noted this weakness as an important factor. Some 37 percent said the volume of work was an influencing factor; only 32 percent said the harshness of the law influenced their decisions (the avoidance of mandatory sentences and the like); and 27 percent said that sympathy for the defendant was a factor.[108] On the other hand, the author of a more recent study commented:

> My impressions differ from the conclusions of the *Pennsylvania* survey. Every prosecutor I interviewed considered the strength of the case relevant and almost every prosecutor considered "sympathy" and the "workload" as well. Nevertheless, my impressions correlated with the *Law Review's* conclusions on a basic point: If tactical considerations are not the most important factor in bargaining, at least they are the factor that prosecutors are most ready to avow.[109]

If it is possible to list the primary consideration where plea bargaining would be considered *inappropriate* by the state, the opposite should also be true. That is, there should be conditions (controlled perhaps by requiring the prosecutor to present a written explanation of his reasons or the judge to write such an opinion or both) under which plea negotiation would be considered proper:

1. *When the motivation is to avoid excessive consequences of mandatory sentences when they are clearly inappropriate in a particular case.* This is simply the frank delegation of discretion to the prosecutor and the trial court to distinguish between cases about which the legislature has generalized. This is not an attempt to usurp legislative power but is merely a way to introduce equity into a system that would otherwise work some excessive hardships. Legislatures, after all, are political collectivities which, when confronted with a particular crime situation, are sometimes prone to enact excessively repressive legislation. For example, some of the narcotics laws, if universally applied to all defendants who technically fit within the descriptions of the crimes, would wreak havoc with any attempt to tailor the sanction to the total circumstances of any criminal action and to the characteristics of individual defendants. After all, while a teenager selling a single marijuana cigarette to a friend and a professional pusher of heroin may both be guilty of sale of narcotics and subject to lengthy mandatory incarceration, their cases can be distinguished on the trial court level without really violating the legislative purpose in condemning drug sellers.

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[107] Note, *supra* note 54, at 896-907.

[108] *Id.* at 901.

[109] Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 59 (1968).

2. *When the motive is to avoid a criminal label which would imply in the public mind that the defendant was guilty of conduct which is really not consistent with the actions that formed his criminal violation.* For example, in a case[110] in which a number of college students were having a noisy party in an apartment near their campus, the police arrested and charged the student owner of the apartment with, of all things, "operating a disorderly house." Confronted with this charge, the judge explained to the prosecutor and the arresting police officer that the connotations of such a label were so negative that he would not accept a plea of guilty even though the offense was a misdemeanor. The charge was modified (not really reduced) to disorderly conduct. The label of disorderly conduct against the male owner of the apartment was not felt to be particularly onerous or misleading. Likewise, in another case in which a girl was arrested for shoplifting and was charged with disorderly conduct, the judge refused to accept a plea to this count, pointing out that a record of disorderly conduct in a case of a young girl could be wrongfully interpreted as involving sexual misbehavior, whereas petty larceny (again not really a lesser charge) would likely be less damaging to the defendant in the long run.

3. *When there is a crime involving co-defendants of unequal culpability.* Again, this is simply a recognition of the prosecutor's discretion to distinguish what the legislature cannot do; that is, to determine the degree of involvement in a single offense on the part of multiple persons involved in the crime. The same can hold true when there are other mitigating circumstances, such as the participation of the victim in a criminal activity (*e.g.,* confidence games), or when the victim in some other way contributed to the commission of the crime.

4. *When the therapeutic benefits of alternative sentences can best be achieved by charge reduction or by awarding probation to guilty plea defendants, where normally such would not be the case.* It has been suggested by the drafters of the A.L.I. Model Penal Code that such considerations be taken into consideration *after* the plea is tendered so that the judge has the power to downgrade a charge to achieve this end without first using it to induce the guilty plea.[111] This is really an extension of sentencing discretion which, while it may achieve the same end of individualizing sentences as negotiated pleas, ignores the operational significance of a preplea bargain. This is indeed a "mercy of the court" situation which ignores the other administrative advantages of negotiation. In any case, there may be situations in which the sentencing structure is such that maximum benefit to the individual

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[110] This illustration and the one which follows are from field observations made during the preparation of the AMERICAN BAR FOUNDATION SURVEY OF CRIMINAL JUSTICE IN THE UNITED STATES (1956-58).

[111] ALI, MODEL PENAL CODE, § 6.12, *Reduction of Conviction by Court to Lesser Degree of Felony or to Misdemeanor* (Proposed Official Draft, 1962).

offender (with due consideration to the consequences for his victims) can be achieved only by charge reduction or some other state concession. If this were the primary motivation, then such reduction could well be considered proper.

5. *When charge reduction and sentencing leniency are used to support law enforcement efforts by rewarding informants, state's witnesses and the like.* This is sometimes called "trading the little ones for the big ones"; but the fact remains that unless differential court leniency is shown such persons, major cases cannot be developed. This is harder to justify on proprietary grounds if one is initially unwilling to support an informant system. If, however, one sees a relationship between the activities of the court and the activities of law enforcement in the community, then a decision must be made about the propriety of using one aspect — namely, sentencing or charge reduction — to support the activities of the other.

6. *When the ultimate sentencing consequences may be too harsh.* This situation may arise when the consequences of new conviction are excessive, because it may move a candidate closer to becoming labeled an "habitual criminal" (with the attendant consequences) when, in fact, the total circumstances of the case and the defendant's characteristics do not so indicate. This, again, is simply an adjustment of the adjudicatory sentencing process — including alternatives like revocation of parole in lieu of new prosecution — to achieve equity when full scale conviction and sentencing would be too harsh.

Without attempting to exhaust the number of situations in which plea negotiation might be considered proper, the point is that there may be a distinction in the propriety of plea negotiation depending upon the motivation of the state in engaging in the practice. When the purpose of the negotiation is to avoid simple overcrowding, to push through weak cases, or to bargain from fear, then plea negotiation is clearly improper. On the other hand, an affirmative case can be made for the individualization of justice and for the equity basis of plea negotiation on the part of the prosecutor and the court. If such a distinction can be made operational, then, of course, it must be circumscribed; it is necessary that all the controls enunciated by the ABA[112] and others are followed.

The price paid for a *motivational basis* of proper plea negotiation may be similar to that of the exclusionary rule, namely, the freeing of offenders when the constable has blundered.[113] Inevitably, there will be cases in which the state opts for a negotiated plea conviction not

[112] *See generally* ABA PROJECT, *supra* note 1.

[113] Mapp v. Ohio, 367 U.S. 643 (1961); *cf.* People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926), per Judge Cardozo, "[t]he criminal is to go free because the constable has blundered." *Id.* at 21, 150 N.E. at 587.

from altruistic reasons but because the evidence is weak or the witnesses uncertain.[114] This risk and its attendant costs will have to be weighed against the desirability of the recognition of plea bargaining as proper or improper under certain conditions.

VI. CONTROL OF PLEA NEGOTIATION

If the basis of proper plea negotiation hinges on its purposes, then, in addition to the admonitions of the ABA Committee,[115] there must be more explicit expression of the details of the way pleas are induced and a more elaborate record of the reasons and motivations for reductions or other promises that are made. This is necessary if such practices are to become reviewable by appellate courts.

Further, an accurate record of all plea agreements should be kept, not only for purposes of review, but also so that followup studies can be made to evaluate and analyze this practice in general. For example, it would be clearly inconsistent with the equity purposes of negotiation to release dangerous persons back into the community on probation in exchange for a guilty plea. If this turned out to be a significant problem, then no matter how beneficient the negotiation motives were at the time, other controls would have to be introduced. Furthermore, allegations of discrimination would be easily testable if accurate records of demographic, as well as criminal, activities of the offenders involved in plea negotiations and those denied plea negotiation were kept by the courts. The burden of such recordkeeping should be on the prosecutor and the judiciary, much as prisons and parole boards assume obligations to evaluate their practices and their effectiveness in correctional decisions, such as release on parole and recidivism.

In addition to accurate recordkeeping, there should be limits (by court rule or statute) on the range of charge reduction, since one of the equal protection issues is not only the deal which can be made but also the *extent* of the deal. That is, the reduction of murder to manslaughter may be one thing, but the reduction of murder to disorderly conduct is quite another. Clearly, there should be no overcharging on the part of the prosecutors in order to induce pleas. Likewise, there probably should be no downgrading to "illogical" lesser offenses where the actual charge bears no relationship to the criminal conduct of the offender involved. In short, there must be some range set to permissible downgrading no matter how noble the motive of the prosecutor and the court.

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[114] Organized crime cases may fit this pattern. The prosecutor might bluff the defendant into pleading to a lesser charge when the prosecutor knows the admissible evidence is in all probability not sufficient for conviction.

[115] *Supra* note 112.

However, in each instance of plea bargaining there should be a lesser charge available for a plea. This is not always the case. For example, there is a problem now existing in the federal system because certain crimes, such as a violation of the Dyer Act (interstate transportation of a stolen motor vehicle), contain no lesser included offense to which a plea may be entered.[116] Most defendants charged under this section are teenagers, many having no prior records and no intent to permanently deprive the owner of his vehicle. The prohibition against illogical downgrading places federal prosecutors in a position of either taking a plea to the Dyer Act felony on the nose or dismissing the charge in its entirety. In most cases, some other charge — possibly a misdemeanor — would be preferable but is not available in federal courts.

Since under current conditions the burden of showing improper negotiation is entirely with the person contesting his conviction, another suggested change is that the state make affirmative statements in either agreeing or refusing to negotiate. This is evidently being done in some jurisdictions. For example, the Erie County District Attorney's Office in New York has a written form on which defense counsel submit their request for plea negotiation.[117] Attorneys are required to set forth the lesser plea they are seeking and the reasons that they believe justify their request. This document is then submitted to the District Attorney's Office for his approval or disapproval and for his comments. It is then given to the judge for his disposition and eventually filed with the court.

It would appear that such a formal procedure, well-posted and publicized, wherein negotiation matters are reduced to writing, attested to by defense counsel and a member of the prosecution's staff, and approved or disapproved by the court, is one way to move plea negotiation into the realm of visible and orderly processing. Only when this occurs, can the various facets and full dimensions of negotiated justice be subject to the tests of effectiveness and propriety which our system of criminal justice deserves.

APPENDIX

OFFICE OF THE DISTRICT ATTORNEY
CITY COURT OF BUFFALO

Date..... Docket.....

Defendant..... Charge.....

Part..... Returnable.....

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[116] 18 U.S.C. § 2312 (1964).

[117] *See* APPENDIX, p. 405 *infra.*

As attorney for the defendant, I offer a plea of guilty to a violation of.....

I submit that this would represent substantial justice and would give the Court ample latitude to deal properly with the matter.

I call the attention of the Court to the following factors:

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Attorney for Defendant

COMMENT:

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Assistant District Attorney

DATE:

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STATE OF NEW YORK
COUNTY COURT : ERIE COUNTY

THE PEOPLE OF THE STATE OF NEW YORK

— vs — Indictment No.....

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Defendant(s)

SIR:

WHEREAS, you have been retained or assigned to defend the above named defendant(s) on Indictment No.....;

PLEASE TAKE NOTICE that pursuant to an Order of the County

Court a General Calendar Call will be held on....., 1968, at.....a.m., County Court, Part.....; at which time the said indictment will be moved for trial;

PLEASE TAKE FURTHER NOTICE that the District Attorney:

(1) Demands that if alibi testimony is intended to be offered on behalf of the defendant that such information be supplied pursuant to Section 295-L of the Code of Criminal Procedure.

(2) Hereby gives notice of his intention to offer into evidence against the defendant upon the trial any and all confessions and or admissions oral or written, alleged to have been made by him/them pursuant to Section 813-F through 813-I, inclusive of the Code of Criminal Procedure and Rule XII of the Erie County Court Rules.

(3) Requests that if the defendant at the time of the commission of the crime was between the ages of 16 and 19, any application requesting Youthful Offender treatment must be processed immediately.

(4) Any application for a plea in this indictment must be made by you in writing *immediately*. This request should contain a detailed statement of the background of your client as well as any other reasons that would give merit to the considerations requested.

Respectfully,

MICHAEL F. DILLON
District Attorney of Erie County
Attorney for the People
Erie County Court Building
25 Delaware Avenue
Buffalo, New York

Dated: .....

To: .....

Attorney for Defendant

Office and Post Office Address

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