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P L E A B A R G A I N I N G

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INTRODUCTION

Many experts agree with the assertion that the prosecutorial stage is "the linchpin of the criminal justice system".[1] The public has become aware that the enforcement of criminal laws may in many cases depend on the prosecutor's sole judgment.[2] As summarized by one commentator,

> He has the authority by law to enforce certain laws by prosecuting offenders. Whom he chooses to prosecute, what he charges them with, whether he charges them at all, whether he later drops the charges or recommends a lower sentence at the time of trial are all within the prosecutor's exercise of discretion.[3]

Prosecutorial discretion provides the flexibility necessary for the smooth operation of the criminal justice system.[4] "If every policeman, every prosecutor, every court and every post-sentence agency performed his or its responsibility in strict accordance with rules of law, precisely and narrowly laid down, the criminal law would be ordered but intolerable".[5] Although discretionary power exists throughout the criminal justice system, "none is potentially more dangerous than that of the public prosecutor."[6] Such discretion "makes easy the arbitrary, the discriminatory, and the oppressive. It produces inequality of treatment. It offers a fertile bed for corruption."[7]

Recent events have raised numerous questions concerning the prosecutor's role in the criminal justice system.[8] According to a recent survey on this subject, a "grounded consensus now exists regarding the means of dealing with the exercise of (the prosecutor's) official discretion."[9] All of the proposals that have been advanced seek "to minimize the opportunity for abuse

and to promote consistency and rationality in prosecutorial decision making."[10] The goal is to cut back unnecessary discretionary power [11] in order to make the prosecutor accountable for his decisions.[12]

Particularly noteworthy among those instances in which a prosecutor exercises discretion are: (1) the decision not to prosecute an individual notwithstanding sufficient evidence to meet the legal requirements for commencing a prosecution; and (2) the decision to make concessions to a charged individual on the condition that he plead guilty rather than stand trial. This paper will study these two areas. Emphasis will be placed on the extent to which such decisions are made, upon what basis they are made and the consequences of the decisions. Attention will also be directed toward approaches that could rectify controversial uses of prosecutional discretion.

FOOTNOTES

1. Thomas and Fitch, "Prosecutorial Decision Making," 13 American Criminal Law Review 506, 509 (1976). Another writer states that the American prosecutor has "a monopoly over the criminal process." Langebein, "Controlling Prosecutorial Discretion in Germany," 41 University of Chicago Law Review 439, 440 (1974).

2. Bubany and Skillern, "Taming the Dragon: An Administrative Law for Prosecutorial Decision Making," 13 American Criminal Law Review 473, 473-4 (1976). According to these authors the public is rarely aware of any activity of the prosecutor other than in connection "with sensational trials reported by the news media" Id at 488.

3. Comment, "Prosecutorial Discretion - A Re-evaluation of the Prosecutors Unbridled Discretion and its Potential for Abuse," 21 De Paul Law Review 485, 487 (1971). The discretion of the prosecutor to engage in plea bargaining is a function of his discretion to charge and has discretion to dismiss. See Cox, "Prosecutorial Discretion: An Overview", 13 American Criminal Law Review 383, 425 (1976).

4. See, e.g., Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion," 19 UCLA Law Review 1, 2 (1972); Bubany, supra Note 2, at 492. According to H.L.A. Hart, discretion is necessary because of the "open texture of law". The Concept of Law, pp. 120-32 (1961). In other words, according to Sarah Cox, "there are inherent limitations of human ability either to predict fully or to describe perfectly in language all the possible instances which might arise and need to be treated according to prescriptions of law. Instead, deicisons must be made by individuals who interpret laws and rules and decide whether and to what degree the laws apply to the situation at hand, Cox, supra note 3 at 386. See also Kenneth Culp Davis, Discretionary Justice: A Preliminary Inquiry pp. 15-21 (1969).

5. Breitel, "Controls in Criminal Law Enforcement", 27 University of Chicago Law Review 427 (1960).

6. Comment, supra note 3 at 485.

FOOTNOTES

7. Breitel, supra note 5 at 429. Herbert Packer is similarly critical of discretion. He feels that flexibility of administration may be carried to the point of excessive lawlessness which is then justified in the name of discretion. The Limits of the Criminal Sanction, pp. 290-92 (1968). Arthur Rosett finds that although discretion may be used in order to individualize justice, it often may become simply discriminatory. "Discretion, Severity and Legality in Criminal Justice," 46 S. California Law Review 12, 16-17 (1972). See also Wechsler, "The Challenge of a Model Penal Code," 65 Harvard Law Review 1097, 1102 (1962); Davis, supra note 4 at 222.

8. Cox, supra note 3 at 383.

9. Thomas, supra note 1 at 510.

10. Bubany, supra note 2 at 490.

11. Davis, supra, note 4 at 51. Davis argues that discretion should be confined, structured, and checked. He first recommends that discretion be limited or confined by statutorial definition of the areas to which it applies. Second, Davis recommends that discretion be structured through the development of written policies guiding the prosecutor's exercise of discretion. Third, Davis argues that all decisions be recorded along with the reasons for which they were made so that some rational and consistent check on the operation can be made through review processes.

12. Cox, supra note 3 at 384.

DECISION TO CHARGE

Washington law states that "the prosecuting attorney shall ...(p)rosecute all criminal...actions in which the state...may be a party."[1] The discretion of the American prosecutor to decide, however, when to or not to prosecute is clearly recognized by case law.[2] The duty of the prosecutor, it is argued, is not only to secure convictions, but to see that justice is done.[3] Even though a prosecutor may be sure he can successfully prosecute a defendant, he still might decline to charge the accused when he "believes that prosecution is not in the community's interest."[4] Professor Davis has suggested that "(p)erhaps nine-tenths of the abuses of the prosecuting power involve failure to prosecute."[5] In recent years selective law enforcement has become a matter of increasing concern resulting in part from uncontrolled prosecutorial discretion.[6] The most dangerous power of the prosecutor, according to one expert, is the possibility that he "will pick the people that he thinks he should get, rather than pick cases that need to be prosecuted."[7]

Usually, the prosecutor bases his decision to prosecute on both subjective and objective factors.[8] Objective factors involve the question of whether there is enough evidence to convict the accused.[9] Subjective factors usually involve the question of whether or not justice will be served by his decision. It is this latter class of decision, in which the prosecutor purports to be rendering "individualized justice" which some find objectionable.[10]

The subjective factors which may affect a prosecutor's decision whether to charge an individual are generally based on

matters that are extraneous to the issue of convictability.[11] For example, as a part of the "criminal justice community", the prosecutor may be sensitive to the pressures of police, courts and the defense bar.[12] In addition to these factors, the prosecutor may be influenced by personal considerations such as enhancing his personal trial record.[13] Along with others, these factors have given rise to several issues surrounding the desirability of prosecutionary discretion which will be discussed below.

SELECTIVE ENFORCEMENT OF CERTAIN CRIMES

It has been stated that "the prosecutor's own notions of what is and what is not good policy "may affect his decision whether to enforce a particular criminal statute."[14] Regardless of a prosecutor's personal philosophy, however, it is generally recognized that resources are simply not adequate to fully enforce every penal law.[15] Often a desire to conserve the limited resources of the criminal justice system may force a prosecuting attorney not to charge an offender he otherwise would prosecute. According to one commentator, "what every prosecutor is practically required to do is select the cases for prosecution and select those in which the offense is the most flagrant, the public harm the greatest, and the proof the most certain."[16]

The problem of limited resources is generally held to be aggravated by the so-called over-criminalization of behavior.[17] There is some evidence that full enforcement of the law regardless of fiscal limitation is at times not consistent with legislative expectations.[18] In other situations, the attitude of the community has resulted in nonenforcement or partial enforcement of certain laws against particular persons.[19] The President's Commission on Law Enforcement and the Administration of Justice has listed, for example, eight categories of crimes which a prosecutor is not likely to prosecute.[20] According to one study, "the worst abuses

of discretion occur in connection with those offenses that are just barely taken seriously, such as consensual sex offenses."[21]

The existence of antiquated laws, the general enforcement of which a community would not tolerate,[22] may lead to the exercise of wide discretion. Such discretion may lead to selective enforcement of the law which, upon its face, appears to be unfair or may even lead to complete nonenforcement of an offense. A refusal to prosecute may be construed either "as the most extreme exercise of prosecutorial discretion or as an abdication of discretion. It is also the ability to or not to prosecute which comes closest to establishing the prosecutor as an entirely independent organ of the government."[23]

"INDIVIDUALIZATION OF JUSTICE"

Often the prosecutor refuses to prosecute a defendant as to do so would cause undue harm to the offender.[24] Wayne LaFave states that

> Individualized treatment of offenders, based upon the circumstances of the particular case, has long been recognized in sentencing, and it is argued that such individualized treatment is equally appropriate at the charging stage so as to relieve deserving defendants of even the stigma of prosecution.[25]

The prosecutor may, for instance, apply such factors as a suspect's "occupation, prior record, and age; the appropriateness of applying the statutorily prescribed sanctions to him; his medical, psychiatric, and family history; and the impact of criminal charges upon him or his family" in deciding whether to charge a suspect.[26] Norman Abrams states that highly respected businessmen are often not charged with white collar crimes as criminal prosecution would do them more harm than good.[27] Finally, prosecutors are reluctant to prosecute defendants who are suspected of harmless, victimless crimes.[28]

APPLICATION OF ALTERNATIVES TO PROSECUTION

"DIVERSION PROGRAMS"

Sometimes a prosecutor will not prosecute an individual if an effective enforcement alternative exists.[29] In some instances, alternatives to prosecution may accomplish the same objective as formal action[30] or achieve the goal when actual prosecution would not.[31] Prosecutors have long exercised discretion to halt criminal prosecution by referring individuals to social services or other similar agencies. This use of prosecutorial discretion has largely been without standards or articulated goals.[32] The recent development of rehabilitation-oriented diversion programs is, in part, a "response to a recognized need that prosecutors often deal with offenders who need treatment or supervision for which criminal sanctions are inadequate."[32] However, the use of these programs may be questioned in light of the findings made relating to the general effectiveness of the type of treatment upon criminal offenders.[34] Once again, applying the critique currently being applied to the exercise of judicial discretion, it may be argued that diversion into such programs should not be based on perceived treatment needs, but on the basis of a uniform standard related to the offense committed by the offender.

"EXISTING CONTROLS IN DECISION TO CHARGE"

"Although the American criminal justice system has effective controls to ensure that the prosecutor does not abuse his power by prosecuting upon less than sufficient evidence," he need not contend with checks of comparable magnitude of other members of the criminal justice system when determining whether or not to charge an individual with a crime.[35] Some controls do exist, however,

which may be used in reversing charging decisions in certain instances or in correcting certain cases of nonenforcement.

Claims of discriminatory enforcement are seldom successful "because the prosecutor's decision is presumed to be regular, improper prosecutorial motives are difficult to prove, and the defendant has the burden of showing that the reasons for not prosecuting are unrelated to a legitimate law enforcement policy.[36] Defendants must show either systematic or intentional discrimination on the part of the prosecutor [37] or selectivity for reasons unacceptable to the courts.[38] As a result, prosecutorial decisions not to charge or to terminate proceedings are rarely reviewed by the courts.[39] Only with great difficulty, can a citizen succeed in having a court issue a writ of mandamus forcing a prosecutor to initiate a case.[40] However, Washington court rules do provide for a procedure where a private citizen can personally initiate criminal proceedings.[41] The citizen also has the right to bring criminal prosecution against a prosecutor for nonfeasance, misfeasance, or malfeasance in office.[42] Civil action for malicious prosecution,[43] proceedings for discharge by the legislature,[44] or recall by the voters[45] are other harsh but effective proceedings give citizens at least the opportunity to control abuses of prosecutorial discretion.

"EXTENSION OF CURRENT CONTROLS"

As noted above, there are few restrictions affecting the prosecutorial charging decision. Many commentators contend that such discretion should be confined, structured, and checked,[46] so that none, if any, abuses occur in the application of the prosecutor's enforcement powers.

The President's Commission on Law Enforcement and Administration of Justice identified three basic needs which must be met

before the prosecutor's charging discretion becomes more structured. The Commission cited the need of the prosecutor for more information, the need for established standards and the need for established procedures.[47] These needs parallel the structuring and checking recommendations suggested by Professor Davis.[48] Davis believes that adoption of written guidelines or policies in the area of charging would structure the exercise of prosecutorial discretion. Such standards "should pertain to such matters as the circumstances that properly can be considered mitigating or aggravating or the kinds of offenses that should be most vigorously prosecuted in view of the community's law enforcement needs."[49] Recent studies show that at this time no established criteria with which to determine whether a case would be charged or dropped exist.[50] Immediate adoption and publication of standards is necessary in order to counteract the increasing public disillusionment with the criminal justice system stemming from the breakdown of the "illusion of equal and full enforcement." [51]

If the principle of guidelines is accepted, it must then be determined how the standards should be implemented. For example, individual prosecutors might be encouraged or required by law to adopt standards or guidelines, or general standards applicable to all offices might be promulgated by the State Association of Prosecuting Attorneys or by the Attorney General.[52] Similarly, the state legislature might wish to impose uniform standards throughout the state.

There have been various suggestions on what these standards should be. For example, Bubany and Skillern have proposed a tri-level system of inquiry. First, factors touching on suspect's guilt are investigated. Second, variables showing whether the community benefits to be derived from prosecution are outweighed by its costs are examined. Finally, factors concerning the probable effect of prosecution on the offender are explored.[53] The third consideration, arguably, might be discouraged in order to

maintain consistency with the philosophy underlying determinate or uniform sentencing. Therefore, the prosecutor should be required to state more than that "insufficient evidence" precludes bringing of a particular prosecution.[54] Already, both the Idaho and Wisconsin Legislatures have made some attempts at controlling prosecutorial discretion by requiring the prosecutor to make a detailed written statement of the reasons for taking certain types of legal actions.[55]

Promulgation of standards does not, by itself, ensure compliance by the prosecutor.[56] Prosecutorial decisions should always be reviewed by the prosecutors themselves. In addition, such decisions may be studied externally on an informal basis by citizens groups or social scientists. Formalized review might be undertaken by the Attorney General.[57] Finally, some type of judicial review, analogous to that used to scrutinize the actions of administrative agencies, might be implemented. Bubany and Skillern state, for instance, that "decisions to prosecute would be subject to review, as they are to a limited extent now, at the behalf of the individual being prosecuted. With reference to decisions not to prosecute, citizens who feel aggrieved by the decision should also have limited judicial review."[58] Unfortunately, this risk could cause the criminal justice process to be slowed even further through excessive "juridicalization".[59]

FOOTNOTES:

1. RCW 36.27.020(4).

2. See, e.g., State v. Reid, 66 Wn.2d 243 (1965). "(A) prosecutor need not prosecute all possible violators of the law in order for a statute to be constitutional" State v. Nixon, 10 Wn. App. 355, 358 (1973). The prosecutor can, in addition, choose whether or not to file in justice court or superior court (State v. Kanistenaux, 68 Wn.2d 652 (1966)); whether or not to charge an individual with being an habitual criminal (State v. Tatum, 71 Wn.2d 576 (1963)); or whether to seek an added deadly weapons penalty (State v. Thorton, 9 Wn. App. 699 (1973)). See also United States v. Cox, 342 F.2d 167, 171 (5th Cir.), cert. denied, 381 U.S. 926 (1965). Powell v. Katzenback, 359 F.2d 234 (DC Cir. 1965), cert. denied, 384 U.S. 906 (1966), reh. denied, 384 U.S. 967 (1968).

3. Comment, "Prosecutorial Discretion - A Re-evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse," 21 De Paul Law Review 485, 498 (1971).

4. Frank Miller, Prosecution: The Decision to Charge a Suspect with a Crime P. 28 (1969). Miller points out that full enforcement of all technical violations would subject practically every number of society to some form of penal sanction and that "no one has seriously suggested that full enforcement in that sense would be desirable, much less tolerable." Id. at 163.

5. Kenneth Culp Davis, Discretionary Justice - A Preliminary Inquiry, P. 191 n.2 (1969).

6. Miller, supra note 4 at 171.

7. Comment, supra note 3 at 501.

8. Id. at 492. Another commentator distinguishes between so called "practical factors" including the prosecutor's belief in the guilt of a subject and the likelihood of a conviction with considerations specifically linked to particular offense categories. Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion", 19 UCLA Law Review 1, 11 (1972).

9. See, e.g., Comment, supra note 3 at 493; The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, P. 5 (1967); Donald Newman Conviction: The Determination of Guilt or Innocence Without Trial, P. 68 (1966). According to one former federal prosecutor

the first and most basic standard followed in determining whether to prosecute an individual was the prosecutor's view of the accused's guilt of the crime to be charged. Kaplan, "The Prosecutorial Discretion - A Comment," 60 Northwestern Law Review 174, 178 (1965). According to this same individual, the second major question is whether in light of the habits of the judges and juries in the area, the case could be expected to result in a conviction. Id. at 180. "Often the complainant is as "guilty" as the suspect in contributing to the dispute...In such cases, conviction would be improbable because of judge and jury reactions to complainants who are as guilty as defendants." Miller, supra note 4 at 267.

10. Bubany and Skillern, "Taming the Dragon: An Administrative Law For Prosecutorial Decision Making," 13 American Criminal Law Review 473, 478 (1976). See also LaFave, "The Prosecutor's Discretion in the United States, 18 American Journal of Comparative Law 532, 534 (1970).

11. See generally Bubany, supra note 10 at 479. Objective and subjective concerns may, of course, sometimes merge in the actual decision making process. Statutory rape may not be charged in order to conserve scarce resources and protect the reputation of the accused as well as on the grounds that a jury would not convict on such a charge.

12. See, e.g., Neubauer, Criminal Justice in Middle America P. 120 (1974). "Although their effect cannot be measured precisely, the news media, judges, attorneys, other officials in the system, private individuals, and public interest groups contribute, to some degree, in shaping prosecutorial decision making." Bubany, supra note 10 at 488. See also Comment, supra note 3 at 497; Cox, "Prosecutorial Discretion: An Overview," 13 American Criminal Law Review 383, 412 (1976).

13. See, e.g., Kaplan, supra note 9 at 181; Comment, supra note 3 at 496. Related to this factor, the prosecutor may be concerned over the possibility that too many acquittals may undermine the functioning of his office. Miller, supra note 4 at 161.

14. Abrams, supra note 8 at 17.

15. See, e.g., Miller, supra note 4 at 159; Cox, supra note 12 at 414.

16. Jackson, "The Federal Prosecutor", 31 J. Crim. L.C. and P.S. 3, 5 (1940).

17. "Criminal law tends to be overburdened with a broad range of sanctioned behavior. Some behaviors included within the category of overcriminalization - gambling, drug use, prostitution and other sexual behavior - represent crimes in that group sometimes referred to as victimless or complaintless crime." Cox, supra note 12 at 387. See also, Breitel, "Controls in Criminal Law Enforcement," 27 University of Chicago Law Review 427, 429 (1960). According to Wayne LaFave, the criminal code has become "society's trash bin." "The Prosecutor's Discretion in the United States," 13 American Journal of Comparative Law 532, 533 (1970).

18. Miller, supra note 4 at 161-2.

19. Id. at 183. Miller states that there are certain unpopular laws which are not enforced unless the facts present in extreme case or there is strong community pressure. "Immediately of course, the question must be raised, "which community?" Abrams, supra note 8 at 15. It may be argued that there is a rural obligation to prosecute regardless of public opinion. See, e.g., Brown v. State, 177 Md. 321, 332, 9 A. 2d 209, 214 (1939) (Laws enacted by the legislature in the public interest must be enforced.)

20. According to the Commission, the following are offenses not likely to be prosecuted:

    (1) domestic disturbances;
    (2) assaults and petty thefts in which the victim and offender are in a family or social relationship;
    (3) statutory rape when both the boy and girl are young;
    (4) first offense car thefts, the "joyride";
    (5) checks drawn upon insufficient funds;
    (6) first offense shoplifting, particularly where restitution is made;
    (7) where the criminal acts involve offenders suffering from emotional disorders short of legal insanity;
    (8) cases involving annoying or offensive behavior other than a dangerous or serious crime, e.g., drunkenness, disorderly conduct, minor assault, vagrancy, and petty theft.

    The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, P. 5 (1967). See also Abrams, supra note 8 at 12-13.

21. Herbert Packer, The Limits of the Criminal Sanction, pp. 290-1 (1968).

22. Some laws are written to satisfy the desire of a community to express "a high moral purpose" through its lawmaking function, although this idealism may not include any real expectation of hope that the laws will be enforced with any great enthusiasm. Kenneth Culp Davis, Discretionary Justice - A Preliminary Inquiry, pp 165 (1969).

23. Abrams, supra note 8 at 13-14.

24. LaFave, supra note 17 at 534-5; Miller, supra note 4 at Ch. 11.

25. LaFave, supra note 17 at 534.

26. Thomas and Fitch, "Prosecutorial Decision", 13 American Criminal Law Review 506, 514 n. 32 (1976). See also National Advisory Commission on Criminal Justice Standards and Goals, Courts, pp 20-22 (1973); The President's Commission on Law Enforcement and Administration of Justice, The Courts, p. 5 (1967); Abrams, supra, note 8 at 11; Rabin, "Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion," 24 Stanford Law Review 1036, 1056-61 (1972); Note, "Prosecutorial Discretion - A Re-evaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse", 21 De Paul Law Review 485, 493 (1972); American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function, §3.8, §3.9(b) (iii) (1971); Kaplan, supra, note 9 at 190-91. According to Arnold Enker, the conviction label "becomes a weapon in the hands of the prosecutor to be applied in his uncontrolled discretion against those whome he judges to be dangerous." Perspectives on Plea Bargaining", in The President's Commission on Law Enforcement and Administration of Justice," Task Force Report: The Courts, p. 109 (1967).

27. Abrams, supra note 8 at 12. See also Miller, supra note 4 at 279.

28. Miller cites a case where a prosecutor refused to charge felonies of illegal occupation and permitting gaming equipment on the premises "because of the caliber of the men included". Miller, supra note 4 at 209.

29. Abrams, supra note 8 at 16. In some situations, the application of alternatives to prosecution may effect a cost savings. Miller, supra note 4 at 213-4. There is a feeling in some cases that alternatives to prosecution may be preferable in terms of achieving treatment objectives. Id. See also Donald Newman, Conviction: The Determination of Guilt or Innocence

Without Trial, p. 388 (1966).

30. See, e.g., Miller, supra note 4 at 6. Miller cites as examples an advisory discussion with the prosecutor in order to compel heads of families to support their families or to force individuals to make good on bad checks.

31. In some cases, the potential sentences are so light that violators are not deterred from returning to the same type of illegal conduct. Rather than prosecuting an individual, then, a house of prostitution might be padlocked under the nuisance laws (Id. at 243) or a vehicle used for an illegal activity might be confiscated (Id. at 241-2).

32. Comment, "Pre-Trial Diversion: The Threat of Expanding Social Control," 10 Harvard Civil Rights - Civil Liberties Law Review 180, 183 (1975).

33. Cox, supra, note 12 at 432. These types of treatment oriented programs may be distinguished from several reviewed by Thomas and Fitch in a recent article. They reviewed a program which resolved family disputes and minor property crimes at an informal hearing, a "night prosecutor program", conducted by law students in cases involving inter-personal disputes and bad checks. Another program involved a Community Dispute Settlement Center where a professional arbitrator settles disputes in such cases as landlord-tenant matters and consumer complaints. "Prosecutorial Decision Making," 13 American Criminal Law Review 506, 536-7 (1976). The newer rehabilitation-oriented pretrial diversion programs typically offer counseling and employment services. Id. at 537.

34. See, e.g., Martinson, "What Works? Questions and Answers About Prison Reform," Public Interest, pp. 22, 49 (Spring 1974). Arthur Rosett points out, further, that there is little in the experience or training of a prosecutor to make him capable of determining what type of help offenders need. "The Negotiated Guilty Plea, "423 The Annals of the American Academy 70, 78 (1969).

35. LaFave, "The Prosecutor's Discretion in the United States," 13 American Journal of Comparative Law 532, 538 (1970). Generally, the prosecutor is controlled only by his "oath of office, the canon of ethics for lawyers, and his personal ethical and moral convictions "Comment, "Prosecutorial Discretion - A Re-evaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse", 21 De Paul Law Review 485, 498 (1971).

36. Bubany, supra note 10 at 503.

37. See, e.g., Edelman v. California, 344 U.S. 357, 359 (1953). State v. Nixon, 10 Wn. App. 355, 360 (1973).

38. Oyler v. Boles, 368 U.D. 448, 456 (1962) (prosecutions based deliberately upon standard such as race are unconstitutional); Dixon v. District of Columbia, 349 F.2d 966, 968 (D.C. Cir. 1968 (prosecution instituted for purpose of pressuring defendant to drop charges against certain police officers found unacceptable.)

39. See, e.g., Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2nd Cir. 1973); United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965). One court in a time of widespread lawlessness allowed the prosecutor to pick out certain laws which he would not enforce generally. State ex rel. Bourg v. Marrero, 132 La. 109, 140-141, 61 So. 136, 146-147 (1913). In Washington, a filed complaint or information may not be dismissed except by leave of the court. CrR 8.3(a). The extent to which a court might scurtinize this decision is unclear. See United States v. Cowan, 524 F.2d 504 (5th Cir. 1975).

40. See, e.g., Bubany, supra note 10 at 485 n. L3; Comment, supra, note 3 at 513. Generally, mandamus may be used to compel the exercise of a discretionary power but not the method in which an officer exercises that discretion.

41. JCrR 2.01. The rule is silent, however, on the mechanism to be used in prosecuting the complaint.

42. Miller, supra note 4 at 298-99. Such an action may be taken "with the expectation that conviction will carry automatic ouster as a sanction or will provide a basis for initiating a separate ouster suit."

43. Comment, supra note 3 at 503.

44. Wash. Const., Article 4, §9.

45. Wash. Const., Article 1, §33 (Amend 8)

46. See Kenneth Davis, Discretionary Justice: A Preliminary Inquiry (1969). Commentators argue that prosecutors' offices should be viewed as administrative agencies and held similarly accountable. See, e.g., Id. and Bubany, supra note 10 at 480-1.

47. The President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, pp. 133-34 (1967).

48. The statutory framework for the prosecutor is confined to the criminal code. While the newly enacted code has decriminalized certain acts, some victimless crimes such as prostitution and drug use continue to be subject to prosecution.

49. Commission, supra note 48 at 134.

50. Cox, supra note 12 at 412 n. 151.

51. Bubany, supra note 10 at 498. According to Sara Cox, "policies should be public and open to comment, so that the public knows what to expect from the prosecutor and so that the prosecutor's policies are subject to public criticism." Cox, supra note 12 at 393. It is argued, however, that publication of policies may invite litigation and impair the deterrent effect of the criminal law. Thomas, supra note 26 at 524-26. Guidelines might be adopted establishing the types of cases which may be considered for diversion programs. Bubany, supra note 10 at 501. Several commentators have suggested that a "precharge conference" might be used to discuss the appropriateness of a diversion program for a particular suspect (See, e.g., LaFave, supra note 36 at 538; Cox, supra note 12 at 7-8).

52. The Attorney General could propogate these standards only if his authority was expanded under RCW 43.10.030(4).

53. The authors set forth the standards in detail as follows:

"The basic standard should be whether in the prosecutor's judgment: (1) a crime has been committed; (2) the perpetrator can be identified; and (3) sufficient evidence exists to support a verdict of guilty.

A second order of inquiry should address the question of whether the benefits to be derived from prosecution or other action are outweight by its costs. Matters pertinent to this determination include: (1) the extent of the harm caused by the offense (2) possible improper motives of a complainant; (3) reluctance of the victim to testify; (4) effect of non-enforcement upon the community's sense of security and confidence in the criminal justice system; (5) the direct cost

of prosecution in terms of prosecutorial time, court time, and similar factors; (6) prolonged nonenforcement of the statute on which the charge is based; (7) the availability and likelihood of prosecution and conviction by another jurisdiction; (8) any assistance by the accused in the apprehension or conviction of other offenders, in the prevention of offenses by others, in the reduction of the impact of offenses committed by himself or others upon victims, and in engaging any other socially beneficial activity that might be encouraged in others by not prosecuting the offender; and (9) the effect of nonenforcement on police department morale.

A third level of consideration is the probable effect of prosecution on the offender. Relevant factors which here tend to individualize disposition of cases include: (1) the impact of further proceedings on the accused and those close to him, especially the likelihood and severity of financial hardship or disruption of family life; (2) the effect of further proceedings in preventing future offenses by the offender in light of his commitment to criminal activity as a way of life; (3) the disparity of the authorized punishment in relation to the particular offense or offender; (4) the seriousness of his past criminal activity which he might reasonably be expected to continue; (5) the possibility that further proceedings might tend to create or reinforce commitment on the part of the accused to criminal activity as a way of life; and (6) the availability of programs as diversion or sentencing alternatives that may reduce the likelihood of future criminal activity."

Bubany, supra note 10 at 497. For other standards see the American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecutorial Function, Standard 3.9; standards suggested by the President's Commission on Law Enforcement and the Administration of Justice in Comment, supra note 3 at 492.

54. Such a notation "has become a shorthand way of saying that one or both of two conclusions has been reached: (1) the evidence is insufficient to prove guilt (or to assure conviction); or (2) prosecution is otherwise undesirable" Miller, supra note 4 at 155.

55. Idaho law states that:

"It shall be the duty of the prosecuting attorney to inquire into and make full examination of all the facts and circumstances connected with any case or preliminary examination, as provided by law, touching the commission of any offense wherein the offender shall be committed to jail or become recognized or held to bail and if the prosecuting attorney shall determine in any case that an information ought not to be filed, he shall ... file with the clerk of the court a statement in writing containing his reasons in fact and in law

....The court may examine said statement and the evidence, and if the court shall not be satisfied with such statement, the prosecuting attorney shall be directed by the court to file the proper information and bring the case to trial." Idaho Code section 19-1306; nearly identical is Mich. State. §28.981.

Wisconsin law requires reporting of the use of illegal gambling devices by taverns or similar establishments and provides that

"Within 10 days after any report the district attorney shall institute a proceeding (to revoke the liquor license) or shall within such time report to the attorney general the reasons why such a proceeding has not been instituted. The attorney general may direct the Department of Justice or the district attorney to institute such proceeding within a reasonable time." Wisc. State. Ann. §176.90(2).

Interpreting this statute, the Wisconsin Supreme Court stated that there was "no basis for holding that (the prosecutor's) duties in representing the state are not subordinate to legislative direction as to the cases in which he shall proceed" (State v. Coubal, 248 Wis. 247, 21 N.W.2d 381 (1946).

56. According to Davis, "The plain fact is that more than nine-tenths of local prosecutors' decisions are supervised or reviewed by no one", Davis, supra note 22 at 208.

57. Prosecutors are now required by law to file annual reports summarizing their activities. RCW 36.27.020. "This is apparently not done consistently, and in any event the data is of limited utility" Steve Rosen, Prosecutorial Discretion, 19 (Staff Draft, Law and Justice Planning Office, August 18, 1976).

58. The private complainant, however, would have to exhaust administrative procedures established by the prosecutor's office before seeking judicial help. Bubany, supra note 10 at 504.

"The court would consider whether the prosecutor's decision was in fact based on the standards and policies of the office or was motiviated by extraneous factors. Normally, the court would not review the merits of the prosecutor's policy. Only in cases of the patent and complete absence of a relationship between a prosecutorial standard and a legitimate law enforcement objective would a court be authorized to invalidate the standard itself." Id.

See also Davis, supra note 22.

59. The now formalized decision making process might be "moved back to an earlier stage where it can again be conducted with informality and flexibility and therefore with greater discretion." Cox, supra note 12 at 402. Norm Abrams would allow individuals to challenge in court prosecutorial policy or a failure by the prosecutor to formulate policy. Judicial review in such instances does not "pose a serious clogging danger". Abrams, supra note 8 at 52. The existence of a broader form of judicial review such as allowing a defendant to challenge policy as applied to himself might "influence the form and content of policy and not in a particular salutory manner". The prosecutor might in anticipating such review, resort to the use of broad terminology plus residual catch-all phrases in formulating policy. Id. at 42.

Plea Bargaining

INTRODUCTION

Plea bargaining is defined as "the exchange of prosecutorial and judicial concessions for pleas of guilty".[1] A defendant, in other words, may expect to obtain a reduced punishment for his criminal acts when he pleads guilty.[2] "Few practices in the system of criminal justice create a greater sense of unease and suspicion than the negotiated plea".[3] According to one commentator, the trial prosecutor's "unchecked discretion" is perhaps the most undesirable feature of the plea bargaining process.[4] This paper will review the problems which allegedly stem from this practice. First, however, plea bargaining and its underlying purposes will be reviewed.

EXTENT OF PLEA BARGAINING

After a decision is made by a prosecutor to prosecute an individual, it is estimated that as many as 90 percent of all his convictions are obtained through guilty pleas.[5] A significant but undetermined number of these pleas are "bargained" or "negotiated".[6] The percentage of negotiated pleas range greatly between different prosecutors' offices.[7] Twenty-one prosecutors responding to an Office of Program Research survey revealed that disparity does exist between jurisdictions. In seven counties over 80 percent of the guilty pleas were "bargained", in five counties between 60 and 80 percent of the guilty pleas were "bargained", while in seven and two other counties the percentages were fifty and less than twenty-five percent respectively. In general, the types of concessions offered defendants in exchange for the guilty plea covered a broad spectrum. Most common are smaller sentence recommendations, charging a lesser included offense and the dismissal of charges for an indictment or information.[8] The extent to which each concession is offered may depend upon the sentencing discretion allowed judges in a particular jurisdiction. "Where the judge's power is severely limited by high legislative minimum sentences, fixed maximum sentences, or frequent absence of probation as a sentencing alternative, meaningful concessions are possible only through charge reduction".[9] As a result of plea bargaining with a prosecutor, a defendant may be convicted of a crime which carries a lower statutory maximum penalty than for the offense actually committed; may avoid a statutory bar to parole or probation; or may avoid a repugnant conviction label, such as being found guilty of a sex offense.[10] To counteract these giveaways, a prosecutor will often charge the defendant for the highest crime that the evidence could possibly support while knowing that the offense for which he can realistically expect conviction is a "lesser included offense".[11]

Plea bargaining may occur at any time, but separately it takes place after the filing of formal charges by the prosecutor.[12] Generally, judges do not take part in the actual bargaining process since their role is generally limited to accepting and validating the terms of the bargain.[13] But often judges play a central role in the bargaining process.[14] For example, a defendant may accept a tacit bargain by pleading guilty when a court has an established practice of showing leniency to defendants who do not demand trials.[15]

1. Alschuler, "The Prosecutor's Role in Plea Bargaining", 36 Unviersity of Chicago Law Review 50 (1968). Such a plea is a formal admission of guilt in which the defendant acknowledges full responsiblity for all of the legal consequences and consents to whatever judgment and sentence the court may legally impose. The United States Supreme Court appears to be moving "towards the goal of insulating all guilty pleas from subsequent attack no matter what unconstitutional action of government may be induced a particular plea." McMann v Richardson, 397 U.S. 759, 775 (1970)(Brennan, J., dissenting).

2. Whether this results from the defendant "show of contrition, or from the more prosaic saving of state time and money "is by definition unimportant; "the fact that he is perceived to receive a reward is the key point" Heumann. "A Note on Plea Bargaining and Case Pressure" 8 Law and Society Review 515, 525 (1975). See also Comment, "The Plea Bargain in Historical Perspective", 23 Buffalo Law Review 499 (1974).

3. The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, p. 9 (1967). According to one account, pleas of guilty were actively discouraged by English and American courts "during most of the history of the common law" and "as recently as the 1920's the legal profession was largely united in its opposition to plea bargaining". Alschuler, supra note 1 at 50-51. Other commentators have shown the "bargain" to be a phenomenon with more distant antecedents. See, e.g., Comment, supra note 2 at 500; Heumann, supra note 2 at 524.

4. White, "A Proposal for Reform of the Plea Bargaining Process", 119 University of Pennsylvania Law Review 439, 449 (1971).

5. See, e.g., The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, p. 4 (1967). According to Donald Newman, 70 to 85 percent of all felony convictions and over 90 percent of all criminal convictions are based on guilty pleas. Newman, Conviction: The Determination of Guilty of Innocence Without Trial, p. 3 n.1. (1966). See also American Bar Association Project in Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, p. 1-2 (Tent. Draft 1967); Thomas, "Plea Bargaining: The Clash Between Theory and Practice", 20 Loyola Law Review 303 (1974); National Advisory Commission of Criminal Justice Standards and Goals, The Courts, pp. 42-43 (1973). Twenty-one Washington prosecutors responding to an Office of Program Research Survey revealed that the total number of guilty pleas ranged from 55 to 95 percent of all pleas entered with fourteen of twenty-one prosecutors stating that at least 77 percent of all pleas were guilty ones.

6. See, e.g., La Fave, "The Prosecutor's Discretion in the United State", 13 American Journal of Comprative Law 532, 539 (1970). Dean, "The Illegitimacy of Plea Bargaining", 38 Federal Probation 18, 19 (Sept. 1974); Alschuler, supra note 2 at 50. Some prosecutors object to the term "bargained" plea. According to the Skagit County Prosecutor, only 20 percent of the pleas in his county are truly bargained although "more than ninety percent of the defendants know what recommendation the state will make if they plead guilty", letter from Pat McMullen to Bob Naon dated, July 20, 1976. "We tell them what we'll do but we don't make any effort in order to obtain a plea of guilty", letter to Bob Naon from Michael Redman, Prosecutor, San Juan County. In a survey of Washington's Superior Courts' caseload reports for May 1976, 63 percent of all criminal cases disposed of were concluded through guilty pleas.

7. The University of Pennsylvania Law Review surveyed prosecutors' office in 43 states and the percentage of negotiated pleas ranged from less than 10 percent to more than 70 percent. Note, "Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas, 112 University of Pennsylvania Law Review 865, 896-99 (1964). Similarly, the number of guilty pleas may vary between jurisdictions. One study found that the average trials to total dispositions ratio for felony cases from 1965-69 in Kings County, Brooklyn, was 300/3000, or 10 percent; in Detroit, 900/9200, or 9.8 percent; in Harris County, Houston, 360/6260, or 5.8 percent; in Cook County, Chicago, 900/4500, or 20 percent. McIntyre and Lippman, "Prosecutors and Early Disposition of Felony Cases", 56 American Bar Association Journal 1154, 1156-57 (1970). However, some figures may be misleading. For example, in Philadelphia only about one-fourth of the defendants convicted of a crime plead guilty. Alschuler, supra note 1 at 61. Many cases recorded there as "waivers" (trials before a judge without a jury) can be more accurately "characterized as slow pleas of guilty". The defendant's counsel "facilitates the presentation of evidence and implicitly or explicitly admits that the defendant is guilty of some offense, but does not enter a formal plea". White, supra note 4 at 441-2. See also Rotenberg, "The Progress of Plea Bargaining: The ABA Standards and Beyond", 8 Conn. L. Rev. 44, 49 (1975).

8. See, e.g., Comment, "Plea Bargaining in Washington", 6 Gonzaga Law Review 269, 283 (1971); Note, supra note 7 at 866. In the University of Pennsylvania study, of those prosecutors who acknoledged that they made plea agreements, 54.5 percent said that they made sentence recommendations, 95.5 percent said they accepted lesser pleas, and 81.7 percent said they would seek dismissal of other counts or other indictments. Id. at 898. The prosecutor can grant numerous other favors to a defendant pleading guilty. He may, for instance, promise not to prosecute the defendant's friends or relations or may see to it that the defendant is sent to a particular prison or tried before a particular judge. He may present the defendant in a favorable light to the judge at sentencing without necessarily making a specific sentence promise. If the defendant is on parole he may consent to withhold a recommendation for parole revocation in return for a guilty plea. Finally, he can drop one or more cases filed against any one defendant and prosecute less than the full number or drop subsidiary charges which might be brought against the defendant. See, e.g., Parker, "Plea Bargaining", 1 American Journal of Criminal Law 187, 192 (1972); Donald Newman, Conviction: The Determination of Guilt or Innocence Without Trial, pp. 94-5 (1966). Cox, "Prosecutorial Discretion: An Overview", 13 American Criminal Law Review 383, 426 (1976).

9. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, p. 66 (Tent. Draft 1967). See also Newman, supra note 5 at chs. 2 and 6; Note, "The Unconstitutionality of Plea Bargaining", 83 Harvard Law Review 1387, 1389-90 (1970). In jurisdictions where the judge maintains broad sentencing discretion, the defendant may plead "on the nose" to the original charge in exchange for the prosecutors promise to seek sentence leniency. See, e.g., LaFave, supra note 6 at 540-1. Of twenty Washington Prosecutors responding, sixteen stated they offered sentence recommendations, fourteen said they allowed a defendant to plead guilty to a lesser included offense and eighteen reported that they dismissed counts.

10. LaFave, supra note 6 at 539-40. Some benefits received by the convicted defendant may be illusory. The reduction of the number of counts may bring no benefit as the imposition of consecutive sentences rarely occurs. See, e.g., Id. at 54. Comment, supra note 8 at 188-9. Pleading "on the nose" may handicap the defendant by placing on the record--for consideration by a parole board--the offense of which he was actually guilty. See, e.g., Parker, supra note 8 at 188-9.

11. See, e.g., Dean, "The Illegitimacy of Plea Bargaining", 38 Federal Probation 18, 20 (Sept. 1974); Note, "Restructuring the Plea Bargain, 82 Yale Law Journal 286, 293-4 (1972)". Overcharging can be either "horizontal"--making out as many offenses as possible from a single criminal transaction--or "vertical"--charging a single offense at a higher level than the circumstances seem to dictate". Alschuler, supra note 1 at 85-6.

12. Common is the practice of negotiations between the defense and the prosecutor after arrest but before assignment, after assignment but before trial, or during trial. Dean, supra note 11 at 19. "Rarely the police 'promise' a defendant (leniency) if he 'cooperates' and pleads guilty". Newman, supra note 8 at 91. Appointment of counsel may to a great extent determine when bargaining will occur. See, e.g., Frank Miller, Prosecution: The Decision to Charge a Suspect With a Crime 193 (1969). See generally Newman, supra note 8 at 79-92.

13. See, e.g., LaFave, supra note 6 at 540; Note, supra note 7 at 867-8.

14. See e.g., Newman, supra note 8 at 92.

15. See, e.g., Parker, supra note 8 at 191-2; White, supra note 5 at 449; Note, "The Elimination of Plea Bargaining in Black Hawk County: A Case Study", 60 Iowa Law Review 1053, 1064 (1975).

RATIONALE OF PLEA BARGAINING

"Administrative Concerns"

The institution of plea bargaining is believed by many to be "indispensable to the efficient administration of justice".[1] Its primary justification is sometimes stated to be "nothing less than the maintenance of the criminal justice system".[2] Because the contemporary criminal justice system "suffers from a critical lack of resources", plea bargaining has been adopted as the way to dispose of the maximum number of cases at a minimum cost.[3] "Despite efforts to decriminalize certain behavior and to streamline criminal trial procedures, large caseloads will continue to generate demand for plea bargaining".[4] The "hard facts are that in many localities, probably including all urban centers, the whole administration of criminal justice would grind to a halt" absent the disposition of cases through the guilty plea.[5] Several commentators have noted that the criminal justice system has become a complex bureaucracy preoccupied with its "capacity to apprehend, try, convict and dispose of a high proportion of criminal offenders whose offenses become known".[6] Without plea bargaining the number of persons who could be processed through the present system would decrease considerably according to many observers of the system.[7]

In 1975 there were 116,690 suits filed with Washington's superior courts. Each of the one hundred superior court judges averaged 1,167 filings for that year. Fortunately, most suits which are filed are settled out of court so that most filings do not result in trials. Thus, the average superior court judge heard 97 trials in 1975.[8] Just how busy 97 trials a year keeps a judge is known only to the judge but by looking at the increasing or decreasing nature of a court's case backlog one can determine just how efficiently the courts are keeping up with their workloads. Backlog can be determined by looking at the disposition/filing ratio of cases. The disposition/filing ratio is obtained by dividing the number of cases disposed by the number of new cases filed during a given period of time. If the ratio obtained is greater than 1.0, cases are being disposed of faster than they are filed and the backlog is being reduced. If the ratio is less than 1.0, cases are entering the court faster than they are disposed of and the backlog is increasing. The disposition/filing ratio for civil cases in 1975 was .89 meaning that the backlog increased by about 10 percent for the year for civil cases. The disposition/filing ratio for criminal cases was 1.02 meaning that the backlog of criminal cases during 1975 decreased slightly, but basically remained the same. Therefore, the overall backlog of both civil and criminal cases increased by slightly less than 10 percent for 1975.[9]

The workload of each superior court judge depends upon the county he serves. Judges in the urbanized counties tend to have a greater workload than those in the rural counties. Therefore, the backlogs of some superior courts are increasing at a much faster rate than 10 percent per year average which in itself is an indicator that the ability of our superior courts, especially those in populated areas, is not great enough to keep pace with the demands placed upon them by our society. All these statistics clearly point to the conclusion that if the workloads in superior courts steadily increase at the present rate, and the present structure of the superior courts' resources remain the same, it will not take long until most if not all of the courts will be far too overtaxed to take on any sudden increase in litigation whether it comes from the abolition of plea bargaining or any other source.[10]

It has been argued that it is an oversimplification to tie the use of the plea bargain solely to the problem of large court caseloads.[11] Some crowded courts appear to be able to deal with their caseloads without great reliance upon plea bargaining,[12] while many courts, relatively free of case pressure, have relied on guilty pleas to a great extent.[13] The prosecutor of Maricopa County, Arizona, has recently eliminated plea bargaining for a number of felonies without congesting the courts in that jurisidiction.[14] In Black Hawk County, Iowa, it was found that a significant decrease in explicit plea bargaining combined with other factors did not hamper the effectiveness of the courts and the rest of the criminal justice system but in fact improved it.[15] At this moment, the only major jurisdictions which have instituted a total elimination of plea bargaining are Alaska state and the city of Honolulu.[16] Unfortunately, neither jurisdiction has abolished plea bargaining for a substantial period of time, and therefore, hard data onthe effect of the subrogation is sketchy and inconclusive.[17] For example, the prosecuting attorney for Juneau, Alaska could cite no statistics, but he claimed his workload had greatly increased since the elimination of plea bargaining. However, in Anchorage the number of state criminal charges, especially misdemeanor charges, have decreased during the last few months.[18] Kitsap County, apparently, has been able to restrict the practice of plea bargaining to a very substantial extent. A study of this jurisdiction's experience is fully discussed in an appendix to this report.

Several studies have concluded that judicial administrative congestion, without more, should not justify granting concessions to selected defendants. The National Advisory Commission on Criminal Justice Standards and Goals, for instance, stated that "lack of resources should not affect the outcome of the processing of a criminal defendant and that it is not unrealistic to expect that the criminal justice system can and will be provided with adequate resources".[19] Addition of new personnel and resources, however, without an institutional commitment to change--as shown by the experiences of several jurisdictions--will not necessarily abolish plea bargaining[20] for there are other justifications for its maintenance quite unrelated to the amount of monetary resources provided the criminal justice system.

"Individualized Justice"

While many commentators have supported plea bargaining with the pragmatic argument that it is necessary from an administrative standpoint, others see plea bargaining as serving other--often penological--purposes in the criminal justice system. "An avowed purpose of a compromised plea is to allow for individualized punishment with an eye towards rehabilitation rather than retribution".[21] Raymond Moley wrote over forty years ago that:

> The whole tendency (to compromise cases) represents a drift in the direction of individualizing the treatment of offenders. What actually should happen in all criminal cases is an attempt to adjust treatment to the needs of the individual case though statutory penalties make this difficult. Yet such individualization is at the heart of most forward-looking reforms of recent times, particularly probation.[22]

Decisions on a bargained disposition "do not call for the yes-or-no answers of guilt or innocence. They seek to predict the offender's future behavior and the impact on the community of what is done to him".[23] In other words the charge reduction aspect of plea bargaining is recognized as a means of allowing "individualized justice".[24]

Prosecutors consider any number of factors in arriving at a bargain with a criminal defendant. Newman's comprehensive categorization of factors derived from a survey of midwestern guilty plea procedures showed that decisions to reduce charges as a form of plea bargaining are generally based on:

(1) characteristics of the particular defendant such as age, respectability, intelligence, or ethnic background;

(2) the unpopularity of a sentencing statute or its unsuitability for certain defendants;

(3) how the defendant will be affected by the conviction label of the original charge; and

(4) various other mitigating circumstances such as the existence of a prior illegal relationship between the defendant and his victim.[25]

Several of these factors, such as the decision to treat "respectable persons" more leniently, are considered questionable by individuals who maintain that justice requires that an individual be punished for what that person has done rather than who that person is.[26] While several commentators defend individualized justice as applied by prosecutors as a necessary complement to a rigid criminal code which draws few distinctions between offenses,[27] "one might ask whether the prosecutor had taken into his domain the roles of legislator, defense counsel and judge which might be better maintained as separate responsibilities".[28]

Many prosecutors argue that a system of individualized justice obtained through plea bargaining is an essential part of a program to rehabilitate the defendant.[29] Some even argue that when a defendant pleads guilty to a bargained charge he is taking the first step towards his rehabilitation.[30] For instance, the American Bar Association's proposed plea bargaining standards place weight on the admission of guilt as a sign of the defendant's acceptance of responsibility for his acts and as a declaration of his willingness to suffer the consequences.[31] Others disagree, contending that this is "perhaps the most naive" justification for plea bargaining because rather than expressing remorse, the defendant pleading guilty is "really showing his ability to manipulate the system to his own advantage".[32] They argue that to the average criminal, the guilty plea "looks more like the purchase of a rug in a Lebanese bazaar than like the confrontation between a man and his soul".[33]

"Record Building"

The use of conviction rates as a measure of the efficiency of the prosecutor may be one underlying reason for the prevalence of plea bargaining. "While some trial prosecutors enjoy the challenge of a difficult case, most will offer sub-

stantial concessions rather than risk losing a jury trial."[34] In political terms, it may be "far more important for a prosecutor to secure convictions than it is for him to secure adequate sentences".[35] Plea bargaining also improves the prosecutor's administrative credibility. Retaining a high rate of convictions may be important in encouraging guilty pleas which are necessary to the efficient functioning of a prosecutor's office.[36]

"Concession in Exchange For Information"

Another justification for plea bargaining is that it enables a prosecutor to obtain cooperation from a defendant in the form of information or testimony concerning other crimes or suspected criminals.[37] The American Bar Association Standards relating to pleas of guilty recognize the legitimacy of this use of plea bargaining.[38] Such cooperation, according to Jerome Skolnick, is especially necessary in the case of vice crimes and burglaries.[39]

1. Note, "The Elimination of Plea Bargaining in Black Hawk County: A Case Study", 60 Iowa Law Review 1053 (1975).

2. See, e.g., Thomas, "Plea Bargaining: The Clash Between Theory and Practice", 20 Loyola Law Review 303, 312 (1974); Bubany and Skillern, "Taming the Dragon: An Administrative Law For Presecutorial Decision Making", 13 American Criminal Law Review 473, 483 (1976). The Courts today uphold prosecutorial discretion note because it allows "the prosecutor to see that justice is done without going to court", but "because without it there can be no justice at all--the system would collapse". Comment, "Prosecutorial Discretion--A Reevaluation of the Prosecutor's Unbridled Discretion and its Potential for Abuse", 21 DePaul Law Review 485, 517 (1971). See Brady v. United States, 397 US 742 (1970); Santobello v. New York, 92 S. Ct. 495 (1971).

3. Note, "The Unconstitutionality of Plea Bargaining", 83 Harvard Law Review 1387 (1970). See also Parker, "Plea Bargaining", 1 American Journal of Criminal Law 187, 195 (1972); comment, "Plea Bargaining: The Judicial Merry-Go-Round", 10 Dequesne Law Review 253, 262 (1971); Rosett, "The Negotiated Guilty Plea", 374 The Annals of the American Academy 70, 77-8 (1967); Alschuler, "The Prosecutors Role in Plea Bargaining", 36 University of Chicago Law Review 50, 50-51 (1968). Note, supra note 1 at 1057.

4. Rotenberg, "The Progress of Plea Bargaining: The ABA Standards and Beyond", 8 Connecticut Law Review 44, 84 (1975). Alschuler notes that due to the volume of crime and extension of the criminal sanction to areas of human activity that were formerly beyond its scope, the guilty plea system has grown "largely as a product of circumstance, not choice" Alschuler, supra note 3 at 50.

5. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Pleas of Guilty, p. 50 (Tent. Draft 1967). See also address of Chief Justice Burger to ABA Annual Convention as reported in New York Times, August 11, 1970, p. 24, col. 4; Comment, supra note 2 at 514, 516. Alschuler, supra note 3 at 54-6; Frank Miller, Prosecution: The Decision to Change a Suspect With a Crime, pp. 6-7 (1969); Note, "Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas", 112 University of Pennsylvania Law Review 865 (1964).

6. Note, "The Unconstitutionaltiy of Plea Bargaining", 83 Harvard Law Review 1387, 1388 (1970). According to Bubany and Skillern, expediency has become the primary objective of the criminal justice system. Bubany, supra note 2 at 495. Abraham Blumberg describes "the emergence of bureaucratic due process, a nonadversary system of justice by negotiation" consisting of "secret bargaining session, employing subtle, bureaucratically ordained modes of coercion and influence to dispose of obviously large caseloads in an efficacious and rational manner" Criminal Justice 21 (1967). See also Blumberg, "The Practice of Law as a Confidence Game", 1 Law and Society Review 15, 19-20, 23 (1967); Jerome Skolnick, Justice Without Trial, p. 241 (1966); Herbert Parker, The Limits of the Criminal Sanction (1969).

7. See, e.g., Note, supra note 6 at 1388, 1405; Note, supra note 5 at 881; Comment, supra note 3 at 262. This argument is based on the premise that when plea bargaining is eliminated a defendant has "everything to gain and

nothing to lose" by going to trial. Note, supra note 1 at 1057. If plea bargaining was "abolished" the courts would be clogged up "to an unbelievable degree". Letter from James Carty, Clark County Prosecutor, June 30, 1976. Almost all Washington prosecutors asked stated that the number of guilty pleas would decrease without the existence of plea bargaining.

8. Office of the Administrator for the courts, 1975 Annual Report Relating to Judicial Administration in the Courts, State of Washington, pp. 38-40.

9. Id.

10. For example, the King County Superior Court took seven to eight months to adjudicate a civil case and less than two months to adjudicate a criminal case in June 1974. A year and one-half latter it took over a year to adjudicate a civil case and four months to adjudicate a criminal case. See Office of the Administrator for King County Superior Court, Presentation of Caseload and Trial Activity (1976).

11. See, e.g., Jerome Skolnick, Justice Without Trial, pp. 57-67 (1967); Feeley, "Two Models of the Criminal Justice System: An Organizational Perspective", 7 Law and Society Review 407 (1973). In one recent survey some very interesting data was discovered. Prosecutors in low population density jurisdictions appeared to be more likely to accept bargains than metropolitan prosecutors. It appeared, in other words, that "where caseload pressures were less, there was actually a greater probability of the acceptance of a plea bargain". Lagoy, et al. "An Empirical study on Information Usage For Prosecutorial Decision Making in Plea Negotiations", 13 American Criminal Law Review 435, 461-2 (1976).

12. See, e.g., The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, p. 4 (1967). For a list of jurisdictions attempting to restrict plea bargaining see Ratenberg, supra note 4 at 86 notes 265-270. See also, National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, p. 47 (1973).

13. Milton Heumann found that variations in case pressure did not directly or appreciably affect trial rates. "A Note on Plea Bargaining and Case Pressure", 9 Law and Society Review 575, 517, 524 (1975). See also Coment, "The Plea Bargain in Historical Perspective", 23 Buffalo Law Review 499 (1974).

14. Berger, "The Case Against Plea Bargaining", 62 ABA Journal 621 (May 1976). Berger has eliminated plea bargaining on serious felonies. He found, for instance, 210 percent increase in guilty pleas to the charge of burglary after plea bargaining was abolished. "Although trials have increased in almost all categories of crime during the last five months, (due to general increase in number of cases filed) pleas to the charge have increased significantly only in those cases in which plea bargaining is not allowed". Id. at 624.

15. Note, surpa note 1 at 1666-1667. The granting of deferred and suspended sentences appear "to be a fertile ground for the continuation of implicit plea bargaining in Black Hawk County". Id. at 1067-68.

16. From an interview with Larry Sipes, Western Regional Office Project Director of the National Center for State Courts.

17. According to Robert Ueoka, Assistant Administrator of the Courts of Honolulu, the no plea bargaining policies was initiated only last April, and since it takes about 7 months to adjudicate a felony case it is still to early to speculate on the consequences of the new policy. The same is true of Alaska's no plea bargaining policy which has been in effect since August 1975.

18. From an interview with a Mr. Martin, Administrator of the Anchorage District Courts. Martin noted that during the same time period, the number of municipal misdemeanor charges sky-rocketed. Martin beleives that since the ban covers only bargaining on state criminal charges, the prosecutors are only charging defendants with bargainable misdemeanor charges rather than state crimes.

19. Task Force, supra note 9 at 46. The ABA also rejected the view that the "defendant should not save two years (or whatever the reduction may be) merely because he has saved the state $500 (or whatever the cost of the trial may be). This kind of exchange cannot be justified under any of the accepted theories of punishment". ABA, supra note 5 at 50. See also Thomas, supra note 2 at 311.

20. Dean, supra note 13 at 21.

21. Note, "Plea Bargaining: The Case For Reform", 6 University of Richmond Law Review 325, 338 (1972). See also Alschuler, supra note 3 at 57.

22. Raymond Moley, Politics and Criminal Prosecution, p. 187-88 (1929).

23. Rosett, "The Negotiated Guilty Plea", 374 Annals of the American Academy of Political and Social Science 70, 76 (1967).

24. ABA, supra note 5 at 45-46. Many other studies and commentators--as well as prosecutors--cite individualized justice as a benefit derived from plea bargaining. See James Manak, Plea Bargaining: The Prosecutor's Perspective, p. 2 (1975); Wayne LaFave, "The Prosecutor's Discretion in the United States", 13 American Journal of Comparative Law 532, 541-2 (1970); Donald Newman, Conviction: The Determination of Guilt or Innocence Without Trial, pp. 98, 115 (1966); Parker, supra note 3 at 192; Rosett, supra note 18 at 80. More than two-thirds of the Philadelphia trial prosecutors stated that their personal evaluation of the defendant is an important determinant of sentence recommendations. White, "A Proposal for Reform of the Plea Bargaining Process", 119 University of Pennsylvania Law Review 439, 446 (1971).

25. Newman, supra note 19 at 106-119. See also Rosett, supra note 18 at 188. Thomas, supra note 2 at 306; Comments, "Plea Bargaining in Washington", 6 Gonzaga Law Review 269, 284 (1971); In another study, prosecutors were asked to choose from a list of 11 factors which influenced staff members to bargain with a particular defendant. Data gathered indicated that the strength of the state's case, a court's ability to fashion an acceptable sentence upon conviction, the defendant's prior record and the crime charged against him constituted the factors most highly influencing prosecutors' decisions. Note, supra note 5 at 901. In a similar survey developed by the House Program Research, the factors influencing those prosecutors were the defendant's record, the details of the case, the strength of the case and the defendant's attitude.

26. Newman states that differential leniency is based on the fact that "respectable violators are 'occasional' offenders, and the consequences of arrest, prosecution, or conviction may be much more damaging to the respectable defendant in terms of loss of employment or professional standing and family and social degradation than to the less respectable defendant, and finally that the respectable defendant ordinarily has available more resources to obtain treatment, if needed, outside the criminal justice process". Newman, supra note 19 at 168. Newman justifies this practice as a reflection of the court's sentencing discretion. Id. at 118-119. See also, Kaplan, "The Prosecutorial Discretion--A Comment", 60 Northwestern University Law Review 174, 181 (1965).

27. See, e.g., Frank Miller, Prosecution: The Decision to Charge a Suspect With a Crime, p. 6 (1969); Alschuler, supra note 3 at 77; Task Force, supra note 9 at 5; Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion", 14 UCLA Law Review 1, 12 n. 34 (1966); Breifel, "Controls in Criminal Law Enforcement", 27 University of Chicago Law Review 427, 431-32 (1960).

28. Cox, "Prosecutorial Discretion: An Overview", 13 American Criminal Law Review 383, 425-26 (1976). See also Berger, supra note 11 at 624.

29. Note, "Plea Bargaining: The Case For Reform", 6 University of Richmond Law Review 325, 326 (1972). The American Bar Association would provide for differential treatment when the prosecutor's concessions would "make possible alternative correctional measures which are better adopted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment" ABA, supra note 5 at § 1.8 (iii). The Walla Walla County Prosecutor's Office utilizes "plea bargaining conferences" which involve "the probation officer, defense counsel, prosecutor, a social worker, or psychologist if one is induced". Letter to Bob Naon from John Biggs, Chief Criminal Deputy, June 22, 1976. It is arguable as to whether social workers, psychologists, and probation officers can offer any insight as to what sentence would be appropriate for a particular offender.

30. See, e.g., Rosett, supra note 18 at 75. When a defendant "pleads guilty to an offense (he) has recognized his guilt and his attitude as such that I feel he would be more receptive to probation". Letter from Davie McFachran, Whatcom County Prosecutor, July 13, 1976. "The defendant who voluntarily admits his mistake and takes the first step towards rehabilitation by pleading guilty should have that fact considered by court". Letter from Pat McMullen, Skagit County Prosecutor, July 20, 1976.

31. The ABA provides for differential sentencing when "the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct" ABA, supra note 5 at § 1.8 (ii). In commentary to the standards, it is held to be "consistent with prevailing and accepted sentencing criteria, which emphasize the relevance of the "attitudes of the defendant" and his willingness to assume responsibility for his action". Id. at 43-44. See also, Bassiouni, Criminal Law and Its Processes 461 (1969); Note, supra note 5 at 869-70; Manak, supra note 19 at 4-5.

32. Parker, supra note 3 at 193. Newman notes that "the outcome of the conviction process from the point of view of the offender is satisfactory or unsatisfactory depending upon the actual sentence he receives compared to his expectations of punishment at the time he is arrested". "Pleading Guilty for Consideration: A Study of Bargain Justice", 46 J. Crim. L., C. and P.S. 780, 783-784 (1956).

33. Rosett, supra note 18 at 75. One research project found that only 12 percent of the defendants who had pleaded guilty continued to admit their guilt. Blumberg, supra note 6 at 33-34. See also, North Carolina v. Alford, 400 US 25 (1970).

34. White, supra note 19 at 445.

35. Alschuler, supra note 3 at 106. See also Abraham Blumber, Criminal Justice 46 (1967); Miller, supra note 22 at 342-3; Mather, "Some Determinants of the Method of Case Disposition: Decision Making by Public Defenders in Los Angeles", 8 Law and Society 187, 187-188 (1973). One commendator states that plea bargaining epitomizes the prosecutor's "conviction psychology" reasons that an innocent person would not be introduced into the criminal justice system and it is his duty to see that the guilty are convicted and introduced into the system's correctional component". Id. at 110. One-third of the prosecutors Felkenes interviewed indicated that their major function is to secure convictions. Id. at 109-10.

36. See, e.g., Kaplan, supra note 21 at 180; Cox, supra note 23 at 415; Manak, supra note 19 at 2.

37. See, e.g., Cox, supra note 23 at 415; Note, supra note 1 at 1051.

38. ABA, supra note 5 at § 1.8 (4). According to the ABA, legislation authorizing the granting of complete immunity from prosecution in exchange for testimony is not uncommon. Id. at 48.

39. Skolnick, Justice Without Trial, p. 115 (1966).

CONCERNS MADE RESPECTING PLEA BARGAINING

In addition to questioning the rationales underlying concessions made by prosecutors to criminal defendants, plea bargaining is currently being scrutinized for the negative impact it may have on the criminal justice system. This section will discuss the following: (1) the coercive effect of plea bargaining on criminal defendant; (2) the possibility that plea bargaining might unfairly penalize innocent people; and (3) the possibility that plea bargaining unfairly differentiates between convicted individuals.

"Possible Coerciveness of System"

When a defendant pleads guilty he waives several constitutional rights, including the right to a trial by jury, the right to confront one's accusers, the right to remain silent and the right to present witnesses in one's own defense.[1] The defendant, in addition, waives all nonjurisdictional defenses "other than that the complaint, information, or indictment charges no offense".[2] In view of these consequences, a large number of defendants "undoubtedly enter their pleas primarily in expectation of prosecutorial concessions".[3] A concern of commentators is that many defendants may be coerced into waiving their rights by pleading guilty.

"When confronted with the constitutional perils of plea bargaining, its supporters will state that if the proper safeguards are maintained, the right of the accused will never be threatened."[4] The most important safeguard is the requirement that the guilty plea be voluntary and understandingly made by the defendant. The Washington State Supreme Court has held that to be voluntary, a plea of guilty must be freely, unequivocally, intelligently and understandingly made by the defendant in open court with full knowledge of his legal and constitutional rights and of the consequences of his plea. It cannot be the product of or induced by a coercive threat, fear, persuasion, promise, or deception.[5] Washington courts are not allowed to accept a guilty plea until they assure themselves that the plea bargaining process is tainted by inherent coercion. A plea "taken to avoid the risk of being convicted of a more serious crime...is truly no more voluntary than is the choice of the rock to avoid the whirlpool".[7] Unfortunately, the United States Supreme Court has recognized that the government may structure an individual's options in this way so that he would find it difficult to ask for a trial as is guaranteed him by the United States Constitution.[8] Many prosecutors overcharge weak cases in order to get a defendant to plead guilty to a lesser charge.[9] It is, therefore, only logical that some assert that the "general briefness of the guilty plea process" does not and cannot adequately protect a defendant's rights.[10] According to one commentator, the artificial voluntary prosecutorial plea bargaining standards are a "totally inadequate response to the situation and can only serve to perpetrate abuses in the system".[11]

"Bargaining May Result in Conviction of Innocent Individuals"

Perhaps the greatest danger inherent in plea bargaining is that innocent defendants may occasionally plead guilty to a lesser charge than risk the uncertainties of trial which may find them guilty of a larger offense.[12] "There is no such thing as a beneficial sentence for an innocent defendant."[13] "In reality, some defendants

who regularly give up their rights in favor of pleading guilty by negotiation are indeed innocent."[14] The safety valve of judicial review of guilty pleas is often defective since even though Washington court rules require that judgment not be entered upon a plea of guilty "unless (the court) is satisfied that there is a factual basis for the plea",[15] this judicial review usually amounts to nothing more than a "brief and perfunctory question and answer sequence".[16]

A related concern is the probability that many of the defendants who plead guilty and are actually guilty would have been exonerated at a trial. Although it may seem that these defendants received their just desserts by being found guilty through plea bargaining, this situation is quite bothersome since the Supreme Court's decisions validating the plea bargaining process appeared to be premised on the theory that those who are induced to plead guilty would have been convicted at trial anyway.[17]

Prosecutors are most likely to bargain weak cases.[18] "As the probability of conviction at trial decreases," the prosecutor "becomes increasingly receptive to conviction of the accused through a guilty plea".[19] "The more doubtful the issue, the more likely it is to be relegated to the wastebasket of the bargained plea."[20] Some observers feel that prosecutorial plea bargaining due to weak or inadmissible evidence is an unacceptable justification of the process[21] and has possibly contributed to the conviction of defendants who would have been found innocent at trial.[22] They argue that this practice is at odds with the fundamental purposes of the criminal justice system: "if trials ever serve a purpose, their utility is presumably greatest when the outcome is in doubt".[23]

"Differential Treatment"

Plea bargaining is also criticized because defendants guilty of the same crime are often given different sentences for reasons unrelated to individual culpability. Differential sentencing can result from unequal access to plea concessions and from the imposition of different sentences from individuals who had plea bargained with the convicted individual. Some argue that only certain classes of individuals know how to manipulate the system in order to receive the benefits of plea bargaining. For example, recidivists drawing upon their past experiences are more able to take full advantage of bargaining opportunities than the more inexperienced but perhaps more deserving first offenders.[24] This can only "foster disrespect for the effectiveness of the law".[25] Other defendants with a highly paid criminal lawyer receive better deals than a poor person defended by "an overworked public defender".[26] Jailed defendants unable to pay bail will be at a bargaining disadvantage compared to defendants free on bail.[27] "The fact that bargains are sometimes made by a number of staff members also may mean that there will be uneven opportunity to gain advantage by pleading guilty."[28]

Another argument against plea bargaining is based on the possible heavier penalities imposed upon the individuals who maintain their innocence and go to trial. It is suggested that these individuals suffer "a substantially more severe sentence than they would have received had they pleaded guilty".[29] It is obvious that many courts do give sentencing advantages to defendants pleading guilty. One study showed that 84 percent of all federal district court judges responding believed that a defendant pleading guilty would be given a lighter sentence.[30] In a survey taken by the Office of Program Research, sixteen Washington prosecutors claimed that individuals pleading guilty do not receive differential treatment while seven stated that they do. In evaluating the desirability of differential sentencing, twelve prosecutors stated that defendants pleading guilty should receive lesser sentences while thirteen said that they should not. One prosecutor indicated that he was losing his handle on bargaining because of the lack of a sentencing differential.

Differential sentencing brought about by plea bargaining is considered inconsistent with a rational sentencing system and unfair to convicted individuals. If a defendant is found to be guilty, sentencing uniformity inherent in a rational system requires:

> An appropriately severe sanction; i.e., one equivalent to the punishment received by other offenders who have committed similar crimes. On the other hand, if he is innocent, he should be excluded altogether from the correctional process. By compromising somewhere between the only two penologically acceptable classifications of the defendant, the bargaining process results in the imposition of either excessive or insufficient punishment.[31]

This process, according to one report, has several adverse effects on the criminal justice system.

> First, it fosters a lack of confidence in the system on the part of the general public. Second, it diminishes the general deterrent effect which the system needs to possess in order to dissuade would-be criminals from entering the criminal arena. Third, it decreases the specific deterrent effect on criminals who are allowed to take advantage of such a process, thereby subjecting the public to further criminal acts committed by these individuals.[32]

It may also, to the extent it is perceived as unfair, hinder the efforts of the corrections system.[33] A 1972 survey of law enforcement officials in California, Michigan, New Jersey, and Texas found that 61 percent of those responding felt that it was "probable or somewhat probable" that most defense attorneys "engaged in plea bargaining primarily to expedite the movement of cases". Thirty-eight percent agreed that it was probable or somewhat probable that most defense attorneys in plea bargaining negotiations "pressure client(s) into entering a plea that (the) client feels is unsatisfactory".[34] Plea bargaining is disconcert with an aim of the criminal justice system which seeks to have offenders feel they have been fairly convicted of their crimes.[35] One survey of those convicted after plea bargaining shows a growing cynicism towards the criminal justice system.[36]

1. Note, "The Guilty Plea as a Waiver of 'Present But Unknowable' Constitutional Rights: The Aftermath of the Brady Trilogy", 74 Columbia Law Review 1435, 1437 91974). In a series of cases the United State Supreme Court has rejected collateral attacks on convictions based on guilty pleas preported to have been induced by a denial of constitutional rights subsequently announced and retroactively applied by the Supreme Court. See, e.g., Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970); Parker v. North Carolina, 397 U.S. 790 (1970). In Blackledge v. Perry, 417 U.S. 21 (1974), the Court held that "present but unknowable" rights that go "to the very power of the State to bring the defendant into court to answer the charge brought against him" are not waived by a plea of guilty.

2. State v. Sawyer, 62 Wn. 2d 1 (1963).

3. White, "A Proposal for Reform of the Plea Bargaining Process", 119 University of Pennsylvania Law Review 439, 440 (1971). As reviewed above, defendants may bargain for reduced charges, less secure sentences, conviction of fewer offenses, or avoidance of the stigma attached to conviction of certain classes of crimes. See also Frank Miller, Prosecution: The Decision to Charge A Suspect With A Crime 192 (1969); Comment, "Plea Bargaining: The Judicial Merry-Go-Round", 10 Duquesne Law Review", 6 University of Richmond Law Review 325, 326 (1972).

4. Note, supra note 3 at 262.

5. Woods v. Rhay, 68 Wn. 2d 601, 605 (1966), cert. denied, 385 U.S. 905 (1966). See also State v. Larkins, 75 Wn. 2d 377 (1969). Washington law is explicit in the requirement that only the defendant himself can enter a guilty plea. RCW 10.40.170. The United States Supreme Court has taken much the same approach in dealing with plea bargaining. See, e.g., Brady v. United States, 397 U.S. 742 (1970); McMann v. Richardson, 397 U.S. 759 (1970). In Santobello v New York, 404 U.S. 257 (1971), the Court held that if a plea of guilty is entered in reliance upon a prosecutor's promise, due process of law requires that the promise be kept or that the defendant be given suitable relief. For equivalent Washington law on this point see Darnell v. Timpani, 68 Wn 2d 782 (1966). The defendant, at the discretion of the court, may withdraw a plea of guilty at any time before judgment. RCW 10.40.175.

6. See Cr. R. 4. 2(d); State v. Harvey, 5 Wash App 719 (1971) describes a situation where the trial court failed to inform a defendant that there was a mandatory minimum sentence in his case and as such the guilty plea was not entered with an understanding of its consequences. Therefore, it was not voluntary and must be set aside.

7. Kuh, "Book Review", 82 Harvard Law Review, 497, 500 (1968). "A plea of guilty is, of course, frequently the result of a 'bargain', but there is no bargain if a defendant is told that, if he does not plead guilty, he will suffer consequences that would not otherwise be visited on him". People v. Picciotti, 4 N.Y. 2d 340, 344, 175 N.Y.S. 2d 32, 35 (1958). See also Note, "The Unconstitutionality of Plea Bargaining", 83 Harvard Law Review 1387, 1396 (1970); Goldstein, "For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain", 84 Yale Law Journal 683, 699 (1975). Arnold Enker indicates that a voluntary plea might encompass any decision which is based primarily on "personal and subjective factors from

which 'almost all persons' would not plead guilty". "Perspectives on Plea Bargaining", in President's Commission on Law Enforcement and Administration of Justice", Task Force Report: The Courts, p. 116 (1967).

8. See, e.g., United States v. Jackson, 390 U.S. 570 (1968), in which the Court notes that "the evil...is not that it necessarily coerces guilty pleas and jury waivers, but simply that it needlessly encourages them" Id. at 583.

9. See, e.g., Alschuler, "The Proseuctors Role in Plea Bargaining", 36 University of Chicago Law Review 50, 98-99, 101 (1964); James Manak, Plea Bargaining: The Prosecutors Perspective, p. 3 (1972). Alschuler points out that overcharging and subsequent charge reduction are often staged to constitute a "selling point" for defense counsels in their efforts to induce defendants to plead guilty. Alschuler, supra at 95. It has been asserted that defense counsel are most effective in persuading a defendant to plead guilty. See, e.g., Blumberg, "The Practice of Law as a Confidence Game: Organizational Cooperation of a Profession", 1 Law and Society Review 15, 36-37 (1967); Thomas, "Plea Bargaining: The Clash Between Theory and Practice", 20 Loyola Law Review 303, 310 (1974); Cox, "Prosecutorial Discretion: An Overview", 13 American Criminal Law Review 383, 428 (1976). "Plea bargaining enables defense attorneys to justify a fee and allows them to build a reputation for getting a 'good deal' for their clients" Note, "The Elimination of Plea Bargaining in Black Hawk County: A Case Study", 60 Iowa Law Review 1053, 1059 (1975).

10. See, e.g., Thomas, supra note 9 at 311. It would be very difficult to adequately assess a defendant's understanding of his guilty plea. Unlike a confession, a plea implies a "sophisticated knowledge of law in relation to the fact". Donald Newman, Conviction: The Determination of Guilt or Innocence Without Trial, p. 23 (1966).

11. Parker, "Plea Bargaining", 1 American Journal of Criminal Law 187, 196 (1972). "The formal inquiry as to whether, in tendering the plea, the defendant was induced by promise or persuasion lacking substance; its foremost purpose is to satisfy the records". Comments, "Plea Bargaining in Washington:, 6 Gonzaga Law Review 269, 289 (1971). "The plea proceedings are basically nonadversary; the prosecutor is attempting to have the case disposed of by plea and the defendant is trying to have his plea accepted. At this point of time the interests of the parties merge. This complicates the court's obligation to determine whether the plea is voluntarily and understandingly made". Note, "Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas", 112 University of Pennsylvania Law Review 865, 886 (1964).

12. See, e.g., Manak, supra note 9 at 5; Newman, supra note 10 at 38; Note, supra note 9 at 1060; Bassiouni, Criminal Law and Its Processes 460 (1969); Finkelstein, "A Statistical Analysis of Guilty Plea Practices in the Federal Courts", 89 Harvard Law Review 293, 310-11 n. 50 (1975).

13. Newman, supra note 10 at 38. Arnold Enker points out that "innocent men may be convicted at trial as well". Enker, supra note 7 at 113. A function of a jury trial is to protect against arbitrariness in the behavior of the prosecutor. Thomas, supra note 9 at 306-07. See also Alschuler, supra note 9 at 78-9; Finkelstein, supra note 12 at 310; Note supra note 7 at 1396-7. Several commentators, however, assert that a trial is an imprecise means of determining truth. See, e.g., Note, supra note 11 at 882; Note, "Plea Bargaining: The Case For Reform", 6 University of Richmond Law Review 329-30 (1972).

14. Thomas, supra note 9 at 305. See also White, supra note 3 at 451-2. The National Advisory Commission on Criminal Justice Standards and Goals Task Force on Courts concluded that despite the lack of evidence, there is a "significant danger" that innocent individuals might be persuaded into pleading guilty. Task Force on Courts, p. 43 (1973).

15. CrR 4.2(d). This requirement is established by case law. See, e.g., McCarthy v. United States, 394 U.S. 459, 466 (1969).

16. President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts p. 13 (1967). There is a minority view that contends that a defendant should not be allowed to plead guilty if he believes he is innocent. See, e.g., sources cited in Ratenberg, "The Progress of Plea Bargaining: The ABA Standards and Beyond", 8 Connecticut Law Review 44, 70-1 (1975). However, the Washington State Supreme Court has noted that "cogent reasons may impel a defendant who does not believe he is guilty to plead guilty and waive a public trial. Whatever his notice, this is his privilege". State v. Weekly, 41 Wn 2d 727, 731 (1952).

17. Finkelstein, supra note 12 at 294. See also Santobello v. New York, 404 U.S. 257, 261 (1971); Brady v. United States, 397 U.S. 742, 752 (1970).

18. In a 1964 survey, the most frequently listed motivation in consideration of a bargaining consideration was the strength of the state's cases. Eighty-five percent of the prosecutors surveyed noted its importance. Note, supra note 11 at 901. See also White, supra note 3 at 448.

19. Note, supra note 7 at 1389. According to one commentator, many plea bargains might be more accurately described as "composition payments to a dubious creditor". Helen Silving, Essays on Criminal Proceedure, p. 254 (1964). See also Cox, supra note 9 at 414; Alschuler, supra note 9 at 59-60; Note, "Restructuring the Plea Bargain", 82 Yale Law Journal 286, 292 (1972). Many Iowa prosecutors feel that "in a plea bargain you always get a conviction. If you don't (bargain), you have about an 80 percent chance of conviction, but 20 percent of those you believe should have a felony on their record will go free" Note, supra note 9 at 1058-9.

20. Alschuler, supra note 9 at 69.

21. See discussion at _____, supra. See also Thomas, supra note 9 at 307. Perhaps, according to one source, the most severe abuse of plea bargaining is the covering up of bad evidence. Parker, supra note 11 at 204. See also Comment, "The Plea Bargain in Historical Perspective", 23 Buffalo Law Review 15-16 (1974); Alschuler, supra note 9 at 79. See CrR 4.7 for discovery rules of Washington Courts.

22. One study estimated that at least one-third of all defendants pleading guilty in certain jurisidictions would have ultimately escaped conviction had they not plead guilty. Finkelstein, supra note 12 at 309-10.

23. Alschuler, supra note 9 at 64-5. See also Report, supra note 17 at 10.

24. See, e.g., Note, supra note 9 at 1058-56; Enker, supra note 7 at 109; Report, supra note 17 at 11; Note, "Restructuring the Plea Bargain", 82 Yale Law Journal 286, 294 (1972); "The degree to which information selection, sorting, and weighing vary even within the same office tends to confirm the worst fear of critics--that equal defendants will receive unequal treatment from prosecutors seated at opposite sides of the same desk". Lagoy, et. at., "An Empirical Study on Information Usage For Prosecutorial Decision Making in Plea Negotiations", 13 Am. Crim. L. Rev. 435, 462 (1976).

25. Comment, supra note 3 at 263. According to one commentator, it results in "a concomitant harm to society's right to be protected from habitual criminals". Note, supra note 9 at 1061.

26. Comment, "Prosecutorial Discretion--A Reevaluation of the Prosecutors Unbridled Discretion and its Potential for Abuse", 21 DePaul Law Review 485, 514 (1971). A public defender might not seek those concessions demanded by a private attorney in order to further his relationship with the prosecutor. White, supra note 3 at 444. See also Comments, "Plea Bargaining in Washington", 6 Gonzaga Law Review 269, 270-1 (1971); Note, "Restructuring the Plea Bargain", 82 Yale Law Journal 286, 295 (1972).

27. Note, "Restructuring the Plea Bargain", 82 Yale Law Journal 286, 294-5 (1972); White, supra note 3 at 450.

28. Note, supra note 9 at 1062.

29. National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, p. 48 (1973).

30. Comment, "The Influence of the Defendant's Plea on the Judicial Determination", 56 Yale Law Journal 204 (1956). See also Newman, supra note 10 at 61-2. While a court may not validly impose a more severe sentence solely because a defendant demands trial, a court can justify differential sentencing "upon a particular combination of infinite variables peculiar to each individual trial". North Carolina v. Pearce, 395 U.S. 711, 722 (1969). See also Comment, "The Unconstitutional of Plea Bargaining", 83 Harvard Law Review 1387, 1402 (1970); Note, "Plea Bargaining: The Case For Reform", 6 University of Richmond Law Review 325, 333 (1972).

31. Note, "Restructuring the Plea Bargain", 82 Yale Law Journal 286, 292-3 (1972).

32. Note, supra note 9 at 1021.

33. See, e.g., Dean, "The Illegitimacy of Plea Bargaining", 38 Federal Probation 18, 20 (Sept. 1974).

34. Project STAR, Survey of Role Perceptions for Operational Justice Personnel: Data Summary, pp. 238, 243 (1972).

35. Newman, supra note 10 at 44. Otherwise, according to Newman, it "may be difficult for (them) to accept responsibility for (their) own criminality and to take steps toward rehabilitation".

36. See, e.g., New York State Special Commission in Attica, Attica, pp. 30-31 (1972); Note, "Restructuring the Plea Bargain", 82 Yale Law Journal 286, 292 (1972); Note, "Plea Bargaining: The Case For Reform", 6 University of Richmond Law Review 325, 337 n. 67 (1972); J. Casper, Criminal Justice: The Consumer Perspective, pp. 3-54 (1972). Even the defendants treated leniently are affected negatively. They are convinced "that they are lucky or great and in no need of treatment". Newman, supra note 10 at 230.

PLEA BARGAINING REFORM

The present bargaining process may neither be the only nor the most equitable way to induce a large volume of guilty pleas. Accepting the continued existence of plea bargaining as inevitable, several commentators now advocate its reform.[1] This section will review the means which have been suggested with which to confine, structure, and check prosecutorial discretion in the area of plea bargaining. Legislative reform will be presented as the most promising method of reform.[2]

"Confine Discretion"

Many commentators have stressed that some significant portion of prosecutorial discretion would be unnecessary if many desolute or largely unenforceable statutes were repealed.[3] According to Ohlin and Remington, the drafters of criminal codes many times fail to predict the impact of their proposals on the day to day administration of justice.[4] The existence of so-called consensual and victimless crimes such as gambling, drug and sexg offenses always involves difficult, resource expending enforcement problems. Victimless felony crimes such as consenting sex acts, drug violations and illegal gambling comprised over 20 percent of all criminal dispositions in King County Superior Court during 1974.[5] Prosecution of such crimes are often handled by a "routine, quasi-automatic reduction" (of charges) to avoid "bad law"[6] or there may result an "anarchical diversity" between dispositions of cases[7] because of concessions made by prosecutors to get convictions.[8] These problems could be partially eliminated by decriminalization of any of these preceding offenses by the legislature.

"Structure Discretion"

It is generally urged that discretion in the area of plea bargaining be restructured so that the opportunity to negotiate is made equally accessible to all defendants.[9] "The greatest single need for courts, prosecutors, and defendants alike, is for uniform standards and procedures to ensure basic and consistent fairness for both the state's interest and that of the defendant".[10]10 Many commentators and studies have urged that plea bargaining guidelines be developed for prosecutors.[11] If such guidelines are promulgated, three major issues must be addressed: (1) the extent to which the guidelines would be made public; (2) the extend to which the guidelines should limit the prosecutors in determining what cases should and should not be bargained; and (3) the means by which the guidelines would be enforced or their implementation monitored.

Many believe that prosecutorial bargaining standards should be open for public examination. Many commentators argue that these standards are a peculiarly appropriate subject for public discussion because they touch upon basic societal concerns and often have important political implications.[12] According to Sarah Cox, "The quality of a prosecutor's performance improves when those he deals with are more aware of his policies and procedures".13 Since knowledge of these policies assists defense counsel in advising their clients, public publication of the standards would eliminate inequities arising from an attorney's inexperience or lack of knowledge.[14] The National Advisory Commission recommends that negotiation guidelines be made public in their entirety.[15] Others suggest that a general statement of plea bargaining and charge reduction policy be published.[16] Some arguments have been made against public publication of the standards, but such arguments ignore the fact that the prohibition against publication would be inconsistent with the determinate sentencing model which argues that all penalties be uniformly applied and known in advance by the defendant.[17]

The most important issue of this discussion is to what extent, if any, the legislature might control plea disposition standards adopted by prosecutorial offices. Most commentators generally agree that once prosecutors are required to establish standards, the content of these standards should be developed by the prosecutor's office.[18] Several commentators have suggested ways in which such standards might be structured. For example, Thomas and Fitch suggest four categories of guidelines to be used in making prosecutorial decisions: (1) consideration of the nature of the alleged offense; (2) consideration of the personal characteristics of the defendant; (3) consideration of the purposes and requirements of the criminal justice system; and (4) considerations of evidence sufficiency.[19]

The King County Prosecutor's office has adopted its own internal standards, which provide a system of points for dealing with certain serious, "high impact" crimes that will not be plea bargained if provable. An accused is "awarded" points for a prior felony conviction, for a prior "high impact" crime conviction, as well as for the use of a weapon, physical injury of the victim, and multiple offenses. The total "score" determines the minimum "loss of liberty" the prosecutor will recommend if the defendant is convicted (by a jury, the court, or by a guilty plea). The establishment of standards should minimize the influence of non-objective factors in the bargaining process[20] so that "similarly situated defendants...be afforded equal plea agreement opportunities".[21] While many commentators suggest that guidelines should specify what factors should not be considered,[22] most would allow decisions to turn on such non-objective factors as "the role that a plea and negotiated agreement may play in rehabilitating the offender",[23] "the attitude of the defendant at the time of the crime, the time of the arrest and the time of the plea discussion",[24] and "the effect of a misleading criminal stigma".[25] Many of these factors, arguably unfair and not based upon proper sentencing concerns, appear to reflect two justifications for differential treatment of offenders suggested by the American Bar Association: "(1) that the defendant has acknowledged his guilt and shown a willingness to assume responsibiltiy for his conduct; and (2) that the concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitation...or other purposes of correctional treatment".[26] Many others argue that these factors should not be grounds for sentence determination, nor should they influence a prosecutor in making concessions in exchange for a guilty plea.

One prosecutor cited in a recent study considered the policy of equality so important and yet so difficult to achieve that he generally avoided plea bargaining altogether.[27] However, the majority of experts agree that equality is achievable, and concession are justifiable. For example, the New York Manhattan District Attorney's Office has developed general prinicples which might be incorporated into state-wide standards. Specifically, that office allows prosecutors to routeinly reduce charges "one class, but only one class", but not to reduce more than one class unless the defendant consents to a pre-pleading investigation "and such pre-pleading investigation has been ordered and the record submitted to the court, defense counsel, and the assistant (prosecutor)".[28] "A fully detailed, highly specific statement" is then made by the prosecutor "on the court record as to the reason for recommednign the acceptance of that plea".[29] The Manhattan guidelines prohibit bargaining in certain instances.[30] They also prescribe that there be no bluffing, overcharging, or subsequent offers of charge reductions in order to gain a conviction in a weak case.[31] Such concessions of a reduction by one grade are not justified by administrative necessity, but by another rationale offered by the American Bar Association: "that the defendant by his plea has aided in assuring the prompt and certain application

of correctional measures to him(self)".[32] This will serve the goals of swiftness and certainty of punishment which form the foundation for the determinate sentencing framework.[33] Reduction of more than one grade might be recommended to the court on the basis of certain specified factors, such as aiding authorities to solve other crimes, which would further the goals of the criminal justice system.[34] Similarly, cases in which the prosecutor normally could employ plea bargaining with court approval, would not be allowed to be the subject of plea bargaining when a specified aggravating factors such as a serious injury exists.[35] Manhattan District Prosecutor Richard Kuh states that:

> Some discretion must remain to differentiate people and cases, even though the same crime may be charged, and the defendants superficially may seem similar.[36]

However, as long as reasons for exercising discretion are narrowly defined, and the reasons for the bargaining made public, discretion could be managed.

"Checks"

Two kinds of controls should be developed. First, courts should continue to find whether pleas are knowingly and voluntarily made, and whether the charges pleaded to have a basis in fact. Second, controls must be developed to ensure that the prosecutor is operating within required guidelines. Suggestions have been made which would help ensure that a plea is voluntary and based in fact. First, several reforms have been recommended at the pre-plea stage, that is, before the defendant has plead in court. In safeguarding an accused person's right to decide his course or action for himself, Joseph Goldstein suggests that prosecutors be required to make certain information known to the accused. The prosecutor would have to:

> "(a) disclose to the accused and his counsel the offense charged or to be charged, (b) offer to disclose, and to disclose unless the accused objects, the evidence upon which proof of the charge is based, the range of sanctions authorized following conviction, the rights which he is being asked to waive, the benefits he could expect in return for the plea and which would or might not otherwise be available to him were conviction to follow trial, (c) honor the accused's wishes not to be informed of some or any of that which the authorities must offer to disclose, and (d) answer any questions raised by the accused even if the prosecutor thought they were not relevant to an intelligent consent to a guilty plea.[37]

Such information might be given within the context of a screening conference made prior to charging.[38] It might be appropriate at this time, in addition, for the judge to indicate whether he will concur in the proposed disposition.[39] On a second level, reforms are suggested which would take place at the actual pleading stage. Such structural changes are aimed at increasing the ability of the court to determine whether a plea is voluntary and the charge is based in fact. The National Advisory Commission, for instance, recommends that:

> Before accepting a plea of guilty, the court should require the defendant to make a detailed statement concerning the commission of the offense to which he is pleading guilty and any offenses of which he has been convicted previously. In the event that the plea is not accepted, this statement and any evidence obtained through use of it should not be

admissible against the defendant in any subsequent criminal prosecution.

The review of the guilty plea and its underlying negotiated agreement should be comprehensive. If any of the following circumstances is found and cannot be corrected by the court, the court should not accept the plea:

1. Counsel was not present during the plea negotiations but should have been;

2. The defendant is not competent or does not understand the nature of the charges and proceedings against him;

3. The defendant was reasonably mistaken or ignorant as to the law or facts related to his case and this affected his decision to enter into the agreement;

4. The defendant does not know his constitutional rights and how the guilty plea will affect those rights; rights that expressly should be waived upon the entry of a guilty plea include:

a. Right to the privilege against compulsory self-incrimination (which includes the right to plead not guilty);

b. Right to trial in which the government must prove the defendant's guilt beyond a reasonable doubt;

c. Right to a jury trial;

d. Right to confrontation of one's accusers;

e. Right to compulsory process to obtain favorable witnesses; and

f. Right to effective assistance of counsel at trial.

5. During plea negotiations the defendant was denied a constitutional or significant substantive right that he did not waive;

6. The defendant did not know at the time he entered into the agreement the mandatory minimum sentence, if any, and the maximum sentence that may be imposed for the offense to which he pleads, or the defendant was not aware of these facts at the time the plea was offered;

7. The defendant has been offered improper inducements to enter the guilty plea;

8. The admissible evidence is insufficient to support a guilty verdict on the offense for which the plea is offered, or a related greater offense;

> 9. The defendant continues to assert facts that, if true, establish that he is not guilty of the offense to which he seeks to plead; and
>
> 10. Accepting the plea would not serve the public interest. Acceptance of a plea of guilty would not serve the public interest if it:
>
> a. places the safety of persons or valuable property in unreasonable jeopardy;
>
> b. depreciates the seriousness of the defendant's activity or otherwise promotes disrespect for the criminal justice system...
>
> A representative of the police department should be present at the time a guilty plea is offered. He should ensure that the court is aware of all available information before accepting the plea and imposing sentence.
>
> When a guilty plea is offered and the court either accepts or rejects it, the record must contain a complete statement of the reasons for acceptance or rejection of the plea.[40]

It has been suggested, as indicated above, that no waiver of counsel should be permitted.[41] Another commentator has proposed that periods of time be set between appearance of counsel and date of plea and between plea acceptance and before sentence in order to protect the defendant against problems arising in this area.[42]

Checking

As in the charging process, certain checks might be placed on the prosecutor's discretion. Summarizing a preceding section, control could be exercised informally within the prosecutor's office,[43] formally by the exercise of judicial review,[44] or by random examination[45] carried out possibly by the State Attorney General.[46]

PLEA BARGAINING REFORM

FOOTNOTES

1. See, e.g., "Tentative Standards Relating to Pleas of Guilty", ABA Project on Minimum Standards for Criminal Justice (1967); Enker, "Perspectives on Plea Bargaining" in The President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: The Courts, p. 108 (1967); White, "Proposal for the Reform of Plea-Bargaining", p. 12 U. Pa. L. Rev. 439 (1971).

2. "With the failure of the courts either to eliminate or satisfactorily control plea bargaining, only a carefully drafted legislative solution seems workable." Comment, "The Plea Bargain in Historical Perspective", 23 Buffalo Law Review 499, 524 (1974).

3. See, e.g., LaFave, "The Prosecutors Discretion in the U.S.", 13 American Journal of Comparative Law 532, 536 (1970); Note, "The Unconstitutionality of Plea Bargaining", 83 Harvard Law Review 1387, 1411 (1970).

4. "Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice", 23 Law and Contemporary Problems 495 (1958).

5. In a survey conducted this year by Barbara Yondorf for her doctoral dissertation, she found that 76 percent of the men and 56 percent of the women interviewed said they would favor legalizing prostitution in Seattle if prostitution were restricted to one non-residential area of the city and if all prostitutes were required to get regular health checks. Only 18 percent of all men and 32 percent of all women objected to such a plan. Though the study was limited to Seattle where public attitude towards legalization of prostitution is probably more liberal than the remainder of the state, it is still a good sign that the mores of society are changing rapidly. Also see Bailey, 1974 Annual Report of the Prosecuting Attorney of King County, pp. 16, 17. The following were considered victimless crimes: obscene material, prostitution, sodomy, violations of drug laws, gambling and indecent exposure. Cases involving drug law violations comprised 84 percent of all the victimless crimes. Prostitution charges are usually misdemeanors, see RCW 9.87.010 (3); RCW 9A.88.030 and, therefore, are processed through district rather than superior court. This accounts for their under representation (i.e., less than 1 percent of all felony cases processed) as victimless crimes in this note.

6. Donald Newman, Conviction: The Determination of Guilt or Innocence Without Trial, p. 112 (1966).

7. Model Penal Code § 2.04(5), Comment (Tent. Draft No. 1, 1953).

8. Id.

9. See, e.g., Task Force, supra note 1 at 13.

10. James Manak, Plea Bargaining, The Prosecutors Perspective, p. 16 (1972).

11. See, e.g., Id.; White, supra note 1 at 441; National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, Standard 3.3 (1973); American Law Institute, A Model Code of Pre-Arraignment Procedure § 350.3(2) (Tent. Draft No. 5, 1972); Note, Guilty Plea Bargaining:

Compromises by Prosecutors to Secure Guilty Pleas", 112 U. of Pennsylvania Law Review 865, 888 (1964); Thomas and Fitch, "Prosecutorial Decision Making", American Criminal Law Review 506, 519-20 (1976); Abrams, "Internal Policy: Guiding the Exercise of Prosecutorial Discretion", 19 U.C.L.A. Law Review 1 (1971); Bubiny and Skillern, "Taming the Dragon: An Administration Law for Prosecutorial Decision Making", 13 American Criminal Law Review 473, Criminal Justice, Standards Relating to Pleas of Guilty § 3.1, Commentary (1967).

12. See, e.g., Abrams, supra note 10 at 26. The National Advisory Committee also recommends this approach. Task Force, supra note 10 at 52. See also Kenneth Culp Davis, Discretionary Justice, A Preliminary Inquiry, p. 225 (1969).

13. Cox, "Prosecutorial Discretion: An Overview", 13 American Criminal Law Review 383, 433 (1976).

14. Abrams, supra note 10 at 27-28.

15. Task Force, supra note 10 at 52.

16. See, e.g., White, supra note 1 at 458. White would omit only particularly sensitive matters such as the effect of the defendant's association with organized crime, Id. at 457-58. The ABA states that the prosecutor should make known a general policy of willingness to consult with defense counsel concerning disposition of charges by plea. The American Bar Association Standards Relating to the Prosecution Function, Standard 4.1(2) (1970).

17. Some of the arguments are: (1) The publication of policy will encourage litigation on issues not presently the subject of judicial scrutiny. (2) Publication of policy will give defense counsel more leverage and issues to raise. (3) Publication of policy will tend to freeze it in its then-existing form since once people begin to rely on it, there will be hesitation to modify it. (4) Publication of policy will improperly modify the deterrent effect of the criminal law. (5) Criminal statutes set standards even when the standard is not enforced in practice. Publication of modifying policies will weaken this function of the criminal law. (6) Publication of policy makes an appearance of impartiality difficult to achieve and breeds disrespect for the law. (7) If prosecutors are required to publish policy, they will hesitate to articulate it--particularly policy dealing with controversial issues. (8) Publication of policy may defeat other legitimate government concerns for confidentiality. Supra note 10 at 28-34.

18. See, e.g., White, supra note 1 at 457.

19. Thomas and Fitch, "Prosecutorial Decision Making", 13 American Criminal Law Review 506, 518-22 (1976).

20. Bubiny, supra note 10 at 497.

21. American Bar Association, supra note 1, Standard 1.8.

22. See, e.g., Thomas, supra note 18 at 548; Rotenberg, "The Progress of Plea Bargaining: The ABA Standards and Beyond", 8 Connecticut Law Review 44, 59 (1975); "Race and Sex Are Obviously Improper Considerations". Thomas at 548.

23. National Commission, supra note 10, Standard 3.3.

24. James Manak, Plea Bargaining, The Prosecutor's Perspective 18 (1972).

25. Thomas, supra note 18 at 549. Clark County's standards also provide for concessions when they render "public trial unnecessary when there are good reasons for not having the case dealt with in a public trial". It may on the other hand be argued that "it is difficult to conceive of an individual case in which the interest in forestalling publicity outweighs the individual defendant's constitutional rights in an accusatorial system". Note, "The Unconstitutionality of Plea Bargaining, 83 Harvard Law Review 1387, 1404 (1970). In Washington State the Walla Walla County Prosecutor's office frames its decisions in the ABA standards (letter to Bob Naon from John Biggs, Chief Criminal Deputy, June 22, 1976).

26. ABA, supra note 1, Standard 1.8(ii)(iii). These prosecutors consider such criterion as the "probable effect of punishment on offender", the "impact of further proceedings on the accused and those close to him", and "disparity of authorized punishment in relation to a particular offense or offender". (Letter from James Carty, Clark County Prosecutor.) In San Juan County, a plea can be bargained when the defendant acknowledges guilt and will agree, among several things, to accept treatment likely to assist the offender. (Letter from Michael Redmond.) In Walla Walla County, a plea bargaining conference is held which involves "the probation officer, defense counsel, prosecutor, a social worker, or psychologist if one is involved. (Letter to Bob Naon from John Biggs, Chief Criminal Deputy, June 22, 1976.) It is arguable whether such individuals should have a place in determining a particular offender's sentence.

27. Daniel Rotenberg, "The Progress of Plea Bargaining: The ABA Standards and Beyond", 8 Connecticut Law Review 44, 60 (1975). The standards followed by the Spokane County Prosecutor's office that "plea bargaining should be primarily based on the particulars of the case and factual sufficiency, not with the particulars surrounding the defendant. Otherwise, it will be most difficult to apply standards consistently to all defendants similarly situated in order to reach the goal of equal justice". (Letter to Bob Naon from Spokane County Prosecutor's office.)

28. Kuh, "Plea Bargaining: Guidelines for the Manhatten District Attorney's Office", 11 Criminal Law Bulletin 48,55 (1975). The court and the defense counsel must consent to the pre-pleading inquiry.

29. Id. at 60. "A single statement that the plea 'is in the interests of justice', or that the 'plea affords adequate scope in sentencing', provides no information and does not comply with the policy."

30. Id. at 57. (1) If a defendant is charged with a series of separate criminal acts, particularly those involving either physical danger or sizeable larcenies, he will be required to plead to the top county of one set of transactions, but as to additional transactions, the general policies herein articulated will apply. (2) In cases involving particularly egregious, heinous, or notorious criminal conduct, a plea to the top count will be required. Another commentator, for example, said that "charges in violent or vicious crimes should not be changed" and that "one must be careful where the defendant is a recidivist or

repeat offender". Manak, supra note 9. Clark County will not bargain in cases of armed robbery or the sale and/or distribution of heroin. (Letter from James Carty, Clark County Prosecutor.) And Benton County is considering eliminating plea bargaining in certain class A felonies, especially those involving firearms. (Letter to Bob Naon from Benton County Prosecutor, Curtis Ludwig, July 27, 1976.)

31. "Plea bargaining will start with the lesser provable charge. There will be no bluffing, no claim that this office can prove a crime when it is clear that we cannot." Kuh, supra note 27 at 50. "Cases involving close fact issues should be tried in order to avoid the danger that an attractive plea bargain has caused an innocent defendant to enter a guilty plea." Id. at 49. See also Task Force, supra note 10, Standard 3.6, 53. Some jurisdictions which have "abolished plea bargaining" still allow concessions to be made where "a case may be so weak that a plea to some other charge may be preferable to going to trial and losing the entire case". Berger, "The Case Against Plea Bargaining", 62 ABA Journal 621 (May 1976).

32. ABA. supra note 1 at § 1.8(i).

33. See, e.g., Parker, "Plea Bargaining", 1 American Journal of Criminal Law 187, 193 (1972).

34. See, e.g., Kuh, supra note 27 at 59.

35. Id. at 58-9.

36. Id. at 49.

37. Comment, "For Harold Lissell: Some Reflections on Human Dignity, Entrapment, Informed Consent, and the Plea Bargain", 84 Yale Law Journal 683, 701 (1975).

38. Bubiny, supra note 10 at 500. Commentators stress the importance of parties bargaining from a well-informed position and of braod discovery rights. Se, e.g., Frank Miller, Prosecution: The Decision to Charge Suspect With a Crime 348 (1969); Note, "Plea Bargaining: The Case for Reform", 6 University of Richmond Law Review 325, 338 (1972); Dean, "The Illegitimacy of Plea Bargaining", 38 Federal Probation 18, 22 (Sept. 1974).

39. See, e.g., Nok, "The Unconstitutionality of Plea Bargaining", 83 Harvard Law Review 1387, 1392 (1970), one commentator would protect the defendant by assuring him that the prosecutor's recommendation sets an absolute ceiling on the sentence which may be imposed, and that if it is not accepted by the court, then the defendant will automatically be allowed to withdraw his plea. White, supra note 1 at 462-3.

40. National Commission, supra note 10 at Standard 3.7. Similar standards designed to make the guilty plea procedure more formal are listed in Note, "Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas", 112 University of Pennsylvania Law Review 865, 893-5 (1964). The judge might be required to inform the defendant whether he follows a systematic practice of sentencing concurrently on all counts or suspending sentence on all counts. Id. at 893. In Wisconsin such a "past plea hearing" is a fairly elaborate procedure, described by some observers as a "little trial". Donald Newman, Conviction: The Determination of Guilt or Innocence Without Trial, pps. 19-20 (1966). "When

a past plea hearing is held, a procedure that formerly took ten minutes now may take an hour or more. But administrative efficiency is not and has never been a merit of proper justice administration." Id. at 234. For description of certain "paperwork" formalities which might be introduced by the court to record these processes see generally Bishop, "Guilty Pleas in the Pacific West", 51 Journal of Urban Law, 171, 193 (1973). Thomas and Fitch, "Prosecutorial Decision Making", 13 American Criminal Law Review 506, 550-1 (1976).

41. Note, "Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas", 112 University of Pennsylvania Law Review 865, 889 (1964). Some courts often assign counsel even where pleading defendants do not request or want counsel. Newman, supra note 39 at 13-15. The presence of a lawyer may be a disadvantage to the defendant because courts are reluctant to find the please of counseled defendants unvoluntary. Note, "The Unconstitutionality of Plea Bargaining", 83 Harvard Law Review 1387, 1390 (1970). For concerns that representation by attorney may be detrimental to defendants in other instances see Thomas and Fitch, "Prosecutorial Decision Making", 13 American Criminal Law Review 506, 546-7 (1976).

42. Bishop, "Guilty Pleas in the Pacific West", 51 Journal of Urban Law 171, 192-194 (1973).

43. See, e.g., Thomas and Fitch, "Prosecutorial Decision Making", 13 American Criminal Law Review 506, 529-39 (1976). The main thrust of intra-office monitoring "should be to provide the office and others with an accurate picture and understanding of the effect of the operation of the guidelines." Id. Reduction in the number of decision makers is another technique for controlling discretion. Id. at 551; White, supra note 1 at 455.

44. See, e.g., Kenneth Davis, Discretionary Justice, p. 213 (1969); White, supra note 1 at 464; Cox, "Prosecutorial Discretion: An Overview", 13 American Criminal Law Review 383, 402 (1976). This might, however, tend to make the criminal process as a whole ... enormously more complex, expensive, and time consuming." Id.; Abrams, supra note 10 at 51-3.

45. Id. at 56-7; Cox, supra note 43 at 391.

46. "One of the principal recommendations of some of the early crime surveys was that law enforcement generally be centralized at the state level. Partly this suggestion reflects a desire for increased efficiency in enforcement, partly a desire to prevent corruption. Certainly it stems from dissatisfaction with nearly exclusive local control of prosecution. Its asserted advantages would include a standardized system of record-keeping, thus assuring greater visibility as well as greater uniformity." Miller, supra note 37 at 322-3.

See also Breitel, "Controls in Criminal Law Enforcement", 27 University of Chicago Law Review 427, 433-35 (1960); Bubiny, supra note 10 at 503.

CONCLUSION

There is disagreement as to what should be done about plea bargaining. Some, as discussed above, feel that the proper approach would be to institute reforms, others would abolish plea bargaining entirely.[1] The National Advisory Commission on Criminal Justice Standards and Goals, for instance, totally condemns plea bargaining as an institution and recommends its abolition within five years.[2] This section will assess the relative strength of the conflicting positions.

Plea bargaining has been attacked on several grounds. It has been castigated as unethical and contrary to Anglo-American notions of criminal justice.[3] One argument is that the practice is detrimental in that it "opposes society's decision that criminal conduct be met with particular penalties".[4] In September 1974, then Attorney General Saxbe attacked the bargaining process claiming that it was "too often used by prosecutors to allow vast numbers of offenders at the state and local levels to receive minimum punishment, if any at all".[5] The ultimate effect of this perception of plea bargaining, not only lessens public respect for the criminal justice system,[6] but also has a negative impact upon the law enforcement agencies of the system.[7]

The second argument against plea bargaining revolves around the actual events surrounding a plea bargaining session and how they affect the offender. There is little justification for imposing greater punishment upon a defendant for refusing to plead guilty and demanding his constitutional right of a trial. Also it is questionable whether a prosecutor should be allowed to complicate the choice of pleas by offering benefits for chosing the right one.[8] "They have placed the judicial system upon a merry-go-round, tempting all who are innocent and guilty alike to grab for the brass ring."[9]

The third major argument against plea bargaining is that the exercise of a prosecutor's discretion permits him to reject or accept guilty pleas for reasons unrelated to the legitimate goals of the criminal justice system. Many believe that the prosecutor's discretion will ultimately result in unequal treatment to similarly situated defendants equally culpable of the same offense.[10] Considerable evidence suggests that people subject to the criminal process feel they are treated unfairly in relation to others who committed relatively the same crime.[11] Several argue that the elimination of bargaining between prosecutor and defendant is necessary to obtain appropriate punishment for the offender's crime.

It is arguable that no change can effectively be made upon the plea bargaining system without a restructuring of the sentencing system. The connection is that plea bargaining appears to be "integral and inevitable in the local criminal court" even beyond its impact on the operation of the prosecutor's office.[12] Under the current sentencing structure it is not realistic to forbid plea bargaining and at the same time continue to accept guilty pleas.[13] Absent a massive commitment of resources to the courts, or perhaps even with the addition of such help, courts may continue to offer concessions to defendants pleading guilty. Courts, for instance, may find it necessary to grant concessions to more individuals if plea bargaining was eliminated in order to avoid a tidal wave of new trials.[14]

Plea bargaining reform, then, should ideally occur with sentencing change. The model presented in this paper for bargaining reform could effectively operate within a determinate sentencing system. As suggested above, a prosecutor should be permitted to offer to all persons charged with specified crimes a "discount" to the next lowest charge in exchange for a guilty plea. The traditional bargained discount of charges would be integrally related to the prosecutor's office new charging policy. For instance, if the office made it a policy to charge only the highest crime which it could prove, that crime would be reduced. If the office charged multiple counts or lesser included offenses, then the feasibility of the discount system would be determined by the court's propensity to issue concurrent as opposed to consecutive sentences. It is argued that this would be based on the justification that the state would benefit from such a bargain in that punishment would be swift and certain.

Under the current system, however, a sentence received might not be necessarily "punishment". Determinate sentencing proposals made so far would alleviate this problem by providing for appropriate criminal sanctions upon conviction for any offense. Such sentences would be consistent with the plea bargaining reform in that they represent less severe punishment than are in effect today, but are designed to be certain. Under a determinate sentencing scheme, moreover, charge reduction rather than sentencing recommendations would be the only real incentive the prosecutor could offer a defendant.

Implementation of the determinate sentencing with this plea bargaining proposal would essentially answer the vast majority of objections made with respect to the current plea bargaining system. First, all convicted offenders would receive some form of criminal punishment not very far removed from that prescribed for the offense he actually committed. Second, prosecutorial discretion would be removed since discounts could only be offered to individuals committing certain offenses and the discounts would be offered to all offenders committing such crimes. Third, the effect of the bargaining incentives on the individual would be reduced. Arnold Enker wrote that "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.[15] With regard to the concessions offered, an innocent defendant would likely choose to go to trial while guilty individuals would probably accept the designated sentence discount. The interests of society and of accused individuals would both be fairly served. Finally, it should be added that prosecutors need not accept the authority to accept guilty pleas to lesser offenses in exchange for a discount if it is against their policy to do so. If an individual prosecutor's jurisdiction has the resources to handle a no-plea bargaining policy, then no such concessions need be given. Even if the prosecutor's jurisdiction does not at this time have sufficient resources to handle a no-plea bargaining policy, there are various reforms which could be implemented to speed up the judicial system to create the resources needed to do so.[16]

This paper does not argue for the elimination of plea bargaining. The practicality of its abolition is questionable. According to Dave Boerner, King County Deputy Prosecutor, even if prosecutors no longer had the discretion to plea bargain, the discretion would only take some other form somewhere else in the criminal justice system. Instead, this paper recommends that prosecutorial discretion to plea bargain be controlled by established standards. Hopefully, if plea bargaining cannot be eliminated, at least it can be regulated.

FOOTNOTES

1. See, generally, Note, "The Unconstitutionality of Plea Bargaining", 83 Harvard Law Review 1387 (1970); Note, "Influence of the Defendant's Plea In Judicial Determination of Sentence", 66 Yale Law Journal 204 (1956); National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts (1973).

2. Id. at 46, Standard 3.1.

3. Note, "Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas", 112 U. of Pennsylvania Law Review 865.

4. See, e.g., Arnold, "Law Enforcement--An Attempt at Social Discretion", 42 Yale Law Journal 1, 18 (1932); Note, 112 U. Pennsylvania Law Review 865, 878 n. 83 (1968). The Fifth Federal District Court asserted that "justice and liberty are not the subjects of bargaining and barter". Shelton v. United States, 242 F. 2d 101, 113 (5th Cir. 1957). See also Donald Newman, Conviction: The Determination of Guilt or Innocence Without Trial, p. 237 (1966).

5. See, e.g., Ohlin and Remington, "Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice". 23 Law and Contemporary Problems 495, 507 (1958).

6. Berger, "The Case Against Plea Bargaining", 62 ABA Journal 614, 621 (May 1976). The greatest cost of plea bargaining, according to one commentator, is the "harm to society which results from a process whereby defendants, including habitual offenders, are allowed to return to the streets more quickly than is "deserved". Note, "The Elimination of Plea Bargaining in Black Hawk County: A Case Study", 60 Iowa Law Review 1053, 1063 (1975). According to Donald Newman, many prosecutors and judges have no objections to illogical pleas and "in fact, support the practice as both necessary and desirable", Donald Newman, Conviction: The Determination of Guilt or Innocence Without Trial, p. 102 (1966).

7. See, e.g., Comment, "Prosecutorial Discretion--A Reevaluation of the Prosecutor's Unbridled Discretion and Its Potential for Abuse", 21 De Paul Law Review 485, 517 (1971). "Imagine the surprise (and contempt) of the person robbed when he learns that his assailant served two months in jail or paid a fine for assault." Id. See also Lagoy, "An Empirical Study in Information Usage for Prosecutorial Decision Making in Plea Negotiations", 13 American Criminal Law Review 435, 435-6 (1976). In a survey on "What Ails American Justice", seventy-five percent of those polled felt that convicted criminals are let off too easily. Sixty-eight percent felt the accused people are not brought to trial promptly. Forty percent of the people felt that lenient judges are the blame for crime. Sixty-two percent felt that letting criminals off too easily is more disturbing than the prospect that constitutional rights may be inadequately protected. "The Public: A Hard Line", 77 Newsweek 39 (March 8, 1971).

8. In discussing this social cost a recent Rhode Island study is particularly informative. In this study seven percent of the police officers in Rhode Island responded to various questions relating to their attitudes and role perceptions in the area of plea bargaining. One of the most interesting findings was the fact that approximately twenty-three percent of the respondents "cited political influence, friendships, or pull as a primary explanation" for plea bargaining. Regardless of the validity of this claim, the fact remains that nearly a fourth of the officers believed it to be true. It is no large extension of the analysis to see that police officers may be extremely reluctant to arrest anyone with political influence if they believe the individual will be able to plea bargain to an insignificant charge once arrested. Arcuri, "Police Perceptions of Plea Bargaining: A Preliminary Inquiry", Case and Comment 32 (May-June 1974). Cited in Note, Supra Note 5 at 1062.

9. See, e.g., Note, "The Unconstitutionality of Plea Bargaining", 83 Harvard Law Review 1387 (1970); Note, "Plea Bargaining: The Case for Reform", 6 University of Richmond Law Review 325, 331 (1972).

10. Note, "Plea Bargaining: The Judicial Merry Go Round", 10 Duquesne Law Review, 253, 269 (1971). "The practice forfeits the benefits of formal, public adjudication; it eliminates the protections for individuals provided by the adversary system and substitutes administrative for judicial determinations of guilt; it removes the check on law enforcement authorities afforded by exclusionary rules; and it distorts sentencing decisions by introducing noncorrectional criteria. This nullification of constitutional values should not continue without careful examination." Note, "The Unconstitutionality of Plea Bargaining", 83 Harvard Law Review, 387, 1398 (1970).

11. See, e.g., Thomas and Fitch, "Prosecutorial Decision Making", 13 American Criminal Law Review 506, 546 (1976). As pointed out by Davis, "the discretionary power to be lenient is an impossibility without a concomitant discretionary power not to be lenient." Kenneth Culp Davis, Discretionary Justice, pg. 170 (1969).

12. Bubiny and Skillern, "Taming the Dragon: An Administrative Law for Prosecutorial Decision Making", 13 American Criminal Law Review 473, 475 (1976). See also White, "A Proposal for Return of the Plea Bargaining Process", 119 U. of Pennsylvania Law Review, 439, 449 (1971).

13. Heumann, "A Note on Plea Bargaining and Case Pressure", 9 Law and Society Review, 515, 526-27 (1975).

14. See, e.g. Id., Note, "Plea Bargaining: The Case for Reform", 6 University of Richmond Law Review 325, 332-3 (1972).

15. See _____ supra. Otherwise individuals forced by the prospect of receiving long mandatory sentences would have little to lose by demanding trial. Newman, supra note 5 at 182. This, however, tends to make a mockery out of many of the public's beliefs about the criminal justice system". Klein, "Habitual Offender Legislation and the Bargaining Process", 11 Criminal Law Quarterly 417, 428 (1973).

16. "Perspectives on Plea Bargaining", The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts p. 117 (1967).

17. Several ways to streamline the judicial systems are:

(1) Increase their funding; (2) computerize their record-keeping system; (3) train administrative personnel in modern managerial skills; (4) standardize the procedureal rules of the superior courts; (5) regional redistricting of superior courts; (6) increase the visiting judge program; (7) eliminate the trial de novo by making district courts courts of record for crimes in which a defendant often appeals (i.e., DWI); (8) provide for administrative adjudication of minor civil suits and traffic violations; and (9) elimination of the liberal continuance policies of most judges. See David Nordeen, The Rise and Fall of Bargained Justice (unpublished report from House Research Center, 1976).

APPENDIX I - PLEA BARGAINING IN KITSAP COUNTY

Plea bargaining, the reduction of charges or sentencing by the prosecution in return for a plea of guilty by the defendant, is a way of life for most prosecuting attorneys' offices in Washington. However, across Puget Sound from King County, the mecca of plea bargaining, lies Kitsap County, a virtual plea bargaining wasteland. The reason for the scarcity of plea bargaining in Kitsap County lies primarily with one man, John Merkel, the Kitsap County Prosecuting Attorney. When Merkel took office for the first time in 1970, it was his goal to increase the resources and manpower of his office so he could try all winable felony cases in court and convict the accused with the crime he was initially charged with instead of permitting him to plead guilty to a lesser charge with a smaller sentence. Merkel's goal has been reached, and although he admits that his staff works a little overtime to keep up with its workload, Merkel does prosecute all the winable cases with little or no use of plea bargaining. For example, Merkel said only 10 - 20% of all cases his office processes are bargained. Compare that small figure to the approximately 90% of all cases handled by the King County Prosecuting Attorney's office which are settled through plea bargaining.

When asked why his office did not believe in plea bargaining, Merkel replied that as a prosecuting attorney it was his job to prosecute and not to play social worker. Respect for the criminal justice system will come only if all accused are treated equally under the law with no favoritism. To quote merkel, "If a fresh-faced 18-year-old kid with no record robs a store with a gun, I'm going to prosecute him for armed robbery." Besides building respect for the law, Merkel believes his hard-nosed policy will reduce crime, as those predisposed to commit a crime will think twice if they know that if they are caught they will recieve a full sentence, not just a small portion of that sentence by copping a plea. Although there is no empirical proof that Merkel's policy has reduced crime or increased respect for the criminal justice system in Kitsap County, it is interesting to note that he does have the support of his constituency as no one dared challenge him for his position in the last election.

As previously mentioned, approximately 10 - 20% of all cases are bargained by Merkel's office. Merkel will plea bargain only in two types of cases. First, in some cases the evidence is either insufficient or tainted so that the chances for successful conviction are small. In these cases, Merkel's office is willing to accept a guilty plea for a lesser charge since a bargained conviction is better than no conviction at all. Second, his office will give a person a "break" if justice requires it. The factors Merkel uses in deciding whether or not a person deserves a "break" are the nature of the crime committed, how well the person has cooperated with the police and the prosecutor, the criminal record of the accused and whether restitution to the victim rather than criminal punishment is the better solution to the problem.

Has Merkel's conservative plea bargaining policy increased the workload of the Kitsap County court? One of the justifications cited by prosecutors for the liberal use of plea bargaining is that without it the courts would be hopelessly flooded by litigation. The theory is that if the defendant is no longer tempted to plead guilty by an offer of a reduced charge, it is only natural that he would not plead guilty; and, since he has nothing to lose, he would demand a trial thereby increasing the workload of the court. Has this been the case in Kitsap County? Merkel said that in some cases this has been true, but in the vast majority of cases the defendant still pleads guilty without the offer of lesser punishment. A questionnaire study done by Bob Naon, staff counsel for the Washington State House of Representative's Judiciary Committee, backs up Merkel's claim. It was discovered by the study that about 70 - 80% of all pleas entered state-wide are guilty pleas, while in Kitsap County, 85% of all pleas entered are guilty pleas. Merkel said the reason the percentage of guilty pleas is so high in his county is because most defendants are in fact guilty and because the police are very efficient in Kitsap County, Merkel's office usually has enough evidence for a conviction or an admission from the defendant so as to convince him and his counsel that it would be a waste of time and money for the accused to go to trial.

However, even with this high percent of guilty pleas, Kitsap County still has the largest number of trials per criminal filings of a county with a population of 100,000 or more in the state, according to a soon to be released Washington State Bar Association report on public defenders. (A high percentage of trials per filing is a good indication that many defen-

dants do indeed go to trial instead of pleading guilty.) But, this fact is statistically insignificant as in 1975 19% of all criminal filings ended up as trials in Kitsap County compared to 16% of all state criminal filings ending up as trials according to the Nineteenth Annual Report Relating to Judicial Administration in the Courts of the State of Washington as prepared by the Office of the Administrator for the Courts. The only other data which would give any suggestion of whether or not Merkel's policy increased the workload of Kitsap County's courts is the amount of growth of their case backlog. Backlog can be measured by comparing the number of cases disposed of per number of cases filed in a county. If the percentage of filed cases disposed of is high, then the backlog of the court is small; if the percentage is low, then the backlog is large. Kitsap County Superior Court disposed of 80% of all cases filed during 1975; meanwhile, the state's superior courts' average of filed cases disposed of was 91% according to the Nineteenth Annual Report of the Office of the Administrator for the Courts. This indicates that Kitsap County Superior Court's backlog is increasing at a much faster rate than the rest of the state's superior courts. Whether this is due to Merkel's policy, to the tremendous population increase in the area (Kitsap County's population increased from 103,100 in 1973 to 118,600 in 1975), or to a combination of these and other factors is unknown, but it does show that Kitsap County Superior Court cannot handle its current workload with its present resources. Considering all relevant statistics, and keeping in mind the limitations in using statistics, one could conclude that Merkel's conservative plea bargaining policy has had some, but not much of an impact on the workload of Kitsap County's court system.

Perhaps more helpful information can be found in the personal observations of those who work daily with Merkel's policy. The Honorable Jay Hamilton, Presiding Judge of Kitsap County Superior Court, believes that the lack of plea bargaining in his court has had an "appreciable" effect on his workload. Hamilton believes if Merkel had a more liberal policy, many more cases would be settled out of court. Ronald Ness, Deputy Public Defender of Kitsap County, believes that Merkel's policy makes his job a lot tougher. Ness said many of his clients would be willing to plead guilty to a lesser charge, but because the prosecutor's office won't plea bargain many defendants demand a trial hoping for an acquittal. Merkel himself thought his plea bargaining policy probably increased the court's workload. Yet, he said the court seemed to be handling its workload fairly well and he saw no reason to abandon his policy.

Merkel asserted that if the people want the criminal justice system to work the way it is suppose to with no behind-the-back dealings and equal treatment for all involved in the criminal process, then the people are going to have to pay the price. If the court's workload becomes too great for them to handle, the prosecutor should not plea bargain to get guilty pleas, but rather more courts should be established.

In summary, the Kitsap County Prosecuting Attorney's Office rarely plea bargains except when a case is either not winable or manifest justice requires it. This policy has had some effect on the court's workload but not as much as many people might expect. So before anyone makes any decisions on reformation of present day plea bargaining practices, that person should look at Kitsap County's experience with John Merkel's policy for some clues on what the results one type of reformation might bring.

I trust the foregoing has been of assistance to you.

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