PERSPECTIVES ON PLEA BARGAINING

by Arnold Enker

Despite the fact that the large majority of criminal cases are disposed of by guilty plea, the major focus of attention to the criminal process traditionally has been upon disputed cases. We have made substantial modifications in the investigatory stages of the process and are devoting ever-increasing attention to pretrial and trial procedures in order to assure a fairer resolution of disputed issues at the trial. Far less attention has been devoted to the dynamics of the guilty plea and its impact on later stages of the proceedings. Even here, to the extent that modifications have been adopted in guilty plea procedures, the focus of attention understandably has been upon the most visible parts of the process, namely, representation by counsel and judicial inquiry at arraignment into "the factual basis for the plea." (Rule 11, Federal Rules of Criminal Procedure.)

Indeed, one gets the impression that our law does not feel quite ready to face up to the theoretical and practical problems involved. Thus, in *Shelton* v. *United States*, 356 U.S. 26 (1958), in which the propriety of the practice of plea bargaining seemed to be squarely presented, after thorough exploration of the issues by a panel of the Fifth Circuit Court of Appeals and then again by that court en banc, the Supreme Court accepted a somewhat dubious confession of error by the Solicitor General and vacated the conviction on the ambiguously stated ground "that the plea of guilty may have been improperly obtained." It is not clear whether the case was reversed because the arraigning judge failed ith Rule 11 in his examination to inquire nt—this was the narrow basis for the Solicconfession of error—, or because the Supreme Court determined that the plea in this case was not voluntary, or because the Supreme Court was of the view that any plea induced by a promise concerning the sentence to be imposed is invalid.

More recently, in *Marder* v. *Massachusetts*, 377 U.S. 407 (1964), only three Justices would have noted probable jurisdiction in a case in which the statutory scheme itself—relating admittedly to insignificant parking violations—contained differential penalties for those who admitted the charge and those who chose to defend the case.

Likely, this judicial shyness expresses a recognition that we really do not know very much about the practice of plea bargaining. Absent carefully collected factual information about the practice, we are unable to assess its potential dangers, both practical and theoretical, and recommend its improvement or abolition. To some extent, this gap in our information has recently been tightened up by the publication of the findings of the American Bar Foundation's study of the problem in NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966). In this paper, based on Newman's findings and other sources, I shall try to evaluate the practice and put it in perspective, assess its dangers and implications, and suggest some—admittedly imperfect—approaches toward improving the process.

I. DESCRIPTION OF PLEA BARGAINING

A. PLEADING GUILTY TO A REDUCED CHARGE

1.

"Plea bargaining," or its popular euphemism "the negotiated plea," actually takes on a variety of forms and occurs in varied legal and factual contexts. In what is probably its best known form, the "plea bargain" consists of an arrangement between the prosecutor and the defendant or his lawyer, whereby in return for a plea of guilty by the defendant, the prosecutor agrees to press a charge less serious than that warranted by the facts which he could prove at trial. "Less serious" in this context usually means an offense which carries a lower potential maximum sentence. In such instances the defendant's motivation for pleading guilty is to limit the

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judge's sentencing discretion to the lesser maximum. Similar results are obtained when the defendant agrees to plead guilty to a given charge in return for a prosecutor's promise not to charge him with being a multiple offender or to drop added counts in a multicount indictment.

The court has no control over the initial charge brought by the prosecutor, so that in cases where such a bargain is struck before any charges have been filed in court, it is not subject to any formal judicial supervision to prevent undesirable reduction of a charge. Presumably a judge has other unofficial ways of expressing his displeasure with a reduced charge, but I have never heard of such judicial expressions. This is probably due to the judge's ignorance of the facts which would warrant a higher charge and to a reluctance to interfere in the conduct of the prosecutor's office. I suppose a judge who disapproves of a low charge could refuse to accept the guilty plea and leave the prosecutor to choose between no prosecution or prosecution for a more serious charge, but that too has been unheard of.

Where the bargain is struck after a higher charge has been filed, there is greater opportunity for judicial control. Still, little control appears to be exercised. New York has a statute which requires the prosecutor to file a statement giving his reasons for accepting a plea to a lesser charge, but a review of the filed statements indicates that they are very vague and general and do not furnish a vehicle for judicial control.[1] A more recent unpublished study in Minneapolis of prosecutors' statements required by a similar statute in Minnesota reveals equally disappointing results. Another reason such statutes are of limited value is that they deal only with pleas to an offense less than that originally charged. As already suggested, the bargain may be struck before any charges have been filed in court. For example, the Minneapolis study disclosed that in the year 1962, out of 91 cases of burglary, only 1 was originally charged as first degree burglary. In the remaining 90 cases the initial charge was third degree burglary.[2] It is difficult to believe that the facts supported a first degree burglary charge in only 1 out of 91 cases. (Compare the comment of one Michigan prosecutor reported in NEWMAN, p. 182, "You'd think all our burglaries occur at high noon.")

As suggested, one reason the court exercises little or no control over charge reduction is that at this early stage of the proceedings, the judge usually has absolutely no information about the crime or the defendant and is in no position to review the prosecutor's judgment. Probably still another reason is that the determination of an appropriate offense category or charge, as distinguished from sentence, is viewed as a matter of prosecutor's discretion. Yet, the ability to control the offense category brings with it control over the sentence, or at least its outside limits. We have never really given any careful thought to the interplay of these forces and roles.[3] When such a problem arose in *United States* v. *Nagelberg*,[4] the Supreme Court, again aided by the Solicitor General's confession of error, failed to grapple with the problem.

Equality of opportunity for such sentencing leniency is also a matter of concern. As would be expected from the above description of prosecutor and judge roles in this instance, judges are not likely to take the initiative in suggesting to the defendant that he use his guilty plea as a bargaining tool. Under the circumstances, the unrepresented defendant, or the defendant represented by counsel inexperienced in criminal matters, may find himself more severely treated than a wiser defendant with an identical background. And even if the judge imposes a light sentence, the felony conviction which might have been avoided may result in collateral disabilities which the judge cannot control.

2.

It is equally common for plea bargaining for reduced charges to be motivated by the opposite goal, namely, to maximize the judge's sentencing discretion. In this type of agreement the defendant pleads guilty to a lesser charge than is warranted by the facts, not to reduce the potential maximum sentence, but to avoid a legislatively mandated minimum sentence or a legislative direction precluding the availability of probation. A typical example is narcotics prosecutions, where Federal law and some States impose severe mandatory minima for sale. It is common in such instances for defendants who have sold narcotics to plead guilty to a "tax count" in Federal cases or possession of narcotics in State cases, thereby avoiding the minimum sentence.

Because of common judicial antipathy to statutes so limiting their sentencing discretion, the problem of possible judge-prosecutor conflict is not significantly present. In fact, Newman reports that judges sometimes take the initiative in these cases to obtain a reduction of the charges. Other problems arise, however. First of all, the threat of a mandatory sentence places a high price on a not-guilty plea that might induce a defendant not to risk the hazards of a trial. This point will be elaborated upon below. Secondly, as Professor Newman's findings suggest, although the practice of accepting such lesser pleas begins as a discretionary device to individualize sentences, "the pattern of downgrading is such that it becomes virtually routine, and the bargaining session becomes a ritual" (p. 182). Under these circumstances, the public interest in heavy penalties for serious offenders may not always be served. Control in this instance remains, of course, with the prosecutor who can refuse to acquiesce in a request for charge reduction in the case of a serious offender. It is far from clear, however, that this is where such decisions ought to be made.[5] There is a danger, for example, that given two defendants equally guilty of a particular offense, the crucial factor which distinguishes them—the alleged professional character of the one's criminal behavior—is never placed on the record and is determined by the prosecutor on the basis of untested (in court at least) information available only to him. The conviction label becomes a weapon in the hands of the prosecutor to be applied in his uncontrolled discretion against those whom he judges to be dangerous. The "official" facts of the crime bear little relation to the

[1] See Weintraub & Tough, *Lesser Pleas Considered*, 32 J. CRIM. L. & CRIMINOLOGY 506 (1950).

[2] First degree burglary carried a minimum sentence of 10 years and second degree 2 years. There was no minimum sentence for third degree burglary. MINN. STAT. §§ 621.07, 621.09, 621.10 (1961) (subsequently repealed).

[3] Compare the judge's power to review a decision to file a nolle prosequi, FED. R. CRIM. P. 48(a), where a similar conflict arises.

[4] 377 U.S. 266 (1964).

[5] See Wechsler, *Sentencing, Correction, and the Model Penal Code*, 109 U. PA. L. REV. 465, 470 (1961).

ultimate disposition, which is reached upon extra-record facts. It is, admittedly, not infrequent that the real dispute between the parties is not over those facts which constitute the necessary elements of the crime but over facts which mitigate or aggravate the offense and are relevant only to sentence.

Our law has thus far paid scant attention to the proper procedures for determining these facts other than to accept the position that something less than a trial hearing is permissible.[6] But in those situations, the sentencing judge retains his factfinding powers, and defense counsel has a forum in which to present his facts and arguments. Combined with the tendency to require increasing disclosure of the contents of presentence reports,[7] the defendant has the opportunity to argue his case visibly and with a chance of a favorable result. When it is the prosecutor who determines whether to accept a plea to a lesser count or to insist on pressing a charge carrying a mandatory sentence, the judge may be deprived of all sentencing discretion by an invisible decision in a "non-forum." Surely, the resolution of what will often be the sole issue of dispute and the single relevant fact, such as whether the defendant was armed, merits some greater formality and some forum more visible and equally accessible to all defendants.[8]

3.

There is a third type of charge reduction which is motivated not by a desire to alter the sentencing powers of the judge but rather to avoid undesirable collateral aspects of a repugnant conviction label. This apparently occurs with some frequency in sex crimes. Thus, to avoid a record of conviction as a rapist, a sexual molester, or a homosexual, the defendant may offer to plead guilty to a charge carrying a vaguer label, such as disorderly conduct. Here, again, there is danger that, apart from sentencing consequences, the risk of having such a repugnant label attached to him may impel an innocent defendant to plead guilty to the nondescript charge. The danger is even greater here, for even the defendant who has a good chance of acquittal at trial may prefer to avoid the adverse publicity of such a trial.

4.

Changes in the conviction label to accomplish these varied purposes raise additional problems for the administration of criminal justice. The lack of a comprehensive record of the proceedings and the misleading conviction label undermine attempts to achieve some degree of equality between defendants and may complicate the job of correctional authorities, who receive meager information about the defendant, the factual background of the case, and the judge's objectives, if any, in sentencing. And the unreliability of the conviction label can be misleading to others who have occasion to make reference to it at later stages in the same proceeding or in later proceedings. Thus, a prison classification committee or a parole board, relying on the conviction label in the case of an armed robbery charge reduced to unarmed robbery may mistakenly conclude that the prisoner was unarmed when he committed the robbery and may release a potentially dangerous offender too early. Perhaps the reverse danger is even more present. Because of the prevalence of plea bargaining and reduction of charges, the parole board may assume that all prisoners who pleaded guilty to charges of unarmed robbery were in fact armed. Or, upon a later conviction, a sentencing judge may assume that the earlier crime was in reality armed robbery. A defendant who pleads guilty to an accurate charge of unarmed robbery, therefore, may in the long run be treated more harshly than he deserves because of an erroneous assumption by others that he bargained to avoid a charge of armed robbery. In other words, where such plea bargaining is widely practiced, conviction records become unreliable and may be misused to the disadvantage of the community or of the defendant.

B. "ON THE NOSE" GUILTY PLEAS

1.

Plea bargaining need not necessarily take the form of a reduction of the charges. A defendant may plead guilty to a charge that accurately describes his conduct in return for a general promise of leniency at sentencing or a more specific promise of probation or of a sentence that does not exceed a specified term of years. To the extent that plea bargaining occurs in Federal courts, except for narcotics cases which carry a mandatory minimum sentence, it usually takes this form. This is probably so because the Federal law contains few lesser included offenses to which charges can be reduced.

In these instances, appearances can be extremely misleading. Superficially, at least, the judge retains complete discretion as to sentence and is able to control the proceedings so as to insure both an accurate guilty plea (protection of the defendant) and a sentence appropriate to the defendant's conduct (protection of the public interest). Closer examination of the process suggests, however, that this may not really be so.

Negotiations usually are handled between the prosecutor and the defendant or his attorney. The judge's isolation from this stage of the negotiations creates a risk that the bargaining will be limited to protection of the interests of the defendant and the prosecutor without anyone being present to protect the "public interest." The defendant's interest in receiving as low a sentence as possible and the prosecutor's interest in maintaining a steady flow of guilty pleas—to preserve a good public image and to induce guilty pleas from other defendants—can easily merge into agreement upon a guilty plea in return for a sentence that is meaningless in terms of the defendant's offense and his need for treatment or control. Related to this is the possibility of inadequate knowledge of the facts, either as to the crime itself or the defendant's background, on the part of the prosecutor who negotiates the guilty plea. Under the pressure of a

[6] *Williams* v. *Oklahoma*, 358 U.S. 576, 584 (1959); *Williams* v. *New York*, 337 U.S. 241 (1949). For the barest minimum standards, see *Townsend* v. *Burke*, 334 U.S. 736 (1948).

[7] See the proposed Rule 32(c), FED. R. CRIM. P.

[8] Compare the remarks of Mr. Justice Fortas, writing for the Court in *Kent* v. *United States*, 383 U.S. 541, 561-63 (1966).

heavy, time-consuming caseload, the prosecutor may easily be seduced at an early stage of the proceedings, before such facts are more fully developed, by the offer of a quick guilty plea in exchange for a light sentence, only to discover too late that the offense, or the offender, was far more serious than originally thought. It is possible, indeed likely, that the full facts may never be discovered since the quick disposition usually eliminates the need or the impetus for further investigation. Thus, there is a good chance that the judge will never become aware of facts which indicate that the agreement is not in the public interest.

Nor can defense counsel be counted on to provide this protection. Rarely does a defense attorney conduct a thorough investigation of the case and his client's background; thus he usually provides little additional insight into the causes of the defendant's problems. Also, defense counsel regards his professional responsibility to be exclusively to his client. The public interest in these instances need not necessarily mean a longer sentence; it may include identification of the sources of defendant's problems and the development and suggestion of a program of correctional treatment that is relevant to these problems. But defense counsel, perhaps in part because of legitimate skepticism over the availability of meaningful correctional treatment and of doubts as to the fairness of such programs, seem to regard their duty to the client solely in terms of obtaining for him as lenient a sentence as possible. Perhaps a broader view of the lawyer's role should include within the counseling function the duty to attempt to make the client aware of the fact that he has a problem and of his need for some correctional program. Thus far, however, lawyers have preferred to avoid the welfare implications of their role as counselors and the conflicts this role would create and to limit their role to getting the client "as good a deal" as they can.

Thus, neither prosecutor nor defense counsel is likely to bring before the judge such facts as would undermine the basis for the negotiated agreement. But even if the judge should become aware of such facts through another source, say a presentence report, the dynamics of the present system would prevent close judicial supervision over the negotiated agreement. First of all, the judge's theoretical role as protector of the public interest is limited by judicial reluctance to intervene and repudiate an arrangement accepted by the prosecutor as agent of the state. In other areas of the law it is rare for judges to reject consensual arrangements even when one of the parties represents the public. Thus, it is easy for the judge to sit back and approve anything to which the lawyers agree.

Moreover, it is essential to the successful working of the system that the judge accept the arrangements worked out between defense counsel and the prosecutor. Because of doubts over the legality of the negotiated plea, prosecutors and defense counsel typically avoid all reference in court to the sentence to be imposed until after the plea has been tendered and accepted, and engage in the pious fraud of making a record that the plea was not induced by any promises. Since the judge's sentence remains to be pronounced, the defendant does not achieve the control he sought in negotiating unless he has confidence that the judge will accept the arrangement. The defendant is interested in controlling the exercise of sentencing discretion, not in a lawsuit over a motion to withdraw his guilty plea because of disappointment over the sentence later imposed. The typical unreviewability of the exercise of sentencing discretion only sharpens the point. The credibility of the system requires, then, that the judge hold his power to reject the agreement in careful reserve. If there is to be any effective judicial participation in the process, rather than mere judicial acquiescence in an agreement worked out between the parties, such participation must come at an earlier stage of the proceedings.

Finally, this type of negotiated plea is even less visible than the negotiated plea which results in the reduction of charges. So far as the record reveals, the defendant was charged with a crime appropriate to the acts he committed; he has pleaded guilty to that charge voluntarily; he has asserted in open court that his plea was not induced by any threats or promises, and this assertion has gone unchallenged by his lawyer or the prosecutor; appropriate arguments, pleas, and recommendations have been addressed to the judge at the time of sentencing to influence his decision; and the judge has exercised his discretion and imposed what appeared to him to be the most appropriate sentence based on all of the relevant facts. Not a hint appears on the record to suggest that some relevant facts were not adduced or that the key determinant of the plea decision was not some appropriate peno-correctional end but the prosecutor's desire to induce a guilty plea. Of course, little of this appears in the record when the defendant pleads to a lesser offense, but in that case a comparison of the plea and the original charge suggests at least the possibility of some noncorrectional factor in the process.

The invisibility or low visibility of the process precludes outside control to protect the public interest. It also, to say the least, complicates the process when the defendant, experiencing a change of heart, alleges some abuse in the negotiations. Most such allegations are, probably correctly, suspect. But a system that requires the defendant to deny the negotiations at the very moment he tenders his guilty plea contains potential for overreaching and unfairness. Under such circumstances, it becomes extremely difficult to sift the valid from the false allegations.

2.

One further type of plea bargain merits attention. This may be called the "tacit bargain." In this instance, there are no formal or explicit negotiations between the defense and the prosecution. Defendant, aware of an established practice in the court to show leniency to defendants who plead guilty, pleads guilty to the charges in the expectation that he will be so treated. This expectation is almost invariably satisfied without the need to enter into any negotiations or make any explicit promises. To an extent, the areas of concern discussed with respect

to other types of plea bargaining are here eliminated or at least mitigated. But, even apart from the fundamental question of the propriety of placing any premium on a guilty plea,[9] some problems remain. Such pleas do not represent a true acknowledgment and acceptance of guilt by the defendant—universally regarded as a first step toward rehabilitation—but are more likely viewed by him as an expedient manipulation of the system. And, again, the overriding desire to keep the calendar moving can easily cause the practice to degenerate into routine and can direct the judge's attention away from consideration of sentencing goals in his determination.

Cutting across the entire system of plea negotiation is the fear that the low visibility of the proceeding lends itself to possible corrupt manipulation. In actual practice such corruption seems rare. But a real vice in the procedure may be that it often gives the defendant an image of corruption in the system, or at least an image of a system lacking meaningful purpose and subject to manipulation by those who are wise to the right tricks. Cynicism, rather than respect, is the likely result.

II. ADMINISTRATIVE CONSIDERATIONS

The most commonly asserted justification of plea bargaining is its utility in disposing of large numbers of cases in a quick and simple way. The need to induce such summary disposition of cases has been most forcefully stated by Judge Lummus:

> Let us suppose that five hundred cases are on the list for trial at a sitting of court. Of these, one hundred cases are tried, and four hundred defendants plead guilty. Seldom is there time in a sitting to try more than a fifth of the cases on the list. . . . [T]he prosecutor must subordinate almost everything to the paramount need of disposing of his list during the sitting. Rather than dismiss the excess by nolle prosequi, with no penalty, he must induce defendants in fact guilty to plead guilty, in order that some penalty may be imposed. Half a loaf is better than no bread. . . .
>
> If all the defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state in the Union. But they dare not hold out, for such as were tried and convicted could hope for no leniency. The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him. . . . The truth is that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty.[10]

Administrative need no longer seems to command the consideration it once received when challenged in the name of due process of law. It is easy to minimize administrative convenience and need. Simply increase the staff of prosecutors, judges, defense counsel, and probation officers if the present complement is insufficient to handle the task, it is said. Even if the money were readily available, it would still not be clear that we could call upon sufficient numbers of competent personnel. A lowering of standards in order to man the store adequately may well result in poorer justice. It may also divert both funds and personnel from other segments of the criminal process, such as corrections work, where they are arguably more needed.

But there are other reasons to maintain a high proportion of guilty pleas and a low proportion of trials. To suggest the least important of these first, a substantial increase in criminal trials would entail an equally substantial increase in the burden of jury duty on citizens. Many citizens prefer to avoid jury service because it interferes with their private and business lives. Would a disproportionate increase in this burden produce resentment against or a sense of alienation from the criminal process that might be directed against defendants and make other "pro-defendant" reforms less politically acceptable? Probably the best that we can say is that we do not know the answer to this question, but it should cause us to pause before throwing administrative considerations to the winds.

Maximization of adjudication by trial may actually result in more inaccurate verdicts. So long as trials are the exception rather than the rule and are limited, by and large, to cases in which the defense offers a substantial basis for contesting the prosecutor's allegations, the defendant's presumption of innocence and the requirement of proof beyond a reasonable doubt are likely to remain meaningful to a jury. The very fact that the defendant contests the charges impresses upon the jurors the seriousness of their deliberations and the need to keep an open mind about the evidence and to approach the testimony of accusing witnesses with critical care and perhaps even a degree of skepticism. If contest becomes routine, jurors may likely direct their skepticism at the defense. Prosecutors too readily apply the overall, and overwhelming, statistical probability of guilt to individual cases; we do not want jurors to do the same. It makes some sense, then, to screen out those cases where there is no real dispute and encourage their disposition by plea, leaving for trial to the extent possible only those cases where there exists a real basis for dispute.

I shall suggest later that there also are some cases in which the price we pay for contested disposition is the posing to the jury of extreme alternatives, due to the law's need to maintain its generality, under circumstances in which compromise may actually yield a more "rational" result.

III. THE RISK THAT INNOCENT DEFENDANTS MAY PLEAD GUILTY

Thus far we have examined plea bargaining from the impersonal perspective of the "system." Some additional perspective can be gained by viewing the practice from

[9] For discussion of the propriety of showing leniency to defendants who plead guilty and expression of judicial attitudes toward this practice, see Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204 (1956); *Pilot Institute on Sentencing*, 26 F.R.D. 231, 285-89 (1960).

[10] LUMMUS, THE TRIAL JUDGE 44-46 (1937).

the defendant's point of view. A prominent defense lawyer has put it thusly:

> These plea bargains perform a useful function. We have to remember that our sentencing laws are for the most part savage, archaic, and make very little sense. The penalties they set are frequently far too tough. . . .
>
> The negotiated plea is a way by which prosecutors can make value judgments. They can take some of the inhumanity out of the law in certain situations. . . .[11]

And, further:

> If a man is guilty, and the prosecution has a good case, there is little satisfaction to the lawyer or his client in trying conclusions, and getting the maximum punishment. A great deal of good can be done in the plodding everyday routine of the defense lawyer, by mitigating punishment in this manner. Anyone who has ever spent a day in a prison and experienced, even vicariously, the indignity and suffering that incarceration entails realizes full well that the difference between a three-year sentence and a five-year sentence is tremendous, not only for the wrongdoer who is being punished, but for the innocent members of his family who love him, and who suffer humiliation and worse while he is away. This is something that the criminal lawyer can rightfully and usefully do for the "guilty" man. In this regard, the criminal lawyer is daily fulfilling a useful function in our society.[12]

Viewed from this perspective, the negotiated plea is not solely a corrupting inducement offered defendants to waive their constitutional rights but is also a device by which defendants and their counsel can manipulate an imperfect system to mitigate its harshness and excesses. It is all too easy to assert that "there is no such thing as a beneficial sentence for an innocent defendant."[13] There is also no such thing as a beneficial conviction for an innocent man. But innocent men may be convicted at trial as well.

The possibility that innocent defendants might be induced to plead guilty in order to avoid the possibility of a harsh sentence should they be convicted after trial is obviously cause for concern. Because of the emotional potential of this problem, it is easy to overstate. The truth is that we just do not know how common such a situation is. Indeed, this may be the very vice of the current system of plea negotiation. Because of the invisible, negotiated, consensual nature of the handling of the case in terms which avoid exploration of those factors deemed relevant by the law, we do not really know whether there is in fact cause for concern or not. It is this very uncertainty about such serious consequences that creates uneasiness.

Still, perhaps the problem can be put in a better perspective. In the first place, trials, too, may not always result in truthful or accurate verdicts. It is interesting to note that disposition by trial and by negotiated plea are similar in that in neither instance do we have any relatively accurate idea of the incidence of mistaken judgments. On one level, then, the significant question is not how many innocent people are induced to plead guilty but is there a significant likelihood that innocent people who would be (or have a fair chance of being) acquitted at trial might be induced to plead guilty?

Further, concern over the possibility that a negotiated plea can result in an erroneous judgment of conviction assumes a frame of reference by which the accuracy of the judgment is to be evaluated. It assumes an objective truth existing in a realm of objective historical fact which it is the sole function of our process to discover. Some, but by no means all, criminal cases fit this image. For example, this is a relatively accurate description of the issues at stake in a case in which the defendant asserts a defense of mistaken identity. If all other issues were eliminated from the case, there would still exist a world of objective historical fact in which the accused did or did not perpetrate the act at issue. And if he did not, a negotiated guilty plea would represent an erroneous judgment. In this instance, then, the issue suggested is the comparative likelihood of such erroneous decisions as between trial and negotiation.

But not all criminal cases fit the above picture. The conventional dichotomy between adjudication and disposition in which the adjudication process is thought of as one of fact determination tends to obscure the nonfactual aspect of much of the adjudication process. Much criminal adjudication concerns the passing of value judgments on the accused's conduct as is obvious where negligence, recklessness, reasonable apprehension of attack, use of unnecessary force, and the like are at issue. Although intent is thought of as a question of fact, it too can represent a judgment of degrees of fault, for example, in cases where the issue is whether the defendants entertained intent to defraud or intent to kill. In many of these cases, objective truth is more ambiguous, if it exists at all. Such truth exists only as it emerges from the fact-determining process, and accuracy in this context really means relative equality of results as between defendants similarly situated and relative congruence between the formal verdict and our understanding of society's less formally expressed evaluation of such conduct.

The negotiated plea can, then, be an accurate process in this sense. So long as the judgment of experienced counsel as to the likely jury result is the key element entering into the bargain, substantial congruence is likely to result. Once we recognize that what lends rationality to the factfinding process in these instances lies not in an attempt to discover objective truth but in the devising of a process to express intelligent judgment, there is no inherent reason why plea negotiation need be regarded any the less rational or intelligent in its results.

Indeed, it may be that in some instances plea negotiation leads to more "intelligent" results. A jury can be left with the extreme alternatives of guilty of a crime of the highest degree or not guilty of any crime, with no room for any intermediate judgment. And this is likely to

[11] Steinberg & Paulsen, *A Conversation With Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW., 25, 31-32 (1961).

[12] Steinberg, *The Responsibility of the Defense Lawyer in Criminal Cases*, 12 SYRACUSE L. REV. 442, 447 (1961).

[13] Comment, *Official Inducements To Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 181 (1964).

occur in just those cases where an intermediate judgment is the fairest and most "accurate" (or most congruent).

Clearly, the line between responsibility and irresponsibility due to insanity is not as sharp as the alternatives posed to a jury would suggest. It may be that such a dividing line exists in some world of objective reality and that the ambiguity arises from the difficulties of accurate factfinding. It is more realistic, however, to view responsibility as a matter of degree at best only roughly expressed in the law's categories of first and second degree murder, manslaughter, etc. The very visibility of the trial process may be one factor that prevents us from offering the jury this compromise in order to preserve the symbolism of uniform rules evenly applied. The low visibility of the negotiated plea allows this compromise which may be more rational and congruent than the result we are likely to arrive at after a trial.[14] While the desire to protect the symbolism of legality and the concern over lay compromises may warrant limiting the jury to extreme alternative, it does not follow that to allow the defendant to choose such a compromise is an irrational or even a less rational procedure.

There is, moreover, a significant difference between conviction upon trial and by consent that merits further consideration; that relates to the role of defense counsel. Despite defense counsel's best efforts, his innocent client may be convicted at trial. But he cannot be convicted on a plea of guilty without defense counsel's participation and consent. Defendant's consent is also necessary for a guilty plea, but that provides less of an independent check on inaccurate pleas since defendant's prime interest is in minimizing unpleasant consequences. Counsel, on the other hand, as an officer of the court, has a duty to preserve the integrity of the process as well. When the system operates as it is supposed to, defense counsel's control over the plea affords added assurance that the plea is accurate.

We are safe in assuming that the system still works less than ideally. Waiver of counsel is still common in guilty plea cases, and even when the defendant is formally represented, his representation is often perfunctory.[15] But Professor Newman also reports increased inquiry into the factual basis for guilty pleas in all three States studied.[16] This suggests that judges accepting such pleas, if alert to the problem, can exercise greater control by refusing to accept waivers and by careful selection of assigned counsel, particularly in those cases in which some lingering doubt as to the defendant's guilt remains.

There is, however, another side to the participation of counsel in the guilty plea. Even counsel may see the occasional practical wisdom of pleading an innocent man guilty. Sworn to uphold the law and at the same time to serve his client's best interests, counsel may be faced with an insoluble human and professional conflict. While such a compromise may serve the defendant's interest in making the best of a bad situation, it can never serve the lawyer's interest in protecting his professional integrity and self-image. At present we have no idea of the extent of this role conflict and its consequences to the profession.[17]

Thus far I have suggested that for those cases in which the key determinant of the plea bargain is experienced counsel's assessment of the chances of conviction, plea bargaining is not likely to impair the accuracy of the guilt determining process. This assumption, of course, does not always prevail. Additional factors may enter into the bargain. Probably the most significant factor is the possibility that the defendant may be convicted of a crime which carries a mandatory, nonsuspendible sentence. Where the sentencing judge retains complete discretion in the imposition of sentence, defense counsel is under less pressure to negotiate a plea and is under little pressure to give up a triable defense. If the defense has sufficient merit so that some doubt may linger even after conviction, there may be a fair chance that such doubt will be reflected in the judge's sentence. Because of the rules relating to cross-examination of a defendant, defense counsel are usually of the view that a defendant ordinarily stands little chance of acquittal unless he has a relatively unblemished background. Where sentencing discretion prevails, such a background is likely to result in a light sentence upon conviction. Under such circumstances, a plea bargain has the effect of changing a substantial probability of leniency to a certainty, hardly a sufficient inducement for a man to plead guilty to a crime he has not committed. This becomes even more certain in the case of the defendant with an unblemished background, where the conviction is probably more damaging than any sentence he is likely to receive.

The removal of sentencing discretion by the enactment of mandatory sentences alters the picture completely. Once the defendant has been convicted, lingering doubts as to guilt and the defendant's exemplary prior life can no longer be considered. Under such circumstances the defendant may be forced to give up a fair chance of acquittal by pleading guilty to a different, usually a lesser, charge upon which the judge can impose a more lenient sentence. The impact of legislatively mandated sentences on plea negotiations was suggested some time ago by prominent writers.[18] Professor Newman's book reports that there was a far greater incidence of bargaining and charge reduction in Michigan, which has legislatively mandated sentences for certain crimes, and in Kansas, whose statutes do not permit the sentencing judge to impose probation as an alternative to a prison term for some crimes, than in Wisconsin, where the legislative sentencing structure leaves judges considerably greater discretion.[19]

An additional extraneous factor influencing counsel's judgment was suggested above, namely, the fear of conviction of a crime carrying a label suggesting abnormality or perversion, and even the fear of going to trial in such a case with its ensuing publicity. Mandatory minimum sentences can be eliminated; adverse publicity of this sort probably cannot. It is difficult to say with confidence that an innocent defendant's plea of guilty to disorderly conduct in such a case is never in the defendant's best interest if he is innocent. It is presumably not in the best interests of the criminal process, but I

[14] The defense of diminished responsibility seeks to accomplish similar ends.

[15] See NEWMAN, CONVICTION—THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 200-05 (1966). These pages contain an excellent discussion of the dynamics of the process and the problems faced by a conscientious attorney.

[16] *Id.* at 7-21, 233-35.

[17] Lawyers handling divorce cases are often faced with similar conflicts. For a selection of materials related to this problem, see FOOTE, LEVY & SANDER, CASES AND MATERIALS ON FAMILY LAW 682-83, 699-711, 752-69 (1966).

[18] Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

[19] NEWMAN, *op. cit. supra* note 16, at 53-56, 177-81.

would hesitate to insist to a client that he owes the system a duty to defend himself and bemuch his family and reputation. In any event, we can encourage greater judicial sensitivity to this problem and closer judicial supervision of the plea in such cases. New Rule 11 of the Federal Rules of Criminal Procedure and the practice in some courts of holding postplea hearings or investigations to develop the facts relating to the offense provide methods for such control.

The discussion in this section has not been designed to suggest that there is no reason for concern over the possibility that innocent persons might be induced to plead guilty by a system of plea negotiations. Rather, my purpose has been to place the problem in what appears to me to be its proper perspective, to demonstrate that there is nothing inherent in such a system that would increase the risk of inaccuracy beyond those present in adjudication by trial, to suggest that plea negotiation has possibilities for more intelligent and more humane disposition of many cases than are available in trial disposition, and to indicate that the problem is not beyond effective judicial control.

IV. VISIBILITY AND INVISIBILITY: SOME SKEPTICAL OBSERVATIONS ON THE NONNEGOTIATED PLEA

At several previous points I have commented on the invisibility or low visibility of key elements of the decision-making process in the case of negotiated pleas. The assumption has been that where there have not been any sort of court negotiations, where the sentence is truly determined by the judge after argument by counsel and perhaps a presentence investigation, the process is fully visible. I would suggest that the present process for nonnegotiated pleas is not really very visible either. In fact it is less visible to the persons most directly involved, the defendant and his counsel, than the negotiated plea.

Visibility depends on one's vantage point. While the negotiated plea may be of low visibility to the public at large (and to law professors), it is highly visible to the defendant. Whether the factors entering into the bargain are or are not meaningful as sentencing goals, they are at least visible to the defendant and his attorney. The defendant is able to influence the sentence, he may set forth bargaining factors and determine their relevance to the decision, and he may use his bargaining power to eliminate the grossest aspects of sentencing harshness and arbitrariness, be they legislative or judicial. The defendant, if he does not like the bargain, may reject it and stand trial. If he accepts the bargain, he cannot help but feel that his sentence is something that he consented to and participated in bringing about, even if he at the same time resents the process that induced his consent. And while he may find his "correctional treatment" brutal and meaningless on one level, his sentence is meaningful on another level in that at least he participated in it and influenced the final result.

Current sentencing practice for a nonnegotiated plea is to defense counsel, and I suspect to the defendant as well, an even more meaningless, less comprehensible procedure. The defendant and his counsel rarely see the sentencing decision take shape and even more rarely feel that they have participated in its formulation. At the point at which the process is most visible to the public, the imposition of sentence, it is least visible to the defendant. The prosecutor and defense counsel make their arguments and the judge decides. One frequently does not know what influenced the judge and how he went about making up his mind. (When the defendant reaches prison, the prison authorities are often at a similar loss to understand the judge's sentencing goals, although this is in part a product of the division between the probation service, which is an arm of the court, and correctional authorities, who are an arm of the prison.) One often gets the impression that the judge had his mind made up before argument and that counsel played no meaningful role in influencing the final result.

This is particularly true where the judge has had the benefit of a presentence investigation. Armed with all sorts of information and recommendations, and probably having discussed the case in chambers with the probation officer, the judge is rarely influenced by the highly visible argument of counsel. Rather, he has been influenced by the usually invisible report and conference with the probation officer. Even competent defense counsel who has devoted the time since pleading to furnishing the probation officer with helpful information about his client and perhaps has attempted to arrange employment for his client often has little idea how this information was used and whether he has really helped his client. This is particularly true when the defendant is disappointed by the sentence, a not infrequent occurrence. In short, both defendant and defense counsel emerge from the process with a sense of frustration and purposelessness. Often, neither feels he has played any meaningful and influential role in the sentencing process.[20]

The bargain may be looked at then as an attempt by the defendant, and even by his counsel, to preserve their dignity in the process by finding a role for themselves even if it means a sentence based upon criteria logically irrelevant to the goals of the process.

I cannot document these comments. They are merely impressions and observations accumulated during several years of criminal practice. Admittedly this practice was almost entirely on the prosecution side, and my impressions may have been distorted by the fact that office policy forbade us to make any specific recommendations as to sentence. But we were free to present and argue to the court those facts we considered relevant. Still, I always regarded my role in the sentencing process as professionally unsatisfying. With but one or two exceptions, I have rarely had the sense that defense counsel participated very meaningfully either. And on the few occasions that I have served on the defense side, the only occasions on which I had any feeling that I was rendering some professional service to my clients in the sentencing process were when I bargained on their behalf for some sentencing consideration.

In other words, in that moment of dread before a nonnegotiated sentence is imposed, counsel at least, and probably the defendant, have the feeling that they await the pronouncement of an arbitrary fiat which they are helpless to shape. The pronouncement of sentence, particularly if it is an unpleasant one, rarely mitigates this sense, for rarely does a judge articulate any reasons for imposing the sentence he has chosen other than to engage in an occasionally harsh speech excoriating the defendant and his like.

[20] Compare the observations of Professor Kadish, *The Advocate and the Expert Counsel in the Penal Correctional Process*, 45 MINN. L. REV. 803 (1961):

"Hearings on sentence and release determinations are commonly attenuated interviews when they are given at all." *Id.* at 841.

"[T]he use of ex parte presentence investigation reports, whose contents are only sometimes made available to the offender, has largely muted the adversary character of sentencing processes." *Id.* at 806.

"[There exists a] traditional value, associated closely with the root idea of a democratic community, that a person should be given an opportunity to participate effectively in determinations which affect his liberty." *Id.* at 830.

V. THE LEGAL DIALECTIC: VOLUNTARINESS

Current doctrine has it that a guilty plea, to be constitutionally valid, must be voluntary.[21] This notion apparently stems from several sources. Since the Constitution guarantees all defendants a right to trial, the entry of a guilty plea constitutes a waiver of that right which, as with all waivers, must be intelligently and voluntarily made. So viewed, the requirement of voluntariness is a function of the specific rights guaranteed by the sixth amendment.

The requirement of voluntariness may also be viewed as emerging directly from notions of due process. At a minimum, due process requires a fair factfinding procedure designed to find the relevant facts accurately. Conviction by judicial admission satisfies this requirement unless the admission has been induced by unfair means or means which might induce an innocent person to plead guilty.

In addition, the defendant's fifth amendment right not to be compelled to incriminate himself covers not only testimonial self-incrimination but compelled judicial admissions as well. In this context, the requirement of voluntariness bespeaks the ethical and political right of an accused to demand that the state not force him to become the instrument of his own undoing, but be prepared to prove his guilt by so-called objective or extrinsic evidence.

It should be recognized immediately that the term "voluntary" is an exceedingly ambiguous term. This stems not only from the difficulties involved in trying to discover a past state of mind but also from the fact that we do not even have a clear idea of what, if any, psychological facts or experience we are looking for. The choice to plead guilty rather than face the rack is voluntary in the sense that the subject did have a choice, albeit between unpleasant alternatives. The defendant who decides to plead guilty and seek judicial mercy also makes a choice between what are to him two unpleasant alternatives. If we call the first choice involuntary and the second voluntary, what we are really saying is that we are convinced that in the first case almost all persons so confronted will choose to admit their guilt but that the defendant's decision is based on more personal and subjective factors in the second instance.[22]

We also are saying that we approve of judicial means but disapprove of the rack. In other words, "voluntariness" expresses not merely judgment of fact but an ethical evaluation. When only certain extreme forms of pressure are disapproved, the difference between those pressures and the milder pressures we are here concerned with is sufficiently great that, while only a matter of degree, the voluntary-involuntary distinction is descriptive and useful. But as milder and less clearly improper inducements fall under the ban, it becomes more difficult to distinguish them from pleas which we regard as valid, at least so long as we are led by our dialectic to look for a nonexistent psychological difference. Thus, it is difficult to distinguish the psychological experience of a defendant who is induced to plead guilty by a prosecutor's or judge's promise of sentencing leniency from that of a defendant who is induced to plead guilty by his desire to begin service of his sentence immediately so that he will be released sooner. There is a danger that so long as we adhere to the terminology of voluntariness, our very inability to distinguish these cases will lead us to hold involuntary all pleas induced by any considerations beyond the defendant's sense of guilt and readiness to admit it publicly.

Both at common law and pursuant to recent Supreme Court decisions, a confession is deemed coerced and hence inadmissible if it was induced by any promises or threats. A typical inducement invalidating a confession is the proffer of leniency. Because the terminology and underlying constitutional sources are the same for guilty pleas as for coerced confessions, the inducement test for confessions may be thought to extend to guilty pleas as well.[23] Indeed, because a guilty plea is itself a conviction and leaves the court nothing to do but impose sentence, while a confession is merely evidence which must be corroborated and may be explained, rebutted, or contradicted, some judges might apply an even stricter standard to a guilty plea than to a confession.[24]

To apply the confession cases in this way would be to ignore some vital differences between the two situations. In the first place, even at common law the inducement test was riddled with arbitrary exceptions such as upholding confessions induced by a promise not to arrest or prosecute a relative of the defendant. Secondly, to the extent that it rests on concern for the reliability of the resulting confessions, the extreme sanction of exclusion bespeaks mistrust of the jury's ability to evaluate the confession properly in light of the inducement.[25] As we have suggested above, the accuracy of the guilty plea is not beyond effective judicial inquiry and evaluation.

Also, the particular inducements held improper in the coerced confession cases usually appear against a background of lengthy interrogation and other pressures to confess, factors not usually present when the same inducement is offered for a guilty plea. And in the confession cases, the defendant succumbed to the inducement without the advice of counsel. Any valid system of plea negotiations would presumably require that the defendant have counsel for this and other reasons.[26] Finally, the coerced confession cases must be viewed against the background of secrecy in the interrogation

[21] *E.g.*, *Machibroda* v. *United States*, 368 U.S. 487 (1962).

[22] See Bator & Vorenberg, *Arrest, Detention, Interrogation, and the Right to Counsel—Basic Problems and Possible Legislative Solutions*, 66 COLUM. L. REV. 62, 72-73 (1966).

[23] See, for example, the dissenting opinion in *Shelton* v. *United States*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam*, 356 U.S. 12 (1958).

[24] See *ibid.* But compare *Haynes* v. *Washington*, 373 U.S. 503 (1963), with *Cortez* v. *United States*, 337 F.2d 699 (8th Cir. 1964).

[25] See the discussion in *Developments in the Law—Confessions*, 79 HARV. L. REV. 938, 954-59 (1966).

[26] See *Davis* v. *Holman*, 351 F.2d 773 (5th Cir. 1965), *cert. denied*, 384 U.S. 907 (1961); *Shupe* v. *Sigler*, 230 F. Supp. 601 (D. Neb. 1964); *Anderson* v. *North Carolina*, 221 F. Supp. 949 (W.D.N.C. 1963).

room and the recurring conflict of testimony between police and defendants over whether more serious "inducements" had been offered. Under such circumstances, the very ambiguity and flexibility of the term "voluntariness" made it easy for skeptical courts to grab onto a conceded inducement, albeit a minor one, and hold that this inducement standing by itself rendered the confession involuntary. The coerced confession cases, then, are hardly controlling with respect to plea bargaining which occurs in a wholly different context, despite the similarity of the legal formula.

The fifth amendment approach is more difficult, largely because the ethical principle it expresses often diverges from the accuracy goal of the criminal process, whereas the two tend to converge in the sixth amendment right to trial. Thus, the problem here is in part to determine at what point the preservation of the dignity of all men before the state is undercut by inducements to plead, or what kinds of inducements undermine this dignity. The mere statement of the issue in this form suggests again some room for play, but the problem is complicated by the coerced confession precedents discussed above. But our notions of dignity seem to require that some room be left to the defendant to judge and act intelligently, knowingly, and with competent professional advice in his own self-interest.

Although the sixth amendment guarantees the right to trial, it is not to be assumed that the constitutional scheme requires or even envisions that defendants will always avail themselves of this right. Indeed, as suggested above, the full exercise of this right by all defendants might even thwart some of the goals of the right to trial. Adjudication by trial may be viewed not as a preferred or desired procedure but rather as an available procedure. Its availability to all defendants stands as a check against governmental arbitrariness and as a device for rational factfinding in case of disagreement between the government and the defendant. Defendants then must be informed of and given the tools necessary for the meaningful exercise of this right. It is not necessary, however, that they be encouraged to exercise this right. Again, each single defendant's own self-interest will determine whether or not he should exercise it.

In light of these considerations, including the benefits to both the system and to defendants that can be derived from a controlled system of plea negotiations, it would not be desirable to lay down a broad constitutional dictum forbidding the practice. It would be a mistake to push valid legal, even constitutional, insights to the ultimate of their logic. Accommodation of conflicting interests is a more sensible pursuit.

VI. WHERE DO WE GO FROM HERE?

To recapitulate for a moment, I have suggested that plea bargaining serves several useful ends: It eases the administrative burden of crowded court dockets; it preserves the meaningfulness of the trial process for those cases in which there is real basis for dispute; it furnishes defendants a vehicle to mitigate the system's harshness, whether that harshness stems from callous infliction of excessive punishment or from the occasional inequities inherent in a system of law based upon general rules; and it affords the defense some participation in and control over an unreviewable process that often gives the appearance of fiat and arbitrariness. These are not insignificant accomplishments.

But we have also seen that the system pays a price for these accomplishments. It bears a risk, the extent of which is unknown, that innocent defendants may plead guilty; negotiation becomes directed to the issue of "how many years a plea is worth" rather than to any meaningful sentencing goals; factual information relating to the individual characteristics and needs of the particular defendant are often never developed; and a sense of purposelessness and lack of control pervades the entire process. This is a high price.

Statement of these areas of concern suggests possible remedies designed to encourage the early development and availability of facts concerning the offense and the offender, the candid exchange of attitudes between the parties, and perhaps even the closer and earlier involvement of the judge in the process, *i.e.*, a sort of preplea conference.

Negotiation is not solely a matter of bazaar bargaining. It also involves the narrowing down of areas of disagreement, the recommendation and exploration of alternative courses of action, and the exchange of information, ideas, and insights. Such a process could result in greater disclosure of relevant information than is presently the case. The scheduling of a conference prior to the entry of a guilty plea would eliminate some of the factors discussed above which at present disable the judge from exercising a degree of control. And, it may be hoped, the participation of the judge might direct discussion along more meaningful lines.

Judicial participation is, of course, no panacea. Judges, too, may misdirect their attention to bargaining over the number of counts and years. The earlier use of presentence investigations should also be encouraged. The judge might order such an investigation after the hearing in order to confirm the facts developed and represented at the hearing. Or, the prosecutor and defense counsel might be authorized to request such an investigation before the conference to serve as a basis for discussions.[27]

The suggestion of greater judicial involvement in the process undoubtedly raises some fears.[28] The principal objections relate to the risk that the defendant may be pressured into pleading guilty because of the impression that he will not receive a fair trail if he rejects the judge's recommended disposition.[29] But this cause for concern can be eliminated by requiring that if the defendant rejects the judge's proposal, the trial and sentence shall be before a different judge, a particularly feasible solution in metropolitan courts where the bulk of plea bargaining takes place. Scheduling the trial before a different judge would also eliminate any prejudice that could otherwise result from the judge's reading the probation report and participating in the preplea conference.

It would be a mistake to deny the judge any role in the process of negotiations, particularly since his power of subsequent review seems at present ineffective. It is not contemplated that such a conference would be required for all cases or even ordinarily called at the judge's initiative. Rather, the parties would call such a conference usually after they have reached agreement. In cases in which defense counsel and the prosecutor are agreed upon a disposition, no harm can come from allowing the judge to review their decision before the guilty plea is entered. Such a review may serve to bring up for consideration matters that would otherwise have been ignored by the parties. At worst, the judge will rubber-stamp their agreement.

Even when there is disagreement, a conference might be held if the parties think it could be useful and indicate a desire for it. In such instances, the judge's role in eliciting the relevant facts is likely to be somewhat lessened. Since counsel disagree, each, or at least defense counsel, is likely to adduce all the facts he can in favor of the disposition he is seeking. Such a hearing can be a very real adversary proceeding. Here, too, as in any adversary proceeding, the judge should be alert to elicit any new facts counsel may have ignored, to make use of probation office facilities for investigation if they have not as yet been called upon to open up possible new avenues for exploration, and to offer additional insights into the case. He may be sufficiently persuaded to bring his prestige to the support of one of the parties' views. Such a development could further encourage the use of probation as a sentencing alternative.

The core problem seems to be whether judges can participate in such a process without becoming quasi-prosecutors.[30] What will happen if, notwithstanding his desire to "settle" the case, the judge agrees with the prosecutor's view as to what is an appropriate disposition of the case? Can defense counsel maintain their independence, or might some lawyers feel themselves under pressure to go along with the judge, lest they develop a reputation for being obstructive and damage their position for future clients? When somewhat similar objections were raised against the establishment of public defender offices, they were rejected. And, it should be noted, pressures to cooperate with the judge usually weigh far more heavily upon the prosecutor than upon the defense. If thought necessary, one might require that such a conference be held only at the defense's initiative.

Moreover, the availability of a record of the proceeding should provide added protection. While it would probably be difficult to control the less formal conference that would follow upon agreement between the parties, the more formal adversary hearing that would follow upon disagreement could and should be entirely "on the record."

Even in the best of worlds, however, negotiation involves some give and take, some compromise. Would it tarnish the image of the law and of the judge to concern him in a procedure that involves compromise? It is no easier to answer this question than those that preceded it. But it may properly be suggested that if there is one area of the law that does not lend itself to the rigidity of either, or, it is sentencing. If we were correct in our suggestion above that adjudication is not always a search for objective truth, the point is all the more valid with respect to disposition, and our search for meaningfulness must be directed not so much to the result as to the process of decision making.

The answers to the above questions are far from clear. They are problematic. Still, the suggestions for new directions seem to be worth careful experimentation. When the parties agree on a disposition, the emphasis should be on improved early factfinding, largely through the probation service, with some greater measure of judicial control. Where there is disagreement, there should be available, perhaps only at defendant's option, opportunity for argument and conference with the judge before a plea is entered.

VII. THE ROLE OF DEFENSE COUNSEL

It is likely that the key participant in any scheme of negotiated pleas would be defense counsel. I suggested earlier that defense counsel typically take a narrow view of their role in representing their clients: to do their best within honorable means to secure an acquittal and to do their equal best after conviction to obtain for the client as "light" a term as possible. The implications of a lawyer's role as counselor are ignored.

This is not the place to explore the possibilities of altering that professional self-image. But it is appropriate to suggest, at least, that it is particularly timely now as a role is being found for the lawyer at more and more stages of the total criminal process that new thought be given to the nature of that role. Is it also the lawyer's function to suggest to his client his need of and the availability of correctional devices which may aid him? Is it his duty to the client to get the client to understand himself better, to advise him that there are procedures and techniques available today for such indepth study in many cases? Should he advise his client that the development of such information and the formulation of a correctional program are more in his long-term interest than the year less in jail he can probably get from hard bargaining?

This is not to suggest, of course, that the ultimate decision as to which course to pursue is to be the lawyer's. Decisions in issues of such moment and consequence must under our system remain in the hands of the defendant.[31] The question is whether it is counsel's duty to explore these issues with his client and perhaps even advise his client which course the lawyer thinks he ought to follow.

Implicit in the foregoing is the requirement that counsel have a thorough understanding of correctional theories and practices—their successes and failures, be trained in the understanding of human behavior so that he may

[27] Probation investigations are frequently conducted prior to adjudication in juvenile delinquency cases. Under this proposal, a preadjudication investigation would be held only upon the defendant's consent.

[28] See, *e.g.*, *United States ex rel. Elkins v. Gilligan*, 256 F. Supp. 214 (S.D.N.Y. 1966).

[29] See Comment, 32 U. CHI. L. REV. 167, 180-83 (1964); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 891-92 (1964).

[30] See, *e.g.*, *United States v. Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963).

[31] *Cf. Brookhart v. Janis*, 384 U.S. 1, 7-8 (1966).

identify the sources of his client's difficulties, and be familiar with the public and private agencies to which the client may be referred for more professional assistance. Such professional skills are vital to the lawyer even today, when he plays a more limited role. Yet it is the rare criminal lawyer who has any real grasp of the correctional aspects of the criminal process. This should be an area of concern to the bar and the law schools in the training of future lawyers.[32]

SOME CONCLUDING OBSERVATIONS

In a very significant sense, the problems involved in the plea bargaining process reflect the context in which it arises, the broader sentencing process. The absence of "legal standards to govern the exercise of individualized correction,"[33] both procedural and substantive, the subjectivism and unreviewability of most sentencing decisions, and the failure to articulate goals beyond the most general and unhelpful are not only attributes of plea bargaining but are endemic to the entire peno-correctional process. It is precisely because of this ambiguity in the total process that it lends itself to the kind of manipulation described above.

The ultimate answers to the problems outlined in this paper cannot come from a mere tinkering with the process of negotiations but must be sought in improvement of the total process. One line of inquiry could be directed toward the development of standards which could serve as frames of reference for individual cases. More precise factfinding might be another approach. Adjudication is, of course, a form of factfinding directed to correctional decision making, but the definitional elements of a given crime represent the minimally relevant facts. They are in a sense jurisdictional facts designed at best merely to indicate generally that the case is appropriate to the correctional process. But they do not carry us very far along that process. A listing of facts deemed relevant to the determination of an appropriate sentence for various crimes[34] would provide an agenda or reference points for argument and decision, and would provide a basis for review. Such a listing might serve as a sort of checklist in negotiated pleas to direct the negotiations along more desired lines.

At the same time attention must be given to the development of new types of correctional programs so that defendant and his counsel might themselves become interested in seeking correction of the defendant's problems rather than merely getting as light a sentence as possible. Exploration of these suggestions is, of course, beyond the scope of this paper. But it is important to stress the point at which the two groups meet and to suggest the broader context in which solutions must be sought.

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[32] *Cf.* the observations of Professor Newman, *Functions of the Police, Prosecutor, Court Worker, Defense Counsel, Judge in Aiding Juvenile Justice*, 13 JUV. CT. JUDGES J. 6, 11-12 (1962).

[33] Kadish, *supra* note 21, at 828.

[34] See, *e.g.*, MODEL PENAL CODE §§ 7.01–.04, 210.6(3), (4) (Proposed Official Draft 1962).

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