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## Plea Bargaining: The Case for Reform

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## NOTE

### PLEA BARGAINING: THE CASE FOR REFORM

Although plea bargaining has not been openly recognized or sanctioned by most courts,<sup>1</sup> it has become quite widespread and effective.<sup>2</sup> Due to this lack of formal recognition, no uniform plea bargaining procedure has been developed, but generally, an accused is encouraged to plead guilty in exchange for some concession, the most familiar being a promise by the prosecutor to ask the court for leniency. Such concession is far from being the only "reward" offered by the state;<sup>3</sup> indeed, if it were the only one, the practice would not have flourished as it has. Depending upon the particular laws of the forum, the prosecutor may agree to a guilty plea to some lesser included offense; dismiss the remaining charges for a plea of guilty to one

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<sup>1</sup> Until recently the constitutional validity of plea bargaining was in question. See *Shupe v. Sigler*, 230 F. Supp. 601, 606 (D. Neb. 1964) (alternative holding) (guilty plea which is the product of plea bargaining is involuntary per se). But see, e.g., *United States v. Williams*, 407 F.2d 940 (4th Cir. 1969); *Martin v. United States*, 256 F.2d 345 (5th Cir. 1958); *People v. Guiden*, 172 N.Y.S.2d 640 (1958); *Commonwealth v. Maroney*, 423 Pa. 337, 223 A.2d 699 (1966) (plea not involuntary merely because it is produced by plea negotiations).

*Brady v. United States*, 397 U.S. 742 (1970) settled these doubts, upholding the validity of the bargained guilty plea. See note 55 *infra* and accompanying text.

Only following this decision have courts felt compelled to confirm the legality of plea bargaining and thereby to set up procedures "in the strong light of full disclosure." *People v. West*, 3 Cal. 3d 595, 596, 477 P.2d 409, 410, 91 Cal. Rptr. 385, 386 (1970). See also *Clancy v. Coiner*, — W. Va. —, 179 S.E.2d 726 (1971).

<sup>2</sup> See *Brady v. United States*, 397 U.S. 742, 752 n.10 (1970): "It has been estimated that about 90%, and perhaps 95%, of all criminal convictions are by pleas of guilty; between 70% and 85% of all felony convictions are estimated to be by guilty plea."

Since plea bargaining has only recently been recognized, there is little evidence to show exactly what proportion of guilty pleas are the result of the practice. It is thought that the number is great. The University of Pennsylvania Law Review surveyed prosecutors' offices in 43 states and the percentage of negotiated pleas ranged from less than 10 per cent to more than 70 per cent. See Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 896-99 (1964).

Courts have recognized the role that plea bargaining plays in securing guilty pleas. See *Barber v. Gladden*, 220 F. Supp. 308 (D. Ore. 1963) (has become integral part of the administration of justice); *People v. Williams*, 75 Cal. Rptr. 348 (Ct. App. 1969) (essential to smooth and fair administration of justice); *In re Hawley*, 67 Cal. 2d 824, 433 P.2d 919, 63 Cal. Rptr. 841 (1967) (a substantial portion and maybe even a vast majority of guilty pleas are the result of plea bargaining).

<sup>3</sup> See D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 78-90 (1966); *Guilty Plea Note*, *supra* note 2.

of multiple courts;<sup>4</sup> promise not to press charges against a friend or accomplice;<sup>5</sup> or agree not to charge the accused under any applicable habitual offender law.<sup>6</sup> In some localities the bargaining is not limited to the prosecutor, permitting the judge also to participate.<sup>7</sup>

The benefits of a plea bargaining practice for the state are readily apparent. With defendants pleading guilty, the overall cost of their criminal prosecution is reduced, administrative efficiency in the courts is greatly increased, and the crowded court dockets are eased, thus allowing more attention to cases in which there is a substantial question of guilt.<sup>8</sup> Plea bargaining also allows the prosecutor to individualize punishment with an eye toward rehabilitating a defendant—a goal otherwise made more difficult because of the high minimum sentences often set by outmoded criminal statutes.

A guilty plea also has certain distinct advantages for a truly guilty defendant. For a person ready to admit his guilt, a protracted wait for trial in an overcrowded jail may be avoided,<sup>9</sup> as well as the uncertainty as to his punishment. The accused will also be spared the notoriety which accompanies a lengthy trial,<sup>10</sup> and in many cases he may escape some socially offensive label commonly associated with sex crimes.<sup>11</sup> The most direct benefit to a guilty defendant would be the possibility of a reduced sentence.

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<sup>4</sup> See *United States v. Weber*, 429 F.2d 148 (9th Cir. 1970) (agreement to plead guilty to one of two counts if the more severe is dropped); *Smith v. People*, 162 Colo. 558, 428 P.2d 69 (1967) (common practice for commonwealth attorney to dismiss or fail to file additional charges).

<sup>5</sup> See *Johnson v. Wilson*, 371 F.2d 911 (9th Cir. 1967) (pregnant wife not to be charged with narcotics offense); *Kent v. United States*, 272 F.2d 795 (1st Cir. 1959) (avoid fiancée being tried as accomplice).

<sup>6</sup> See *Ford v. United States*, 418 F.2d 855 (8th Cir. 1969) (charge under state habitual criminal law would be dropped, if defendant would plead guilty to the federal charges).

<sup>7</sup> See *Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970) (participation by a Virginia state judge in plea discussions does not render the plea per se involuntary but is merely one factor to be considered). *But see Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 (1969). See generally notes 94-97 *infra*.

<sup>8</sup> See *Lassiter v. Turner*, 423 F.2d 897 (4th Cir. 1970) (plea bargaining increases the quality of justice in those cases which must be tried); *Raleigh v. Coiner*, 302 F. Supp. 1151, 1160 (N.D. W. Va. 1969) (plea bargaining leads to accomplishment of justice at minimum cost and with maximum efficiency).

<sup>9</sup> See *Langdeau v. South Dakota*, 446 F.2d 507 (8th Cir. 1971) (defendant pleaded guilty because the county jail where he was confined was crowded and he did not like the food).

<sup>10</sup> See *Overman v. United States*, 304 F. Supp. 237 (W.D. Tenn. 1969) (plea allows guilty defendant to spare himself and his family the spectacle and expense of protracted trial proceedings).

<sup>11</sup> See *State v. Ashby*, 81 N.J. Super. 350, 195 A.2d 635 (1963) (defendant allowed to plead guilty to charge of disorderly person instead of open lewdness).

## I. OBJECTIONS RAISED TO PLEA BARGAINING

Even in light of the enumerated benefits to both parties involved, plea bargaining has been criticized inasmuch as the desired result—a plea of guilty—has some rather severe consequences for the accused. If his plea is accepted by the court, the defendant is deemed to have admitted all the elements of the crime necessary for a conviction. The only step remaining is the imposition of the sentence.<sup>12</sup> By so pleading, the defendant's constitutional rights to a trial by jury, to a confrontation with his accusers, and against self-incrimination have been waived.<sup>13</sup> Additionally, no objections may be made to any errors committed prior to arraignment unless they assume jurisdictional proportions.<sup>14</sup>

The safeguards applicable to the waiver of other constitutionally protected rights have been applicable to plea bargaining—that is, in order to be binding on the defendant, his plea must be entered voluntarily and with knowledge of the consequences of his act.<sup>15</sup> However, it is generally agreed that plea bargaining, due to its secretive nature, should not continue as presently practiced, *i.e.*, widespread, yet officially unrecognized. It is not surprising that there is disagreement as to what action should be taken. Some would

<sup>12</sup> *Kercheval v. United States*, 274 U.S. 220, 223 (1927), *cited with approval in Boykin v. Alabama*, 395 U.S. 238, 242 (1969).

<sup>13</sup> *See* *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (guilty plea amounts to a waiver of these fundamental rights); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (right to jury trial); *Pointer v. Texas*, 380 U.S. 400 (1965) (right to confront accusers); *Malloy v. Hogan*, 378 U.S. 1 (1964) (right against self-incrimination).

<sup>14</sup> *See, e.g.*, *Nobles v. Beto*, 439 F.2d 1001 (5th Cir. 1971) (plea waives denial of defendant's right to compulsory process, his right to counsel at police interrogation, and his right to be brought immediately before a magistrate); *Colson v. Smith*, 438 F.2d 1075 (5th Cir. 1971) (objections as to construction of grand jury waived); *Lavergne v. Henderson*, 323 F. Supp. 532 (W.D. La. 1971) (cannot consider question of a coerced confession on appeal—coerced confession does not necessarily mean that the plea was coerced); *Loomis v. Peyton*, 323 F. Supp. 246 (W.D. Va. 1971) (defendant may no longer object to any illegal search or seizure).

*But see* *Gilinsky v. United States*, 430 F.2d 1292 (9th Cir. 1970) (plea does not waive objections concerning the inducements to plead); *United States ex rel. Stephen v. Shelly*, 430 F.2d 215 (2d Cir. 1970) (under New York law a plea does not waive all non-jurisdictional defects); *Colson v. Smith*, 315 F. Supp. 179 (N.D. Ga. 1970) (plea does not waive any defects which are clearly jurisdictional); *United States v. Kelly*, 314 F. Supp. 500 (E.D.N.Y. 1970) (no waiver if alleged defect is the prosecution itself).

<sup>15</sup> According to the classic definition, a valid waiver of constitutional rights is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). *See* *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (states must abide by federal standards); *Kercheval v. United States*, 274 U.S. 220 (1927) (federal courts will not accept unless voluntary and knowledgeable).

abolish plea bargaining altogether,<sup>16</sup> while others feel that the proper approach would be to institute much needed reforms.<sup>17</sup>

Those who wish to abolish plea bargaining base their attack on arguments of questionable validity. They fear the official recognition of plea bargaining might bring about a shift toward the administrative determination of guilt,<sup>18</sup> resulting in a great detriment to the public, the encouragement of illicit government practices, and necessarily, the loss of protection for the rights of the individual.

#### A. Public Detriment

It is true that the public benefits in a general way from jury trials. A trial is instructional by providing the populace a "lesson in legal procedure, dignity, fairness and justice."<sup>19</sup> It gives people a greater degree of social responsibility by virtue of their participation as jurors.<sup>20</sup> These lessons are perpetuated by a steady flow of trials, which will not abate even with the increased acceptance of plea bargaining.

It is also argued that jury trials enhance the legitimacy of criminal justice by making the guilt determination a matter open and before the public, and that secretive plea bargaining might lessen the public's confidence in the criminal justice system.<sup>21</sup> But, behind the scenes discussions are not inherent in plea bargaining. They have only come about because the courts have chosen not to recognize the practice. Any such "defect" is easily cured.

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<sup>16</sup> See generally Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970); Note, *Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956).

<sup>17</sup> See generally Bongiovanni, *Guilty Plea Negotiation*, 7 DUQ. L. REV. 542 (1969); Underwood, *Let's Put Plea Discussions—and Agreements—on Record*, 1 LOYOLA (CHI.) L.J. 1 (1970); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964); AMERICAN BAR ASS'N PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (Tent. Draft 1967) [hereinafter cited as ABA STANDARDS].

<sup>18</sup> There would actually be little or no shift to an administrative determination since the practice is presently widespread. See note 2 *supra*. Although there may be some slight increase in plea bargaining, official recognition primarily would bring the present practice into a position in which it could be effectively controlled. See note 45 *infra* and accompanying text.

<sup>19</sup> Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359, 398 (1970).

<sup>20</sup> See Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1395-96 (1970).

<sup>21</sup> Not only is the confidence of the public lost by the present system, but by being secretive it also reduces the rehabilitative effectiveness. See Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM L.C. & P.S. 780 (1956).

### B. *Illicit Government Practices*

Since a plea of guilty is a waiver of all non-jurisdictional errors, the thought has been advanced that the recognition of plea bargaining, and the consequential increase in guilty pleas, will tend to encourage the government to make illegal searches and use illegal means to force confessions.<sup>22</sup> In theory, the main reason police abstain from such conduct is that any evidence, and the fruits therefrom, would be excluded from use in a subsequent trial.<sup>23</sup> Conceivably the police could coerce a confession and use it to encourage a defendant to plead guilty, and once he so pleads, their past illegal conduct would be absolved.<sup>24</sup> Again the problem is not one which is unavoidable with a bargaining practice, but which may be prevented with proper police restrictions.<sup>25</sup>

### C. *Loss of Individual Rights*

The most persuasive criticism of plea bargaining concerns the anticipated loss of protection for the rights of an accused. It has been contended by some that there can be no viable substitute for a trial determination of guilt which would insure protection of individual rights. But this view unjustifiably presupposes the infallibility of the jury trial.<sup>26</sup> Many factors other than a search for the truth affect the guilt determination process.<sup>27</sup> More-

<sup>22</sup> See 83 HARV. L. REV., *supra* note 20, at 1396.

<sup>23</sup> See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966) (coerced confession); *Mapp v. Ohio*, 367 U.S. 643 (1961) (illegal search).

<sup>24</sup> As a consequence of pleading guilty, the defendant waives his objections to illegally seized evidence and any coercion employed to elicit a confession. See, e.g., *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967) (illegal confession in prosecutor's possession cannot be basis for collateral attack on a valid plea); *Loomis v. Peyton*, 323 F. Supp. 246 (W.D. Va. 1971) (illegally seized evidence).

The police are deterred in blatant cases. The issue of the validity of a confession or admissibility of seized evidence must be examined by the court if the defendant alleges that his guilty plea was a product of the abridgment of his corresponding constitutional rights. Assuming the truth of the allegation, the plea itself would have been involuntary. See *Pennsylvania ex rel. Herman v. Claudy*, 350 U.S. 116 (1956); *Gladden v. Holland*, 366 F.2d 580 (9th Cir. 1966) (guilty plea given a few hours after a coerced confession invalid).

<sup>25</sup> Our legal system has not developed to the point of invalidating a particular practice simply because it is potentially coercive if abused. The Supreme Court has recognized that unregulated police interrogations were highly coercive. The solution was not to prohibit the policy of questioning, but to establish safeguards which would lessen the impact on the defendant. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

<sup>26</sup> J. FRANK, *COURTS ON TRIAL, MYTH AND REALITY IN AMERICAN JUSTICE* 124 (1949):

Mr. Justice Cordoza, in a Supreme Court opinion, wrote, "Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without" jury trials.

<sup>27</sup> See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE,

over, most court decisions fail to properly consider the implications of modern developments in sociology, psychology, and psychiatry.<sup>28</sup>

### 1. *Chilling Effect Arguments*

One further argument against plea bargaining involving the rights of the accused is founded in the pervasive chilling effect concept, which was developed to give "breathing space"<sup>29</sup> to certain constitutionally protected rights.<sup>30</sup> The substance of this new concept, as it applies to plea bargaining, broadens the critical standard by which the validity of governmental action is judged. To be objectionable, a particular practice does not have to actually coerce a defendant, thereby rendering his subsequent choice necessarily involuntary. The courts now recognize that a government may so structure a set of circumstances that an individual would be hard pressed to assert his rights, since to do so would be "costly."<sup>31</sup> Such a conclusion was reached in *United States v. Jackson*,<sup>32</sup> in which the court noted that "[t]he evil . . . is not that it necessarily coerces guilty pleas and jury waivers but simply that it needlessly encourages them."<sup>33</sup> Without some justification, any encouragement to waive guaranteed rights directed toward the defendant would be invalid even though the pressure would not remove the element of voluntariness from the defendant's choice. To ascertain what is "needless encouragement" within the *Jackson* rationale, a court must undertake a balancing process, weighing the particular individual right present and the degree to which it is deterred, against the necessity of this practice

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TASK FORCE REPORT: THE COURTS 10 (1967) [hereinafter cited as TASK FORCE REPORT]:

At its best the trial process is an imperfect method of factfinding; factors such as the attorney's skill, the availability of witnesses, the judge's attitude, jury vagaries, and luck will influence the result.

See generally, Newman, *Trial by Jury: An Outmoded Relic?* 46 J. CRIM. L.C. & P.S. 512 (1955).

<sup>28</sup> *Id.* at 518.

<sup>29</sup> *NAACP v. Button*, 371 U.S. 415, 433 (1963).

<sup>30</sup> Although the chilling effect doctrine developed in the area of first amendment rights, see *Malone v. Emmet*, 278 F. Supp. 193, 200-01 (M.D. Ala. 1967) (chilling effect only applies to first amendment cases), it has expanded into the criminal law as well. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711 (1969) (no unjustifiably higher sentence on retrial after appeal); *Griffin v. California*, 380 U.S. 609 (1965) (improper for prosecutor to comment on the defendant's failure to take the witness stand); *Green v. United States*, 355 U.S. 184 (1957) (successful appeal does not waive former jeopardy plea).

As applicable to plea bargaining, the chilling effect rationale has been used in the area of waiver of jury trials. See *United States v. Jackson*, 390 U.S. 570 (1968).

<sup>31</sup> *Griffin v. California*, 380 U.S. 609, 614 (1965).

<sup>32</sup> 390 U.S. 570 (1968).

<sup>33</sup> *Id.* at 583.

to advance some valid public interest.<sup>34</sup> If there is no public interest advanced, or if the same result could be reached by some "less drastic means,"<sup>35</sup> then the conduct is unjustifiable and invalid.

Two chilling effect arguments may be made as a result of the circumstances surrounding plea bargaining.<sup>36</sup> The first involves the validity of government action in offering benefits to an accused, thus making his choice of pleas a difficult one. The second argument attacks not the offer, but questions the propriety of a sentencing differential—that is, the imposition of a punishment which is more severe after a trial than it would have been had the defendant pleaded guilty.

Since plea bargaining involves an offer of some benefit to an accused in exchange for his guilty plea, there is little question that he must pay a price in order to exercise his right to a jury trial. The inquiry now should be first to determine if any public interest is served by such payment, and if so, whether there is any less drastic way to achieve the same result.

The public has a definite interest in plea bargaining since the procedure is designed to increase the efficiency of the administration of criminal justice.<sup>37</sup> The goal of a more efficient system might seem a questionable purpose for which to subordinate the right to trial, but this goal must be assessed within the precarious framework of the entire judicial process.<sup>38</sup> If all the cases which might be settled by guilty pleas were forced upon the courts, the already overcrowded system might very well collapse under the strain. The public interest in "negotiated" justice then is not in mere efficiency, but rather the paramount interest in a functional judicial system, which is the basic protection for individuals in an ordered society.<sup>39</sup>

<sup>34</sup> See *Garrity v. New Jersey*, 385 U.S. 493 (1967):

The validity of a consequence depends both upon the hazards, if any, it presents to the integrity of the privilege and upon the urgency of the public interests it is designed to protect.

*Id.* at 507 (Harlan, J., dissenting).

<sup>35</sup> *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

<sup>36</sup> See generally Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

<sup>37</sup> See, e.g., *State v. Wright*, 103 Ariz. 52, 436 P.2d 601 (1968) (there is a public interest in encouraging guilty pleas); *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 413, 91 Cal. Rptr. 385 (1970) (benefit to the state is that it lessens cost and increases efficiency).

<sup>38</sup> "Interminable delays in civil cases; unconscionable delays in criminal cases; . . . a steadily growing backlog of work that threatens to make the delays worse tomorrow than they are today . . ." Address by President Nixon, National Conference on the Judiciary, in Williamsburg, Virginia, Mar. 11, 1971.

<sup>39</sup> See Address by Chief Justice Warren E. Burger, National Conference on the Judiciary, in Williamsburg, Virginia, Mar. 12, 1971:

[T]he administration of justice is the adhesive—the very glue—that keeps the parts of an organized society from flying apart. Man can tolerate many short-



There has not been offered a less drastic alternative that would allow a defendant a completely free choice for trial, short of a mandatory trial in every case, which must be avoided for obvious practical reasons.<sup>40</sup> Aside from the argument that a defendant has a constitutional right to plead guilty,<sup>41</sup> a lack of resources prevents the expansion of the judicial machinery which would be required to effectively handle the increased load.<sup>42</sup> It is also thought that by trying a great number of cases in which no substantial issue of guilt was present, the presumption of innocence would be weakened and the courts would become skeptical of a real defense when presented.<sup>43</sup>

It is not a realistic alternative to forbid plea bargaining and at the same time continue to accept guilty pleas.<sup>44</sup> This was the situation in past years, and experience has shown that prosecutors still offered "deals." The real danger from plea bargaining lies in the fact that since the practice is offi-

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comings of his existence, but history teaches us that great societies have foundered for want of an adequate system of justice.

See also III R. POUND, JURISPRUDENCE 277-82 (1959).

<sup>40</sup> Such an alternative has been suggested. It was suggested that if there was a trial in every case, the fairness in each case might decrease but there would be an increase in the overall fairness. Even accepting this to be a valid observation, the change proposed was based on a necessary reformation of society's philosophy. The adversary system would be abandoned in favor of a "family" system. This shift of philosophy seems highly unlikely. See Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 YALE L.J. 359 (1970).

<sup>41</sup> See *Lawrence v. State*, 455 S.W.2d 650 (Tenn. Crim. App. 1970). "The right to plead not guilty has inherently and constitutionally within it the right to plead guilty." *Id.* at 651. See also *People v. White*, 8 Mich. App. 220, 154 N.W.2d 1 (1967); *Day v. Page*, 436 P.2d 59 (Okla. Crim. App. 1968).

But see *Lynch v. Overholser*, 369 U.S. 705, 719 (1962) (defendant has no absolute right to have guilty plea accepted under federal rules); *Griffin v. United States*, 405 F.2d 1378 (D.C. Cir. 1968) (a guilty plea should not be refused without good reason); *State v. Fernald*, 248 A.2d 754 (Me. 1968).

<sup>42</sup> See President Nixon's Address, *supra* note 38:

[I]f we limit ourselves to calling for more judges, more police, more lawyers operating in the same system, we will produce more backlogs, more delays, more litigation, more jails and more criminals. "More of the same" is not the answer.

<sup>43</sup> Cf. *Lassiter v. Turner*, 423 F.2d 897 (4th Cir. 1970) (plea bargaining increases the quality of justice in those cases which must be tried).

<sup>44</sup> Once an agreement has been reached which is thought to be beneficial by both parties, neither the prosecutor nor the defendant will subsequently say or do anything which might cause them to lose the benefit gained. Presently a federal judge is required to canvass the defendant to determine if his plea is valid. See *Boykin v. Alabama*, 395 U.S. 238 (1969); FED. R. CRIM. P. 11. As a general rule the judge will ask the defendant if anyone has made any promises to him and the reply is a categorical "No." See *United States v. Jackson*, 390 F.2d 130, 138 (7th Cir. 1968) (Kiley, J., dissenting). If plea bargaining were clearly outlawed, there is even more reason to suspect a similar charade to be practiced since a defendant would know that his plea would automatically be rejected.

cially nonexistent,<sup>45</sup> the prosecutor is free to employ whatever coercive pressures he desires, as there is no one to police his actions. This alternative, then, would do a graver injustice to the rights of the accused than an open recognition of the practice, since effective controls can only be imposed if the practice is officially before the public.

The prevalence of sentence differentials is also the foundation for a "chilling effect" argument against plea bargaining. In *North Carolina v. Pearce*,<sup>46</sup> the Court held that a state may not impose a higher sentence after a successful appeal and retrial merely to discourage appeals.<sup>47</sup> Similarly, a state may not impose a higher sentence solely because the accused demands a trial. It is important to note that the Supreme Court did not place an absolute bar upon a higher sentence upon retrial.<sup>48</sup> A judge may validly impose a more severe sentence in light of any new facts which would inform the court of the "life, health, habits, conduct, and mental and moral propensities"<sup>49</sup> of the defendant.

There are valid justifications for the disparity between sentences after guilty pleas and those following trial determinations of guilt. The courts will argue that the individual who pleads guilty shows that he is moving toward rehabilitation,<sup>50</sup> therefore the lighter sentence is a reward for the guilty plea, as opposed to the stiffer penalty being a punishment. This is merely begging the issue, since the accused knows he may be benefited by the formality of the plea whether he is repentant or not. The better response is that during a trial the defendant may have committed perjury, asserted a frivolous defense, or at the very least revealed circumstances of the crime and himself,<sup>51</sup> any of which reasons would justify a higher sentence by the test in *Pearce*.

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<sup>45</sup> See, e.g., *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 417, 91 Cal. Rptr. 385 (1970) (danger of secretiveness results from lack of judicial sanction).

<sup>46</sup> 395 U.S. 711 (1969).

<sup>47</sup> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.  
*Id.* at 725.

<sup>48</sup> It was argued that the constitutional prohibition of double jeopardy (U.S. CONST. amend. V) and the Equal Protection Clause (U.S. CONST. amend. XIV, § 1) absolutely forbade the imposition of a more severe sentence upon retrial, but these contentions were rejected. 395 U.S. at 723.

<sup>49</sup> *Id.*

<sup>50</sup> See ABA STANDARDS § 1.8(a) (ii).

<sup>51</sup> See generally NOTE, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 209-19 (1956) (although the conditions are criticized, the justifications have been made and are used).

## 2. *Equal Protection Argument*

Another line of attack on plea bargaining is founded on the loss of the rights, not of the defendants who plead guilty, but of those individuals who maintain their innocence and go to trial. It could be argued that they have been denied equal protection of the law, since generally speaking the sentence which is imposed at the conclusion of the trial is higher than that which would have been received upon a plea of guilty. Upon a close examination of the equal protection rationale it becomes apparent that the government has not "invidiously classified" these defendants.<sup>52</sup> By choosing to accept a jury trial, these defendants had the opportunity to be acquitted or to receive a lesser sentence, but at the same time they subjected themselves to the possibility of receiving a harsher sentence. It is a specious argument that the higher punishment was the direct result of demanding a trial since "the result may depend upon a particular combination of infinite variables peculiar to each individual trial."<sup>53</sup>

Although the Supreme Court has never directly dealt with any particular bargaining practice, it is difficult to foresee the Court invalidating any reasonable bargaining procedure in light of dictum in *Brady v. United States*:<sup>54</sup>

. . . [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his [guilty] plea that he is ready and willing to admit his crime . . .<sup>55</sup>

## II. REFORMATION OF PLEA BARGAINING PRACTICE

That plea bargaining exerts pressures upon a defendant cannot be denied, and idealistically any waiver of a fundamental right should be the product of a mind free of all external influences and pressures.<sup>56</sup> However, accepting as a fact the limitations inherent in our legal system, such completely

<sup>52</sup> See *North Carolina v. Pearce*, 395 U.S. 711, 722-23 (1969).

<sup>53</sup> *Id.* at 722.

<sup>54</sup> 397 U.S. 742 (1970).

<sup>55</sup> *Id.* at 753.

<sup>56</sup> As long as the defendant has the option to plead guilty, the pressure on him to so plead will be inherent in the system. *Ashcraft v. Tennessee*, 322 U.S. 143, 161 (1944) (Jackson, J., dissenting) (no truly voluntary confessions as the system is fraught with pressures). See *Brady v. United States*, 397 U.S. 742, 750 (1970):

The State to some degree encourages pleas of guilty at every important step in the criminal process. For some people, . . . apprehension and charge, both threatening acts by the Government, jar them into admitting their guilt. In still other cases, the post-indictment accumulation of evidence may convince the defendant . . . that a trial is not worth the agony. . . . All these pleas of guilty are valid in spite of the State's responsibility for some of the factors motivating the pleas . . . .

untrammelled conditions are unrealistic. The need for plea bargaining is inescapable and all efforts should be directed not toward its elimination<sup>57</sup> but to whatever reforms are necessary to provide the maximum individual protection within the framework of a practically feasible system.

The procedure set out below does not pretend to be a solution to all the problems surrounding plea bargaining. It is offered more to point up some of the areas of difficulty and to show that many of the objections can be minimized. The suggested safeguards do not reflect the minimum standards presently demanded by the courts' requirements for voluntary and knowing waiver. They offer more protection to the defendant in an attempt to greatly reduce the coercive influences to which he is presently subjected. The desired goal is a system in which an innocent defendant will not feel compelled to plead guilty,<sup>58</sup> and a truly guilty individual may make his choice in a rational manner based on the facts of his situation.<sup>59</sup>

This goal is of the utmost importance in light of the view the Supreme Court seems to have taken as to the finality of guilty pleas once accepted. It is felt that the Court is moving "toward the goal of insulating all guilty pleas from subsequent attack no matter what unconstitutional action of government may have induced a particular plea."<sup>60</sup> Consequently, any plea bargaining procedure must afford protection to the individuals prior to final acceptance of his plea.<sup>61</sup>

<sup>57</sup> *Cortez v. United States*, 337 F.2d 699, 701 (9th Cir. 1964):

The important thing is not that there shall be no "deal" or "bargain," but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of the plea, and is neither deceived nor coerced.

<sup>58</sup> See *Bailey v. MacDougall*, 392 F.2d 155, 158 n.7 (4th Cir.), cert. denied, 393 U.S. 847 (1968) (plea bargaining that induces an innocent person to plead guilty cannot be sanctioned); *Davidson v. State*, 92 Idaho 104, 437 P.2d 620, 621 (1968) (plea is involuntary if made under such inducements as would cause an innocent person to confess guilt).

<sup>59</sup> Some innocent defendants plead guilty when such action is the more attractive of the two alternatives open to him. See 3 J. WIGMORE, EVIDENCE § 822, at 246 (3d ed. 1940). A fine line must be drawn so that the necessary guilty pleas will be forthcoming but at the same time only guilty individuals will be persuaded to so plead. See generally Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964).

<sup>60</sup> *McMann v. Richardson*, 397 U.S. 759, 775 (1970) (Brennan, J., dissenting).

<sup>61</sup> A motion to withdraw a guilty plea may usually only be made before the sentence is imposed. See FED. R. CRIM. P. 32(d). After a plea has become final, a defendant can attack it collaterally only on the basis of lack of effective counsel or involuntariness of the plea. See *United States v. Smith*, 448 F.2d 726 (4th Cir. 1971). On this attack there is a presumption in favor of the plea's validity that the defendant must overcome. See *Vanater v. Boles*, 377 F.2d 898 (4th Cir. 1967) (defendant must establish by a preponderance of the evidence facts rendering the plea involuntary); *Commonwealth v.*

### A. *Prenegotiation Considerations*

As has been suggested, the first step in the development of safeguards is an official sanction for plea bargaining, and the establishment of some formal procedure to be uniformly followed.<sup>62</sup> The adoption of standardized guidelines would not only afford a means to regulate plea negotiations, but would also tend to negate the equal protection objection to the practice. It is not imperative that all defendants be offered the same concessions,<sup>63</sup> so long as all individuals have the same opportunity to bargain. This does not mean that all defendants must be allowed to negotiate, but only that the prosecutor's decision whether to bargain or not be based on the same rational considerations.<sup>64</sup>

Any formal procedure must be public in nature in order to give it the legitimacy necessary to gain the support of the people.<sup>65</sup> With such openness, some of the coerciveness presently inherent in plea bargaining would likely be reduced. Any thought by the defendant that the procedure is inquisitorial, which is presently generated by the negotiations being held behind closed doors, will automatically be dispelled.<sup>66</sup>

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Holl, 434 Pa. 312, 254 A.2d 11 (1969) (presumed plea was made knowingly); Commonwealth v. Simpson, 434 Pa. 439, 254 A.2d 306 (1969) (burden of proving illegal inducement on defendant); Gibson v. State, 47 Wis. 2d 810, 177 N.W.2d 912 (1970) (defendant must prove plea's invalidity by clear and convincing evidence).

<sup>62</sup> See United States v. Williams, 407 F.2d 940 (4th Cir. 1969); Smith v. United States, 277 F. Supp. 850 (D. Md. 1967); Commonwealth v. Maroney, 423 Pa. 337, 223 A.2d 699 (1966); State *ex rel.* Clancy v. Coiner, — W. Va. —, 179 S.E.2d 726 (1971).

. . . We should exhume the process from stale obscurantism and let the fresh light of open analysis expose both the prior discussions and agreements of the parties, as well as the court's reasons for its resolution of the matter.

People v. West, 3 Cal. 3d 595, 477 P.2d 409, 417, 91 Cal. Rptr. 385 (1970).

There have been many standardized practices suggested. See ABA STANDARDS; TASK FORCE REPORT 12-13; Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964).

<sup>63</sup> Cf. Williams v. New York, 337 U.S. 241, 247 (1949) (state not required to impose same punishment on different individuals for same crime; it may adopt the modern philosophy of penology that the punishment should fit the offender and not the crime).

<sup>64</sup> The American Bar Association suggests that the prosecutor only bargain "when it appears that the interest of the public in effective administration of criminal justice . . . would thereby be served." ABA STANDARDS § 3.1(a). To aid in the determination of what is "in the public interest," six factors have been listed for consideration in each case. ABA STANDARDS § 1.8(a) (i)-(vi).

<sup>65</sup> See Raleigh v. Coiner, 302 F. Supp. 1151, 1160-61 (N.D. W. Va. 1969):

The agreement reached here was made part of the public record and the negotiations were carried out in the ventilated atmosphere of openhandedness and truthfulness, replete with good faith and fairness, with no underlying covert or extrajudicial factors.

<sup>66</sup> See Rogers v. Richmond, 365 U.S. 534, 541 (1961). It is not the lack of truth which invalidates involuntary pleas but they are unacceptable "because the methods

Of equal importance is the change that this recognition would cause in the mind of the defendant. He would be forced to realize that he is not just "getting off easy," but that only those consequences which are in the interest of the public are being afforded. In this way some of the present contempt for criminal justice could be eliminated.<sup>67</sup>

Another consequence of a public bargaining procedure would be to force the prosecutor to investigate more fully and to develop substantial evidence in the case. Absent ample incriminating proof, a defendant will not plead guilty without some substantial benefit being conceded to him. However, bargaining publically, the prosecutor will be unable to offer a man charged with a serious crime some minimal punishment because such a compromise would incense the public's notion of justice.<sup>68</sup> People would not accept a practice of offering large concessions merely to coerce guilty pleas. This aspect of increasing the quantum of evidence collected in each case limits two serious problems. The chance of arbitrary prosecutions will be greatly reduced since a dearth of evidence is inherent in such actions. Also, the prosecutor will not be as tempted to bring charges greatly in excess of those that he knows he can prove merely to improve his bargaining position.

Responsibility for initiating plea negotiations should be shifted from the defendant to the prosecutor. This change would be consistent with the discretion presently vested in the prosecutor, as to whether to prosecute or not and if so on what charge.<sup>69</sup> Such an alteration is needed to correct a grave

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used to extract them offend an underlying principle in the enforcement of our criminal law: that ours is an accusatorial and not an inquisitorial system . . ."

<sup>67</sup> See Thompson, *The Judge's Responsibility on a Plea of Guilty*, 62 W. VA. L. REV. 213 (1960). Prisoners' contempt for the judicial system was exemplified by statements in petitions to the West Virginia Legislature to the effect that courts used "every shabby trick" in order to "expedite and clear their docket."

Additionally, much contempt is generated by the present system when an unexperienced defendant, who accepted a trial, gets to prison and discovers that he is to serve a longer sentence than the hardened criminal who was experienced and took advantage of bargaining opportunities. Chances of rehabilitation in the latter case are greatly reduced. See Newman, *Pleading Guilty for Considerations: A Study of Bargain in Justice*, 46 J. CRIM. L.C. & P.S. 780, 790 (1956).

<sup>68</sup> This effect is based on the fact that all bargaining will be conducted before the public. It would be too idealistic to assume members of the public would regularly attend the sessions to hear the "deals." Notwithstanding the few who might be present, the pressure will still be on the prosecutor to have sufficient facts; first, because of the immediate possibility that the judge might not accept the plea and second, because the bargains will be a matter of public record, subject at any time to review by the press or some organization. If a general practice were being made of large concessions with weak evidence, the public could easily be made aware of this fact, bringing the anticipated condemnation. See Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499, 501 (1972) (prosecutors will be more accountable to general public).

<sup>69</sup> See Note, *Prosecutor's Discretion*, 103 U. PA. L. REV. 1057 (1955). "The discre-

inequity which is prevalent today. Since the burden is now upon the defendant to initiate plea discussions, only those with experienced counsel or who "know the ropes" themselves are aware of the opportunity for a compromise plea. With the suggested change no longer would anyone fail to take advantage of a plea agreement simply because he was ignorant of the procedure to be followed.

Plea bargaining is criticized because concessions are made by a prosecutor just to secure a guilty plea. To forestall such an argument while at the same time increase the overall validity of any settlement reached, both parties must bargain from a well-informed position.<sup>70</sup> In order to achieve this, three things must be accomplished prior to any negotiations: 1) the prosecutor must have before him the presentence report; 2) the defendant should be afforded the opportunity to test the admissibility of any confessions or seized evidence in the prosecutor's possession; and 3) the rules of discovery should be liberalized.

An avowed purpose of a compromised plea is to allow for individualized punishment with an eye toward rehabilitation rather than retribution.<sup>71</sup> It is essential for the prosecutor to have the presentence report in order to tailor the sentence, and it is impossible for him to structure some rehabilitative program with only information of the present crime. It would be advisable for the prosecutor to consult a probation officer for a suggested framework within which to work.<sup>72</sup>

Of primary importance to the defendant's decision of how to plead is the admissibility of confessions and seized evidence. Until he knows whether such evidence will be excluded, he will not know the true strength of the

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tionary power exercised by the prosecuting attorney in initiation, accusation, and continuance of prosecution gives him more control over an individual's liberty and reputation than any other public official." *Id.*

Prosecutors are presently hesitant to initiate bargaining proceedings because of its questionable validity and the fear that the public looks on the practice as an evil. See ABA STANDARDS at 61-62. This hindrance would be removed with the open recognition of plea bargaining.

<sup>70</sup> It is not to be thought that upon acceptance of the following suggestions, bargains will not be offered solely for administrative reasons. With such requirements met, however, it would be a great deal easier to determine if this were the case, thus imposing on the court the duty to reject such pleas. Also the main reason the criticism is made now is that prosecutors bargain with little or no information.

<sup>71</sup> See *Williams v. New York*, 337 U.S. 241, 248 (1949): "Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence."

<sup>72</sup> It has been held that probation officers should not become a party to plea negotiations, but the mere fact that he is consulted by both the prosecutor and defense counsel as to the defendant's parole status will not make him a party. See *Farrar v. State*, 52 Wis. 2d 651, 191 N.W.2d 214 (1971).

prosecutor's case. However, a mandatory pre-negotiation challenge could work more to the detriment of the defendant and is therefore not suggested. If the court were to decide that the evidence was admissible, the defendant's chances of obtaining a bargain would be drastically reduced. Knowing this, if an accused still wished to test the admissibility of the evidence, there should be some method available to him for this purpose.<sup>73</sup>

Discovery in criminal cases, though much contested in the past, is now being accepted in varying degrees.<sup>74</sup> With respect to plea bargaining, it would appear logical that discovery should be mandatory to enable both sides to comprehend adequately the relative merits of the case. This would put a defendant with a tenuous defense to a difficult choice, however. Making discovery optional at the election of the accused may be rationalized from the point of view of lessening the pressures on the defendant to plead guilty. If there is a possible defense unknown to the prosecutor, he will be less disposed to a compromise, since his case will seem stronger. Also if there is additional evidence that is unknown to the defendant, he will feel less compelled to plead guilty since the prosecutor's case will seem weaker. Although mandatory discovery is not desirable, it should be optional for those defendants who wish to know exactly the case against them.<sup>75</sup>

### B. *The Bargaining Session*

There are certain safeguards with respect to the actual bargaining session which ideally should be observed in addition to making it public: 1) the

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<sup>73</sup> See FED. R. CRIM. P. 41(e). One trial court on its own has agreed with defense counsel to set aside the guilty plea if an adverse ruling on a motion to suppress was later reversed. The appellate court recognized that a ruling in a motion to suppress normally doesn't survive a guilty plea, but heard the appeal since the procedure followed was suggested by the trial court. *United States v. Frye*, 271 A.2d 788 (D.C. Mun. App. 1970).

<sup>74</sup> Many jurisdictions now allow discovery of evidence in the possession of the prosecutor by the defendant preparing for trial. See, e.g., FED. R. CRIM. P. 16; VA. SUP. CT. R. 3A:14.

No jurisdiction expressly allows for discovery before entry of a plea. FED. R. CRIM. P. 16(f) provides the time for discovery to be "only within 10 days after arraignment," which is subject to the possible construction that discovery is limited to the post-arraignment period. The problem is not quite as prevalent with the new rules in Virginia. VA. SUP. CT. R. 3A:14(d) provides for discovery "at least 7 days before the day fixed for trial." This could mean only the time prior to the seven day limit, but it could also mean that the date of the trial must have been set. Such constructions are mere speculation but would present potential problems. The rules should be changed to expressly allow for pre-negotiation discovery.

<sup>75</sup> If the defendant elects to take advantage of discovery procedures, the prosecutor must be given reciprocal privileges. See generally Comment, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527 (1971).



presence of both the defendant and his counsel is essential;<sup>76</sup> 2) the prosecutor should be limited in the concessions he might offer; and 3) a record should be made of the proceeding to aid the judge at arraignment in deciding whether to accept or reject the plea.<sup>77</sup>

At present it is not unusual for defense counsel to confer with the prosecutor out of the presence of the accused and later merely to relate to the defendant the final offer, with an opinion as to the advisability of accepting it. This procedure does not afford the defendant the opportunity to weigh the situation, and most often puts him in the position of accepting the advice of his attorney on blind faith which may or may not be well founded. If the defendant is present he might not be any more cognizant of all the technical ramifications of everything said; but at least he would know what evidence there is against him, and more importantly he could see his counsel in the adversary role on his behalf. The defendant would then know that the outcome is not merely the product of collusion without regard to his interests. The defendant's final decision would still largely depend upon the advice he received, but his acceptance of the outcome would likely be more palatable.

There has been some question raised as to whether a defendant should ever be permitted to waive counsel at the plea bargaining stage.<sup>78</sup> Under the present practice, an attorney is absolutely necessary to minimize the hostile and unfamiliar atmosphere of the plea bargaining session.<sup>79</sup> Much of this problem would be alleviated by making the negotiations public. Under the suggested system an attorney would still be necessary both to reduce the impact of the unfamiliar proceedings and to give the defendant advice concerning the admissibility of the prosecutor's evidence and the overall

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<sup>76</sup> *But see* *Woody v. State*, 445 S.W.2d 288 (Mo. 1969) (not unconstitutional for state to bargain with defendant before counsel appointed, as long as defendant has opportunity to discuss the plea with counsel before it is tendered).

<sup>77</sup> See notes 91-93 *infra* and accompanying text.

<sup>78</sup> See, e.g., *Zales v. Henderson*, 433 F.2d 20, 23 n.7 (5th Cir. 1970) (defendant who waives counsel stands in no better position than one who enters guilty plea on the advice of counsel); *People v. Zunno*, 384 Mich. 151, 180 N.W.2d 17 (1970); *Semmes v. Williard*, 247 Ore. 583, 431 P.2d 844 (1967); *Creighbaum v. State*, 35 Wis. 2d 17, 150 N.W.2d 494 (1967). *But see* *Shupe v. Sigler*, 230 F. Supp. 601 (D. Neb. 1964); *Anderson v. North Carolina*, 221 F. Supp. 930 (W.D.N.C. 1963).

<sup>79</sup> It has been suggested that unlike the interrogation situation, the presence of counsel cannot remove the coercive pressures on the defendant since the pressure is generated by the choice itself. See 84 HARV. L. REV. 32, 155 (1970).

The presence of counsel might even be a detriment since courts are reluctant to characterize a plea as involuntary if counsel was present. See Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1391 (1970). *But see* *Zales v. Henderson*, 433 F.2d 20 (5th Cir. 1970) (defendant who waives counsel stands in no better position than one who enters plea of guilty upon advice of counsel).

probability of conviction at a jury trial.<sup>80</sup> However, if a man could not waive counsel, problems would arise in the situation of a man who could readily afford a lawyer but refused to retain one. Society lacks both the financial resources and the required attorneys to supply free counsel in all such cases. The concept that an individual may waive his constitutional rights is well established and the defendant should be allowed to forgo counsel in this case. If a defendant offers a plea without having the advice of an attorney, the court should extensively examine him to ensure that it was made voluntarily and with full knowledge not only of the consequences of the plea but also of the importance of this right.

Since this suggested procedure is structured primarily to minimize the pressures inherent in the option to plead guilty, the pressures which may be brought to bear upon the defendant by the prosecutor should be restricted. One factor which is effectively utilized by the prosecutor is actually beyond his control—that is “legislative bargaining.” Though legislatures may no longer apply one type of pressure,<sup>81</sup> the existence of statutes demanding high minimum sentences gives the prosecutor greater leverage with respect to inducing pleas to lesser included offenses.<sup>82</sup> An accused will be more likely to accept the assurance of a lower sentence by pleading guilty if he knows that the only way to avoid a much harsher one at trial is by an acquittal. Legislatures should remove or at least reduce minimum sentences as they serve no useful function in light of modern sentencing theories.

Those pressures over which the prosecutor does have control should be limited also.<sup>83</sup> Plea negotiations should be in the form of offer and acceptance, not threats and submission.<sup>84</sup> Some of the concessions which the pros-

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<sup>80</sup> Plea bargaining places heavy responsibilities on the defense counsel. He must protect the rights of the defendant while at the same time preserve the integrity of the judicial system, and most importantly he must see that an innocent man does not plead guilty. See *United States v. Rogers*, 289 F. Supp. 726 (D. Conn. 1968).

<sup>81</sup> In the past, legislatures had structured punishment schemes in such a way that a defendant could only be subjected to a more severe sentence if he chose a jury trial. See, e.g., Federal Kidnapping Act, 18 U.S.C. § 1201(a) (1970) (death penalty can only be imposed by a jury). The Supreme Court invalidated such a plan since it “chilled” the defendant’s right to trial and the same result could be reached in some less drastic manner. See *United States v. Jackson*, 390 U.S. 570 (1968).

<sup>82</sup> See *Parker v. North Carolina*, 397 U.S. 790, 809 (1970) (Brennan, J., dissenting and concurring). It is recognized that the pressures exerted by a legislative scheme have more of an impact on a defendant than normal plea negotiations. In plea bargaining there is a give and take proposition, but by statute the harsh terms are inflexibly stated.

<sup>83</sup> See *Bailey v. MacDougall*, 392 F.2d 155 (4th Cir.), *cert. denied*, 393 U.S. 847 (1968) (negotiations should be limited to quantum of punishment for an admittedly guilty man).

<sup>84</sup> Plea bargaining should not be employed as a coercive tool to force guilty pleas but must be used in an attempt to reach an agreement which is acceptable by both sides as being beneficial. See *Dube v. State*, — Ind. —, 275 N.E.2d 7 (1971).

ecutor may now make assume the overtones of threats rather than mutually beneficial offers.<sup>85</sup> Any promise not to prosecute the accused's family is of a threatening nature but the courts permit it to be used.<sup>86</sup> Other alternatives by their very nature make it extremely difficult for the defendant to make a rational choice. The pressures certainly inherent in the choice between life and death, and possibly between a misdemeanor and felony, are of such great weight that a defendant should not be forced to make a decision when faced with them.<sup>87</sup> It is not unrealistic to demand a trial of every capital case, and although it is more stringent than present requirements, "breathing space" would be given to the rights of the accused.

### C. Considerations in Accepting the Plea

In addition to these suggested pre-arraignment changes, the duties of the judge at arraignment must also be clarified. It is clearly the responsibility of the judge to make inquiries of the defendant to ensure that his plea is made voluntarily and with knowledge of its consequences.<sup>88</sup> To make an accurate determination the judge must know of the existence of any bargain made and the events of the negotiation proceedings.<sup>89</sup> Only if the court itself knows of the actual agreement which was made can it prevent any misunderstanding by the accused,<sup>90</sup> and knowledge of the comments made by the prosecutor as well as any concessions is essential to a finding of voluntariness.

Presently in most jurisdictions the promises made to a defendant are seldom brought to the court's attention prior to the acceptance of the plea,

<sup>85</sup> See *Ford v. United States*, 418 F.2d 855 (8th Cir. 1969) (in order for a threat to be illegal it must concern some illegitimate action); *Kent v. United States*, 272 F.2d 795 (1st Cir. 1959).

<sup>86</sup> See, e.g., *Johnson v. Wilson*, 371 F.2d 911 (9th Cir. 1967); *Kent v. United States*, 272 F.2d 795 (1st Cir. 1959); *McGuffey v. Turner*, 267 F. Supp. 136 (D. Utah 1967); *Lawler v. Page*, 449 P.2d 714 (Okla. Crim. App. 1969).

<sup>87</sup> See, e.g., *North Carolina v. Alford*, 400 U.S. 25 (1970); *Williamson v. State*, 441 F.2d 549 (5th Cir. 1971); *Richardson v. State — Mo. —*, 470 S.W.2d 479 (1971).

<sup>88</sup> See, e.g., *Boykin v. Alabama*, 395 U.S. 238 (1969) (judge must "canvass" the defendant to determine if plea is voluntary and knowledgeable).

<sup>89</sup> See *Jones v. United States*, 423 F.2d 252 (9th Cir. 1970) (knowledge of agreement, its terms and negotiations is crucial to effective discharge of court's responsibility).

<sup>90</sup> From the cases there seems to be a recurring problem of the defendant claiming that he did not receive the treatment he expected or understood he would receive. Due to a lack of evidence most of these claims go unsubstantiated, but the appeals do point up the fact that many defendants do not have a thorough understanding of exactly what has been promised. See, e.g., *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970) (defendant alleged that prosecutor failed to fulfill promise to recommend sentence); *People v. Fisher*, 24 Mich. App. 312, 180 N.W.2d 211 (1970) (defendant claimed she was led to believe she would be placed on probation).

even though the judge specifically asks if any have been made.<sup>91</sup> It has been suggested that a full disclosure on record at arraignment would cure this deficiency,<sup>92</sup> but such a remedy would fail to give the judge truly accurate information. Since he still would have to depend on the statements of those who do not wish to lose the benefits gained, the judge would continue to receive information sufficiently distorted to ensure the court's acceptance of the tendered guilty plea. This problem would be circumvented by requiring a record of the bargaining session itself. The record of the arraignment proceeding is certainly important, but its function should be recognized as a prophylactic measure against frivolous appeals and not as a source to establish the validity of the plea.<sup>93</sup>

While he must be the arbiter of the validity of the plea and either accept or reject it, there is substantial controversy as to whether the judge himself may actually participate in the bargaining. The authorities are inconsistent as to whether he may assume the role of a negotiator. Some cases hold that any such participation by the judge renders the consequent plea involuntary *per se*.<sup>94</sup> The majority of the courts seem to feel that judicial intervention is only one of the factors to be considered.<sup>95</sup> The sounder view is that judicial bargaining should be prohibited. In light of the many opposing arguments,<sup>96</sup> to allow it would be to permit an additional unnecessary pressure on the defendant. The judge should become involved only after a tentative agreement has been reached and then only to the extent of acceptance or rejection of the plea.<sup>97</sup>

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<sup>91</sup> See note 44 *supra*.

<sup>92</sup> See ABA STANDARDS § 1.7. See also Proposed Amendments to FED. R. CRIM. P., 52 F.R.D. 409, 415-16 (1971). The amendment to Rule 11 would require that notice be given to the court of any agreement reached and that the record of the arraignment proceeding include the terms of the bargain.

<sup>93</sup> See United States *ex rel.* Wiggins v. Commonwealth, 430 F.2d 650 (3d Cir. 1970).

<sup>94</sup> See United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966); Mesmer v. Raines, 351 P.2d 1018 (Okla. Crim. App. 1960) (dictum) (court may not bargain with defendant to induce pleas); Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969) (any participation by the judge is forbidden).

<sup>95</sup> See, e.g., Brown v. Peyton, 435 P.2d 1352 (4th Cir. 1970) (judicial bargain not *per se* bad but is one factor to consider); United States v. Cariola, 323 F.2d 180 (3d Cir. 1963) (plea valid even though judge suggested it and promised a specific sentence). But even in these jurisdictions, the judge may render a plea involuntary by his threats. See Tyler v. Swenson, 427 F.2d 412 (8th Cir. 1970) (threat by judge of more severe punishment if defendant found guilty establishes *prima facie* case of involuntariness of guilty plea).

<sup>96</sup> See United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966). See generally Note, *Another Look at Unconstitutional Conditions*, 117 U. PA. L. REV. 144, 173-77 (1968); 19 STAN. L. REV. 1082 (1967); 5 GA. L. REV. 809 (1971). In support of judicial plea bargaining see Underwood, *Let's Put Plea Discussions—and Agreements—on Record*, 1 LOYOLA (CHI) L.J. 1 (1970).

<sup>97</sup> See ABA STANDARDS § 3.3(a) and commentary at 72-74.

Aside from voluntariness and understanding, the judge must consider other factors before accepting a plea. The presentence report and a detailed statement of the government's evidence must be consulted<sup>98</sup> to determine the appropriateness of the disposition with respect to the interests of both the defendant and the government. A plea should be rejected if the punishment suggested fails either to protect society or to rehabilitate the defendant.

An understanding of the evidence both for and against the defendant should be a determinative factor in the judge's decision, and a plea should be rejected if there is no factual basis to substantiate it.<sup>99</sup> If the facts are not clear or are insufficient, the judge should ask the prosecutor to particularize or should question the defendant to determine his involvement in the charge alleged. As to the quantum of the facts necessary to sustain a guilty plea, there is some controversy over the required amount.<sup>100</sup> It is suggested that enough facts should be presented which would enable the judge to find that reasonable men could convict the defendant on these facts.<sup>101</sup> Such a burden of proof would cause a more thorough investigation by the prosecutor and would tend to limit arbitrary prosecutions.

The judge should examine the record for possible defenses which have

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<sup>98</sup> *But see* *People v. Patton*, 25 Mich. App. 713, 181 N.W.2d 569 (1970) (not error for court to accept guilty plea without having preliminary examination transcript in the court file).

<sup>99</sup> *See* FED. R. CRIM. P. 11 (as amended Feb. 28, 1966). The amendment in 1966 added the requirement that the judge must find a factual basis for the plea, but fails to say how substantial these facts must be.

<sup>100</sup> *See* *People v. Johnson*, 33 App. Div. 2d 573, 305 N.Y.S.2d 274 (1969) (if court upon questioning the defendant receives facts inconsistent with crime, it should proceed with extreme caution). *But see* *People v. Wade*, 24 Mich. App. 518, 180 N.W.2d 349 (1970) (if defendant's response gives reason to doubt plea, court should reject it). *See generally* notes 102-05 *infra*.

*United States v. Silva*, 449 F.2d 145 (1st Cir. 1971) (strong evidence of guilt); *United States v. Youpee*, 419 F.2d 1340 (9th Cir. 1969) (must be some basis in fact); *Griffin v. United States*, 405 F.2d 1378 (D.C. Cir. 1968) (high probability of conviction). *Cf. United States ex rel. Miner v. Erickson*, 428 F.2d 623 (8th Cir. 1970) (caution in accepting plea varies with gravity of the offense).

<sup>101</sup> The requirement is not and should not be that the facts offered must establish guilt beyond a reasonable doubt. *See* *People v. Bartlett*, 17 Mich. App. 205, 169 N.W.2d 337 (1969). The rule should be that substantial, uncontroversial facts be presented on which the court could say that the defendant might well be convicted if there was a trial. *See* *People v. Peiffer*, 34 Mich. App. 123, 190 N.W.2d 699 (1971).

The old Virginia rule concerning the effect of a guilty plea is a good example of what should be done. If a plea of guilty was tendered, the court would hear and determine the case without a jury. *See* VA. CODE ANN. § 19.1-192 (1960). Unfortunately this section has been superseded by the new rules of criminal procedure which do not require any factual determination by the court prior to the acceptance of the guilty plea. VA. SUP. CT. R. 3A:11.

not been raised. There is some controversy as to whether a judge may reject a plea because of an unasserted defense,<sup>102</sup> but the better view would seem to dictate the rejection of the plea unless the defendant can give some adequate justification for his decision.<sup>103</sup>

Finally, if at arraignment the defendant pleads guilty but nevertheless maintains his innocence, the judge should reject the plea. The majority of courts today equate such an equivocal plea to a plea of *nolo contendere* and have no difficulty in accepting it.<sup>104</sup> Since a guilty plea is a conviction no less conclusive than a verdict of a jury, due process should require from the accused an unequivocal admission of his guilt to justify the acceptance of his plea.<sup>105</sup>

If for whatever reason the judge cannot accept the terms of the agreement as decided upon by the parties, he should reject the plea or at least inform the defendant of his decision and of his unqualified right to withdraw the guilty plea.<sup>106</sup> Upon withdrawal of the plea, the statements made by the accused during the proceedings or the fact of the initial guilty plea should be inadmissible in any subsequent trial for all purposes.<sup>107</sup> To guarantee the defendant his right to an impartial judge, the judge at a trial subsequent to a guilty plea withdrawal should not be the same one who rejected the plea.

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<sup>102</sup> The majority rule seems to prevent the judge from rejecting the plea. *See, e.g., Griffin v. United States*, 405 F.2d 1378 (D.C. Cir. 1968).

<sup>103</sup> For example, there may be the possible defense of insanity but the defendant prefers not to assert it because he calculates that he would spend more time in the mental institution than he would in prison.

The law today is that acceptance of a guilty plea is within the sound discretion of the court. Hopefully courts could be persuaded that to reject a plea because of possible defenses is within their discretion. *See Tremblay v. Overholser*, 199 F. Supp. 569 (D.D.C. 1961).

<sup>104</sup> *See, e.g., North Carolina v. Alford*, 400 U.S. 25 (1970); *United States v. Silva*, 449 F.2d 145 (1st Cir. 1971) (assertion of innocence irrelevant as long as there is strong evidence against the defendant); *Oaks v. Wainwright*, 445 F.2d 1062 (5th Cir. 1971); *People v. Cook*, 1 Ill. App. 3d 292, 274 N.E.2d 209 (1971) (equivocal plea valid if defendant intelligently decides his interests require such a plea).

<sup>105</sup> Rejection of an equivocal plea has been held to be validly within the court's discretion. *See United States v. Bednarski*, 445 F.2d 364 (1st Cir. 1971). *See also People v. Johnson*, 8 Mich. App. 204, 154 N.W.2d 16 (1967) (court should refuse the plea if defendant's answers are limited or qualified); *State v. Forcella*, 52 N.J. 263, 245 A.2d 181 (1968) (equivocal plea cannot be accepted); *People v. Valiente*, 28 App. Div. 2d 983, 283 N.Y.S.2d 601 (1967) (inability to answer to question of guilt invalidates plea); *State v. Stacy*, 43 Wash. 2d 358, 261 P.2d 400 (1953) (court should refuse to accept until any equivocation is eliminated). *See generally* 75 Dick. L. Rev. 366 (1971).

<sup>106</sup> *See* ABA STANDARDS § 2.1 (a) (ii).

<sup>107</sup> *Id.* §§ 2.2, 3.4.

## III. CONCLUSION

Plea bargaining as it is practiced today satisfies neither the accused nor the public. The defendant feels coerced to relinquish his constitutional protections and is disillusioned by unequal treatment. The public distrusts all compromise in light of their potential political motivations, being unable to determine why or how they were brought about. It has been demonstrated that plea bargaining is necessary, but its continuation should be predicated upon substantial reformation. Once the abuses and inequities have been eliminated, the practice will become an effective tool not only in the disposition of cases but also in the achievement of justice.

*F. P. W.*