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PLEA BARGAINING DIRECTIONS FOR CANADIAN REFORM

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I. *Introduction.*

From studies in Canada it appears that over seventy percent of accused persons plead guilty before trial.¹ Yet in the past, nearly all attention and research in criminal procedure have been focused either on pre-trial procedures that are designed to improve the trial where accused persons plead not guilty, or on the proper rules and procedures for conducting a criminal trial. The law and practice relating to guilty pleas, despite their statistical overwhelming significance, have been sadly neglected.²

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¹ There are no statistics available which would indicate for all of Canada the number or percentage of convictions by trial as opposed to the number of convictions by guilty pleas. However, a few studies have been conducted in various regions at various times from which an estimate or approximation can be made. See M. Friedland, *Detention Before Trial* (1965), p. 89; Report of the Canadian Committee on Corrections (1969), p. 134; Canadian Civil Liberties Education Trust, *Due Process Safeguards and Canadian Criminal Justice* (1971), p. 39; J. Hogarth, *Sentencing as a Human Process* (1971), p. 270.

² There is a noticeable paucity of commentary on guilty pleas in Canadian legal literature. There has been very little written since the publication in 1946 of two short annotations by A. E. Popple in (1946), 1 C.R.

There are perhaps four aspects of the guilty plea process that could be examined. They are: the nature and form of a guilty plea,³ the procedure for the acceptance of a guilty plea,⁴ the law relating to the withdrawal of a guilty plea,⁵ and plea bargaining. Notwithstanding the importance of all of these subjects, this article is strictly confined to the fourth subject—plea bargaining. As to the first subject, while it would be helpful to know more about the development of our system of guilty pleas in contrast with certain continental systems where guilty pleas are not received, it nevertheless seems reasonable to assume that given the large percentage of cases disposed of by guilty pleas some

183-187 and 260-263. But see *Adgey v. The Queen* (1973), 23 C.R.N.S. 298 where Laskin J. in dissent expressed concern for this neglect of the system.

³ This might include a study as to whether there should be a guilty plea system at all or whether all convictions should be entered only after a trial, or whether the plea system could be changed, as in Israel, to require the prosecution to provide facts and details in the charge and then permit the accused to admit or deny those facts.

⁴ The procedure which a judge must follow before accepting a guilty plea is uncertain when one examines the various cases on this subject. See, e.g., *Rex v. Johnson & Creanza*, [1945] 4 D.L.R. 75 (B.C.C.A.); *Rex v. Hand* (No. 1), [1946] 3 D.L.R. 128 (B.C.C.A.); *Rex v. Milin*, [1946] 2 W.W.R. 584 (B.C.C.A.); *Rex v. Gordon* (1947), 3 C.R. 26 (B.C.C.A.); *Regina v. Doiron* (1958), 124 C.C.C. 156 (N.B.S.C., App. Div.); *Brosseau v. The Queen*, [1969] S.C.R. 181, 5 C.R.N.S. 331; *Adgey v. The Queen* (1973), 23 C.R.N.S. 298. Should there be a uniform procedure for accepting guilty pleas? Is it sufficient for a judge to enquire whether the accused understands the nature and effect of the charge against him or should the judge ask further questions to assure himself that the accused really does understand? Should the judge assure himself that there is a factual basis for a plea of guilty? Should a judge accept a plea of guilty when an accused desires to plead guilty but, at the same time, professes his innocence? See *North Carolina v. Alford* (1970), 400 U.S. 25. For a suggested procedure for the acceptance of guilty pleas, see A.B.A., *Standards Relating to Pleas of Guilty* (1968); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas* (1964), 112 U. Pa. L. Rev. 865, at pp. 893-895; Conrad, *Profile of a Guilty Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas* (1971), 17 Wayne L. Rev. 1195; Hobbs, *Judicial Supervision Over California Plea Bargaining: Regulating the Trade* (1971), 59 Cal. L. Rev. 962.

⁵ There is some uncertainty in the present law as to when and for what reasons a plea of guilty can be withdrawn. The main area of concern is the problem of withdrawal of guilty pleas induced by promises of advantages or threats by persons either in authority or not in authority. See *Rex v. Ah Tom* (1928), 49 C.C.C. 204 (N.S.S.C.); *Rex v. McNeil* (1933), 59 C.C.C. 169 (N.S.S.C.); *Guerin v. The King* (1933), 60 C.C.C. 350 (Que. K.B.): "A plea, or confession, can only be set aside, if it is shown to have been offered involuntarily, and to have been induced by a person in authority, who might have been in a position to hold out a promise of favour or advantage." At p. 352, aff'd. in *Colligan v. The Queen* (1955), 21 C.R. 120 (Que. Q.B., App. Side); *Dore v. The Queen* (1959), 30 C.R. 281 (Que. Q.B., App. Side); *Regina v. Behr*, [1967] 2 O.R. 622, rev'g [1967] 1 O.R. 639; *Brosseau v. The Queen*, *ibid.* There is also the question of whether a guilty plea induced by an inadmissible confession may be withdrawn. See *Regina v. Gagne* (1956), 25 C.R. 134 (Alta S.C., App. Div.); *Regina v. McLeod* (1968), 5 C.R.N.S. 101 (Ont. C.A.).

measure of the guilty plea process will remain.⁶ As to the procedures for the acceptance and withdrawal of guilty pleas, they are inextricably tied to the assumption that some form of the guilty plea process will remain. If the procedure for the acceptance and withdrawal of the guilty plea, and hence the significance of the guilty plea, can be improved, then the assumption that the guilty plea process will remain will be more firmly grounded. In addition to these factors, plea bargaining in Canada has received so little analysis⁷ and yet appears to be of such growing concern to many people that it warrants a special study.

In order to confine the discussion in this article to plea bargaining, it is perhaps necessary to make two further assumptions. The first is that the adversarial trial system will be retained for disposing of serious criminal cases when the accused is not prepared to admit guilt.⁸ Although certain matters now dealt with by our adversarial system of criminal trial may in the future be determined by non-adversarial methods of conflict resolution such as mediation or arbitration, it again seems realistic to assume that the adversarial trial will continue to be used for all serious criminal offences where the accused disputes his guilt.⁹

⁶ Some of the advantages of a guilty plea system have been outlined by the A.B.A., Standards Relating to Pleas of Guilty, s.1.8: (1) a guilty plea may result in a more prompt application of correctional measures to the offender; (2) a guilty plea may avoid the delay and expense of a trial and thereby allows resources to be expended elsewhere and ensures earlier trials for others; (3) a guilty plea may avoid the embarrassment of a public trial for an offender, his family, and the victim. There are other advantages as well. Guilty pleas may help to maintain the presumption of innocence which is stronger if trials are comparatively rare, and it provides an important psychological device for those offenders who want to admit their guilt immediately and receive punishment without the unnecessary delay of a full trial. See Newman and NeMoyer, *Issues of Propriety in Negotiated Justice* (1970), 47 *Denver L.J.* 367, at p. 372.

One argument to support this assumption is that our present system is unlikely to be totally abandoned for another when it has not been demonstrated, and it is not likely to be so demonstrated, that the present system is completely unsatisfactory. In addition, it is not at all certain that the alternative, *i.e.* not allow guilty pleas in any trial, would in fact work as well or better than our present system. Finally, a sensible system of pre-plea disclosure to the accused would go a long way in removing the criticisms of the guilty plea process.

⁷ Professor Grosman's book, *The Prosecutor*, published in 1969, was the first extensive examination of plea bargaining in Canada. For a list of other comments and articles on plea bargaining in Canada, see Ferguson, *The Role of the Judge in Plea Bargaining* (1973), 15 *Crim. L.Q.* 26, at p. 27, n. 7. See also Report on Administration of Ontario Courts (1973), Part II, p. 119 and Canadian Bar Association, *Preliminary Report on A Code of Professional Conduct* (1973), pp. 58-61.

⁸ The existence of a trial system is important in a discussion of plea bargaining since the very thing the accused uses as a bargaining item is his right to demand a full trial. Without the right to a full trial, he would not be in a bargaining position.

⁹ Many arguments have been levelled against the present adversarial trial system, not the least of which is its "zero-sum" or "all-or-nothing" effect.

Second, since there is so little empirical data on the extent and nature of plea bargaining in Canada,¹⁰ it will be necessary to assume for the sake of argument that many plea bargaining practices either exist or *could exist* in one or more regions.

The purpose of this article therefore is to describe the important aspects of the practice of plea bargaining and to set out its advantages and disadvantages. In the light of our lack of empirical data, this article will be directed at stimulating further discussion and examination rather than at formulating final recommendations for the abolition, retention, or reform of plea bargaining. This does not mean, however, that a preference for a certain position or direction for reform will not be expressed.

Upon close examination it appears that plea bargaining is not a new phenomenon in the Canadian criminal process.¹¹ What is new is the increased discussion about it. Professor Graham Parker has observed that as recently as 1965 the whole subject was treated as a "dirty little secret".¹² He suggests that most lawyers took the following pharisaic attitude: "Yes, it probably exists but it is only practised by inferior criminal lawyers. We would rather not discuss it and then, perhaps, it will go away."¹³ It has also been suggested that, until recently, plea bargaining in Canada "could be likened to a mysterious ghost freely strolling the halls of our criminal courts, no one knowing exactly what it is or what force it carries, and no one daring to ask for fear the answer might reveal that which we would rather leave unknown".¹⁴

This conspiracy of silence now appears to be at an end. Plea bargaining is a subject that is widely discussed at bar conventions, law society seminars, and judicial conferences. Occa-

It has been suggested that the trial system is not a sound method for dealing with some criminal cases and that other means of conflict resolution such as arbitration and mediation should be found. Professor Grosman, *op. cit.*, footnote 7, p. 108, suggests that the negotiated guilty plea is often a more precise procedure for handling individual problems than the "all-or-nothing" solution available in the adversarial forum. Unfortunately, his writing does not take account of the serious disadvantages of plea bargaining. Yet no author goes so far as to suggest that the trial system should be completely abandoned in favour of compromise and conciliation. In fact a trial system seems to be a necessary forum for those who wish to deny their involvement in an alleged crime.

¹⁰ Professor Grosman's study, *op. cit.*, *ibid.*, is the only available study but it is limited to Toronto with pre-test data from Ottawa and Montreal. In addition, the author admits his study is only impressionistic and descriptive. It does not include a statistical approach to the nature and extent of plea bargaining. Nonetheless, one can hardly argue with the author that "a loose speculative approach to a fundamental area of conduct is better than a rigorous blindness to it".

¹¹ See, e.g. *Rex v. Stone* (1928), 58 C.C.C. 262 (N.S.S.C.).

¹² Copping a Plea (1972), 20 Chitty's L.J. 310.

¹³ *Ibid.*

¹⁴ Ferguson, *op. cit.*, footnote 7, at p. 30.

sionally it is talked about as a process which threatens to undermine the traditional trial process.¹⁵ More often, it is talked about, in fact defended, as the basic means of expediting the administration of criminal justice.¹⁶ Recently it has been referred to as "a fundamental fact of the criminal process",¹⁷ with the implication that it is necessarily here to stay.¹⁸

Many object to the use of the term plea bargaining and would much prefer the terms plea discussion and plea agreement. However, the term plea bargaining is used in this article because it accurately describes the practice being examined, that is, the practice whereby the accused uses his right to plead not guilty and demand a full trial to bargain for a benefit that is usually related to the charge or the sentence. In other words, plea bargaining means the accused's plea of guilty has been bargained for and some consideration has been received for it.

It is surprising that the general perception of plea bargaining has changed so rapidly from a "dirty little secret" and "something less than ethical" to a "fundamental fact". It is equally surprising that plea bargaining has remained in relative obscurity for so long. While there are a few Canadian cases in which the practice has been mentioned, Canadian courts have not made any serious effort to confront the important issues inherent in the practice.¹⁹ More often the courts have simply ignored the fact that bargains were made even though, in each case, which we will now examine, it is fairly obvious that plea bargaining occurred.²⁰

The diversity and possible variation in plea bargaining practices can be illustrated by a reference to these cases. In *Regina v. Agozzino*,²¹ the Crown Attorney agreed not to seek a jail term if the accused would plead guilty to a charge of possession of counterfeit money. Upon the advice of his counsel the accused pleaded guilty and the trial judge followed the Crown Attorney's

¹⁵ See Report of the National Conference on Criminal Justice (1973), Ct-37 to 45.

¹⁶ See Panel Session on Plea Discussions, Law Society of Upper Canada Special Lectures (1969), p. 299, at pp. 301-302; Proceedings of the Programme on Criminal Law, Law Society of Upper Canada Continuing Education Series (October 1970), pp. 1-3; A.B.A., Standards Relating to the Prosecution Function and the Defence Function (1971), pp. 102-103; Klein, *Plea Bargaining* (1972), 14 Crim. L.Q. 289, at pp. 289-291; Grossman, *op. cit.*, footnote 7, pp. 51-59.

¹⁷ See a report on the panel session on plea bargaining at the 1972 Canadian Bar Association Annual Meeting, in *The Globe and Mail*, Wednesday, August 30th, 1972, p. 3.

¹⁸ This assumption will be examined later in this article. See also Ratushny, *Plea Bargaining and the Public* (1972), 20 Chitty's L.J. 238, where this assumption is questioned.

¹⁹ These cases are outlined below.

²⁰ For a few examples of such cases see Ferguson, *op. cit.*, footnote 7, at p. 27, n. 8.

²¹ [1970] 1 O.R. 480, [1970] 1 C.C.C. 380 (Ont. C.A.).

recommendation and imposed a fine. In doing so the judge indicated that had it not been for the Crown's representation as to sentence a jail term would have been imposed. The Crown subsequently decided to appeal the sentence as being too lenient. The Ontario Court of Appeal held that the Crown could not repudiate its bargain on appeal.

A bargain may also be made with the Crown not only as to certain sentence recommendations, but also for a reduction in the charge or a withdrawal of other charges. For example, in *Regina v. Brown*,²² counsel for the accused and counsel for the Crown agreed that the accused would plead guilty to a possession charge if the Crown would withdraw the theft charge and all other outstanding charges and would advise the court that it was not asking for a sentence to be imposed consecutive to the sentence the accused was already serving from another case. On this understanding the accused pleaded guilty, but the Crown partially repudiated its bargain by urging a consecutive sentence. The judge, who was likely unaware of the bargain, imposed a consecutive sentence. On appeal, the Ontario Court of Appeal restored the bargain by changing the sentence to a concurrent term.

There have been three recent cases in Quebec involving "broken" plea bargains.²³ In each case, the accused agreed to plead guilty in exchange for the Crown making certain representations as to sentence. In each case, the Crown subsequently appealed the very sentence it had recommended and thereby repudiated its bargain with the accused. In two of the three cases,²⁴ the Quebec Court of Appeal increased the sentences, thereby, in effect, allowing the Crown to repudiate its bargains. In the third case,²⁵ decided in the Court of Queen's Bench, the court refused to increase the sentence and thus the bargain was preserved.

Not only do the above cases indicate that the nature or form of a plea bargain may differ, but they also indicate that the court's treatment of the "broken bargain" cases differs. The courts' lack of uniformity in this regard is, of course, undesirable.²⁶

²² (1972), 8 C.C.C. (2d) 227 (Ont. C.A.).

²³ *Regina v. Kirkpatrick*, [1971] Que. C.A. 337; *Regina v. Mouffe* (1972), 16 C.R.N.S. 257 (Que. C.A.); and *Attorney-General of Canada v. Roy* (1972), 18 C.R.N.S. 89 (Que. Q.B.). See also *Regina v. Fleury* (1971), 23 C.R.N.S. 164.

²⁴ *Kirkpatrick and Mouffe*, *ibid.*

²⁵ *Attorney-General of Canada v. Roy*, *supra*, footnote 23.

²⁶ See Ferguson, *op. cit.*, footnote 7, at p. 28, n. 9. In *R. v. Agozzino*, *supra*, footnote 21, *R. v. Brown*, *supra*, footnote 22, and in *Roy*, *supra*, footnote 23, the courts refused the Crown appeals to increase the sentences on the ground that the Crown should not be permitted to repudiate its earlier position as to sentence. Although this solution may be fair for the

For still other variations on bargaining pleas, in some cases a plea bargain is struck by the police or the prosecutor in order to obtain the accused's co-operation in the arrest or prosecution of other offenders. For example, in *Regina v. Stone*,²⁷ the accused was promised by the prosecution that if she gave information, presumably as to whom the person really was who had the liquor in her garage, and pleaded guilty, the minimum fine of \$50.00 would be imposed upon her. As the case turned out, the information given was considered worthless and the prosecution no longer felt bound by the bargain; but the accused was not informed of this change in position. Thus, she pleaded guilty relying on the promise of a minimum fine, but, upon sentencing, she was fined the maximum amount. The Nova Scotia Supreme Court, by a three to two majority, allowed the accused to withdraw her guilty plea.

As well, there may be plea agreements with the Crown for the reduction of charges or withdrawal of other charges on a plea of guilty in exchange for testimony against a co-accused.²⁸

accused, it is not an appropriate resolution of the public interest because the Court of Appeal is thereby forced to abdicate its supervisory function of ensuring that the appropriate sentence is applied to the accused. For example, in *Agozzino*, the members of the court said that had they thought themselves at liberty to consider the appropriateness of the sentence, they would probably have imposed a different sentence. In *Roy*, Mr. Justice Huggessen adopted much the same position.

In *Kirkpatrick and Mouffe*, the courts ignored the original bargains and increased the sentences on appeal by the Crown. This solution ensures that the public interest will be protected by applying the most appropriate sentence regardless of any prior bargain. However, it is manifestly unfair to the accused who was induced to plead guilty on the basis of an agreement which is now being ignored and repudiated.

The above solutions to the "broken bargain" cases are unsatisfactory because one solution ignores the public interest in an appropriate sentence and the other solution is manifestly unfair to the accused. But there is another and better solution. The appellate courts could continue to review sentences and alter them when they are inappropriate regardless of a prior bargain. However, when a sentence is altered from what was bargained for at trial, the accused should be given the opportunity to withdraw his guilty plea if he so desires and have a trial. For a similar proposal, see A.B.A., Standards Relating to Pleas of Guilty, s. 3.3(b). This solution still leaves undecided the point in time at which the appellate court should allow the accused to change his plea. In other words should the opportunity to change the plea be offered after the court has indicated it will vary the sentence or after it has indicated exactly how much it will vary the sentence?

In cases where the Crown repudiates a bargain after the guilty plea has been entered but before sentence, there is usually no problem. The accused has time to appeal his conviction and seek permission to withdraw his guilty plea on the basis of misrepresentation. See, e.g., *Rex v. Stone*, *supra*, footnote 11; *Weiner v. Sa Majesté la Reine*, [1962] B.R. 556; *Courtois v. Sa Majesté la Reine*, [1962] B.R. 364.

²⁷ *Ibid.*

²⁸ This form of bargaining is obviously quite old as indicated by these words of Sir James Stephens:

"It is probable that the commonest and most important form of appeal was that of appeal by an approver. The nature of this proceeding was

For example, in *Regina v. McKee*,²⁹ two persons were jointly charged with murder. Towards the end of the Crown's case, one co-accused offered to plead guilty to manslaughter. The Crown raised no objection and the trial judge accepted a plea of guilty to the lesser charge, whereupon the accused took the stand and testified against his co-accused. Although there is no mention of a bargain in the case, it would appear that there was an agreement by the Crown to accept the plea of guilty to a lesser charge³⁰ in exchange for testimony against the other accused.

In some cases, a bargain may be struck because of the uncertainty of conviction on the charge laid. For example, when uncertain of its case, the Crown will often reduce a murder charge to manslaughter in exchange for the accused's agreement to plead guilty to the reduced charge.³¹ In other cases, a bargain may be struck on the basis of the combined factors of difficulty of proof and the likelihood of a long trial. These two factors seem to have been at work in the trial of thirteen Kingston inmates for the murder of two other inmates during a riot.³² The trial came to an abrupt end upon the accused entering pleas of guilty to the lesser offences of manslaughter and assault. Then again, a bar-

as follows: If a person accused of any crime, but especially of robbery, chose to plead guilty and to offer up his accomplices he was handed over to the coroner, before whom he confessed his guilt and accused a certain number of other persons, and the king might 'grant him life and limb if he would deliver the country from a number of malefactors either by his body', (i.e. by killing them upon battle waged), 'or by the country' (i.e. by convicting them before a jury), 'or by flight'. If he failed to fulfill the conditions imposed upon him he was hanged on his own condition."

See Stephen Criminal Procedure from the Thirteenth to the Eighteenth Century, 2 Select Essays in Anglo American History (1908), p. 485, as cited in Cooper, Plea Bargaining: A Comparative Analysis (1972), 5 N.Y.U.J. of Int. L. and Pol. 427, at pp. 433-434.

²⁹ (1960), 126 C.C.C. 251 (Ont. C.A.).

³⁰ In some cases, the bargain may involve not charging the accused at all, or withdrawing any charges that have already been laid in exchange for the accused's testimony against other accomplices. But this is not plea bargaining since the accused does not have to plead guilty to any charge. There is however a question of the proper exercise of prosecutorial power. See for example, *Regina v. Black* (1970), 10 C.R.N.S. 17, at p. 32 (B.C.C.A.), where the trial judge commented to the jury on such a deal in the following manner: "There is nothing illegal with making a deal with the police". See also *Regina v. Rosenberg* (1968), 5 C.R.N.S. 285 (Ont. C.A.) and *Regina v. Henaire & Bedard* (1954), 18 C.R. 257 (Ont. C.A.).

³¹ The reduction of charges on the basis of uncertainty of conviction can induce innocent persons to plead guilty to the lesser charge in order to avoid the possibility of more severe punishment if convicted on the greater charge. This is most likely to occur when a person is unrepresented or when he feels there is strong circumstantial evidence against him and that any story he gives will not be believed. The problem of innocent persons pleading guilty as a result of plea bargaining is discussed in the text under the heading "Disadvantages of Plea Bargaining" and, therein, under the sub-heading "Impropriety of Plea Bargaining".

³² See Globe and Mail, Monday, December 13th, 1971, pp. 1 and 9.

gain may involve the avoidance of a harsher sentence which, on the facts of the case, could be applied. For example, in *Rex v. Fodor*,³³ the accused pleaded guilty believing that there was a promise to treat his offence as a first offence punishable only by a fine, although in fact it was his second offence and was punishable by imprisonment according to the provisions of the statute in question. When the accused was sentenced to prison for three months, he appealed seeking a writ of prohibition to prevent the judge from passing such a sentence.³⁴ Similarly, a bargain can be made that the accused will plead guilty if the prosecutor will not apply in accordance with sections 592 and 740 of the Criminal Code for the harsher penalty legislatively prescribed after a second conviction for the same offence. For example, a minimum punishment of fourteen days is provided for a second conviction of impaired driving. As well, although there are no reported cases on the subject, it is also possible that an accused could agree to plead guilty to a particular charge in exchange for a promise by the prosecutor that an application for a sentence of preventive detention will not be made.³⁵

A plea bargain could also involve an agreement not to appeal. In *Rex v. LeBlanc*, *Rex v. Long*,³⁶ the Crown was seeking to have the sentences of the two accused increased. Counsel for the accused objected to this on the ground that there had been an agreement that if the accused pleaded guilty "no further proceedings would be taken" and this was presumed to mean that no appeal would be taken. The court concluded, on the basis of the prosecutor's denial of the alleged agreement, that there was no such bargain in this case between the prosecutor and counsel for the accused. However, the court added that, "if a promise were broken, it might afford some reason for this Court to say that it would not act under such circumstances".³⁷

Although most plea agreements are struck between counsel for the Crown and the defence, it is not unheard of for the judge and counsel for the defence to make an agreement with or without

³³ (1938), 70 C.C.C. 108 (Alta S.C., App. Div.).

³⁴ The court held that a writ of prohibition could not be granted in such circumstances since there was no question of a lack of jurisdiction manifest on the face of the proceedings.

³⁵ In this regard, Professor Price has said: "There are other objections to the habitual criminal provisions. The seriousness of the penalty and the scope for its differential application make a prisoner highly vulnerable to prosecutorial plea bargaining". Psychiatry, Criminal-Law Reform and the "Mythophilic" Impulse: On Canadian Proposals for the Control of the Dangerous Offender (1970), 4 Ottawa L. Rev. 1, at pp. 7-8 and n. 25. See also John F. Klein, Habitual Offender Legislation and the Bargaining Process (1973), 15 Crim. L.Q. 417, at pp. 426-436.

³⁶ (1938), 71 C.C.C. 232 (N.B.S.C., App. Div.).

³⁷ *Ibid.*, at p. 239.

the Crown's consent or knowledge. In *Rex v. LeBlanc, Rex v. Long*, although there was no bargain with the Crown, the judge and counsel for the defence had made a bargain as to the sentence to be imposed. In the circumstances of that particular case, the bargain as to sentence involved bribery and was conducted behind closed doors in secrecy and with subterfuge. The appeal court concluded that: "The result is that the sentence has not been arrived at by proper judicial consideration and this Court will alter the penalty to that which it considers adequate."³⁸ In the murder trial of the thirteen Kingston inmates, it was alleged that in his chambers the trial judge had indicated the length of sentences that would be imposed if guilty pleas were entered to reduced charges and thereby had assisted in a plea bargaining settlement. However, the trial judge emphatically denied being a party to any deal.³⁹

Finally, not infrequently guilty pleas are the result of implicit or tacit bargains⁴⁰ rather than express agreements. In a tacit bargain there is no actual negotiation between the defendant and the prosecutor or the judge, but the defendant pleads guilty in expectation of receiving a lighter sentence because he has heard that courts generally treat those who plead guilty more leniently.⁴¹ Providing a justification for this expectation, in *Regina v. Johnston and Tremayne*,⁴² the Ontario Court of Appeal reduced the sentences of the accused on the ground that "it is obvious that little, if any, consideration was given by the trial judge to the fact that

³⁸ *Ibid.*, at p. 245. By increasing the sentence on appeal from thirty days to two years plus three months, the court in effect repudiated the earlier bargain which the accused had relied on when pleading guilty without giving the accused an opportunity to change his plea. For a discussion of other cases on this point, see the text following footnotes 21-26.

³⁹ See *Ottawa Citizen*, Monday, December 13th, 1971, p. 1.

⁴⁰ The expressions "tacit" or "implicit" bargains have been used by other authors. See Enker, *Perspectives on Plea Bargaining*, p. 108, at p. 111, in Appendix A, *The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967)*; D. Newman, *Conviction: The Determination of Guilt or Innocence Without Trial* (1966), pp. 60-62.

⁴¹ But see *Regina v. Spiller*, [1969] 4 C.C.C. 211 (B.C.C.A.) where it was held that it is not a principle of universal application that because a person has pleaded guilty he should be treated more leniently, though it may be appropriate to apply it in some cases. "I do not think that any significant weight should be given to the plea of guilty here: the respondent knew that she was inescapably caught". (At p. 215). The court's refusal to apply the principle of leniency for guilty pleas since the accused was "inescapably caught" suggests that leniency is a reward for willingness to admit guilt where strict proof of guilt might be difficult. This may be one rationale for the principle, but it is not the only one. Other justifications for leniency are when a guilty plea shows true remorse, avoids an expensive trial, or saves the victim the embarrassment of an unnecessary public trial.

⁴² [1970] 4 C.C.C. 64 (Ont. C.A.).

these two men pleaded guilty and thus saved the community a great deal of expense".⁴³ And in *Regina v. Shanower*,⁴⁴ the Ontario Court of Appeal, while considering an appeal as to sentence on a charge of rape, stated: "There are, of course, some extenuating circumstances that should be mentioned. He pleaded guilty, and thus saved the girl the considerable embarrassment of having to testify at the trial."⁴⁵

The cases outlined above and others,^{45a} demonstrate some of the diversity and variation in plea bargaining practices. A bargain can be with a judge or a prosecutor, or both. It may involve a reduction in the charge, a withdrawal of other charges, a promise not to institute other charges or proceedings, or a recommendation as to leniency of sentence. The accused may agree to testify against other co-accused persons or there may be an agreement not to appeal. The crown may bargain because of a weakness in the evidence or to save time or money, or to protect innocent victims from embarrassment. As well, there are a few other possible variations for plea bargaining which have not been illustrated. These will be discussed in the next section which involves a more structured analysis of plea bargaining.

Although the above cases have been presented to illustrate the diversity in plea bargaining, they also establish or tend to establish, the following points:

1. That the phenomenon of plea bargaining is not entirely unknown in Canada, and in fact, there is real evidence that the Crown does engage in bargaining in connection with its power to make recommendations as to sentence or to reduce charges—at least more so than has been acknowledged;⁴⁶

⁴³ *Ibid.*, at p. 67.

⁴⁴ (1972), 8 C.C.C. (2d) 527 (Ont. C.A.).

⁴⁵ *Ibid.*, at pp. 528-529.

^{45a} *Regina v. Butler* (1973), 11 C.C.C. (2d) 381 (Ont. C.A.); *Regina v. Kennedy* (1972), 6 C.C.C. (2d) 564 (Ont. C.A.); *Regina v. Koury and Rivet* (1972), 25 C.R.N.S. 75 (Ont. C.A.); *Regina v. Caulfield* (1972), 10 C.C.C. (2d) 539 (Alta S.C., App. Div.); *The Queen v. Vinette*, not yet reported, Supreme Court of Canada, May 27th, 1974; *Phillips v. The Queen* (1972), 24 C.R.N.S. 305 (P.E.I. S.C.); *Regina v. Greene* (1972), 20 C.R.N.S. 238 (Ont. Co. Ct); *Regina v. Carey* (1951), 102 C.C.C. 25 (Ont. C.A.); *Regina v. Bezeau* (1958), 122 C.C.C. 35 (Ont. C.A.); *Regina v. Caron* (1972), 9 C.C.C. (2d) 447 (Ont. C.A.); *Regina v. Gross* (1972), 9 C.C.C. (2d) 122 (Ont. C.A.); *Regina v. Scroggie* (1974), 15 C.C.C. (2d) 309 (B.C.S.C.); *Re Regina v. Pooley* (1974), 17 C.C.C. (2d) 168 (B.C.S.C.); and *Regina v. Jones* (1973), 26 C.R.N.S. 398 (B.C.S.C.).

⁴⁶ As a result of his study in Toronto, Professor Grosman, *op. cit.*, footnote 7, p. 35, has made the following comment:

"Prosecutorial promises linking reduction of sentence to an exchange for a guilty plea are minimal. Support may be given by the prosecution to the defence submissions relating to sentence, but most often the prosecutor will merely say nothing to contradict the defence plea for

2. That the judge, more often than not, will follow the Crown's recommendations as to sentence and were it not for such recommendations sentences would be greater;⁴⁷
3. That trial judges frequently ignore the appropriateness of the Crown's charge reductions;⁴⁸
4. That while Canadian courts have recognized instances of plea bargaining, they have failed to discuss and analyze the practice;⁴⁹

mitigation of the sentence. Agreements to sentence in exchange for a plea of guilty do occur, but infrequently for the judge must then be made a party to the agreement in order to assure its predictability. The attitude to agreements on sentence is summed up by one prosecutor who said: 'The sentence doesn't play much part in settling them. Defence have to take their chance on sentence, but I would let them know what I was going to say as to sentence'."

In regard to this observation, it is interesting to notice that in the cases of *Agozzino, Brown, Kirkpatrick, Mouffe, Roy, Stone and Johnson and Tremayne*, all discussed above, a recommendation by the prosecutor to the trial judge as to the appropriate sentence appeared to be an essential part of the agreement. Notwithstanding the fact that the majority of the reported cases on plea bargaining have involved a recommendation as to sentence by the prosecutor, Professor Grosman's observation may still be accurate. The above cases are likely to be a biased sample of plea bargaining practices. Courts have nearly absolute control over sentencing but little or no control over the withdrawal or reduction of charges. For this reason, it is not surprising that most of the reported cases on plea bargaining deal with "sentence" bargains rather than "charge" bargains.

But see also Judge Graburn's comments in *Law Society of Upper Canada Special Lectures* (1969), pp. 303-306 which are somewhat contrary to Professor Grosman's observations. See also 1970 Proceedings of the Programme on Criminal Law, *op. cit.*, footnote 16, pp. 1-9 to 1-12 for similar views by other experienced criminal lawyers.

For further information on the frequency with which counsel for the Crown speaks to sentence and the weight or value which magistrates' afford to such submissions, see J. Hogarth, *op. cit.*, footnote 1, pp. 191-193.

⁴⁷ For example, in *Regina v. Agozzino*, *supra*, footnote 21, the trial judge stated that he would have imposed a sentence of imprisonment had it not been for the fact that the Crown Attorney had said he was not seeking a jail term. In *Regina v. Mouffe*, *supra*, footnote 23, at p. 260, the trial judge stated: "It was solely upon the basis of the recommendations of the latter [counsel for the Crown] that I imposed the sentences in question". See also *Regina v. Kirkpatrick*, *supra*, footnote 23, at p. 338. But see *Regina v. Johnston and Tremayne*, *supra*, footnote 42, where defence counsel and counsel for the Crown agreed the sentences should be five and seven years respectively, but the trial judge imposed sentences of fourteen years.

⁴⁸ For example, in *Regina v. McKee*, *supra*, footnote 29, there is no indication that the court seriously considered whether the lesser plea of manslaughter to the original charge of murder was appropriate before agreeing to accept it. Section 534(6) of the Criminal Code, S.C., 1968-69, c. 38, seems to suggest that a judge may refuse to accept a plea to a lesser charge. Ultimately, however, the Crown's power to initiate a stay of proceedings could nullify any judicial attempt to oversee the appropriateness of charge reductions and withdrawals by the Crown. For cases on the inappropriateness of the judge commenting on the charge laid or to be laid, see Klein, *op. cit.*, footnote 16, at pp. 294-298.

⁴⁹ All the cases discussed above warrant this conclusion with the possible exception of *Attorney-General of Canada v. Roy*, *supra*, footnote 23, at pp. 92-93.

5. That Canadian courts have failed to analyze the issue of the voluntariness of guilty pleas resulting from plea bargaining.⁵⁰

II. *Definitional Analysis of Plea Bargaining.*

From the cases just outlined it will be seen that it is most difficult to give a short, and accurate definition of plea bargaining. The term can be used to describe many different situations and relationships. Thus plea bargaining is not a monolithic concept although much of the discussion and debate surrounding the practice is carried on as if it were. For example, many persons argue that plea bargaining is either an acceptable or an unacceptable practice. Arguments about it are usually centered on only one or two common forms of plea bargaining but presented as if they are applicable to all forms and aspects of the practice. But discussion of plea bargaining in this monolithic sense can only lead to confusion and error. Arguments which justify the retention or abolition of one form of plea bargaining may not be relevant in an analysis of another form of plea bargaining. It may turn out that in examining these arguments some forms of plea bargaining will be acceptable while others will not. Therefore, for the sake of accuracy and clarity, it is necessary to dissect plea bargaining into its various elements before engaging in any debate as to its advantages and disadvantages.

Plea bargaining may be divided into two major types: express and tacit. In the literature, most of the attention is focused on express plea bargaining wherein actual or overt negotiation culminates in the accused exchanging his guilty plea for some apparent benefit. In tacit plea bargaining, a guilty plea is entered, without actual or express negotiation, for a benefit which the accused expects or hopes to receive because he believes that courts will frequently reward an offender who has pleaded guilty with a lighter than normal sentence.

A. *Express Plea Bargains.*

In analyzing plea bargaining, it is necessary to further dissect these two major forms of express and tacit bargains. An express plea bargain can be separated into at least three constant and five variable elements. The constant elements are: (a) there will always be a plea of guilty to one or more charges, (b) a bargain, that is, the benefit offered, will only be granted if the accused agrees to plead guilty, and (c) the bargain must result from express or overt negotiation. In turn the five variable elements

⁵⁰ All the cases discussed above warrant this conclusion as well. See also the cases cited in footnote 5, *supra*.

can be stated by posing the questions: where, when, why, for what and with whom does an express plea bargain occur?

1. *The Constant Elements.*

(a) With regard to the first constant element, it is essential that there be a plea of guilty to some charge. If, for example, the prosecutor should agree to drop all charges against an accused in exchange for his testimony against a co-accused, then, strictly speaking, there is no plea agreement because the accused would not be agreeing to plead guilty to any charge. Of course the bargained withdrawal of all charges raises interesting questions⁵¹ but since a guilty plea is not involved, the two situations are not identical and should not be discussed as if they were. There are important questions in plea bargaining that are not relevant in situations where all charges are withdrawn.⁵²

(b) With regard to the second constant element, there is an important distinction to be made. If discussions are carried on by the accused or his lawyer with a view to convincing the police or the prosecutor that a particular charge should be reduced, or not laid at all, but there is no discussion or agreement as to the plea the accused will make in the event that charges are reduced, then here again plea bargaining has not occurred. The essence of a plea bargain is that the Crown or police will reduce a charge or withdraw other charges if, and only if, the accused agrees to plead guilty. Thus, there is an important and essential difference between a discussion of the appropriate charge in relation to the strength of the evidence and an express plea bargaining discussion. The former is clearly within the ambit of the prosecutor's role, the latter may or may not be. Once again, the two situations are similar and they share mutual problems. For example, in both situations it is important to determine what factors a prosecutor should consider in his decision to reduce or not reduce a particular charge. But, on the other hand, the two situations are dissimilar in many respects. As will be illustrated later,⁵³ many of the problems raised by plea bargaining are not present in discussions that relate solely to the appropriate charge without discussion of the accused's plea. For example, if the accused is required to bargain away

⁵¹ For example, an examination of the criteria for exercise of prosecutorial discretion regarding withdrawal of charges is equally relevant to an examination of plea bargaining involving charge reduction or withdrawal of other charges.

⁵² For example, there is no question of an innocent person being induced to plead guilty when all charges have been withdrawn.

⁵³ See text *infra* under the heading "Disadvantages of Plea Bargaining".

his right to trial in order to obtain a reduced charge or sentence leniency, then the accuracy and voluntariness of his plea are thrown into doubt. The greater the benefit offered for a plea of guilty, the greater the chance of an innocent person pleading guilty to avoid the risk of conviction on a more serious offence. But these problems, and others, are not involved in a prosecutor's decision to reduce a charge on the sole ground that the evidence warrants that reduction.

While the importance of this distinction will be returned to later, it should be recognized that it is a distinction which may be difficult to draw.⁵⁴ For example, on a charge of non-capital murder, if a defence counsel walks into the prosecutor's office and says his client is willing to plead guilty to manslaughter if the Crown will accept this lesser plea and the prosecutor does agree, is this a charging conference or a plea bargaining conference? Or is this different from the case where the prosecutor says: "I will reduce the murder charge to manslaughter if, and only if, the accused agrees to plead guilty"? But are not both situations still plea bargaining? The difference is really only one of form depending on which party initiates the bargaining discussion. In essence whichever side makes the offer, a charge reduction in exchange for a guilty plea is plea bargaining *unless the prosecutor would have reduced the charge to manslaughter regardless of whether or not the accused agrees to plead guilty*.

(c) Little need be said about the third constant element since it is self-explanatory. The negotiation or bargaining must always be express.

2. *The Variable Elements.*

Much may be said about the variable elements in express plea bargaining. The first two elements are "where" and "when". Plea bargaining may be carried on anywhere and at anytime prior to conviction. A plea bargain may result from one or more careful conferences in the prosecutor's office or in the judge's chambers, or on the other hand it may result from "a brief whispered conversation in the back of the court-

⁵⁴ For example, if the police tell an accused that he is likely to get a fine or probation if he pleads guilty (and thereby imply that he will be treated more severely if he pleads not guilty and is convicted), and as a result of this conversation with the police the accused pleads guilty, is this plea bargaining? The answer is that there is no express plea bargaining between the accused and the police, but the police are indicating to the accused that in their region the judges engage in tacit plea bargaining, that is, that judges reward those who plead guilty by granting leniency (perhaps a fine instead of imprisonment). The propriety of this practice is discussed in the text, *infra*, under the heading "Tacit Plea Bargaining".

room or in the corridor outside"⁵⁵ just prior to trial and surrounded by confusion, lack of time, and insufficient information. The latter type of plea bargaining is more likely to occur in a busy magistrate's court where the vast majority of cases are handled.⁵⁶

The time at which a plea bargain is made is important in several ways. A refusal to make an early bargain is often a tactic employed by defence counsel to obtain a better bargain for the client. In busy courts, sometimes the name of the game is bluff and in a weak case defence counsel may hold out for a trial hearing right up to the date of trial in order to cajole a busy or uncertain prosecutor into giving his client a little better deal on a guilty plea. Yet in cases where guilty pleas are not entered until the very last moment, valuable judicial resources are often left idle for the remainder of the day since it is often too late to re-schedule another case for trial.⁵⁷

The third variable element is the person with whom the accused bargains. There are at least four possible variations.

⁵⁵ Rosett, *The Negotiated Guilty Plea* (1967), 374 *Annals of the Am. Academy of Pol. and Soc. Sc.* 70, at p. 71.

⁵⁶ This observation was also made in Grosman, *op. cit.*, footnote 7, p. 50.

⁵⁷ An empirical study in England established that "court administration is seriously affected by changes of plea negotiated, as is often the case, so late that other matters waiting in the lists cannot, on such short notice, be brought forward to occupy the court for the day . . . Changes of plea, so conducted, result in significant, if not disgraceful, waste of time, effort and money. Counting time alone, it was estimated that such changes of plea occasioned a total waste of approximately eight weeks of court time calculated over the thirty sittings observed during the research programme. This conclusion might be of interest to those who assume that changes of plea naturally and inevitably expedite the flow of cases, and especially to those who then contend that it seems to follow necessarily that the rights of the accused are being compromised for the sake of administrative efficiency". Purves, *That Plea-Bargaining Business: Some Conclusions from Research*, [1971] *Crim. L. Rev.* 470, at pp. 473-474. However, the situation may not be as bad in a large Canadian city where there is a permanent prosecution office and each trial prosecutor is responsible for arranging back-up cases. In this regard, Professor Grosman states:

"The prosecutor assigned to a particular courtroom must arrange the order of the cases to be heard at the sitting of the court. In addition he must arrange for backup cases. If a case is 'settled' by the entry of a plea of guilty just prior to or at trial another case must be readied immediately to proceed. The backup case must be one of some simplicity, not requiring extensive preparation. It must depend, for the most part, on police evidence as other witnesses will be unavailable on short notice. The prosecutor constructs the calendar of cases to be heard in the courtroom two weeks prior to the commencement of the term. He knows then the nature of the cases coming before the judge and he is aware also of the number of cases he must deal with during the sitting. Careful planning and administration is required in order to avoid the possibility of a judge sitting ready to try a case when there is no case readily available for trial." (*Op. cit.*, *ibid.*, p. 50).

They are: (1) the prosecutor, (2) the police, (3) the judge, and (4) the victim or the informant or some other interested party. While no empirical data exists which would indicate how often each is a party to an express plea bargain (it is possible for more than one to be party to the same bargain),⁵⁸ based on observations and comments made by defence counsel and prosecutors, it would seem that the majority of express plea bargaining occurs with the prosecutor.⁵⁹ Most judges deny that they engage in any express plea bargaining and the extent of express police plea bargaining, if any, is unknown. The latter practice will be examined in more detail later. Express plea bargaining with the victim, informant, or a third party is also likely to be rare.

The fourth variable element is the "what" of a plea bargain, that is, what benefit does the accused receive in exchange for a guilty plea. This variable is as broad as the fertile imaginations of the parties to the bargain. The range of benefits discussed in the legal literature are: (1) a reduction in the charge to a lesser or included offence; (2) a withdrawal of other charges or a promise not to proceed on other possible charges; (3) a recommendation or a promise as to the type of sentence that can be expected (fine, probation, imprisonment, and so on); and (4) a recommendation or a promise as to the severity of the sentence (amount of fine or length of imprisonment). Other possible benefits mentioned less often are: (5) the use of summary conviction procedure rather than indictable procedure in offences where the Crown has a choice; (6) a promise not to apply for a sentence of preventive detention;⁶⁰ (7) a promise not to apply for a harsher penalty

⁵⁸ For example, the accused may bargain with the police and the prosecutor concerning a charge reduction or withdrawal. The accused could also bargain with the prosecutor and the judge concerning charge or sentence leniency.

⁵⁹ It may be that much initial bargaining is done with the police and that in less serious cases this is the most important level of bargaining. Nonetheless the prosecutor has to officially accept any deal that is brought to him from the accused or his lawyer and the police.

⁶⁰ See Price, *op. cit.*, footnote 35. However, one experienced Toronto prosecutor has indicated that this threat is never used. "Another thing we have consistently adhered to is this—if we have decided to apply for a finding of an habitual criminal or a dangerous sexual offender and the resultant imposition of preventive detention, then under no circumstances, if the notice has been served upon the accused, will we embark upon any plea discussion whatsoever. To depart from this policy could only lead the accused to believe that we were using the prospect of preventive detention to induce, I think terrorize is the more appropriate word, him to plead guilty to the substantive or one of the substantive offences involved". Lecture by Judge Graburn (then Crown Attorney for York County) to Ontario Crown Attorneys (1970), pp. 119-120; but see Klein, *op. cit.*, footnote 35.

in accordance with sections 592 and 740 of the Criminal Code where the accused has a previous conviction for the same offence; (8) a promise not to force trial by jury under section 498 of the Criminal Code where the accused wishes to avoid that mode of trial; (9) a promise not to charge friends or family of the accused;⁶¹ (10) a promise not to mention at the time of sentencing any aggravating circumstances of the offence, or not to mention a previous criminal record,⁶² or not to make public any embarrassing circumstances of the offence; (11) a promise or a recommendation as to the place of imprisonment, the type of treatment, or the time of parole; (12) a promise to arrange for sentencing before a particular judge, who is generally lenient, or a threat to have the accused sentenced by a certain judge who is considered very harsh;⁶³ (13) a promise not to oppose release on bail or release after conviction but before sentence.⁶⁴

The fifth variable, the "why" of express plea bargaining, differs according to the motivations of the various parties. A prosecutor may bargain for a lesser charge because he is not certain that there is proof beyond a reasonable doubt to sustain a conviction on the more serious charge. A prosecutor might also bargain to prevent further caseload backlogs or to gain the accused's co-operation in the prosecution of others. However an accused's motivation for plea bargaining is much clearer. An accused will normally bargain in order to minimize the length or severity of his own sentence. As to the extent that the judiciary would engage in plea bargaining, it would normally be for the purpose of assisting in the efficient disposition of cases. Lastly, an accused's lawyer might bargain in order to get the best deal for his client or for the unethical purpose of quickly disposing of an unwanted, unprofitable, or difficult case. These various motivations, as well as many others which could promote plea bargain practices, will be

⁶¹ This situation has arisen in a few American cases and, in each case, the courts have held that the accused's plea was valid and not improperly induced. *Kent v. U.S.* (1959), 272 F. 2d 795 (1st Cir.); *Cortez v. U.S.* (1964), 337 F. 2d 699 (9th Cir.); and *Thomas v. Warden, Maryland Penitentiary* (1964), 236 F. Supp. 501 (D. Md.). But see, A.L.I., *A Model Code of Pre-Arrest Procedure* (Tentative Draft No. 5, 1972), pp. 106-107, where the Reporter records his disagreement, and the reasons therefore, with the decision of the A.L.I. Council to eliminate from the Council Draft a provision which would have made these inducements illegal.

⁶² For a discussion of the use of this benefit, see Proceedings of the Programme on Criminal Law, *op. cit.*, footnote 16, pp. 1-12 to 1-14.

⁶³ This practice was mentioned by Judge Graburn, *op. cit.*, footnote 60, at p. 115.

⁶⁴ See Friedland, *op. cit.*, footnote 1, and Grosman, *op. cit.*, footnote 7, p. 57.

further analyzed under the heading of "Advantages of Plea Bargaining".

B. *Tacit Plea Bargains.*

Tacit plea bargaining has received much less analysis or discussion in legal literature than express plea bargaining. Unlike express plea bargaining, in tacit plea bargaining the accused does not "agree" with anyone to plead guilty in exchange for a benefit—there is no express agreement. Nonetheless some accused persons do plead guilty with the hope or expectation of receiving benefits which they believe would normally not be obtained in the event of a conviction after a trial. Thus, the two practices are similar in the sense that a plea of guilty is entered in order to receive a benefit. The difference is that in one case the benefit is expressly offered by the prosecutor, judge, or police to a particular accused, whereas in the other the benefit is offered to all accused persons as a result of a general policy position either express or implied.

Although there may be several types of tacit plea bargaining,⁶⁵ the practice that most frequently occurs in Canada is tacit judicial plea bargaining. Under this practice an accused will plead guilty because of an awareness that a court at the time of sentencing "may" take his plea of guilty into consideration in granting him some leniency.⁶⁶ Although it appears that only some provincial courts of appeal have articulated this judicial policy,⁶⁷ it may be the case that the principle is more widely accepted.⁶⁸ While it is not normal practice for courts to inform an accused before plea that a plea of guilty may be considered as a mitigating factor, an accused will generally be aware of such a policy through either his counsel, the police, the prosecutor, or because he is an experienced offender who is "courtroom wise". Thus, it would be only the inexperienced or unrepresented offender who would be unaware of tacit judicial plea bargaining.

In regard to tacit plea bargaining, there are two important points of contrast with express plea bargaining that should be noted. First, unlike express plea bargaining, the tacit judicial offer of leniency is uncertain; the court may not grant leniency.

⁶⁵ If it was an established practice and common knowledge, at least to experienced offenders, that the police or the prosecutor always rewarded those who entered guilty pleas with some benefit, e.g. sentence recommendations to the judge, this would be a form of tacit plea bargaining. However this is not the practice—benefits are not tacitly awarded by the prosecutor or police, they must be actively or expressly sought.

⁶⁶ See, e.g. *Regina v. Johnston and Tremayne*, *supra*, footnote 42.

⁶⁷ In British Columbia, see *Regina v. Spiller*, *supra*, footnote 41, and in Ontario see *Regina v. Johnston and Tremayne*, *ibid.*, and *Regina v. Shanower*, *supra*, footnote 44.

⁶⁸ From discussions with prosecutors and directors of prosecutions in a number of provinces, this would seem to be the case.

Second, an accused can seldom determine the amount or extent of leniency which may have resulted from his guilty plea since the court has wide sentencing discretion and seldom indicates what factors account for the nature or extent of a sentence. Thus, in tacit plea bargaining the accused pleads guilty hoping for some leniency, but normally will never be sure what, if any, leniency is actually granted. On the other hand, in express plea bargaining, the accused's bargain is much more specific. He knows what to expect and if his expectations are unfulfilled, he may try to seek redress for breach of his bargain.⁶⁹

The subject of tacit plea bargains will be returned to after a further analysis of express plea bargaining. The importance of the two points of distinction made above will be discussed at that time. In addition, there are several questions that will then have to be analyzed. For example, what reasons, if any, justify judicial leniency for pleas of guilty? Does the tacit offer of leniency put an undue burden on the accused's freedom of choice as to how to plead thereby rendering a guilty plea involuntary? What are the advantages and disadvantages of tacit plea bargaining?

There is a third major type of plea bargaining which is a cross between express and tacit bargaining. Although it exists in the United States, to date it has not appeared in Canada. This practice may be referred to as legislative plea bargaining.⁷⁰ In this type, a legislatively prescribed benefit is provided for those who plead guilty. For example, a United States federal statute⁷¹ provides that an accused who is charged with "kidnapping and not returning the victim unharmed" is liable to capital punishment if so recommended by the jury, or otherwise to a term of imprisonment for life. But only a jury can recommend capital punishment. By pleading guilty, thereby avoiding trial by jury, an accused can escape all possibility of capital punishment. However, in view of two recent and conflicting Supreme Court decisions,⁷² the constitutional validity, and therefore the continuing future of such statutes, is uncertain.

Although there is no legislative plea bargaining in Canada, it should be noted that, at least in some cases, express prosecutorial bargaining can have the same effect. For example, on a charge of capital murder, if the prosecutor offers to reduce the charge to non-capital murder if, but only if, the accused agrees to plead

⁶⁹ For example, see the appeals in cases of broken bargains as discussed in the text between footnotes 21 and 26.

⁷⁰ See Newman and NeMoyer, *op. cit.*, footnote 6, at pp. 379-380.

⁷¹ (1964), 18 U.S.C., § 1201(a).

⁷² See generally *Brady v. U.S.* (1970), 397 U.S. 742 and *U.S. v. Jackson* (1968), 390 U.S. 570. See also *State v. Forcella* (1968), 52 N.J. 263, 245 A. 2d 181.

guilty, the same effect as legislative plea bargaining has been created. The benefit offered is specific and certain. The accused can avoid all possibility of the death penalty only by pleading guilty. The validity of this form of express prosecutorial plea bargaining has been ignored by all Canadian courts, including the Supreme Court of Canada.⁷³ This area will be further analyzed under the heading of the voluntariness of the plea.

III. *Plea Bargaining Examined.*

A. *Police Plea Bargaining.*

While this form of plea bargaining would seem to be the least known of all possible forms, there is some evidence, however small, that it does exist in some parts of Canada. Moreover, because the police are the first members of the criminal justice system to be in contact with accused persons, the system is such that there is always an opportunity for some police bargaining to occur. Thus, in the interests of completeness, our analysis of plea bargaining commences with the police.

There are three ways in which the police could become involved in plea bargaining. First, in the lower courts, particularly in federal and provincial summary conviction matters, the police are often responsible for prosecutions. In such cases, it is possible to strike a plea bargain with a police prosecutor. However, this is really a form of prosecutorial plea bargaining, a practice which will be analyzed in detail in the next section. Second, in more serious criminal matters even though all cases are prosecuted by a crown prosecutor, the police may still play an important role in plea bargaining. In Canada most criminal charges are laid by the police, not the prosecutor.⁷⁴ In busy magistrates courts, the prosecutor must rely heavily on the police. In this regard, Professor Grosman has noted that in Toronto, as he observed matters:⁷⁵

The prosecutor will rarely be informed about the facts of the case before the accused has been charged and is arraigned in court. At the arraignment it is customary for a police liaison officer to pass the "dope sheet" to the prosecutor. In that fleeting moment, between the calling of the case and the moment when the prosecutor reaches his feet, he reviews the dope sheet which contains a brief police summary of the evidence against the accused. Inadequacies in the charge or the evidence are seldom reviewed by the prosecutor at this first arraignment. After arraignment, inadequacies will usually continue unnoticed and unremedied until the preliminary hearing is held. The accused may plead guilty or

⁷³ See *Brousseau v. The Queen*, *supra*, footnote 4. See also cases cited by Ferguson, *op. cit.*, footnote 14, n. 37.

⁷⁴ *Op. cit.*, footnote 7, pp. 20-35.

⁷⁵ *Ibid.*, p. 21.

waive the preliminary hearing. If the former, problems of proof and the adequacies of the charges will not be reviewed; if the latter, review will be delayed until the prosecutor prepares the case for trial.

In addition, in some prosecutor offices responsibility for cases is often fragmented. "During the progress of a case from the first arraignment to the trial, different prosecutors appear at each of the stages of the case up to and including the trial."⁷⁶ Consequently, in this situation there would be little or no prosecutorial control over a whole case and thus the trial prosecutor may lose insights gained by another prosecutor at the preliminary and at the grand jury.⁷⁷ With this appreciation of the actual roles played by the police and prosecutors in a busy urban court one observer has commented:

The two individuals who remain with a case from beginning to end are the detective in charge of investigation and the defence counsel. The Prosecutor's discretion as to pre-trial disclosure of evidence is either not exercised at all or exercised by the officer in charge. . . . Therefore, if the defence counsel is to learn anything about the case, he must go to the man who is in charge until the day of trial—the investigating officer. And it is to the investigating officer first that he goes to negotiate lesser pleas if the case is still in that court of first instance.⁷⁸

The same commentator also added that: "A young inexperienced assistant Crown Attorney can always be made to see the wisdom of the bargain the officer has struck especially if it is put to him no earlier than 10 minutes before he is to go into court to deal with that case and 50 others like it."⁷⁹ In addition, a young prosecutor's reliance on experienced police officers to provide him with necessary and relevant information,⁸⁰ will create a relationship of trust and dependence which makes it easier for the police to be convincing as to the wisdom of a particular bargain.

However, aside from these comments there is no general body of information as to direct police involvement in plea bargaining. In fact in serious cases tried in the higher courts the evidence is clear that any bargaining that does occur is bargaining by prosecutors not the police.⁸¹ Moreover, in all cases it would seem that despite the factors that might be seen as bringing the police and accused persons together in potential bargain situations, there are other factors that would tend to discourage or disincline the police to engage in direct plea bargaining. One factor is that the police will have fewer motives for bargaining than prosecutors. For example, the police may feel less administrative pressure to quickly

⁷⁶ *Ibid.*, p. 26.

⁷⁷ Chasse, Annotation (1970), 10 C.R.N.S. 392, at p. 406.

⁷⁸ *Ibid.*, at p. 407.

⁷⁹ *Ibid.*

⁸⁰ Grosman, *op. cit.*, footnote 7, pp. 44-47.

⁸¹ *Ibid.*, p. 49.

dispose of cases and for this reason they may be less eager to bargain. Another factor is that the police will likely have a stronger professional bias in regard to the guilt of accused persons they have charged. Consequently they may be less willing to bargain even in cases where the evidence is not strong. The one situation in which the police will have an interest in a plea bargain is where the accused has agreed to supply them with information which will be of assistance in the detection or solution of other crimes. But even here, as Professor Grosman has noted: "prosecutors are particularly reluctant to consent to the withdrawal of charges against informants".⁸² Grosman did add, however, that there still may be a "saw-off for an informer".⁸³ All charges will not be withdrawn, but the charges will be sufficiently reduced to ensure that the informer is not jailed since he is of no use to the police as an active informer if he is behind bars.

A third manner in which the police could play a role in plea bargaining is the influence they may have on the extent to which the prosecutor will bargain. This influence results from the relationship which develops between prosecutors and police in busy criminal courts. Professor Grosman described this relationship and suggested that because of prosecutorial reliance and trust placed in the police, "the operational biases of the police become contagious".⁸⁴ The prosecutor is usually willing to repose faith in whatever the police say concerning the circumstances of the crime, the available evidence, and the character of the accused. In addition, because this relationship is important to the prosecutor, especially in busy lower courts, the prosecutor is less likely to make a plea bargain which he knows will displease the police.⁸⁵ Thus the nature of the police-prosecutor relationship may have an important impact on the prosecutor's willingness to bargain, as well as on the nature of the bargain that will be offered. However, in recognizing this third role of the police in plea bargaining, it is clear that it is less a role and more of an influence on prosecutorial plea bargaining.

B. *Express Prosecutorial Plea Bargaining.*

Although an accused or his counsel may negotiate for a plea bargain with four different parties, in fact insofar as plea bargaining has been made visible it nearly always takes place with prosecutors. This is the experience in the United States and in the main it appears to be the experience in Canada. Therefore a

⁸² *Ibid.*, pp. 39-40.

⁸³ *Ibid.*, p. 40.

⁸⁴ *Ibid.*, p. 46.

⁸⁵ *Ibid.*, p. 33, quoting a prosecutor: "You try and get the best deal you can. You've got to please the police, and justify what you do."

major part of this article it taken up with this form of plea bargaining under the sub-headings of: necessity of express plea bargaining, and the advantages and disadvantages of express plea bargaining.

1. *Necessity: Will the Administration of Criminal Justice Grind to a Halt Without Plea Bargaining?*

Most of the legal writing in the United States on this subject is premised on the assumption that plea bargaining is necessary to maintain a high proportion of guilty pleas. It is argued that the whole administration of justice could grind to a halt without it. For example, one state court judge has commented: "... a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty, paying in leniency the price for the pleas."⁸⁶ The American Bar Association in its monograph entitled *Standards Relating to Pleas of Guilty* states:

Although there are some places where congestion is not a problem, the hard facts are that in many localities, probably including all urban centers, "the whole administration of criminal justice would grind to a halt" were not most cases disposed of on a plea of guilty. Thus, some contend that the "dominant factor" in the granting of charge and sentence concessions to guilty plea defendants "remains the need to expedite the administration of criminal justice" and "that the issue ought to be faced on that ground".⁸⁷

In the same monograph, the American Bar Association recognizes six justifications for granting charge and sentence concessions for guilty pleas, two of which are in fact based on the necessity argument, that is, the need to dispose of a large number of cases by bargained for guilty pleas.⁸⁸ Also the President's Commission on Law Enforcement and the Administration of Justice⁸⁹ has concluded that negotiated guilty pleas were essential to the viability of the court system and therefore recommended that the system should face up to the need for plea bargaining, admit the existence of the practice, and subject it to visible controls in open court.

This necessity argument has also been voiced by many experienced lawyers in Canada who have variously said: "The administration of justice would be seriously hampered if plea negotiation and plea agreement could not take place";⁹⁰ "Do away with that [plea bargaining], and you produce a state of chaos in our country, especially in the urban areas like Montreal, Toronto,

⁸⁶ H. Lummus, *The Trial Judge* (1937), p. 46.

⁸⁷ *Op. cit.*, footnote 4, pp. 49-50 (footnotes omitted).

⁸⁸ *Ibid.*, § 1.8.

⁸⁹ *The Challenge of Crime in a Free Society* (1967).

⁹⁰ See the remarks made by three leading defence lawyers at a Canadian Bar Association panel session reported in *The Toronto Globe and Mail*, Wednesday, August 30th, 1972, p. 3.

Vancouver and Winnipeg";⁹¹ "Unless we resort to 'plea discussions' and arrangements and do so on a continually increasing basis, the quality of the administration of criminal justice in the County of York will be seriously impaired";⁹² "In my view it is unarguable that failing plea discussions in every case where it is in the interests of justice to do so, it is not dramatizing it one bit to say that the machinery of the criminal courts would grind to a halt".⁹³ As well, throughout his book, *The Prosecutor*, Professor Grosman emphasized the importance of plea negotiations in expediting cases through the overburdened court system.⁹⁴

However, in making the argument that plea bargaining is necessary to prevent a breakdown in the system, there is often a confusion between the importance of guilty pleas *per se* and plea bargaining. In Canada, as already indicated, the vast majority of cases (approximately seventy per cent)⁹⁵ are disposed of by guilty pleas and undoubtedly if all accused demanded a full trial the system would be thrown into disarray. Facilities and personnel would have to be multiplied many times over and this would be very expensive. Thus the point is well taken that a high percentage of guilty pleas are necessary if the criminal justice system is not to be significantly expanded. But does it also follow that express plea bargaining is necessary? The essence of the necessity argument is that plea bargaining is necessary to maintain a high flow of guilty pleas. But do all guilty pleas now entered result from this practice? While solid empirical data is not available to provide a definitive answer and the answer will likely vary from region to region, the assumption in the necessity argument is most doubtful. One experienced prosecutor in Toronto estimated in 1968 that only about twenty per cent of all cases in Toronto magistrate courts were disposed of by express plea bargaining.⁹⁶ All remaining guilty pleas were entered without any express plea bargaining.⁹⁷ Further, in many other regions it is likely that much less than twenty per cent of guilty pleas are entered as a result of express plea bargaining. For example, it has been contended that very little express plea bargaining exists in Saskatchewan⁹⁸ or British

⁹¹ *Ibid.*

⁹² See the remarks of Judge Graburn (then Crown Attorney), *op. cit.*, footnote 46, p. 301.

⁹³ *Ibid.*, p. 302.

⁹⁴ *Op. cit.*, footnote 7, pp. 32, 34, 35, 41, 42, 52-55, 58, 63, 95-96, 108.

⁹⁵ See text at footnote 1.

⁹⁶ See Grosman, *op. cit.*, footnote 7, p. 32, quoting a Toronto prosecutor. If 20 per cent of all the cases are settled by plea bargaining and if 70 per cent of all the cases are disposed of by guilty pleas, then approximately 29 per cent of all guilty pleas (i.e. $20/70 \times 100$) are negotiated and approximately 71 per cent of guilty pleas are entered without negotiations.

⁹⁷ See explanation of 70 per cent figure in footnote 96.

⁹⁸ Determined from a conversation with Director of Public Prosecutions for Saskatchewan.

Columbia⁹⁹ where high rates of guilty pleas are maintained. Therefore, the argument that plea bargaining is necessary to prevent a breakdown in the system is to be doubted.

But yet, in some regions, it may be wondered if express plea bargaining has increased from the 1968 level in Toronto. At that time Professor Grosman indicated that much of the plea bargaining practice resulted from administrative pressure to quickly dispose of cases and thereby prevent caseload backlogs. But since then caseloads have increased. As well it is conceivable that in some regions plea bargaining has increased simply because of a higher awareness by the accused and defence counsel that bargaining can and does occur. During the past five years there has been an increase in the discussion and general awareness of this practice and accused persons may now be conditioned by this publicity to expect a bargain. As for defence lawyers Professor Graham Parker noted that young criminal defence lawyers, fresh out of law school, "seem to think that their first task is not to prepare a competent defence to the charge but to bargain for a guilty plea to a lesser charge".¹⁰⁰ Thus, plea bargaining can become a self-perpetuating practice. Moreover, it has been suggested that since the police realize that prosecutors will sometimes bargain for pleas of guilty to lesser charges, they automatically over-charge in order to compensate for the anticipated bargaining.¹⁰¹ And because there is over-charging, bargaining has the effect of reducing the charge to the appropriate level. But of course there would be less need to bargain if there were no over-charging and there would be less demand for bargaining if accused persons were not conditioned to expect bargains.

As a second reference point in examining the necessity argument, let it be assumed for the sake of argument that in some busy urban centres express plea bargaining does in fact account for twenty per cent of guilty pleas. The question may then be asked as to whether, in those centres, plea bargaining is necessary to

⁹⁹ Bowen-Colthurst, Editorial Note (1969), 11 *Crim. L.Q.* 377: "As far as charges are concerned, our Department [Department of the Attorney General, British Columbia] does not enter into negotiations with the defence with a view to obtaining a plea of guilty to a reduced charge." See also remarks of several members of the British Columbia Bar at their 1972 Criminal Justice Subsection Meeting, from Minutes of the Meeting, 1972.

¹⁰⁰ *Op. cit.*, footnote 12, at p. 310.

¹⁰¹ Grosman, Letter to the Editor, *Toronto Globe and Mail*:

"The current debate on the question of the propriety of plea bargaining neglects to take into account the role of the police in pre-trial negotiations. Police are aware that certain charges are normally reduced by the prosecution to a lesser included offence. In the circumstances the police may decide to lay the more serious offence in anticipation of a deal being made by defence counsel."

prevent a breakdown in the criminal justice machinery. In answer to this question, it is obviously overreaching to found a necessity argument on a twenty per cent figure. If plea bargaining were abolished in these centres and all of the cases in the twenty per cent figure were to proceed to trial, the administration of criminal justice would not have to expand all that much to accommodate them.¹⁰² Furthermore, it is quite possible that the efficiency of the existing system could be improved without spending more money on courts and personnel. For example, more efficient scheduling of trials, longer "in-court" working hours for judges, and the possible removal of some offenders from the criminal courts by pre-trial diversion programmes¹⁰³ would all result in more court time for trials.¹⁰⁴ As well, if plea bargaining did not occur, much courtroom time could be saved that is now needlessly wasted in a "cat-and-mouse" type of negotiation, which may go through several court appearances right up until the day scheduled for trial, until a satisfactory bargain is concluded. A bargain agreed to on the date for trial makes it difficult if not impossible to re-schedule another trial for that day.

Finally it should not go unnoticed in this examination of the necessity argument that for all cases in the twenty per cent figure it was assumed that all of them would proceed to trial following not guilty pleas. But of course it would be most unlikely for this assumption to be borne out. Many accused persons plead guilty because in fact and in law they are guilty and this would continue to be the case without any "encouragement" by way of plea bargaining. Other persons, hopefully only those who are guilty, will plead guilty to save the expense of a trial, or to avoid embarrassment or damaging publicity. These factors will continue to operate without the assistance of plea bargaining. There are still other factors, as will be discussed later, that will encourage guilty accused persons to plead guilty without plea bargaining and so from our second reference point the necessity argument simply cannot stand.

To take as a third and final reference point in examining the necessity argument, let us assume that in some urban centres ex-

¹⁰² This solution is strongly recommended by the Report of the National Conference on Criminal Justice (1973), Ct-42-43.

¹⁰³ The concept of diverting cases from the criminal process means no more and no less than this: in an appropriate case where the accused is prepared to admit responsibility for the offence charged, before a conviction is entered, the case is diverted out of the process to allow the accused to participate in an alternative programme such as alcoholic treatment, psychiatric and marital counselling, restitution, etc. See e.g. the discussion on these procedures in the Report of the National Conference on Criminal Justice (1973), Ct-19-36.

¹⁰⁴ See Graburn, *op. cit.*, footnote 46, p. 302; see also Enker, *op. cit.*, footnote 40, p. 112.

press plea bargaining accounts for much more than twenty per cent of all guilty pleas—say up to fifty per cent of all guilty pleas. But while a fifty per cent figure is much more serious than the twenty per cent figure in the previous hypothesis, the necessity argument should still be doubted. For a start the factors mentioned earlier still apply: (a) trial court efficiency can be improved, (b) some modest expansion of the court machinery can be achieved in the urban areas concerned, (c) many accused persons will still plead guilty for reasons unrelated to plea bargaining and thus the fifty per cent figure is completely artificial. But in addition there are three means other than plea bargaining that will maintain a sufficiently high flow of guilty pleas—and improve the guilty plea process as well. They are: (a) a pre-plea discovery practice, (b) a flexible sentencing structure, and (c) consistent use of pre-sentence reports. Folberg, an American commentator on the subject of plea bargaining, cites the experience of several United States jurisdictions in regard to these three factors:

It has been the experience of some federal districts and state jurisdictions that a combination, in whole or in part, of a forthright, open practice of cautious and accurate charging, full and early disclosure of the government's case, post-plea hearings and pre-sentence reports in a statutory framework of broad sentencing discretion by the judge has resulted in an adequate and sustained flow of guilty pleas with little need for prosecutive bargains.

In Newman's study of negotiated pleas in Wisconsin, Michigan and Kansas, the number of what Newman calls "on-the-nose guilty pleas" (pleas to the original charge with no negotiation) was clearly much greater in Wisconsin than in the other two states. Wisconsin has a statutory framework that allows wide judicial discretion in sentencing and early eligibility of parole. When the state's case is strong most defendants in Wisconsin are willing to plead guilty without benefit of a bargain in hope of more lenient treatment from the judge.

Negotiated pleas are of even less significance in sustaining the flow of guilty pleas in Wisconsin because "the post-plea-of-guilty hearing" used extensively in Milwaukee brings to the court's attention the facts of the defendant's criminal conduct and the amount and type of evidence held by the state. The resulting visibility of the relationship between conduct and charge makes what the defendant did rather than what he is charged with of significance in the exercise of the trial judge's sentencing discretion. Promises by the prosecutor to recommend a light sentence as a form of plea bargaining are largely precluded in Wisconsin, as in federal jurisdictions, because trial judges in Wisconsin typically received a detailed pre-sentence report. The information in the report is of more sentencing importance than any recommendation of the prosecutor.

The juvenile court process, though the comparison is admittedly strained, is another example of a system where, because of the wide discretion of the judge, bargaining is almost unknown. Yet the percentage of

juveniles who, in effect, plead guilty is much higher than in the adult criminal system.¹⁰⁵

Folberg also cites the example of a United States attorney in the federal district of Oregon who stated that his district has a guilty plea rate of over ninety per cent with fewer than five per cent of that number resulting from negotiation. These statistics were attributed to a policy of thorough preparation of each case and full disclosure of the prosecution case to defence counsel early in the process.¹⁰⁶

In regard to the three factors discussed by Folberg, Canadian sentencing laws are presently quite flexible and are likely to remain so, and many judges already make extensive use of pre-sentence reports. As for discovery, in particular pre-plea discovery, this subject is part of a thorough study by the Procedure Project on the whole question of discovery in criminal cases and the recommendation of the Project is that Canadian criminal procedure should provide for full pre-plea discovery to the accused.¹⁰⁷

In conclusion, it is important to recognize that the assumption that express plea bargaining is necessary for the efficient administration of criminal justice is critical in an examination of the merits of the practice and the acceptance or rejection of this assumption will greatly affect any possible recommendation for dealing with it. If the assumption is accepted, plea bargaining, to the extent that it now exists and may develop, will be here to stay and any possible reform will be limited to removing its more serious abuses and excesses. However, if this assumption is rejected, the abolition of plea bargaining is a possible alternative.

From the discussion in this article it should be clear that we are far from convinced as to the necessity of plea bargaining. In fact, if a conclusion must be made on this issue, our conclusion is that it is clearly not necessary to resort to plea bargaining to prevent a breakdown of the system. Of course this conclusion does not mean that other arguments on the desirability of plea bargaining should be ignored. Apart from the necessity argument, various other arguments have been advanced in favour of plea bargaining practices and they will be examined next. But if these arguments should prove unsound and the disadvantages of plea bargaining are found to outweigh the alleged advantages, abolition of plea bargaining is a realistic approach if the system can survive without it. The conclusion reached here is that it can if we want it to.

¹⁰⁵ Folberg, *The Bargained for Guilty Plea—An Evaluation* (1968), 4 Cr. L. Bul. 201, at pp. 210-211 (footnotes omitted).

¹⁰⁶ *Ibid.*, at p. 210, n. 59.

¹⁰⁷ See study paper on *Discovery in Criminal Cases* by the Procedure Project of the Law Reform Commission, Part 7, at pp. 5-9.

2. *Advantages of Express Plea Bargaining.*

If plea bargaining in Canada is not an administrative necessity, what other benefits or advantages make it a desirable practice? Or, may these advantages be gained in other ways?

Express prosecutorial plea bargaining may be viewed as having different advantages for the various, interested parties, meaning the accused, his lawyer, the prosecutor, the public, and the victim. Therefore the alleged advantages of the practice will be examined in the context of these different interests.

(a) *Advantages to the Accused.*

(i) Prosecutorial plea bargaining usually results in a more lenient sentence than conviction after trial either because the prosecutor agrees to recommend a more lenient sentence and the judge accepts the prosecutor's recommendation, or because the charge has been reduced or other charges withdrawn and therefore the sentence is likely to be less on the reduced or remaining charge. However, this benefit can be analyzed from several perspectives, and it may in fact be seen as a non-benefit. While some leniency for the accused may be a useful step in his rehabilitation, too much leniency may result in a lack of protection for society, a lack of satisfaction for the victim, and may even be contrary to the accused's rehabilitative interests. Further, attempting to achieve leniency through express prosecutorial plea bargaining may be misconceived in several other respects. First, the reason for the leniency is the accused's agreement to forego the right to a full trial and every accused who makes such an agreement bargains for and expects leniency. Therefore, the question of whether leniency is appropriate in relation to rehabilitation of the accused and protection of society loses its primacy when all accused who bargain are granted leniency. The leniency is for the guilty plea—other considerations become secondary. Second, leniency as a result of express prosecutorial plea bargaining is a serious threat to the sentencing authority of the judge. Through plea bargaining the prosecutor may usurp the sentencing function of the judge. In changing a charge to one that is less serious than the original charge the prosecutor will be restricting the scope or severity of the sentencing sanctions. And even for bargains resulting only in prosecutors making recommendations as to sentence, the judge may feel compelled to go along with them in order to avoid delay. Therefore: "Since plea bargaining performs a sentencing function, it must be evaluated according to its ability to generate dispositions that comport with accepted sentencing standards."¹⁰⁸

¹⁰⁸ Note, Restructuring the Plea Bargain (1972), 82 Yale L.J. 286, at p. 289.

However, the authors of a recent Note in the *Yale Law Journal* contend that, in the United States, the present plea bargaining practice is inadequate in performing a sentencing function because of its indifference to relevant sentencing criteria, and its contribution to sentencing disparity.¹⁰⁹ Hence while prosecutorial plea bargaining can result in leniency, and while leniency may be appropriate in a certain case, plea bargaining appears to place the power of leniency in the hands of prosecutors who may dispense leniency for reasons unrelated to sentencing. But, the question may be asked, cannot these disadvantages of prosecutorial plea bargaining be solved by bringing the court into the bargaining process at an early stage so that it can exercise "full responsibility for the concessions the defendant receives in exchange for his plea"?¹¹⁰ However, this solution raises its own special problems—as will be examined later in connection with judicial plea bargaining.

(ii) Prosecutorial plea bargaining can result in a less severe stigma or label if a charge is reduced or withdrawn as a result of the bargain. For example, an accused may consider it quite an advantage to have an indecent assault charge reduced to common assault because of the much greater stigma that is attached to the former charge. Once again, such a reduction may be beneficial to the accused's rehabilitation and, in all the circumstances of the case, justified. However, this advantage to the accused can be a disadvantage to others. Where serious charges are reduced to less serious charges in exchange for a plea of guilty, society and the victim may not be well served and individual and general deterrence may be weakened.¹¹¹ Moreover, correctional authorities and parole boards will often be unaware of the dangerousness of an offender because his plea to a lesser charge will not reflect the seriousness of his conduct.

Even for those cases where the reduction of charges to avoid stigma would not seriously impair the other concerns of the process, the question remains as to whether plea bargaining is the best means of achieving it. The answer to this question depends on the factors motivating the prosecutor to bargain. If administrative pressure to dispose of cases, real or assumed, is the principal

¹⁰⁹ *Ibid.*, at pp. 291-295.

¹¹⁰ *Ibid.*, at p. 287.

¹¹¹ Dash, *Cracks in the Foundation of Criminal Justice* (1951), 46 Ill. L. Rev. 385, at p. 395. He wrote:

"A third and equally as important a result of the practice of the lesser plea is its effect in undermining the deterrent theory of punishment. A principal purpose for felony cases is to deter persons from committing felonies. But when the seasoned criminal knows that he will be permitted to plead to a lesser charge and get a few months in the county jail, he may well conclude that it is worth his while to commit the crime in face of such light punishment."

force behind prosecutorial bargaining, plea bargaining can hardly be a sound means of avoiding the stigma of a criminal conviction. Because of plea bargaining, in cases where the stigma should attach it will not, and in cases where perhaps it should not attach but be relieved in some fashion, it will remain because of an absence of any pressure to plea bargain.

Our conclusion on this point is that the reduction of charges to avoid stigma in appropriate cases should be done in accordance with criteria established for that purpose and the pursuit of this objective should be divorced from an accused's decision as to plea. In other words, a prosecutor is quite able to reduce charges in appropriate cases or to withdraw them altogether without extracting an agreement from an accused to plead guilty.

(iii) A different version of the reduced-stigma argument is the contention that plea bargaining is an advantage to the accused, and to his family and friends because in pleading guilty some public disgrace or public notoriety is avoided. But of course this advantage does not result from plea bargaining; it is an advantage inherent in all guilty pleas regardless of whether or not a plea is obtained as a result of a bargain. Hence the only connection between this advantage and plea bargaining is in the assumption that plea bargaining is necessary to maintain a high rate of guilty pleas. But, as argued earlier, this assumption should be rejected.

(iv) It is also argued that plea bargaining results in a faster disposition of cases than is the case with the trial process and that this is often advantageous to an accused especially when he is being held in pre-trial custody. It is argued first that an accused may not get credit for time served in pre-trial custody, and, second, that it is easier to serve time in prison with organized programmes than in local jails where there are no programmes at all. Once again this so-called advantage, apart from the fact that it ignores the proper solution to this problem, is a result of the guilty plea process and not of plea bargaining.

One danger that should be noted at this point is that the longer it takes for an accused to get a trial the more likely it is that he will be induced to plead guilty and to indulge in plea bargaining, even if he may have a valid defence, simply because the longer the delay the more attractive the guilty plea becomes. *Life* magazine in an article on plea bargaining in New York City gave an extreme example which makes the point:

One defendant, in jail for ten months, was approached by his lawyer with the suggestion that he enter a guilty plea; he could probably get a one-year sentence which, with credit for time served and good behavior, would put him right out on the street. If he insisted on trial, on the other hand, he would have to spend a few more months in jail before

he could get one, and would get a stiff sentence as well if he lost. The poor defendant could hardly believe it: "You mean if I'm guilty I get out, but if I'm innocent I stay in jail?" But that's the way the system works.¹¹²

In his book *Detention Before Trial* Professor Friedland found the same pressure in Toronto,¹¹³ that is that those held in custody without bail were more likely to plead guilty. No doubt the changes brought about by the bail reform legislation¹¹⁴ should relieve such pressure, but it is fair to remark that to the extent that lengthy pre-trial incarceration remains a problem the greater will be the pressure on accused persons to plead guilty and to bargain for their entry of guilty pleas.

(v) It is also argued that plea bargaining is advantageous to the accused who does not qualify for free legal services since it can result in the avoidance of expensive legal fees that would be incurred for a defence at trial. Once again this argument shows a confusion between guilty pleas and plea bargaining. This advantage is a benefit of guilty pleas regardless of whether or not the guilty plea results from a bargain. As well, this so-called advantage is extremely dubious. If an innocent accused should plead guilty to avoid expensive legal fees this is hardly an advantage of the practice to be paraded around.

(vi) It is also argued that plea bargaining is advantageous to the accused (and the prosecutor) because it removes the inevitable risks and uncertainties of trial. For example, a vital witness for either side may fail to appear or become un-co-operative, a complex legal argument may be decided one way or the other, or the jury may convict despite the evidence. Thus, the accused may feel that a reduced charge or a lighter sentence on a plea of guilty is better than running the risk of a conviction on a serious charge which carries a heavy sentence. On his part, the prosecutor may feel that "a half a loaf is better than none".¹¹⁵ Although this advantage may appear to benefit both the accused and the prosecutor, it points up aspects of plea bargaining that are extremely

¹¹² Mills, *I Have Nothing to Do with Justice*, Life, March 12th, 1971, at pp. 57, 62 quoted in Bazelon, *New Gods for Old: Efficient Courts in a Democratic Society* (1971), 46 N.Y.U.L. Rev. 653, at p. 666.

¹¹³ *Op. cit.*, footnote 1, pp. 40, 60-62, 76, 112, 147-48. For similar conclusions, see several American studies cited in Newman and NeMoyer, *op. cit.*, footnote 16, at p. 372, n. 6.

¹¹⁴ The pressure on accused persons in custody to plead guilty is fully examined by Dean M. L. Friedland, *op. cit.*, *ibid.* A purpose of the Bail Reform Act, R.S.C., 1970, c. B-2 was to eliminate unnecessary pre-trial detention and thus to reduce such pressure.

¹¹⁵ Alschuler, *The Prosecutor's Role in Plea Bargaining* (1968), 36 U. Chi. L. Rev. 50, at p. 60.

objectionable. Insofar as plea bargaining may be engaged in for this so-called advantage, it increases the risk of convicting the innocent accused, it avoids the testing of legal issues, it can result in an inappropriate conviction or sentence in terms of the accused's need for rehabilitation, the protection of society, and the satisfaction of the victim, and it produces sentencing inequalities. While these risks and abuses are disadvantages of plea bargaining generally, and in that context will be taken up again, it may be noted now that the greater the charge or sentence concessions between a conviction after a negotiated guilty plea and conviction after a trial, the greater is the likelihood of these risks and abuses occurring. If a prosecutor should determine the proper charge without reference to what the accused might do and if sentencing differences between convictions on guilty pleas and convictions after trials are kept down, an accused is less likely to be induced into pleading guilty in cases where he should not. In other words, if the differences in charge or sentence concessions between a conviction at trial and upon a not guilty plea are very slight, an accused will be less easily discouraged from demanding a trial when there is a reasonable issue to be litigated.

(vii) It is also argued that "a significant advantage of plea negotiation is the psychological effect [on the accused] of any admission of guilt as a step toward rehabilitation".¹¹⁶ It is said that a plea of guilty is a sign of remorse and willingness to amend one's ways. But here again, if this is an advantage it is an advantage of the guilty plea and not one of plea bargaining. Furthermore, although this advantage may exist in cases where the guilty plea is spontaneous and a free admission of guilt, this is unlikely to be the case for a guilty plea resulting from plea bargaining. In plea bargaining the guilty plea is used as a bargaining tool to purchase as much leniency as possible. Thus, a negotiated guilty plea should not be taken as a sign of remorse and readiness for rehabilitation. At the risk of being repetitive, it has been said that:¹¹⁷

Although a guilty plea may at times be motivated by repentance, more often it would seem to represent exploitation by the accused of the prosecutor's and court's reaction to such a plea. If a defendant who acknowledged his guilt were aware that the plea could not influence the extent of punishment, then perhaps his action might reflect a renunciation of criminal propensities. But the very fact that a defendant realizes a guilty plea may mitigate punishment impairs the value of the plea as a gauge of character.

¹¹⁶ Ariano and Countryman, *The Role of Plea Negotiation in Modern Criminal Law* (1969), 46 Chi.-Kent L. Rev. 116, at p. 121. See also Newman, *op. cit.*, footnote 40, at p. 96.

¹¹⁷ Comment, *The Influence of the Defendant's Plea on Judicial Determination of Sentence* (1956), 66 Yale L.J. 204, at p. 210.

This view is also supported by Professor Newman's research on plea bargaining. He found that where guilty pleas resulted from plea bargaining the accused's reasons for pleading guilty were usually self-serving, exploitive, and not remorseful.¹¹⁸ In fact the argument on this point is so telling against plea bargaining that one United States Court of Appeal judge has suggested that:¹¹⁹

Those who think that "confession is food for the soul", that acknowledgment of guilt and repentance is an important step on the road to rehabilitation, should be in the forefront of opposition to plea bargaining in any form, because only elimination of all concessions will remove the temptations which contaminate the moral surge of those truly repentant.

The same judge went on and noted:¹²⁰

And while we are focusing on remorse, it appears that the bargaining system may create as much recriminatory remorse as penitent remorse. If a defendant pleads guilty in the expectation of a sentence lighter than the one he in fact receives, he may well be left with feelings of both regret and having been cheated, feelings which, whether completely justified or not, are bound to occur in particular cases as long as defendants are encouraged to believe it is to their advantage to plead guilty. Plea bargaining may then produce at least as much negative as positive remorse and may retard as well as promote rehabilitation.

(viii) It is argued that through plea bargaining, an offender has the opportunity to participate in and to influence the sentencing process. The argument proceeds that participation in this way will make the offender feel less angry and frustrated at an otherwise highly impersonal system and in turn will make him more receptive to rehabilitation.¹²¹ The essence of the argument here is that the present sentencing process is often invisible to the accused¹²² and he often does not know how or why the court arrived at a particular sentence. But while this may be a valid criticism of our system, the question remains as to whether plea bargaining is the appropriate way to respond to it. As we have already noted, involved in a bargaining decision are factors that do not comport with accepted sentencing standards. As well, rather than make the accused more receptive to rehabilitation,

¹¹⁸ Pleading Guilty for Considerations: A Study of Bargain Justice (1956), 46 J. Crim. L. C. & P.S. 780, at pp. 783-785.

¹¹⁹ *People v. Earegood* (1968), 12 Mich. App. 256, 162 N.W. 2d 802 (Levin J.) quoted in Hall, Kamisar, LaFave and Israel, *Modern Criminal Procedure* (3rd ed., 1969), pp. 934-935. See also *Scott v. U.S.* (1969), 419 F. 2d 264 (Bazelon C.J.): "But with the inducement of a lighter sentence dangled before him, the sincerity of any cries of *mea culpa* becomes questionable. Moreover, the refusal of a defendant to plead guilty is not necessarily indicative of a lack of repentance. A man may regret his crime but wish desperately to avoid the stigma of a criminal conviction".

¹²⁰ *Ibid.*, at p. 935.

¹²¹ See, e.g. Enker, *op. cit.*, footnote 40, at p. 115.

¹²² *Ibid.*

participation in the sentencing process through plea bargaining may make an accused even more cynical and distrustful of a system where everyone can be "bought off".¹²³ The system can hardly appear fair and impartial when it puts the determination of innocence or guilt on sale with guilty pleas being the acceptable currency. Such a system encourages an accused to believe that the system is there to be manipulated.¹²⁴

But despite these criticisms, it has been doggedly argued, that: "The defendant, if he does not like the bargain, may reject it and stand trial. If he accepts the bargain, he cannot help but feel that his sentence is something that he consented to and participated in bringing about, even if he at the same time resents the process that induced his consent."¹²⁵ This argument ignores the fact that the accused may find it too difficult to reject the bargain and stand trial if the difference between the bargain and the sentence after a trial is great. Furthermore, although he may have consented to and participated in the bargain, he may still not like it; his decision may be based on fear of possible conviction at trial and the imposition of a much heavier sentence, and thus the attitudes so engendered will likely not allow for any possible satisfaction in arranging his own sentence. Finally, as we have already noted, one should doubt any suggestion that through plea bargaining an accused is a ready candidate for rehabilitation having participated in the determination of his own sentence. In Canada, Professor Grosman has written:¹²⁶

Association of accused persons with the pre-trial negotiating environment imprints upon them a conception of criminal prosecution as a system which is subject to manipulation by those experienced at the game to the exclusion of those who are not. This perspective engenders little respect for the administration of criminal law and creates correctional and rehabilitory problems. Donald Newman stressed the importance of the way in which accused persons perceive their treatment within the criminal law processes when he wrote: "Correctional personnel feel that it is desirable for an offender to enter the correctional process convinced that he has had his day in court, that all officials have acted fairly and decently to him, that his side of the story has been heard, and that he has not been railroaded or cheated of his rights in any way".

In sum, although the accused's involvement in the sentencing

¹²³ Dash, *op. cit.*, footnote 111, at p. 395.

¹²⁴ Enker, *op. cit.*, footnote 40, at p. 112:

"A real vice in the procedure may be that it often gives the defendant an image of corruption in the system, or at least an image of a system lacking meaningful purpose and subject to manipulation by those who are wise to the right tricks. Cynicism, rather than respect is the likely result."

¹²⁵ *Ibid.*, at p. 115.

¹²⁶ *Op. cit.*, footnote 7, p. 43 (footnotes omitted).

process is important and methods for achieving this goal might be examined, it is not at all properly attained through plea bargaining.

(b) *Advantages to the Prosecution.*

Prosecutorial plea bargaining is said to have advantages for the prosecutor as well as the accused. However, rather than examine these advantages directly, it may be more revealing to do so indirectly through a prosecutor's motivations for bargaining.

There are several possible reasons motivating prosecutors to engage in plea bargaining which will vary in importance from region to region,¹²⁷ from prosecutor to prosecutor, and from one type of case to the next. However, since the true nature and extent of plea bargaining in Canada is unknown, much of this examination is based on what "would be", were prosecutors to engage in plea bargaining, rather than what "is".

The reasons motivating a prosecutor to bargain may be one or more of the following: an attempt to dispose of cases in the fastest, most efficient manner in order to prevent case-load backlogs; a certain lack of strength of the prosecutor's case; an attempt to avoid too harsh a result for a particular accused; and a personal relationship with the defence lawyer.

(i) *Efficient Disposition of Cases to Prevent a Backlog.*

In Professor Grosman's study in Toronto, the motivation for plea bargaining most often documented was the need to efficiently dispose of cases. This factor was emphasized throughout the book.¹²⁸ For example, Professor Grosman wrote:

In all the criminal courts the prosecutor's major administrative responsibility is to ensure that the cases before the court keep moving.¹²⁹

...

The prime administrative value is celerity, the need to dispose of a great number of cases with the least delay.¹³⁰

...

To encourage the disposition of the greatest number of cases with the least complication and delay the prosecutor relies on the informality and flexibility of pre-trial negotiations and resorts to the compromise of cases in exchange for guilty pleas.¹³¹

...

¹²⁷ Grosman, *ibid.*, at p. 42:

"The inducements and reductions available in one prosecutorial jurisdiction may not resemble those available in another. An urban jurisdiction with the burden of a heavy case load may engage in expediting procedures unheard of in a neighbouring prosecutorial office that is not subject to the same administrative strains. Differing policies of pre-trial negotiation may depend on the demands of the locality."

¹²⁸ See page references in footnote 94.

¹²⁹ *Op. cit.*, footnote 7, p. 51.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*, p. 52.

The preoccupation with maintaining celerity and avoiding delay colours the prosecutor's perspective and gives rise to a number of practical adjustments to meet pressing administrative needs.¹³³

...

As a result of the pressures inherent in his work the prosecutor is not primarily interested in winning cases at trial. He is most interested in disposing of cases efficiently.¹³³

And finally:

Extensive pre-trial negotiations have developed in recent years to meet the needs of the overburdened court systems in high-crime urban centres. New administrative adjustments are made to answer new demands upon the traditional adversarial structures. For example, a jurisdiction in a large metropolitan area such as Toronto, with a high crime rate, understaffed courts, inadequate facilities, and an overburdened system, may encourage each judicial administrator from arresting officer, to prosecutor, to lower court judge to expedite procedures in order to process the largest number of cases through the system with the least delay. As one young prosecutor said: "The pressure of work will cause you to accept a plea of guilty and to reduce a charge. The overloaded case load that you have is a psychological factor in making you accept a plea to a lesser offence." The prosecutor is able, in this way, to expedite the conclusion of the case with the least complication and time loss. The defence lawyer has also expedited his case with the least loss of time and money and has obtained a tangible result for his client—a reduced charge. Judicial agreement to defence-prosecution submissions is seldom refused as tangible benefits for the expedition of case backlog is a prime concern of lower court judges.¹³⁴

While there are prosecutors who vigorously assert that administrative pressure should not and does not influence them in plea bargaining,¹³⁵ it would seem that for some prosecutors the pressure to efficiently dispose of cases is a compelling motivation. To them plea bargaining is seen as an advantage because the end product is a guilty plea which avoids a time-consuming trial.

However, lost somewhere in this approach is the question of whether plea bargaining is in fact essential to maintain a reasonably high rate of guilty pleas. And as we suggested earlier, there is too much assumption and not enough analysis in this approach. The elimination of the expectation of a bargain coupled with reasonable charging practices, open discovery, and flexible sen-

¹³³ *Ibid.*

¹³³ *Ibid.*, p. 54.

¹³⁴ *Ibid.*, p. 41.

¹³⁵ See, e.g. Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, *op. cit.*, footnote 4, at p. 901 (where only 37 per cent of the prosecutors interviewed stated that heavy caseloads were a significant factor in their bargaining decisions). But see, Alschuler, *op. cit.*, footnote 115, at p. 58 (where it is indicated that only a few prosecutors discount the importance of administrative considerations in bargaining decisions).

tencing laws should achieve this result well enough. As well, when a prosecutor gives primary attention to this motivation, he is deviating from his role as a minister of justice, that is, his role in the objective and fair prosecution of offences warranted by the evidence. Finally, one might wonder why a prosecutor should feel so compelled to compromise cases solely out of administrative necessity. Society has an obligation to provide resources and personnel and prosecutors should not compromise their proper role to compensate for, and further encourage, society's failure to provide them.¹³⁸

(ii) *A Weakness in the Prosecution's Case.*

A second motivating factor for bargaining is the existence of a weakness in the prosecution's case. In Professor Grosman's study, one prosecutor commented: "If there is no evidence or little evidence, or when I know that the jury will most likely not convict on the charge, that is a major factor to me in taking a plea of guilty to a lesser charge."¹³⁷ In a survey of prosecutors conducted in various states in the United States, the most frequently listed factor motivating plea bargaining decisions was the strength (or weakness) of the state's case.¹³⁸ Also, in his own survey Professor Alschuler found the strength of the case to be a factor repeatedly mentioned by prosecutors as influencing them to engage in plea bargaining.¹³⁹ In sum, the attitude of many American prosecutors is to get something from every accused: "When we have a weak case for any reason, we'll reduce to almost anything rather than lose."¹⁴⁰ The philosophy that "half a loaf is better than none"¹⁴¹ predominates.

A close neighbour to the "weak case" motivation is the "no case at all", and this variant of the second motivation raises the possibility of bluff. But then, along with Professor Hooper, we question whether it is "unethical for a prosecutor to bluff an accused, whom he believes to have committed the offence charged, into pleading guilty when he knows that a conviction would be unlikely or impossible. . .?"¹⁴² Professor Hooper suggests that there is little doubt that some bluffing of this kind does occur and in support he refers to the remarks of one leading Crown Attorney

¹³⁶ *People v. Byrd* (1968), 12 Mich. App. 186, 102 N.W. 2d 777, at p. 797.

¹³⁷ *Op. cit.*, footnote 7, p. 34.

¹³⁸ See, *op. cit.*, footnote 135, at p. 901, where it is indicated that 87 per cent of prosecutors stated that this was a significant factor.

¹³⁹ *Op. cit.*, footnote 115, at pp. 58-64.

¹⁴⁰ *Ibid.*, at p. 59.

¹⁴¹ *Ibid.*, at p. 60.

¹⁴² *Discovery in Criminal Cases* (1972), 50 Can. Bar Rev. 445, at pp. 469-470.

who described plea bargaining as something like a poker game. In any event, in answer to this question Professor Hooper contended that in nearly all respects, if not all,¹⁴³ such bluffing is unethical.¹⁴⁴

From this description of the second motivation, the question might be asked as to why the weakness of the case is so important a factor in a prosecutor's decision to bargain. To that question there are several possible answers. First, the prosecutor may be interested in the efficient disposition of cases and if the prosecution case is weak, although convincing to the prosecutor, the accused is less likely to plead guilty. To induce a guilty plea and thereby aid in the efficient disposition of cases, the prosecutor will offer the accused a bargain. Second, the prosecutor may simply feel that in the light of the available evidence the charge is too high and therefore agree to reduce it in exchange for a guilty plea. Third, the prosecutor may be interested in maintaining a good "won-loss" record, and in order to avoid losing a weak case, he will bargain for a guilty plea to something.

Although these factors may appear as advantages for the prosecution, they completely ignore the serious disadvantages that may be created by plea bargaining for other parties and they also ignore the important question of whether it is proper for the prosecutor to give any scope at all to this motivation through plea bargaining. While the propriety issue itself will be dealt with later, it ought to be noted now, that if a bargain arises out of the "weakness-of-case" motivation, the serious risks and abuses which have already been mentioned will arise.¹⁴⁵ Of course it is understandable that a prosecutor will not want to waste time or incur expense in taking a weak case to trial. But the proper response in this situation is to consider a reduction or withdrawal of the charge, for

¹⁴³ *Ibid.*, at p. 471 (footnotes omitted). The exception Hooper suggests is the following:

"Similar considerations would seem to require on ethical grounds the disclosure of the absence of corroboration or of the fact that the prosecutor knows that the confession could not be proved to be voluntary. On the other hand, ethical obligations would not seem to require the prosecutor to reveal that the vital Crown witness without whose testimony a conviction is unlikely or impossible, is unavailable for the trial. This can hardly be said to be a 'fact' within the meaning of the Canon 1(2). [When engaged as a public prosecutor his primary duty is not to convict, but to see that justice is done; to that end he should withhold no facts tending to prove either the guilt or innocence of the accused]. Nor would a prosecutor who is satisfied of the accused's guilt, seem to be in breach of his duty to 'see that justice is done' by not objecting when the accused pleads guilty in ignorance of the unavailability of the witness."

¹⁴⁴ This conclusion is based on the dual duties of the prosecutor to "see that justice is done" and "to withhold no facts tending to prove either the guilt or the innocence of the accused". *Ibid.*, at pp. 467-471.

¹⁴⁵ See the abuses cited in the text, *supra*, following footnote 115.

the reason only that this response is warranted by the strength or weakness of the evidence. What is logically and morally foreign to this consideration is whether or not the accused will plead guilty to a reduced charge.

(iii) *Avoidance of Harshness of Conviction or Sentence.*

A third factor that in some cases may motivate a prosecutor to bargain is a desire to avoid the infliction of too severe a conviction or too harsh a sentence. Here it is argued that plea bargaining is advantageous because it gives the prosecutor the flexibility to avoid harsh laws. This factor, at least in relation to sentencing laws, is important in the United States where many jurisdictions have high, mandatory and minimum sentences for first or subsequent offenders. To avoid imposition of these harsh sentencing laws, the United States prosecuting attorney may reduce a provable charge to a lesser charge which has a lower minimum sentence or no minimum sentence at all. In effect in this practice the prosecutor becomes a legislator; by reducing provable charges he thereby changes the sentence mandated by the legislature for a certain type of conduct. However, in Canada, since Canadian criminal law has very few mandatory, minimum sentences,¹⁴⁶ bargaining to avoid harsh sentencing laws must be much less frequent than in the United States. As well, in the limited instances where it might occur, Canadian prosecutors can still avoid harshness without plea bargaining; to avoid a harsh sentence, a charge can always be reduced without requiring the accused to agree to plead guilty.

Before leaving this possible motivation, it is also argued that plea bargaining allows for flexibility in another sense. Because the trial is primarily an adversarial contest which engages in a "yes or no" decision as to an accused's guilt, the argument has been advanced that this leads to a "sweet simplicity of result . . . that perpetuates certainty and symmetry",¹⁴⁷ at the expense of "compromise and conciliation which are often more precise procedures with which to handle individual problems".¹⁴⁸ The argument has been made that questions of intention, provocation, and insanity are not always "black or white", yet the adversarial trial system demands a "yes or no" type of decision. Thus, it is argued that in some instances plea bargaining leads to a more intelligent result. To put the frosting on this argument, Professor Enker contended that:¹⁴⁹

¹⁴⁶ For example, capital murder (death), non-capital murder (life), importing narcotics (seven years), and driving offences (ss. 234 and 236 of the Criminal Code).

¹⁴⁷ Grosman, *op. cit.*, footnote 7, p. 83.

¹⁴⁸ *Ibid.*, p. 108.

¹⁴⁹ *Op. cit.*, footnote 40, at pp. 113-114.

A jury can be left with the extreme alternatives of guilty of a crime of the highest degree or not guilty of any crime, with no room for any intermediate judgment. And this is likely to occur in just those cases where an intermediate judgment is the fairest and most "accurate" (or most congruent).

Although flexibility may be important to the achievement of justice in individual cases, it can be achieved independently of plea bargaining. The prosecutor can alter the charge or charges against the accused, or abandon a charge altogether, without exacting a bargain. In suggesting that "the concept of flexibility is itself entirely independent of the concept of compromise",¹⁵⁰ Professor Alschuler rejects the use of plea bargaining because the flexibility plea bargaining provides is "lawless" and potent with abuses.¹⁵¹ As well, the recent *Report* of the National Conference on Criminal Justice in America rejects the idea that prosecutorial plea bargaining is important and advantageous in the sense that it brings flexibility to the system. The *Report* notes that:¹⁵²

A prosecutor can accomplish the same result by care in his selection of . . . [the charge to be proceeded with]. To the extent that greater flexibility is desired, it should be made available as a matter of formal law, either by changes in the definition of substantive crimes or in the modification of dispositional alternatives available to sentencing courts.

In Canada, the power of the Crown to reduce charges, the Code provisions that allow for convictions to be entered on lesser or included offences, and the wide discretion found in most sentencing provisions, allow for enough flexibility without requiring plea bargaining.

(iv) *Personal Relationships between Prosecutors and Defence Lawyers.*

In *The Prosecutor*, Professor Grosman singled out another important factor motivating prosecutors to engage in plea bargaining. He pointed out that the very achievement of a bargain, as well as its nature and extent, may depend largely on the relationship between the prosecutor and the defence lawyer. If there is no relationship, or a negative relationship, both the prosecutor and the defence lawyer are less likely to bargain than if their relationship is a good one.

However, the offering of bargains, or better bargains, only to those few defence lawyers whom the prosecutor feels are trustworthy has serious consequences. It leads to unequal bargaining positions because most accused persons are dependent

¹⁵⁰ Alschuler, *op. cit.*, footnote 115, at p. 71.

¹⁵¹ *Ibid.*, at pp. 71-78.

¹⁵² Report of the National Conference on Criminal Justice (1973), Ct-43.

upon the lawyers that they retain or receive and do not have the sophistication to shop around for those lawyers most favoured by the prosecution. It also creates a serious ethical problem for defence lawyers since a useful, reciprocal relationship with a prosecutor may depend upon the defence lawyer entering a proportionately high number of guilty pleas. Professor Grosman contended that the failure on the part of a defence lawyer to reciprocate to the disclosure of the prosecution's case by entering a proportionate number of guilty pleas "results in loss of trust and, ultimately, in exclusion from further exchanges . . ." ¹⁵³ "Lawyers who do not supply their 'quota' of guilty pleas and contest every case are subjected to 'the bare bones of the legal system'." ¹⁵⁴ Therefore defence lawyers must guard against influencing an accused to plead guilty simply to maintain a bargaining relationship with the prosecutor.

(v) *Other Factors.*

Another factor which will affect the extent, if any, of prosecutorial plea bargaining is the publicity or notoriety a case has received. For example, if the news media have given considerable coverage to a senseless murder which occurred during the course of a petty robbery, it is unlikely that the Crown will bargain. But conversely, where cases are not so well known and have low visibility, which is true of most cases, the motivation to achieve results through bargaining will be stronger.

From this description of the motivations of prosecutors to engage in plea bargaining, the advantages of the practice, as seen by prosecutors, have been described. But upon examination, these alleged advantages either do not flow from plea bargaining but from guilty pleas, or they are advantages that can be secured without resorting to plea bargaining. They also ignore the very serious disadvantages brought about by plea bargaining in the context of the criminal justice system as a whole.

(c) *Advantages to Society.*

In regard to the interest of society in the administration of justice, it has been urged that plea bargaining is advantageous because it saves a great deal of time and money from being spent on long trials, and expedites the trial for other cases, and allows for proper consideration to be given to serious cases. However, by now it should be clear that all of these advantages are not advantages of plea bargaining *per se*, but rather they are advantages of the guilty plea process. And, as already argued, a high

¹⁵³ *Op. cit.*, footnote 7, p. 77.

¹⁵⁴ *Ibid.*, p. 80.

number of guilty pleas can be obtained without the aid of plea bargaining and without its disadvantages too.

It has also been argued that plea bargaining is in society's interest because it aids law enforcement by allowing "bargained for" leniency in exchange for the accused's co-operation in the arrest or prosecution of other offenders. No doubt, if kept within limits, leniency in exchange for information and assistance can be of benefit to society, but it is a practice that is in no way dependent upon plea bargaining. In other words, prosecutors can grant leniency to an informer by reducing or withdrawing charges without requiring a plea of guilty on the lesser charge as part of the bargain or agreement. Likewise, the prosecutor can request the court to grant leniency and make certain representations as to sentence in exchange for information or assistance regardless of how the accused pleads. Thus, if leniency is granted separate and apart from an accused's decision as to plea, by definition there has been no "plea" bargaining, and the disadvantages inherent in "plea" bargaining cannot occur.¹⁵⁵

Finally, it has been argued that plea bargaining is in society's interest, and, more particularly, in the victim's interest, because it avoids the necessity of a public trial which could be harmful or embarrassing to the victim or the victim's family. For example, in some cases of rape it might be psychologically harmful for a victim to have to go through a trial where she will be required to publicly recall all the circumstances of an ugly incident she would rather forget. Likewise, it could be disruptive to a rape victim's life to have to publicly testify to an event which occurred perhaps two years ago and is unknown to many of her current associates. In such cases the thrust of the argument is that it would be better to consider the interests of the unwilling victim and permit a bargain with the accused for the entry of a guilty plea on a reduced charge or in exchange for a sentence concession.

While this situation presents perhaps the strongest argument in favour of plea bargaining, there are still other factors to be considered. First, situations of wanting to protect victims from the exigencies of a full trial seldom arise. In fact it is the exceptional case. It is confined to sexual crimes and even then only to cases where accused persons have decided to plead not guilty, and even for these cases the present experience is that most victims are willing to testify despite personal feelings or concerns. Second, it is in just this kind of case that the abuses of plea bargaining are most in evidence. There is the serious risk that in an effort to comply with a victim's reluctance to be a witness at trial a prosecu-

¹⁵⁵ The exchange of information for leniency may have some problems of its own; but it does, at least, avoid the abuses inherent in plea bargaining.

tor will offer a deal so attractive as to induce a guilty plea from an innocent accused. Then there is the risk that accused persons will be treated differently and receive different sanctions not because of differences as to the gravity of the offences but simply because in one case the victim was made of sterner stuff than the victim in another. Third, for all cases that might come within this category a procedure already exists in the Criminal Code that allows for witnesses to give evidence in private.¹⁵⁶ And in balancing out all factors it would seem that this procedure is a sound and reasonable solution for dealing with the problem of the sensitive victim or witness and not the medium of plea bargaining.

(d) *Advantages to Defence Counsel.*

While it has even been argued that plea bargaining carries advantages for defence counsel, upon examination they are really advantages accruing to accused persons and not to counsel. For example, the suggestion that plea bargaining allows a defence counsel to obtain a better result than might be obtained at trial is a benefit, in so far as it is real, for the accused and not for his counsel. The possibility that defence counsel might feel pleased with such a procedure because it opens up another avenue for obtaining a beneficial result is irrelevant; criminal procedures are not created for the benefit of lawyers.

In fact those advantages of plea bargaining that might accrue only to defence counsel run the risk of bringing defence lawyers into conflict with their clients and with their role in the criminal justice system. For example, plea bargaining resulting in a guilty plea to a reduced charge may appeal to an unscrupulous lawyer as a means of getting rid of an unwanted, unprofitable, or unduly difficult case. In fact unwittingly a defence counsel could respond to the practice of plea bargaining by putting undue pressure on an accused to plead guilty to a charge, rather than go to trial. In noting this possible pressure on an accused to plead guilty, Professor Hooper has suggested that it may occur for two main reasons:

First, if counsel receives a set fee whether there is a trial or not, he has no direct financial incentive to have a trial once the fee has been received and if he receives no fee (or a reduced fee) there will be a temptation to do as little work as possible. Secondly, if the success of a defence counsel in his future plea negotiations depends upon his having good relationships with the police, court officials, prosecutors and judges, there will be a strong pressure on him to do what he thinks they want, for instance, plead his client guilty so that the machine will not slow down.¹⁵⁷

¹⁵⁶ S. 442.

¹⁵⁷ *Op. cit.*, footnote 142, at pp. 461-462 (footnotes omitted).

In conclusion, while there might be some debate as to the value of some of the other alleged advantages of plea bargaining, the arguments in favour of the practice are clearly not assisted by the suggestion that plea bargaining holds out advantages to defence counsel.

3. *Disadvantages of Express Prosecutorial Plea Bargaining.*

(a) *The Impropriety of Plea Bargaining.*

In examining the legal writings and judicial decisions on plea bargaining it is surprising to discover that the question of the propriety of the practice has been ignored.¹⁵⁸ Most authors have indicated that plea bargaining has its disadvantages, but few have questioned whether the practice is proper or improper *per se*. Yet it seems that this question is of such fundamental importance that it can hardly be ignored. In fact perhaps it ought to have been discussed separately like the necessity question. However, since our own conclusion on the propriety question is that plea bargaining is improper, we decided to begin the analysis of the disadvantages of the practice with this issue.

English criminal procedure systems have always had as their principal aim or purpose the determination of innocence or guilt,¹⁵⁹ although the methods for that determination have varied. In early English history guilt or innocence was, in theory, decided by God through the medium of trial by ordeal.¹⁶⁰ With the abolition of this form of trial in 1215, an alternative method of determination of innocence or guilt had to be established. The source of our modern trial system begins at this stage. Unlike other European countries, England concentrated on the use of laymen in its creation of an alternative system, in part as a result of the Magna

¹⁵⁸ The best analysis is in Newman and NeMoyer, *op. cit.*, footnote 6, at p. 70. Other shorter analyses appear in Newman, *op. cit.*, footnote 40, at pp. 38-42 and Note, *op. cit.*, footnote 4, at pp. 878-882. These latter two references do not discuss in any detail whether plea bargaining is contrary to the principles of Anglo-American criminal procedures. See also Arnold, *Law Enforcement—An Attempt at Social Dissection* (1932), 42 Yale L.J. 1, at pp. 13-19.

¹⁵⁹ Some might argue that the main purpose of criminal procedure is to provide a theater for the "acting out" and reinforcing of important social values. See Arnold, *op. cit.*, *ibid.*, at pp. 9-11. Although this is an important purpose, we do not believe it can be placed ahead of the purpose of fairly determining innocence or guilt. If, in fact, it was the *main* purpose, all criminal procedure should be designed in order to achieve this aim more effectively—i.e., televised trials, more public trials and fewer guilty pleas, more public involvement in the trial process (more jury trials or the use of lay assessors), and less concern for sophisticated evidentiary and procedural safeguards which are designed to protect the innocent, but also make the trial a more complicated and therefore a less effective morality play for the public.

¹⁶⁰ W. Walsh, *A History of Anglo-American Law* (2nd ed., 1932), pp. 300-304.

Carta signed in 1215 which guaranteed the right to trial by one's peers. "One body of laymen (ultimately the grand jury) was charged to present accusations against suspects. . . . Another body of laymen (ultimately the petit jury) was to ascertain the truth or falsity of the accusation."¹⁶¹ The historical development of this embryonic seed into our modern trial process, both jury and non-jury, shows a clear progression of procedural and evidentiary safeguards aimed at ensuring that no innocent man is convicted. In other words, the adage that it is better that 100 guilty men go free than one innocent man be convicted has been the theoretical base for the historical development of our modern trial. The safeguards protecting against the risk of convicting an innocent accused include the presumption of innocence, the burden of proof on the prosecution to prove guilt beyond a reasonable doubt, the right to cross-examine prosecution witnesses, and the right to legal representation.¹⁶² Likewise the concern in the United States with due process values reflects the desire to ensure that the trial process protects the innocent from conviction as well as ensuring that the conviction of the guilty is fair, that is balanced against such values as human dignity, privacy, and freedom.

Along with the trial system, the plea of guilty was introduced¹⁶³ as a means whereby an accused person could admit guilt and be punished to avoid delay or the expense of a trial, and to show repentance for wrong-doing. However pleas of guilty were not permitted in capital cases, which once were many¹⁶⁴ and this rule still obtains in Canada.¹⁶⁵ But more importantly it became established at common law that for a plea of guilty to be valid it had to be "express and voluntary".¹⁶⁶ This requirement reflected an interest in obtaining only reliable pleas of guilty, that is to say, pleas of guilty that truly reflect the guilt of an accused as it would be shown at trial in accordance with all of the safeguards provided to protect against the risk of false convictions.

Thus, in the development of our system of criminal procedure, whether for trials or the entry of guilty pleas, since the principal aim of the system has been to convict the guilty without also convicting the innocent, plea bargaining is inherently improper because it offends against this aim. In offering benefits or con-

¹⁶¹ G. O. W. Mueller and F. Griffiths, *Comparative Criminal Procedure* (1969), p. 4.

¹⁶² W. Holdsworth, *History of English Law*, Vol. 9 (1926); M. Radin, *Handbook of Anglo-American Legal History* (1936), pp. 219-234; Walsh, *op. cit.*, footnote 160, pp. 300-304.

¹⁶³ On the history of the guilty plea, see Cooper, *op. cit.*, footnote 28, pp. 429-434.

¹⁶⁴ Holdsworth, *op. cit.*, footnote 162, p. 179.

¹⁶⁵ *Criminal Code*, s. 634(3).

¹⁶⁶ *Powtler's Case* (1610), 11 Co. Rep. 29a, 77 E.R. 1181.

cessions to accused persons in order to secure guilty pleas, plea bargaining encourages both the guilty and the innocent to plead guilty. As to the innocent, there may be some incriminating evidence making conviction at trial a distinct possibility. Also, an innocent accused may have a record of convictions for previous offences and may be concerned that this fact will become known should a full defence be pursued. By themselves these factors can pressure an accused into foregoing a trial. But they may become pressures that are impossible to withstand in a plea bargain system, particularly where the bargain offered is large; in short, as the concession or inducement increases, so also does the risk of causing an innocent person to plead guilty.¹⁶⁷

It has been argued however that this disadvantage is overplayed, that safeguards can be used to reduce the risk of inducing innocent people to plead guilty, and that it is not a disadvantage which is great enough in nature or extent to render improper all plea bargains—the overwhelming majority of which are only with guilty persons. It has also been argued that “although there is no such thing as a beneficial sentence for an innocent defendant”,¹⁶⁸ there likewise is no guarantee that an innocent defendant will always be acquitted at trial.¹⁶⁹ Thus, it has been argued that a lenient sentence for an innocent defendant on a negotiated plea is better than a heavier sentence for an innocent defendant who has been wrongly convicted at trial. Moreover, it has been argued that the abuse of causing innocent persons to plead guilty seldom occurs and, at any rate, the real question is not how many innocent persons plead guilty, but rather how many innocent persons who would likely be acquitted at trial plead guilty.¹⁷⁰ In this perspective,

¹⁶⁷ See for example, *R. v. Nelson* (1919), 32 C.C.C. 75 (S.C. Alta). In this case, on a charge of stealing a heifer, the accused was appealing a denial to have his plea of guilty changed to a plea of not guilty. In support of his application he swore that “he was innocent of the charge and that he pleaded guilty because he understood that two other men who were in custody on charges respectively of stealing and receiving this same heifer had made statements to the police implicating him in the theft, and he thought that it would be impossible for him in the face of their evidence to escape conviction. . . . Both of the other men had made statements to the police implicating the accused but one of them, Moore, after the defendant’s plea of guilty, made an affidavit stating that that part of his confession which implicated the defendant was false, that the defendant had bought this animal from him, and that he had accused him of its theft because he had refused to pay the balance owing on it, and had assaulted him when he asked for it”. *Ibid.*, at p. 77. Although the magistrate did not believe this story, the case does illustrate why an innocent accused might plead guilty especially if he thinks he will be treated leniently by pleading guilty.

¹⁶⁸ Note, *Official Inducements to Plead Guilty: Suggested Morals for the Market Place* (1964), 32 U. Chi. L. Rev. 167, at p. 181.

¹⁶⁹ See E. Borchard, *Convicting the Innocent* (1932), p. 146.

¹⁷⁰ See Enker, *op. cit.*, footnote 40, at p. 113.

with the safeguards of right to counsel and a judicial inquiry into the factual basis for the guilty plea,¹⁷¹ this disadvantage is said to be minimal. In an English study by McCabe and Purves, the authors concluded that this disadvantage of plea bargaining was, in England, only a disadvantage in theory, not in practice.¹⁷² In addition, they argued that: "However concerned academic observers may be, the offenders themselves do not seem to see the bargaining process as a source of injustice."¹⁷³ It should be noted, however, that this argument was based on the opinion of *guilty* persons who had plea bargained, not on the opinion of any *innocent* persons who had plea bargained.

But against this opinion, an American author contends: ". . . the truth is that we just do not know how common such a system is"¹⁷⁴ (of innocent accused persons pleading guilty because of plea bargain inducements). Still other writers have gone further and asserted that this disadvantage is perhaps the strongest, single indictment against plea bargaining. Alschuler maintains that "the greatest pressures to plead guilty are brought to bear on defendants who may be innocent", that is, generally "the sentence differential between guilty-plea and trial defendants increases in direct proportion to the likelihood of acquittal".¹⁷⁵ In other words, the more likely it is that an accused is innocent, at least

¹⁷¹ At present, an enquiry into the factual basis of a plea is not normally made, especially when an accused has counsel. See *Rex v. Milina*, [1947] 1 D.L.R. 124, at pp. 130-131, approved in *Brosseau v. The Queen*, *supra*, footnote 4:

"But however that may be, it is desirable to state now quite plainly that in my opinion when an accused person pleads guilty it is not the law that the Magistrate must go into the facts in order to satisfy himself that the accused is in fact guilty. If that were so there would be an end at once to any efficacy in a plea of guilty.

What the quoted language does mean is that upon a plea of guilty the Magistrate should satisfy himself that the accused knows exactly what he is doing when he so pleads, and knows and understands the exact nature of the offence with which he is charged. . . . The cases will be rare indeed in which a Magistrate will feel himself obliged to make any special enquiry when the accused, as here, is represented by counsel. The circumstances which are contemplated by the expression used in the above cases are those in which the accused may be a foreigner, or illiterate, or the charge is one of unusual complexity or of an unusually grave nature".

¹⁷² *By-Passing the Jury: A Study of Changes of Plea and Directed Acquittals in Higher Courts* (Occasional Paper No. 3, 1972), p. 23. The authors base this conclusion on their study of 90 cases and Newman's sample of 97 cases, neither of which included any innocent persons who had pleaded guilty.

¹⁷³ *Ibid.*, p. 24. Again this conclusion is based on one small study conducted nearly twenty years ago. Professor Grosman, in quoting from a letter from an inmate, suggests that inmates are not happy with present plea bargaining practices (*op. cit.*, footnote 7, p. 103).

¹⁷⁴ *Enker, op. cit.*, footnote 40, at p. 113.

¹⁷⁵ *Op. cit.*, footnote 115, at p. 60.

in the sense of the chances of gaining an acquittal, the more likely it is that the prosecutor will offer a greater inducement to obtain a conviction on at least some charge.¹⁷⁶ In turn the greater the inducement the harder it is even for an innocent offender to refuse to plead guilty.

In sum, it would seem that the argument that plea bargaining can lead to the conviction of more innocent persons than the trial process remains as a serious indictment of the plea bargain process. As one American judge noted:¹⁷⁷

Few accused persons whose guilt is debatable—*e.g.* because their case presents for resolution a debatable value judgment of the underlying facts, or a debatable issue of credibility, or of inferences to be drawn from circumstantial evidence—would decide the debatable issue against themselves, and by pleading guilty forego a more favorable jury or trial judge appraisal, unless influenced to plead guilty by the belief or hope that they may thereby obtain an advantage otherwise unobtainable. An accused person whose guilt is debatable and who pleads guilty to a lesser offence in expectation of leniency is not merely appraising the evidence. His plea reflects not only a value judgment of the evidence, or, to be more precise, the anticipated evidence, but also an appraisal of the alternatives offered him.

In essence, plea bargaining increases, enhances, or confirms "the belief or hope" that "an advantage otherwise unobtainable" will be obtained and for that reason alone is improper.

It may also be argued that plea bargaining is improper for other reasons. First, by definition, all plea bargaining involves a concession from the Crown in exchange for a guilty plea. But the issue is whether our system of justice should permit the offering of concessions in order to prove guilt. For example, it may be doubted whether there is any real difference between a threat to "throw the book" at a defendant if he should plead not guilty, which is clearly unacceptable, and a promise by a prosecutor to recommend probation, or to substitute a lesser charge if the accused should be willing to plead guilty.¹⁷⁸

Second, it may be argued that plea bargaining is improper because it introduces an improper element into the prosecutor's exercise of discretion concerning the appropriate charge or charges on which to proceed. In our system the prosecutor is to proceed on the charge justified under the circumstances of the case and not on some lesser charge simply to save the time or money of a trial. Because through plea bargaining, it has been suggested:

If the negotiated charge concession is not justified by the merits, then the injury is to society [lack of protection and a reduction in general

¹⁷⁶ For examples, see Alschuler, *ibid.*, at pp. 61-65.

¹⁷⁷ *People v. Byrd*, *supra*, footnote 136, at pp. 788-789 (footnote omitted).

¹⁷⁸ Newman and NeMoyer, *op. cit.*, footnote 6, at pp. 374-375.

deterrence]. If a charge concession justified by the merits can only be obtained by waiver of a jury trial, then it is the defendant who is unjustly importuned, it is the constitutional right which is tarnished. If the concession is illusory rather than real, *e.g.*, a reduction in charge but no reduction in sentence, the trial judge sentencing just as he would on the greater offense, then, frequently, the defendant has been misled into giving up his right to a trial.¹⁷⁹

In analyzing this argument Professor Newman suggests that the propriety of plea bargaining depends upon the prosecutor's motivation for bargaining. He suggests that plea bargaining is intrinsically improper if the prosecutor bargains for a guilty plea under one or more of the following conditions: solely because the evidence is too weak to convict, solely to avoid increased case backlogs, or solely out of fear or dislike for defence counsel. On the other hand, he argues that plea bargaining is proper if the prosecutor's motivation is to avoid a harsh mandatory sentencing law, or to avoid a conviction for a serious crime where a conviction is not really warranted under the circumstances, or to reward the accused for his co-operation in the arrest and prosecution of other offenders.¹⁸⁰ However, in reply to Newman's analysis, it has already been contended that his three "proper" motivations can be achieved by appropriate charge reductions or withdrawals without any bargaining as to plea.

Third, it may be argued that plea bargaining is inherently improper because, to a large extent, it results in the prosecutor usurping the sentencing function of the judge and in exercising that sentencing function for reasons that do not comport with accepted sentencing standards. Again this problem was discussed earlier.¹⁸¹

Fourth, it may be argued that plea bargaining is improper because it allows the accused to use a fundamental safeguard of criminal procedure as a bargaining tool. The accused has a right

¹⁷⁹ *People v. Byrd*, *supra*, footnote 136, at p. 796 (footnote omitted). Historically, plea bargaining, or at least the compromise of criminal cases, has been considered improper. "In theory there should be no compromise of criminal cases. So careful is the law to guard against such practices that there has been created a special crime, called compounding crime, which denounces the acceptance of anything of value in consideration of a promise not to prosecute one guilty of crime. The crime may be committed by the injured person by merely agreeing not to prosecute in consideration of the return of stolen goods by the thief; and it may be committed as well by one not the injured person. This crime has been called a conspiracy to prevent public justice". Miller, *The Compromise of Criminal Cases* (1927), 1 S. Cal. L. Rev. 1 (footnotes omitted). But see generally Arnold, *Law Enforcement—An Attempt at Social Dissection* (1932), 42 Yale L.J. 1. In Canada, see Criminal Code, ss 108, 109 and 127 dealing with the interference, obstruction or perversion of justice. See also Klein, *op. cit.*, footnote 16, at pp. 291-293.

¹⁸⁰ See Newman and NeMoyer, *op. cit.*, footnote 6, at pp. 400-403.

¹⁸¹ See text *supra*, at footnotes 108 and 109.

to trial wherein his guilt must be proven beyond a reasonable doubt. But in plea bargaining, by use of his right to trial the accused acquires the status of a bargainer, a position which is contrary to the theoretical framework of our procedure. The accused is not supposed to have anything with which to bargain. The tools of our criminal procedure, the right to trial and the safeguards therein provided, and the guilty plea, were not established in order to place the accused in a bargaining position and it is improper for the system to encourage or permit the accused to use them for that purpose.¹⁸²

Should these arguments outlining the inherent impropriety of plea bargaining be sound, there is only one solution: abolition.¹⁸³ In effect, there can be no question of controlling or limiting plea bargaining because there are no controls or limits which would completely remove these inherent improprieties of the practice.

(b) *The Voluntariness of Bargained for Guilty Pleas.*

The second major criticism against plea bargaining concerns the effect of the practice on the voluntariness of guilty pleas. Most observers of our system accept the proposition that a plea of guilty should be entered freely and voluntarily. In fact there is authority to the effect that it is unacceptable to receive a guilty plea that is entered as a result of promises or threats made to an accused by a person in authority.¹⁸⁴ Of course, the requirement that a guilty plea be freely and voluntarily made has not attained the same formalism as the "voir dire" hearing to determine the voluntariness of a confession. But this omission is more a consequence of not perceiving a problem in the reception of guilty pleas than an altering of the legal theory that guilty pleas should be voluntary. However, plea bargaining upsets this assumption of legal theory. In reality all bargained for guilty pleas are involuntary because by definition plea bargaining involves a promise of advantage if a guilty plea is entered and a threat of more serious

¹⁸² See Cooper, *op. cit.*, footnote 28, at pp. 433-434. In Canada, the accused often bargains with the prosecutor concerning charges and this bargaining is generally not controlled or supervised by the judiciary as it is in England. Thus, in Canada, at least, the accused has the status of a bargainer. See Klein, *op. cit.*, footnote 16, at pp. 293-298, for a discussion of the differences in judicial supervision over the "charging" process in England and Canada.

¹⁸³ This is the conclusion that the U.S. National Conference on Criminal Justice arrived at in their Report. *Op. cit.*, footnote 15, Ct-42-45.

¹⁸⁴ See, e.g. *Regina v. Gagne*, *supra*, footnote 5, at pp. 98-100 (dissenting opinion); *Guerin v. The King*, *supra*, footnote 5, at p. 352 (per Walsh, J.). *Colligan v. The Queen*, *supra*, footnote 5; *Regina v. Ballegeer*, [1969] 3 C.C.C. 353, at p. 354 (Man. C.A.); *Regina v. Behr*, *supra*, footnote 5, at pp. 4, 7; *Regina v. Tennen*, [1959] O.R. 77, at p. 84, 122 C.C.C. 375, at p. 382 (Ont. C.A.).

consequences if the proffered advantage is rejected and a not guilty plea entered.

As might be expected not everyone is in agreement with this analysis of the involuntariness of guilty pleas resulting from plea bargaining. It has been argued that voluntariness in relation to guilty pleas means simply that the accused is entitled to understand the nature of the charge and the consequence of a plea of guilty.¹⁸⁵ Therefore, by this standard the concern that an accused should be free from pressure in determining how to plead is rejected. One American commentator has argued that there are good reasons why the voluntariness standards for confessions and guilty pleas should be kept separate. Enker has written:¹⁸⁶

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

Also, the particular inducements held improper in the coerced confession cases usually appear against a background of lengthy interrogation and other pressures to confess, factors not usually present when the same inducement is offered for a guilty plea. And in the confession cases, the defendant succumbed to the inducement without the advice of counsel. Any valid system of plea negotiations would presumably require that the defendant have counsel for this and other reasons. Finally, the coerced confession cases must be viewed against the background of secrecy in the interrogation room and the recurring conflict of testimony between police and defendants over whether more serious "inducements" had been offered. Under such circumstances, the very ambiguity and flexibility of the term "voluntariness" made it easy for skeptical courts to grab onto a conceded inducement, albeit a minor one, and hold that this inducement standing by itself rendered the confession involuntary. The coerced confession cases, then, are hardly controlling with respect to plea bargaining which occurs in a wholly different context, despite the similarity of the legal formula.

But while these reasons point out the differences between the situations for confessions and guilty pleas, the fact remains that plea bargaining exerts pressure on accused persons to plead guilty and because of the risk involved in coercing the wrong people to

¹⁸⁵ See, e.g. *Brosseau v. The Queen*, *supra*, footnote 4. However presumably anyone prepared to argue this position would nonetheless agree that a guilty plea exacted by physical threats is invalid.

¹⁸⁶ *Op. cit.*, footnote 40, at pp. 116-117 (footnotes omitted). See also Note, *op. cit.*, footnote 4, at p. 884 for an additional argument. But see *People v. Byrd*, *supra*, footnote 136, at pp. 778-779, n. 25 for an extensive criticism of this additional argument.

plead guilty, that is innocent accused,¹⁸⁷ and the effect an involuntary plea may have on the later treatment and rehabilitation of even the guilty accused, such pressure should be avoided. In conclusion, while a distinction might be drawn between improper inducements to plead guilty such as threats, false promises or misrepresentations, and inducements proper by their nature, such as promises that are kept as to sentence recommendations or charge reductions,¹⁸⁸ it is likely that in either case the accused will still feel the same pressure to plead guilty. Thus, guilty pleas are untrustworthy and the system of justice demeaned whichever kind of pressure is applied and so it is a distinction that is without any real merit.

(c) *Other Disadvantages of Plea Bargaining.*

In addition to the two main disadvantages just described there are a number of others which were indicated in our discussion of the alleged advantages of plea bargaining and in the discussion of the propriety and voluntariness issues. They will now be outlined below.

(i) Plea bargaining brings discredit on the criminal process by fostering the attitude that justice can be "bought" and that it is just a matter of knowing how to manipulate the system. This attitude reflects badly on everyone involved in the process. Moreover it is not at all conducive to the rehabilitation of the convicted accused.¹⁸⁹

(ii) Plea bargaining places defence counsel in a dilemma. On the one hand counsel is obliged to serve the best interests of the accused and that may mean resisting plea bargain overtures of the prosecution. Yet, on the other hand, counsel will want to maintain a good relationship with prosecutors in order to receive discovery

¹⁸⁷ It has been argued that in fact the standard of voluntariness for guilty pleas should be higher than that for confessions because a guilty plea amounts to a conviction whereas a confession is only one fact in a larger trial. See, e.g. *U.S. ex rel. Codarre v. Gilligan* (1966), 363 F. 2d 961, at p. 966 (2nd Cir.) cited in *People v. Byrd*, *supra*, footnote 136, at pp. 778-779, n. 25 where this view is expressed.

¹⁸⁸ See e.g. *Shelton v. United States* (1957), 246 F. 2d 571, at p. 572, n. 2 (5th Cir.):

"... a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes)."

Roach J. A., in *R. v. Tennen*, *supra*, footnote 184, at p. 83 (O.R.), aff'd 125 C.C.C. 336, 32 C.R. 301, [1960] 5 S.C.R. 302 limits "voluntary" to any improper inducements or threats rather than all inducements or threats.

¹⁸⁹ See text *supra*, at footnotes 116-126.

of prosecution cases and this may mean that from time to time a goodly number of guilty pleas will have to be entered.¹⁹⁰

(iii) In criminal law systems where plea bargaining is common, police and prosecutors tend to over-charge in order to secure the most favourable bargaining position. But over-charging encourages charge and plea conferences between the prosecution and the defence where plea bargaining is even more likely to occur. Thus plea bargaining which is itself a distortion of the criminal process tends to promote other distortions.

(iv) Plea bargaining not only permits prosecutors to usurp the sentencing function of the courts, a criticism already made, but the fact finding function of the courts as well. Of course, even without plea bargaining the accused can avoid the fact finding process by guilty pleas. But when a prosecutor offers to reduce a charge on the condition that the accused will plead guilty to it, and but for the offer the accused would have pleaded not guilty, the prosecutor is removing the decision of guilt or innocence from the courts:

By offering the concession only in exchange for a plea of guilty the prosecutor goes beyond the charging function and, by foreclosing trial review of his evaluation, in effect passes judgment on the accused as well. However convinced the prosecutor may be of the defendant's guilt, it is the function of the trier of fact, and not of the prosecutor, finally to pass upon the accused's guilt.¹⁹¹

(v) Plea bargaining results in unjustifiable sentencing disparity. First, an offender who is inexperienced, unrepresented, or poorly represented may plead guilty without obtaining a bargain from the prosecutor and thereby receive a greater sentence than if he had bargained. When such an offender later learns, usually from other offenders, that he missed a possible bargain, he may be disgruntled and less receptive to rehabilitation. He may thereby become a greater disciplinary problem for correctional authorities.¹⁹² Second, in a case where the prosecution evidence is weak, the prosecutor may significantly increase his charge or sentencing

¹⁹⁰ See text *supra*, at footnotes 153-154.

¹⁹¹ *People v. Byrd*, *supra*, footnote 136, at p. 784.

¹⁹² See Newman, *op. cit.*, footnote 40, at p. 43:

"Differential opportunity for plea negotiation typically results in disparate sentences, a major problem for correctional authorities. In prison, particularly, offenders quickly learn of this 'cop out' process and quite obviously compare their own sentences with those of other inmates guilty of similar crimes. It is a difficult correctional task to convince an inmate to accept a sentence perhaps three times as long as that of another who has successfully bargained. Not only is he likely to be embittered by his conviction, but the major lesson he learns is not remorse but that the system can be manipulated by the knowing offender. The consequence is that he is far from a good prospect for rehabilitation".

offers. To take the crime of rape as an example, in a case where the evidence is strong, an accused may get ten years whereas, in a case where the evidence is less compelling, the accused may be able to bargain for indecent assault and a recommendation of two years. But the first offender will look to the vagaries of the bargain system as his impersonal nemesis and feel discriminated against. Third, since plea bargaining depends on a reciprocal relationship between defence counsel and the prosecutor, there can be great disparity in sentencing treatment depending upon the choice of counsel. Where there is a bad relationship between the prosecutor and the defence counsel or none at all, an accused may be deprived of the opportunity for a bargain. This same problem may appear at trial where one accused is better represented than another but room for gross disparity is greater in the administrative and invisible system of plea bargaining. Fourth, since plea bargaining is not endorsed by all prosecutors, an accused may be treated more harshly if he is prosecuted by a prosecutor who does not bargain.

(vi) Plea bargaining tends to encourage the suppression of important legal issues and rights. Of course the vehicle by which the suppression occurs is the guilty plea and not plea bargaining. But in a plea bargain system the more likely it is that a serious issue or right will be raised at trial the more likely it will be that the prosecution will seek to avoid it by engaging in plea bargaining and by inducing a guilty plea to a lesser charge.¹⁹³

(vii) The typical arraignment session may produce cynicism on the part of both the participants and observers when an accused denies that any promises were made to him when everyone either knows or strongly suspects that promises have in fact been made in exchange for a guilty plea. This *sub rosa* nature of plea bargaining contributes to an aura of corruption. In addition, lawyers may not attempt to disabuse a client of such notions and, on occasion, may even foster or encourage them.¹⁹⁴ In this respect, Professor Grosman recorded the opinion of one prosecutor as follows:¹⁹⁵

Certain defence counsel will come into your office and say, "good morning, lovely day", and then will go out and see their client and say to their client, "I've just paid off the prosecution and that will be another

¹⁹³ See, e.g. *Regina v. Ballegeer*, *supra*, footnote 184, where the accused made a signed confession after being expressly denied counsel by the police. The accused pleaded guilty in court without counsel feeling his signed confession committed him to enter a plea of guilty. On appeal, his conviction was quashed, and a new trial was ordered since his confession, and thus his guilty plea, had been induced as a consequence of a denial of counsel. For other examples of how an illegal confession could induce a guilty plea, see *Rex v. McNeil*, and *Regina v. Gagne*, *supra*, footnote 5.

¹⁹⁴ Newman and NeMoyer, *op. cit.*, footnote 6, at pp. 397-398.

¹⁹⁵ *Op. cit.*, footnote 7, p. 77. See also, p. 88.

two hundred dollars". These same defence lawyers will do the same thing with a magistrate. They'll go in to see him, say, "Good morning", walk out, and tell their client that they've just spoken to the magistrate and they require another two hundred dollars

(viii) Plea bargaining is often an irrational process. Most of the motivations that lead prosecutors to bargain—time, expense, difficulty of the case and so on are completely unrelated to the proper questions concerning innocence or guilt and, if guilt, the appropriate sentence.

(ix) Plea bargaining can result in illogical charge concessions. For example, a robbery charge may be reduced to simple theft or assault, when circumstances clearly indicate robbery.¹⁹⁶ This results in a disparaging of the whole system and of the rule of law if the concession is not warranted by the evidence. Moreover, in such cases the correctional authorities and parole board may be misled as to the seriousness of the accused's conduct.

(x) Plea bargaining imposes its own peculiar problems which will require solution if some form of the bargain system were to be retained. Already the case law in Canada reveals two dangers for accused persons who bargain. First, in *Regina v. Kirpatrick*¹⁹⁷ and *Regina v. Mouffe*¹⁹⁸ the Quebec Court of Appeal has indicated that on an appeal it will alter the terms of a bargain by increasing the sentence without first giving the accused the opportunity to withdraw his guilty plea. Thus should the prosecution become unhappy with a bargain it may appeal the sentence and violate its former plea bargaining position. Second, as a result of *Regina v. Draskovic*¹⁹⁹ in Ontario, an accused person who bargains directly may run the risk of offering evidence which could later be adduced against him on a trial should the bargaining negotiations break down.

¹⁹⁶ See, e.g. *Regina v. Doiron*, *supra*, footnote 4, where the accused was charged with robbery and assault, and on a plea of guilty to assault, the robbery charge was withdrawn. On appeal, the court stated: "Although it would seem probable from the evidence at the preliminary inquiry the accused stole a wallet containing a \$10.00 bill and some receipts from Saunders, and was therefore guilty of robbery, such circumstances cannot be taken into consideration in determining the proper sentence on the conviction for assault. . . ." *Ibid.*, at p. 159 (emphasis added).

¹⁹⁷ *Supra*, footnote 23.

¹⁹⁸ *Ibid.*

¹⁹⁹ (1971), 5 C.C.C. (2d) 186 (Ont. C.A.). In this case the court held that the accused's statement to a police officer—"I will plead guilty to those five charges if you will drop the other, you know, the armed robbery"—was "in no sense 'plea bargaining' but was simply a volunteered statement made by the accused to the detective, who had no authority to do anything other than report the making of the statement to someone else". *Ibid.*, at p. 188. The court's decision ignores the reality of police plea bargaining wherein the accused or his lawyer attempts to convince the police of the appropriateness of a deal in hope that the police will then influence the prosecutor to accept it.

No doubt the problems presented in these cases could be removed or resolved should plea bargaining be retained as a viable practice. But the resolution of these problems would still leave unanswered all of the other criticisms and disadvantages of plea bargaining, some of which, including the basic impropriety of the practice, appear to defy any resolution short of abolition.

C. *Judicial Plea Bargaining.*

For the purpose of analysis, judicial plea bargaining may be divided into two separate practices. The first is express judicial plea bargaining, and the second is tacit judicial plea bargaining.

1. *Express Judicial Plea Bargaining.*

Under this practice the judge directly participates, either with or without the prosecutor, in bargaining with the accused or his lawyer for a plea of guilty. The following quotation provides a somewhat outrageous example of express judicial plea bargaining that occurred in a Texas criminal court:²⁰⁰

I had a client who was pushing heroin out at [a local college]. Well, [a police captain] is out to get him. I try to plead him at five years, but the cop won't budge. The D.A. says, "I'm sorry, but [the captain] wants twelve years on this one, and I've got to give it to him." So I ask for a jury trial. Well, we've been in court all day on voir dire, and it looks like it's going to last a lot longer. So the judge calls me over and says, "What are you after on this case?" I say, "Five years." He says, "Will you settle for six?" I say, "No." He sits there for a while and then says, "Goddamn, you plead him".

In this instance the judge appears to have been motivated to bargain as a result of administrative pressure to dispose quickly of time-consuming cases.

Closer to home Professor Grosman has suggested that in terms of factors motivating plea bargaining, "administrative demands may influence the judiciary as much as the prosecution".²⁰¹ A judge might also be motivated to participate in plea bargaining out of a desire to achieve a compromise which seems more just under the circumstances.

However, despite these motivational factors, it is doubtful if there is any significant involvement of the Canadian judiciary in express judicial plea bargaining. Earlier we noted the case in Kingston, Ontario where thirteen inmates of the Penitentiary who were charged with murder abruptly entered guilty pleas to reduced charges of either manslaughter or assault. This about-face resulted in newspaper allegations that the guilty pleas were the result of ju-

²⁰⁰ Battle, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defence Attorneys* (1971), 50 Texas L. Rev. 60, at p. 94.

²⁰¹ *Op. cit.*, p. 103.

dicial plea bargaining.²⁰² However the trial judge emphatically denied these allegations stating: "I was not party to any deal".²⁰³ In general, no data exists which would indicate any judicial involvement in express plea bargaining and most judges themselves deny, or would deny if asked, that any such practice exists in Canada.

In the United States on the other hand, express judicial plea bargaining is not uncommon and this analysis will be based upon that experience.²⁰⁴ In some American states, defence counsel and the judge can and do bargain in the absence of, or in disregard of, the prosecutor. One American defence counsel has written:²⁰⁵

Yes, you can bargain with the judge sometimes [as a second source of plea bargaining]. It happens. It's not supposed to, but it does happen. The prosecution is more guilty of this than the defence. So you have to get your licks in, too. But this is only rarely done. You don't want to try to go behind the D.A.'s back very many times.

In regard to the propriety of express judicial plea bargaining, the majority view in England,²⁰⁶ Canada,²⁰⁷ and even the United States,²⁰⁸ is that it is a dangerous and unjust practice and should be prohibited. This view is held even in jurisdictions where some prosecutorial plea bargaining is countenanced, or at least tolerated.

In England, the Court of Appeal in *R. v. Turner*²⁰⁹ expressly forbade any judicial plea bargaining. In the judgment of the court Lord Parker ruled that:²¹⁰

²⁰² Toronto Globe and Mail, Monday, December 13th, 1971, p. 1; Ottawa Citizen, Monday, December 13th, 1971, p. 1.

²⁰³ Ottawa Citizen, *ibid.*

²⁰⁴ See, e.g., Note, Guilty Plea Bargaining: Compromises to Secure Guilty Pleas, *op. cit.*, footnote 4, at p. 905, where questionnaire results indicated that judges were present in about one third of all plea bargaining cases. See also A.B.A., Standards Relating to Pleas of Guilty, p. 72: "Although it is by no means the prevailing practice, it is not uncommon for trial judges to participate in plea discussions and to promise or predict certain concessions in the event the defendant pleads guilty. This is sometimes done in open court during what is called a pre-plea hearing, or it may occur during a pre-trial conference in the judge's chambers". See also, Newman, *op. cit.*, footnote 40, chaps 3 and 6.

²⁰⁵ Battle, *op. cit.*, footnote 200, at p. 93.

²⁰⁶ The Court of Appeal in England has expressly prohibited express judicial plea bargaining. See *R. v. Turner*, [1970] 2 All E.R. 281.

²⁰⁷ See, e.g., Ferguson, *op. cit.*, footnote 7, and 1969 Law Society of Upper Canada Special Lectures, *op. cit.*, footnote 16, at p. 307, where a panel of distinguished lawyers and judges unanimously agreed that "judges should not participate in the plea discussions of counsel and . . . should not be a part of a team negotiating a sentence".

²⁰⁸ See, e.g., Note, *op. cit.*, footnote 108, at p. 287, n. 5 where the authors, after examining the American material on plea bargaining, concluded: "The scholarly literature on plea bargaining reflects an almost total hostility to judicial participation in the bargaining process . . . The court decisions, however, present a somewhat more complicated picture . . . Nevertheless, the clear weight of authority seems to condemn judicial concessions as well."

²⁰⁹ *Supra*, footnote 206.

²¹⁰ *Ibid.*, at p. 285.

The judge should, subject to the one exception referred to hereafter, never indicate the sentence which he is minded to impose. A statement that, on a plea of guilty, he would impose one sentence but that, on a conviction following a plea of not guilty, he would impose a severer sentence is one which should never be made.

. . . What on occasions does appear to happen, however, is that a judge will tell counsel that, having read the depositions and the antecedents, he can safely say that, on a plea of guilty, he will for instance, make a probation order, something which may be helpful to counsel in advising the accused. The judge in such a case is no doubt careful not to mention what he would do if the accused were convicted following a plea of not guilty. Even so, the accused may well get the impression that the judge is intimating that, in that event, a severer sentence, maybe a custodial sentence, would result, so that again he may feel under pressure. This accordingly must also not be done. The only exception to this rule is that it should be permissible for a judge to say, if it be the case, that, whatever happens, whether the accused pleads guilty or not guilty, the sentence will or will not take a particular form, *e.g.* a probation order or a fine, or a custodial sentence. Finally, where any such discussion on sentence has taken place between judge and counsel, counsel for the defence should disclose this to the accused and inform him of what took place.

The reason given for this rule was that anything less stringent allowing for some judicial involvement "could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential".²¹¹ But it would seem that if this argument justifies banning judicial plea bargaining, it likewise must justify banning prosecutorial plea bargaining since prosecutorial plea bargaining can produce as much "undue pressure" as judicial plea bargaining or nearly as much. And even if it is less, the difference is one of degree not of kind and so the same reasoning applies to prosecutorial plea bargaining.²¹² However, even though in logic the reasoning applies to both forms of plea bargaining, most courts and commentators who have recommended the banning of express judicial plea bargaining on this ground have not also advocated the banning of prosecutorial plea bargaining.

There are other reasons that have been suggested for banning express judicial plea bargaining. First, express judicial plea bargaining would destroy the accused's and the public's view of the judiciary as independent and fair arbiters, aloof from "secret deals" and uncorruptible. In this regard, Chief Justice Gale of the Ontario Court of Appeal has commented:²¹³

It seems to me that if a judge allows himself to get into the arena he

²¹¹ *Ibid.*

²¹² See Ferguson, *op. cit.*, footnote 7, at pp. 34-37.

²¹³ 1969 Law Society of Upper Canada Special Lectures, *op. cit.*, footnote 16, at p. 311.

may do some good in the odd case, but in the long run he disparages himself and he disparages the administration of justice.

As well, one American judge has commented: "A judge's prime responsibility is to maintain the integrity of the judicial system; . . . The judge stands as the symbol of even-handed justice. . . ."²¹⁴

In regard to the effect of this practice on the accused, it has been suggested that the accused may view the judge as one more official to be "bought-off",²¹⁵ and this attitude is not at all conducive to engendering in the accused respect for law and for the administration of justice.

Second, it may be argued that express judicial plea bargaining should be banned because a judge who bargains may in fact lose his objectivity and impartiality. This can have at least two serious repercussions. In the first place, the judge is in no position to determine whether a bargained-for-plea is voluntary when he is an active party to the bargain. In such a case there would be good reason to doubt "the judge's impartiality, at least on an unconscious level, if he has been at all zealous in encouraging the accused to accept what, at least to the judge, looks like a good bargain for the accused".²¹⁶ Another, and perhaps more important repercussion in terms of impartiality, is the erosion of the presumption of innocence. Where an accused initially bargains with a judge but a bargain is not reached and the accused pleads not guilty leading to a trial before the same judge, it is quite possible that the judge will have negated, consciously or unconsciously, the presumption of innocence. This negation could then have a significant impact on any decision made during the trial. For example, if as a result of admissions made during plea negotiations the judge should believe an accused to be guilty of a crime and then the negotiations break down, the fact that the accused was considering pleading guilty to the main or lesser charges could affect the judge's decision at trial on the voluntariness of the accused's confession or on the amount of evidence necessary to establish proof of guilt beyond a reasonable doubt. Of course, these two problems could be solved if, in the case of receiving a guilty plea, the judge involved in the bargaining did not receive the plea and therefore did not have to be concerned about its voluntariness and, as to the second problem at trial, did not conduct the trial when a plea bargain was not reached. However, these solutions would severely strain the resources of the criminal law system and in many parts of

²¹⁴ *United States ex rel. Elksnis v. Gilligan* (1966), 256 F. Supp. 244, at p. 254 (S.D.N.Y.).

²¹⁵ Dash, *op. cit.*, footnote 111, at p. 395.

²¹⁶ Ferguson, *op. cit.*, footnote 7, at p. 42.

Canada, where only one or two judges are available, would just not be feasible.²¹⁷

Thirdly, it could be argued that express judicial plea bargaining should be banned because it may result in a judge binding himself to an inappropriate sentence at a time when he does not have a pre-sentence report or other relevant sentencing data.²¹⁸ This would leave the judge in the difficult position of either violating the bargain or adhering to it and imposing an inappropriate sentence. It is possible however that this particular difficulty could be avoided by the judge simply allowing the accused to change his plea if the bargained sentence is later felt to be inappropriate.

As a final argument against express judicial plea bargaining, it could develop that an accused would find it too difficult to reject a judicially offered bargain out of an apprehension that if he did reject it the judge would be annoyed and would not conduct a fair trial or would mete out a harsher sentence. While this could well be a false concern, if it is conceivable that an accused person would react this way, it is an argument against judicial plea bargaining that cannot be ignored.

While these arguments against express judicial plea bargaining may seem sufficiently compelling that this discussion could be concluded, there are arguments that have been advanced in favour of such a practice and in the interest of completeness they will be briefly mentioned. It has been suggested that bargaining:

Conducted or presided over by a judge may be less subject to administrative pressures than bargaining between the prosecutor and defendant. Secondly, it has been suggested that judicial bargaining may produce a sentence more appropriate to the crime, and thirdly, that judicial bargaining reduces the opportunity for the prosecutor to use coercive tactics.²¹⁹

However, as to all three of these arguments, it is clear that they

²¹⁷ See Ferguson, *ibid.*, n. 58.

²¹⁸ See A.B.A., Standards Relating to Pleas of Guilty, p. 73. See also, Note, *op. cit.*, footnote 108, at p. 296, n. 42.

The problem of the impartiality of a judge who rejects a plea bargain and then conducts the trial will be further aggravated, however, if that same judge is privy to all the information contained in a pre-sentence report before the trial even begins. This point further supports the argument that where a judge is involved in plea bargaining, the trial judge should not be the same judge who rejected the plea agreement or who permitted the accused to change a plea of guilty to a plea of not guilty.

²¹⁹ See Ferguson, *op. cit.*, footnote 7, at pp. 47-48, where these advantages are criticized:

"In the first place, judges are often subject to as much administrative pressure to prevent any increase in the backlog of cases as are prosecutors. As to the second and third advantages, if a judge conducts a full and proper inquiry before accepting a plea, then he will have enough information about the alleged crime to impose an appropriate sentence as well as to ensure himself that the prosecutor has not used coercive tactics". (footnotes omitted).

assume the validity of some form of plea bargaining and are directed to the question of which form would be best—bargaining by prosecutors or by judges. In addition they ignore the many serious disadvantages inherent in this form of plea bargaining.

It has also been argued that express judicial plea bargaining has the advantage of allowing the bargaining to be certain, that is, it avoids the drawback of the accused bargaining in the dark as is the case in bargaining with prosecutors.²²⁰ But once again this argument assumes the validity of plea bargaining and is only concerned with its form. As well, even accepting this assumption, with judicial plea bargaining the accused may still be gambling in the dark because while the judge may specify the sentence to be imposed on a guilty plea, it would be unlikely that he would specify the sentence that would be imposed upon a conviction after a trial. Finally, all of the disadvantages inherent in this form of plea bargaining would still obtain.

So far in this part our attention has been focused on the issue of express judicial plea bargaining. There is however, a related practice which should be considered. It is that of judicial ratification of a plea bargain, a practice which is accepted and endorsed by some of the same commentators who are opposed to express judicial plea bargaining. The practice may be described as follows: once the prosecutor and the defence have reached a bargain, then before the accused enters a guilty plea in accordance with that bargain, it is brought to the court for judicial approval. The case of the former Vice-President of the United States, Spiro Agnew, is perhaps the most celebrated example of this form of judicial plea bargaining.^{220a}

There would appear to be fewer disadvantages to this form of judicial plea bargaining than with express judicial plea bargaining.²²¹ There would seem to be less coercion on accused persons because judges would not be directly involved in making offers. The judicial role of independence would also be less compromised and the accused would have some certainty as to the precise bargain—because if the bargain were not acceptable to the judge the accused would then be able to plead not guilty and proceed to trial or negotiate with the prosecutor for a more acceptable deal.

However, as against these advantages, once again it is clear

²²⁰ See Lambros, *Plea Bargaining and the Sentencing Process* (1972), 53 F.R.D. 509, at p. 515. See also Note, *op. cit.*, footnote 168, at p. 183.

^{220a} Kress, *The Agnew Case: Policy, Prosecution and Plea Bargaining* (1974), 10 *Crim. L. Bull.* 80; Newman, *The Agnew Plea Bargain* (1974), 10 *Crim. L. Bull.* 85; Cohen and Witcover, *A Heartbeat Away* (1974), chap. II.

²²¹ See Note, *Judicial Participation in Guilty Pleas—A Search for Standards* (1971), 33 *U. Pitt. L. Rev.* 151, at pp. 157-158.

that this form of judicial plea bargaining implicitly accepts the validity of a plea bargain practice, and as already argued, the validity of that position is very much open to challenge. As well, judicial ratification of plea bargaining by prosecutors will likely be a cause of delay in the criminal process while acceptable bargains are determined. In some cases a number of court appearances may be necessary in order to review a proposed bargain, but then, if a bargain should be rejected and the accused enters a plea of not guilty and proceeds to trial, the presumption of innocence and the impartiality of the court would be compromised just as much as if the judge were directly involved in the bargaining. While in actual cases the judge may be able to forget the fact that the accused was prepared to plead guilty in exchange for some benefit it would seem impossible to avoid the appearance of compromise. Finally, all of the various disadvantages or criticisms of plea bargaining apply equally to this version of the practice.

In conclusion, the practice of express judicial plea bargaining has such serious disadvantages that nearly all commentators have argued that it should not be permitted. As for judicial involvement in the ratification of prosecutorial plea bargains, commentators have been less in agreement although many have argued that it is a reasonable solution to avoid some of the abuses and excesses that occur in uncontrolled plea bargaining. But of course this view is based on the premise that plea bargaining is all right so long as it is formalized, made visible, and controlled. However, both the premise and the method of control are open to question. The premise may indeed be false and perhaps the better approach would be to challenge it and to eliminate, insofar as it is possible, any form of plea bargaining. As to the method of control in judicial ratification of plea bargaining, it may still leave the judiciary in a compromised position.

2. *Tacit Judicial Plea Bargaining.*

In tacit plea bargaining the accused does not negotiate directly or expressly with the judge, but nonetheless a plea of guilty is entered because the accused thinks there is a court policy of giving lighter sentences to those who plead guilty. Thus, even though no express bargaining occurs, the elements of plea bargaining are still present: a benefit is offered in exchange for a guilty plea. But notwithstanding this similarity, the difference from express plea bargaining, centering on an absence of direct or express negotiation, is very important.

In Canada the courts have only ruled that they "may" take an accused's plea of guilty into consideration in granting leniency at the time of sentence. In addition, since the severity of a sentence

depends on a number of factors such as deterrence, rehabilitation, protection of the public, character of the accused, and circumstances of the offence, and since it is not common to specify which are the operative factors, an accused is seldom in a position to know if any leniency is received because of a guilty plea. Of course should a general policy develop of rewarding accused persons who plead guilty with lenient sentences, tacit plea bargaining would move closer to actual or express plea bargaining.

The question may be asked as to how extensive tacit judicial plea bargaining is in Canada. In two provinces the appellate courts have stated that a plea of guilty is a factor that a judge may take into consideration in granting leniency at the time of sentencing.²²² But in *Regina v. Spiller*²²³ it was held that while this approach could well be appropriate in some cases, it was not "a principle of universal application".²²⁴ In addition, in two separate Canadian studies it has been found that there is very little variation between the sentences imposed after a guilty plea and after conviction at trial.²²⁵

In the United States however, a significant sentencing difference between sentences upon guilty pleas and sentences after trial has been found. Some United States federal judges have estimated that the extent to which sentences are reduced because of the entry of guilty pleas varies from a minimum of ten per cent to a maximum of ninety-five per cent.²²⁶ In another report it was found that "the chances of getting probation are roughly two and one-half times as great if one pleads guilty to begin with as they are if one pleads not guilty and sticks to it".²²⁷

What reasons prompt a court to consider a plea of guilty as a mitigating factor in sentencing and are these reasons sufficient justification for the practice? In an excellent analysis written over fifteen years ago, the authors of a comment in the *Yale Law Journal* examined the reasons why a judge might feel that a guilty plea is a relevant factor in sentencing.²²⁸ They then demonstrated that these reasons did not justify the practice.²²⁹

²²² See the text accompanying footnotes 65-69.

²²³ *Supra*, footnote 41.

²²⁴ *Ibid.*, at p. 215.

²²⁵ M. Friedland, *op. cit.*, footnote 1, p. 121, n. 12 and J. Hogarth, *op. cit.*, footnote 1, pp. 345-349. In spite of these studies, intuition suggests that there must be some sentencing differential in some cases as a result of guilty pleas. Also, where the charge is reduced or other charges are withdrawn, the sentencing differential from plea bargaining may well be present but it may not be evident if one only looks at the conviction and sentence apart from the question of reduction or withdrawal of other charges.

²²⁶ Comment, *op. cit.*, footnote 117, at pp. 206-207.

²²⁷ Illinois Crime Survey (1929), p. 84 cited in Comment, *op. cit.*, *ibid.*, at p. 204, n. 4.

²²⁸ Comment, *ibid.*

²²⁹ *Ibid.*, at pp. 209-220.

In challenging the validity of awarding leniency in exchange for guilty pleas, the authors have singled out some of the very serious abuses in tacit plea bargaining. There is the very serious danger "inherent in the policy of utilizing the plea as a factor in sentencing . . . that innocent men will be influenced to plead guilty".²³⁰ There is the abuse that while the court may believe an accused to be pleading guilty out of remorse and therefore is a ready candidate for rehabilitation and reformation, in fact a plea of guilty in the circumstances of tacit plea bargaining is more likely an exploitation of the court's leniency policy. Then there is the criticism that by following such a policy society's interest in deterrence and protection is undercut. Finally the practice improperly imposes a penalty on all accused who are convicted after a trial. By insisting on what is their right they incur the risk of receiving a more severe punishment if they are convicted.

Of course the importance of all of these abuses is lessened where there is no significant sentencing differential. But then perhaps sentence leniency in only some cases would not justify the label of "tacit plea bargaining". No doubt there are some cases in which guilty pleas are genuine admissions of guilt and real indications of a readiness for rehabilitation. Thus perhaps the Canadian courts are right in deciding that a guilty plea "may" be a factor in determining whether leniency should be granted and the application of this principle does not result in a system of tacit plea bargaining.

In one very important respect tacit judicial plea bargaining does not have disadvantages inherent in direct judicial plea bargaining. Unlike the latter, tacit plea bargaining does not affect the impartiality of the court nor erode the presumption of innocence. However, because of the other disadvantages that have been noted, this does not mean that tacit plea bargaining is necessarily a sound practice. Rather it is a case of both express and tacit judicial plea bargaining being open to criticism with the former being more disagreeable than the latter.

Before leaving the subject of tacit judicial plea bargaining, one other point might be noted. If both express prosecutorial plea bargaining and tacit judicial plea bargaining were permitted, an accused could obtain dual sentencing concessions.²³¹ For example, a prosecutor could reduce a charge and then the judge could award sentence concessions for the accused's plea of guilty to the reduced charge. The results of the Yale study referred to earlier indicated that "judges who give reduced sentences following guilty pleas do

²³⁰ *Ibid.*, at pp. 220-221.

²³¹ This point is made by the authors of the Comment, *ibid.*, at pp. 207-209.

not take into consideration whether the defendant was originally indicted for a more serious crime".²³² Therefore in a system in which tacit judicial plea bargaining occurs and prosecutorial plea bargaining is permitted, care would have to be taken by the courts to protect against allowing an accused to obtain two sentencing benefits.

IV. *Directions For Reform.*

Thus far the aim of our study has been to examine plea bargaining in all of its forms without expressing any definite direction for reform. Of course strong opinions have been expressed and in the case of express judicial plea bargaining the arguments against it are so compelling that it can hardly be said that a position has not been expressed. But, in the main, the focus of the study to this point has been more analytical than judgematical.

However in this part the aim is to examine possible directions for reform and to take a position as to which of them appears to be the soundest. This examination will center on prosecutorial plea bargaining. As for police plea bargaining, as we have seen it is not a widely known practice and that which is known about it would suggest that, in terms of its advantages and disadvantages and in terms of the basic question as to its propriety, it is not much different from prosecutorial plea bargaining. As for judicial plea bargaining, at least express bargaining, it is so clearly unjustifiable and a distortion of the criminal law process that nothing more need be said about it. It does not and should not be permitted. As for tacit judicial plea bargaining, there is so little evidence of this practice in Canada that it would seem unnecessary to be concerned about possible directions for reform. That leaves prosecutorial plea bargaining for which three possible directions could be taken. They are: (1) that the plea bargain practice, such as it is, be left alone, (2) that the plea bargain practice be recognized, made more visible, and made subject to certain controls to eliminate its excesses and abuses, (3) that the plea bargain practice be abolished or, insofar as it is possible, that ways be found to discourage and eliminate it. These three directions will now be examined.

A. *Leave the Present Practice Unchanged.*

In 1972 this was in fact the view expressed by some members of the British Columbia bar at a Canadian Bar Association criminal justice subsection meeting.²³³ They contended that plea bargaining is a matter of "molehill proportions", that very few pleas

²³² *Ibid.*, at p. 208.

²³³ See Minutes of Meeting, *op. cit.*, footnote 99.

are negotiated and that problems in plea bargaining are being unnecessarily imported from the United States and Eastern Canada. Having established the source of the evil, it was then suggested that the system should be allowed to work as it is and function on the basis of common sense without fashioning a set of "artificial" rules.²³⁴

In England a similar position has been advocated:

The fifth, the final and, in the light of some discussions, perhaps the most important conclusion on plea bargaining, is that the United States experience of this phenomenon differs significantly at all levels, and that observations drawn from it must be handled with caution. Details of these differences will be found elsewhere; neglect of these differences could lead to conclusions which are not merely worthless, but positively misleading. The moderation of the police; the ethics of the legal profession; the close professional relationship between the Bar and the judiciary; the duties of lawyers, prosecuting or defending, as officers of the court; the important differences in prosecution practice and statutory sentencing provisions; the firm control which the court exercises over all matters which concern it—all these factors contribute in England by a lesser or greater degree to a reduction in the possibility of abuse in the plea bargaining process. Measures such as the "formalising" of the process which, it has been suggested, should be implemented in English courts in order to correct possible abuses, and which would almost certainly achieve nothing of importance except a waste of time, surely arise out of a failure to understand the etiology of the United States situation and to appreciate the extent to which this situation differs from the English at almost every level. It cannot be denied that more research has yet to be done, but it can at least be concluded at this stage that the plea bargaining process in this country does ease the administration of justice and, unless more extensive empirical investigations prove otherwise, does so without either prejudicing the rights of innocent men or occasioning real injustice to the guilty.²³⁵

This view has been agreed with by at least one other English commentator.²³⁶

However, while a maintenance of the status quo may be an acceptable position to adopt in areas where little or no plea bargaining occurs, but just which areas in Canada can claim this status is not at all clear, its effect is to ignore the very serious issues that are raised by the practice which would appear to warrant a clearer position.²³⁷ If, as it has been suggested earlier, there are no real advantages in plea bargaining,²³⁸ and if the practice

²³⁴ *Ibid.*

²³⁵ Purves, *op. cit.*, footnote 57, at pp. 974-975 (footnotes omitted).

²³⁶ Davis, *Sentences for Sale: A New Look at Plea Bargaining in England and America*, [1971] *Crim. L. Rev.* 150, 218.

²³⁷ The fact that plea bargaining may seldom occur does not mean that there is nothing to worry about. First, abuses can arise in those cases in which there is bargaining. Secondly, when present bargaining practices are left alone there is always the possibility that plea bargaining will increase since the practice is neither controlled nor disapproved.

²³⁸ See *supra*, at footnotes 107 and 157.

distorts the criminal law process and creates a number of serious disadvantages,²³⁹ then despite the low incidence of the practice it would seem that a definite position against plea bargaining should be taken. If, on the other hand, one were to argue that in fact there are advantages in the practice that overcome its disadvantages, particularly if some control were introduced, then that position should be advanced. Therefore only if one were to analyse plea bargaining by setting off advantages against disadvantages and conclude that no balance one way or the other could be determined would it be justified to maintain the status quo. This analysis has been largely avoided by the proponents of the status quo position, even by the English writer previously quoted.²⁴⁰ Rather they have been content to make the observation that the "etiology of the United States situation . . . differs from the English at almost every level".²⁴¹ But, to challenge such contentment, while the "etiology" of criminal procedure may differ it is difficult to see how the arguments for or against plea bargaining can be any different. Both systems use guilty pleas, and the disadvantages and abuses of plea bargaining centre on that constant factor. The fact that in England plea bargaining may occur more with police officers than with prosecutors, or may occur in a setting where court dockets are not as over-crowded as in the United States, in no way answers the criticisms levelled against the practice. Even those who would permit plea bargaining and who argue that it does have some advantages, fully acknowledge that there are serious problems in allowing it to operate without any review or visibility. They acknowledge that excessive bargains may be struck, that too much pressure can be exerted on an accused to plead guilty and that as a result it is possible through plea bargaining to coerce innocent people to plead guilty. They also acknowledge that uncontrolled plea bargaining fosters the image that the criminal process and "justice" is just a matter of bargaining for the right price. Thus, in arguing for some review and control of plea bargaining they are acknowledging that it is not a practice about which one can be neutral.²⁴²

B. *Reforming and Controlling Plea Bargaining.*

If one were to conclude that despite the arguments against

²³⁹ See *supra*, at footnotes 158 and 199.

²⁴⁰ Purves, *op. cit.*, footnote 57.

²⁴¹ *Ibid.*, at p. 475.

²⁴² For example, the A.B.A., the President's Commission, the A.L.I., and most legal commentators have recommended that plea bargaining be brought into the open and formalized and controlled. But see Report of the National Conference on Criminal Justice (1973), Ct-42 which recommends abolition and which may indicate a new trend in academic thinking on plea bargaining.

plea bargaining the practice still has some advantages, a second approach would be to recognize it and to provide for some control. In this way, so it is argued, the abuses of plea bargaining which stem from a lack of review and control and from its *sub rosa* treatment would be avoided.

This approach in fact represents the majority view in the United States, although there is some indication that a shift towards "abolition" is underway.²⁴³ A number of American models have been advanced for the formalization and control of plea bargaining. The key point in all of them is the transfer of plea bargaining from behind closed doors into open court. This approach necessarily involves the judge in the system, not as an active bargainer, but rather in a judicial capacity requiring him to examine the propriety of the bargain in relation to certain guidelines or rules. For example, the National Conference on Criminal Justice in its recent *Report*²⁴⁴ recommended as temporary measures the following improvements:

STANDARD 3.2 RECORD OF PLEA AND AGREEMENT

Where a negotiated guilty plea is offered, the agreement upon which it is based should be presented to the judge in open court for his acceptance or rejection. In each case in which such a plea is offered, the record should contain a full statement of the terms of the underlying agreement and the judge's reasons for accepting or rejecting the plea.

Commentary

Under current practice, plea discussions between prosecutor and defense counsel are usually informal and consequently virtually unreviewable. This invites the consideration of questionable, if not improper, criteria. The prosecutor may be tempted to enter into a plea agreement because of the weakness of the government's case or an overloaded trial calendar. Or the defense counsel may seek the guilty plea disposition when he lacks the time or inclination to represent his client adequately. Justice demands that a control mechanism be superimposed on the administrative disposition of prosecutor and defense counsel. (Standard 3.7 provides for review of the plea agreement by the judge.) This standard, however, lays the groundwork for an additional method of encouraging fairness—that of regularizing the administrative process by which the parties enter into plea agreements. The standard requires that the visibility of the plea negotiation process be raised. If the terms and reasons for acceptance or rejection of negotiated pleas can be brought into the open, general practice in the area can be identified and corrective measures taken if necessary. Individual incidents of unfairness—as, for example, too lenient bargains—can also be identified and guarded against. The corrective measures would, in most cases, consist of internal

²⁴³ See A.B.A. Standards, the President's Commission, the A.L.I. *etc*; but then see Report of the National Conference on Criminal Justice (1973).

²⁴⁴ Report of the National Conference on Criminal Justice (1973).

action by the prosecutor in directing the way in which prosecutorial discretion is exercised in the bargaining process by his staff.

. . . The commission feels that the need to raise the visibility of the entire plea negotiation process requires not only these steps but also that the reasons for accepting a plea be placed on the record. In this sense, then, the standard here goes beyond the American Bar Association's position.

STANDARD 3.7

ACCEPTABILITY OF A NEGOTIATED GUILTY PLEA

The court should not participate in plea negotiations. It should, however, inquire as to the existence of any agreement whenever a plea of guilty is offered and carefully review any negotiated plea agreement underlying an offered guilty plea. It should make specific determinations relating to the acceptability of a plea before accepting it.

The review of the guilty plea and its underlying negotiated agreement should be comprehensive. If any of the following circumstances are 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 is not aware of these facts at the time the plea is 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 his innocence of the conduct upon which the charge is based; 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;
 - c. gives inadequate weight to the defendant's rehabilitative needs; or
 - d. would result in conviction for an offense out of proportion to the seriousness with which the community would evaluate the defendant's conduct upon which the charge is based.

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.

A representative of the police department should be present at the time a guilty plea is offered. He should insure 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.²⁴⁵

It is clear that this model places the responsibility for the acceptance or rejection of plea bargains in the hands of the court. The criteria listed in numbers 1 to 10 are designed to insure that a plea is offered voluntarily and with a full understanding of the nature of the charge and the consequences of the plea. Criterion 5 indicates that a plea should be subject to invalidation if any of the accused's rights are violated during plea negotiations. Criterion 6, informing the accused of the mandatory minimum sentence and the maximum sentence, if any, are designed to assist the accused in understanding the possible effect of his plea. Criterion 7 forbids improper inducements and this includes any threats or misrepresentations as well as promises or other inducements that may render a guilty plea involuntary. Criterion 8 forbids, amongst other things, prosecutorial bluffing. Criterion 9 forbids the acceptance of a guilty plea from a person who would want to plead guilty in order to obtain an otherwise unobtainable bargain, but who at the same time asserts that he is innocent. This criterion is controversial. It has been argued that an accused should have the right to plead guilty and receive a bargained-for-benefit even if he maintains innocence—so long as the court is satisfied that there is a

²⁴⁵ *Ibid.*, Ct-54-55.

factual basis for the plea.²⁴⁶ The nub of the argument is that the accused has made a prediction that he will likely be convicted if he goes to trial, and based on the evidence the court is merely asked to agree with this prediction. To do otherwise, it is argued, would mean that some innocent defendants facing reasonably certain convictions would be deprived of the opportunity of bargaining for a lesser charge or sentence. Finally, it is argued that if an accused wants to bargain but feels he is innocent, he will now be forced to lie to the court by acknowledging guilt in order to obtain a bargain. On the other hand, by requiring a trial where innocence is asserted, criterion 9 will help reduce the danger of innocent persons being convicted and will prevent the criminal justice system from being disparaged.²⁴⁷

Criterion 10 is the most significant of all the recommendations. It permits a court to reject a plea bargain by refusing to accept a plea of guilty if the plea would not serve "the public interest". This criterion would give the trial judge the power to review a prosecutor's decision as to the formulation of the proper charge and to reject that decision if it is too lenient, or otherwise inappropriate or contrary to the public interest. At present, Canadian and American judges do not have this power and thus this recommendation may have far-reaching implications. A fairly recent amendment to the Criminal Code gave Canadian judges some supervisory power over the acceptance of guilty pleas to included and other offences,²⁴⁸ but this power is not often exercised. It is also unlikely that this power was intended as a general supervisory section, but rather only as a means to facilitate the existing practice for the entry of pleas to included offences.²⁴⁹ However, if criterion 10 were to be accepted in Canada, it would provide a power to the courts for a general review, control, and limitation of prosecu-

²⁴⁶ The United States Supreme Court recently held in *North Carolina v. Alford*, *supra*, footnote 4, that an accused can plead guilty even when he asserts his innocence so long as he makes a free, voluntary, and informed choice between a guilty plea and a trial and so long as there is a factual basis for the plea of guilty.

²⁴⁷ Report of the National Conference on Criminal Justice (1973), Ct-58.

²⁴⁸ Criminal Code, s. 534(6):

"Notwithstanding any other provision of this Act, where an accused pleads not guilty of the offence charged but guilty of an included or other offence, the court may in its discretion with the consent of the prosecutor accept such plea of guilty and, where such plea is accepted, shall find the accused not guilty of the offence charged."

²⁴⁹ See R. Salhany, *Canadian Criminal Procedure* (2nd ed., 1972), p. 131, n. 12 where it is stated: "This section appears to have been enacted to avoid the difficulty in *R. v. Dietrich*, [1968] 4 C.C.C. 361." In *Dietrich*, on a charge of capital murder, the accused's plea of guilty to the lesser offence of non-capital murder was declared invalid.

torial discretion in the charging process.²⁵⁰

The essence of this second approach is the control function given to the court which requires all plea agreements and the reasons for their acceptance or rejection to be placed on the court record. All bargains are reviewed by the court at the time a plea is offered. Other models such as that of the American Bar Association²⁵¹ provide for the same control at a ratification conference before the entry of a plea.²⁵²

When considering models for the formalization and control of plea bargaining it is important to determine whether any particular model will remove or significantly reduce the abuses and disadvantages inherent in plea bargaining. Unfortunately there is disagreement on just how effective any of the models are for this purpose. To illustrate this concern, the model of the American National Conference on Criminal Justice was put forward only as an interim measure. Their principal recommendation was that plea bargaining should be banned and the interim recommendations were only advanced in order to improve the practice of plea bargaining up to the time of its final prohibition—which they recommended should be a gradual process over a five year period. Their conclusion that plea bargaining should be prohibited rather than controlled was based on the opinion that control, even in the model they had recommended, was subject to abuse, and that plea bargaining had no inherent advantages which could not be obtained in other ways. In this regard, their *Report* states:²⁵³

This standard abolition of plea bargaining may be the most far-reaching in the entire Courts Report. It embodies the Commission's view that plea negotiation is inherently undesirable and that such negotiations should and can be eliminated. This decidedly is a minority position. As one authority has observed, "even the observers most critical of today's guilty-plea system usually stop short of total condemnation of plea bargaining as an institution".

The Commission does not stop short. It totally condemns plea bargaining as an institution and recommends that within 5 years no such bargaining take place.

The only concession the Commission is willing to make is that total elimination of the practice will take appreciable time. Therefore, the following standards, which propose safeguards for plea bargaining systems, are presented as a stopgap measure. However this is on the express assumption that such measures cannot remake plea negotiation into a process ultimately acceptable to the criminal justice system.²⁵⁴

²⁵⁰ This very subject, the exercise of prosecutorial discretion in the charging process, is under review in a separate study for the Commission.

²⁵¹ A.B.A., Pleas of Guilty, approved Draft 1968.

²⁵² *Ibid.*, pp. 1-5, 11-12, and 71-78.

²⁵³ Report of National Conference on Criminal Justice (1973), Ct-42 (footnotes omitted).

²⁵⁴ *Ibid.*, Ct-44.

Not only does the Commission believe that plea negotiation serves no legitimate function in the processing of criminal cases, it also has concluded that it exacts unacceptable costs from all concerned. Perhaps the major cost is that of reduced rationality in the processing of criminal defendants. Whether a defendant is convicted should depend upon the evidence available to convict him, and what disposition is made of a convicted offender should depend upon what action best serves rehabilitative and deterrent needs. The likelihood that these factors will control conviction and disposition is minimized in the inevitable "horse-trading" atmosphere of plea negotiation. Some defendants suffer from the resulting irrationality. But the public's interest in disposition of cases to serve their interest in protection also suffers. The Commission is convinced that rationality cannot be brought into the system by raising the visibility of the plea negotiation process and structuring the making of the administrative decisions in it. Inherent in plea negotiations is the consideration of factors that should be irrelevant to the disposition of the case. This cannot be prevented by any means short of abolishing the process.

* * * *

Plea negotiation not only serves no legitimate function in the processing of criminal defendants, but it also encourages irrationality in the court process, burdens the exercise of individual rights, and endangers the right of innocent defendants to be acquitted.

Separately from the National Conference *Report*, it was eloquently argued in the United States case of *People v. Byrd*²⁵⁵ that making plea bargaining open and visible and subjecting it to judicial scrutiny does not solve many of the problems and abuses that now exist. The judge in that case commented:²⁵⁶

It has been suggested that inquiry by the trial judge will aid considerably in assuring the plea is trustworthy. However, such an inquiry has long been required in Michigan, and most judges make these inquiries. An inquiry was made in the case at bar. But a defendant who desires to make a negotiated plea arrangement is in the anomalous position of having to prove his guilt; if he asserts his innocence his plea must be rejected.

While skillful judges cross-examining an accused have on more than one occasion ferreted out a contrived story and rejected a plea based upon such a story, all judges do not make such searching inquiries. If they did, they might often reveal the defendant is guilty of a great deal more than that to which he is pleading guilty, a disclosure which, depending on the trial judge and the circumstances, might create an awkward situation, one endangering the charge reduction and guilty plea desired by prosecutor and defendant alike.

One argument for a new open system is that it would eliminate the perjury implicit in the present system, which requires the defendant to deny any promise has been made to him. However, both the judicial and public consciences may well be outraged where defendant's conduct, truthfully related on the record, constitutes a serious offense and, also related on the record, that defendant is allowed to enter a guilty plea to a less serious offense.

²⁵⁵ *Supra*, footnote 136.

²⁵⁶ *Ibid.*, at pp. 791-792.

The likelihood is that some judges and, following the publicity which attends public records, much of the public would object to some agreements which in the past have been allowed. And so once again, at least as to those judges and the more "delicate" cases, the parties will have to resort to pre-plea secret negotiations and pre-arranged answers and explanations bearing no necessary relationship to what in truth has occurred. Nothing could be more calculated to destroy the integrity of the judicial process and to denigrate respect for law and order among those brought to the bar of justice, as also does the assumption of experienced offenders, all too frequently an accurate assumption, that a reduction in the charge can be obtained in exchange for a plea of guilty.

Unveiling the negotiated plea system will make more blatant that which is now oblique. Perhaps that is what the President's Commission on Law Enforcement and Administration of Justice had in mind when it concluded its report on this subject with the thought that "experience with a plea bargaining system in which negotiations are open, visible, and subject to judicial scrutiny should help to identify the risks involved in the system, and indicate the need for and direction of further change".

Perhaps the wisdom of the fundamental principles which have been eroded by the negotiated plea would be best revealed by bringing into the open the operational consequences of the expediciencies with which they contend.

In conclusion it would seem that a system which provides for judicial control and supervision of plea bargaining, "is hardly a panacea for all the evils of plea bargaining".²⁵⁷ To borrow from the authors of a recent note in the *Yale Law Journal*, in a reformed and controlled system of plea bargaining:²⁵⁸

. . . judges, prosecutors and public defenders would continue to be more responsive to docket congestion than to the needs of the individual defendant. The indigent defendant would still feel pressured to agree to a plea bargain rather than linger in pre-trial confinement until his case came to trial. The innocent defendant might choose to plead guilty rather than risk the harsher punishment that he would face if he were convicted. And the guilty defendant who stands trial would still serve a longer sentence merely because he had exercised a right that the Constitution guarantees him.

The pre-plea process (judicial control of bargaining) promises to minimize these inequities. It cannot eliminate them entirely because they are inherent in the very nature of plea bargaining. Complete reform of the plea bargaining process must inevitably await the complete abolition of plea bargaining.

C. *Disapproving and Prohibiting Plea Bargaining.*

If plea bargaining is improper *per se*, or if its disadvantages outweigh its advantages, the only sensible solution would seem to be a disapproval and prohibition of the practice. While the abolitionists of plea bargaining have generally been in a minority posi-

²⁵⁷ *Ibid.*

²⁵⁸ *Op. cit.*, footnote 108, at p. 312.

tion,²⁵⁹ the principal reason for this has been the unquestioning acceptance of the assumption that plea bargaining is necessary to prevent a collapse in the administration of criminal justice. But, as previously argued in this article, this assumption should be rejected. Once rejected, the approach of disapproval and prohibition is not foreclosed as a sound alternative for the reform of plea bargaining.

In attempting to prohibit plea bargaining there are at least three possible methods that might be employed. First, Bar associations could declare the practice unethical and subject it to disciplinary proceedings. However by itself, this method might not be too effective since lawyers, like other professionals, would be slow to report conduct of fellow lawyers, particularly if the conduct involved is not traditionally criminal. Many lawyers, if they were to discover another lawyer bargaining, might easily rationalize that the conduct in the circumstances of the particular case was not unethical and therefore it would not be reported. A second method for banning the practice would be a judicial pronouncement that any plea of guilty which was induced by a prosecutorial bargain is involuntary and therefore invalid. A third possible method for prohibiting plea bargaining would be a legislative pronouncement that plea bargaining in any form is illegal and would invalidate a guilty plea so procured.

A recent note in the *Harvard Law Review* on the unconstitutionality of plea bargaining²⁶⁰ discusses the possibility of enforcing both judicial and legislative prohibitions of plea bargaining. There it is suggested that evasion of such a prohibition would not generally be expected since lawyers are officers of the court who have pledged to work within the law. Thus, there could be a strong moral inclination to observe all court rules. However, the authors also noted:

A prosecutor may nevertheless feel that administrative pressures require disobeying the ruling. He may be able to rationalize his behaviour because he feels it is in the best interests of society to convict defendants he believes to be guilty. Similarly, defence attorneys may still bargain, both to save time and to obtain reduced charges or lower sentences for their clients.

If the moral and deterrent force of the law proves insufficient to eradicate the practice, judicial enforcement will be difficult. Plea bargaining is a consensual matter involving the defendant, defence counsel, if any,

²⁵⁹ This was not always the case. Alschuler reports that as recently as the 1920's, the American legal profession was largely united in its opposition to plea bargaining. See Alschuler, *op. cit.*, footnote 115, at p. 51. See also Miller, *op. cit.*, footnote 179, at p. 29.

²⁶⁰ Note, The Unconstitutionality of Plea Bargaining (1969-70), 83 Harv. L. Rev. 1387, at p. 1407.

and the prosecutor; none of them will be apparently injured or willing to complain as long as the bargain is kept.²⁶¹

In order to curtail this possible deviation, the authors suggested that a defendant should be allowed to appeal any conviction on a negotiated guilty plea without fear of punitive recharging or re-sentencing practices.²⁶² Their proposal was that a defendant would get the benefit of the promised lenient treatment by pleading guilty but he could then withdraw his plea on the ground that it was involuntary and go to trial hoping for a dismissal—but realizing that a conviction could not result in a more severe sentence than the sentence received on the guilty plea unless new correctional data were uncovered.²⁶³ Because of the ban against plea bargaining, the prosecutor would have to deny the existence of a bargain²⁶⁴ and the subsequent hearing would turn on credibility, with the defendant's word pitted against the prosecutor's and perhaps even against that of his own counsel. No doubt many of the attempts to overturn a conviction in this way would be lost, however, "not all defendants who are penalized for going to trial or who are induced to plead guilty need be successful. . . . An occasional judicial decision overturning a plea bargain may substantially deter the prosecutor, since it is . . . embarrassing . . . to be discovered intentionally violating such a prohibition".²⁶⁵ The authors concluded: "Judicial enforcement should thus have some concrete impact on the behaviour of prosecutors and defence attorneys."²⁶⁶ The possibility of disciplinary proceedings with the power of suspension might also be an effective deterrent, in combination with a judicial

²⁶¹ *Ibid.*

²⁶² To appreciate the problem see Cooper, *op. cit.*, footnote 28, at p. 441, n. 58. "It should be remembered that up until 1967 the Court of Criminal Appeals had, by reason of the 1907 Act, power to increase sentences in the case of unmeritorious appeals, a power not infrequently exercised." See also D. Thomas, *Principles of Sentencing* (1970), p. 196.

²⁶³ In the now famous English case, *R. v. Turner, supra*, footnote 206, the accused was granted a new trial and allowed to change his plea of guilty to not guilty because the court felt that he may not have exercised a "free choice" with regard to his plea. At trial he had been convicted on his guilty plea and was fined £50 plus £75 cost. On the new trial which lasted six days, "in the course of which every conceivable point seems to have been taken and argued", Turner was convicted and fined £200 and £150 costs. On appeal the increased sentence was upheld.

"As regards sentence, it is to be observed that in fact the learned judge imposed on this appellant a larger fine and a larger order in regard to costs of the prosecution than had been made at the earlier trial. He said that he did so because he, after six days, knew very much more about the case than the judge who dealt with the matter originally on a plea of guilty. This court is quite satisfied that he was entitled to approach the matter in that way, and having said that, it is clear that this penalty in no way erred in principle." (At. p. 444).

²⁶⁴ Note, *op. cit.*, footnote 260, at p. 1409, n. 95.

²⁶⁵ *Ibid.*, at p. 1410.

²⁶⁶ *Ibid.*

pronouncement of prohibition. to prevent defence attorneys from gambling their whole careers for the sake of saving a little time or money on a bargained plea.

In addition to these measures perhaps the most effective way to stop plea bargaining would be to remove any incentive prosecutors presently have for bargaining. In the United States it has been suggested that the two principal reasons that prosecutors bargain are to reduce heavy caseloads and to maintain a high conviction rate (that is, a good won-loss record).²⁶⁷ In some areas heavy caseloads will always be a problem, but perhaps Parliament can mitigate this problem by removing some less serious conduct from the criminal law and by ensuring that courts are more efficiently operated. Moreover, since Canadian prosecutors do not have to worry about being elected, perhaps they are not as concerned as their American counterparts about good "won-loss" records. The concept that a prosecutor should be interested in winning or losing is openly rejected by Canadian courts and prosecutors as a negation of a prosecutor's proper role.²⁶⁸ For example, Mr. Justice Rand of the Supreme Court of Canada, in *Boucher v. The Queen*, stated:²⁶⁹

It can not be over-emphasized that the purpose of a criminal prosecution is not to obtain a conviction; it is to lay before a jury what the Crown considers to be credible evidence relevant to what is alleged to be a crime. . . . The role of the prosecutor excludes any notion of winning or losing.

A long-time prosecutor has observed that: "The Crown, of course, never wins or loses and there is no room in our system of criminal justice for cynicism in connection with this statement."²⁷⁰ Since Canadian prosecutors may be less motivated to maintain high conviction rates²⁷¹ than their American counterparts, and since administrative pressure resulting from heavy caseloads is likely to be less in Canada, at least in some areas, an effort to ban prosecutorial plea bargaining should be more successful than it would be in the United States.

Another important factor in removing the incentive to engage in plea bargaining would be to recognize the lesson learned in other jurisdictions, that is, that a fair and sensible charging pro-

²⁶⁷ *Ibid.*, at p. 1389; see also Note, *op. cit.*, footnote 4, at p. 867.

²⁶⁸ But see Grosman, *op. cit.*, footnote 7, p. 86.

²⁶⁹ [1956] S.C.R. 16 at p. 23; see also M. Orkin, *Legal Ethics* (1957), pp. 116-120.

²⁷⁰ Bowen-Colthurst, *op. cit.*, footnote 99, at p. 377.

²⁷¹ See generally Alschuler, *op. cit.*, footnote 115; Note, *op. cit.*, footnote 260; White, *A Proposal for Reform of the Plea Bargaining Process* (1971), 119 U. Pa. L. Rev. 439; and Bowen-Colthurst, *op. cit.*, footnote 99. But cf. Grosman, *op. cit.*, footnote 7, p. 86.

cess coupled with full discovery of the prosecution case is successful in maintaining a reasonably high flow of guilty pleas.²⁷²

Finally, it should be noted that the concept of enforcement is not an absolute one. Enforcement is not an "all or none" proposition. Conceivably, it will be difficult to achieve full enforcement of such a ban. But if it is accepted that plea bargaining is undesirable and that measures are available to discourage and even to prohibit the practice, it would seem that they should be tried even if only partial success will be achieved. In short, the fact that enforcement of a ban against plea bargaining may be difficult does not justify not trying.

²⁷² See text *supra*, preceding footnote 105.