IN DEFENSE OF "BARGAIN JUSTICE"

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The strongest critics of plea bargaining argue that the practice should be abolished because it coerces defendants to give up their right to trial and because it results in irrational sentences for criminal defendants. Neither charge is applicable to a system of plea negotiations that meets four basic criteria: (1) the defendant always has the alternative of a jury trial at which both verdict and sentence are determined solely on the merits; (2) the defendant is represented throughout negotiations by competent counsel; (3) both defense and prosecution have equal access to relevant evidence; and (4) both possess sufficient resources to take a case to trial. The most fruitful direction of reform is to seek to achieve these conditions rather than attempt to eliminate plea bargaining.

Although plea bargaining has a venerable history, at least in America (see Alschuler, *supra*; Friedman, *supra*), its centrality in criminal procedure has come to public prominence only in the past decade. The revelation that the modal criminal conviction in American courts follows a negotiated plea of guilty rather than the jury trial commonly glorified in literature, on television, and in bar association after-dinner speeches has been accompanied by indignant calls for reform, if not eradication, of the practice.

The critics of plea bargaining can be divided into two camps, distinguished primarily by the amount of reform they advocate. The first group, including the American Bar Association (1967) and the President's Commission on Law Enforcement and the Administration of Justice (1967), urges selected reform. Their concern typically focuses on procedural deficiencies of particular bargaining systems: the possibility of broken or misunderstood promises, for example, or of prosecutorial caprice in determining which defendants are to be offered a plea bargain. The seriousness of these concerns has been substantiated by scholars and practitioners alike, but the faults can be redressed through changes that fall short of a fundamental alteration in dispositional procedures. A remedy often advanced for broken promises is the formalization of plea bargains: agreements are placed on the record in open court (see, e.g., U.S. National Advisory Commission, 1973:50). Abuse of prosecutorial discretion can be lessened considerably if prosecutors promulgate and enforce office standards to guide the

This essay has benefited from a lively exchange with Albert Alschuler. I regret to report that he remains unconvinced. I also wish to thank Richard Abel for both substantive and stylistic suggestions.

plea bargaining decisions of their deputies (see, e.g., Davis, 1971: ch. 7; American Law Institute, 1972: § 350.3(2)).

Many of the proposals for adding procedural safeguards to present plea bargaining practices have considerable merit; there is little question that bargain justice is subject to abuse. My concern in this paper is with a second group of commentators who assert the inherent impropriety of *any* system of negotiated guilty pleas. These critics conclude that the defects of bargain justice are irremediable and that a defensible system of criminal justice can only be achieved by eliminating bargaining. The prestigious U.S. National Advisory Commission on Criminal Justice Standards and Goals made such a far-reaching recommendation (1973:46) as have a growing number of scholars (see, e.g., Alschuler, 1968, 1975, 1976; *Harvard Law Review*, 1970; Kipnis, 1976).

Two separate arguments support the recommended abolition of plea bargaining. The first focuses on procedural fairness for individual defendants: any system of plea bargaining is held to be improper because it places a price—forfeiture of those concessions available after a guilty plea—on the exercise of important constitutional rights. In particular, plea bargaining allegedly operates to encourage, if not coerce, even innocent defendants to waive their right to trial by jury. The second argument is quite different. Rather than solicitude for individual defendants, the concern is for the societal interest in rational (and appropriately stringent) criminal sentences. Plea bargaining, particularly in pressured urban jurisdictions, is said to encourage harried prosecutors and judges to make dispositional concessions to defendants on the sole ground of administrative expediency. The resulting sentences therefore cannot be justified by any rationale for the penal sanction, whether it be deterrence, societal protection, rehabilitation, or (even) retribution. When this argument is combined with the preceding due process critique, the current system of plea negotiation is placed in the unenviable position of being assaulted by civil libertarians and law-and-order advocates at the same time.

This "abolitionist" literature coexists with a growing body of behavioral research on criminal courts whose common theme is the extraordinary resistance of court systems to change, particularly in the negotiation process by which most criminal and civil cases are resolved (see Church, 1976; Heumann, 1975; Heumann and Loftin, *supra*; Nimmer, 1976; *Iowa Law Review*, 1975). This paper grew out of my reflection on the demonstrated difficulty of eliminating plea bargaining,

together with an observation from my own research that is confirmed by a number of current empirical studies of plea negotiation: in many court systems across the country, bargain justice does not appear to suffer from the systematic irrationality and unfairness attributed to it by many critics. Indeed, a number of studies have found that the flexibility of plea bargaining as a dispositional device has substantial advantages over the formal rigidities of the jury trial (see, e.g., Heumann, 1978; Rosett and Cressy, 1976; Utz, 1978; Enker, 1967).

If plea bargaining cannot readily be eliminated and operates in a tolerable, or even desirable, manner in many jurisdictions, a careful examination of abolitionist arguments is surely in order. Although plea bargaining is not without its supporters, particularly among those prosecutors, defense attorneys, and judges involved in the daily administration of criminal justice, most of these defenders fail to address the arguments charging the inherent impropriety of the process. Rather, they claim that we must live with plea bargaining because of the enormous financial burden that would accompany any increase in already crowded trial dockets. It is in this context that Chief Justice Burger repeated a familiar refrain in *Santobello* v. *New York* (404 U.S. 257, 260, 1971), a case that gave bargain justice the constitutional stamp of approval:

> "[P]lea bargaining" . . . is an essential component of the administration of justice. Properly administered, it is to be encouraged. If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

But a defense grounded upon economics or administrative convenience is somewhat beside the point against the kind of fundamental charges leveled against plea bargaining by its strong critics. It is surely beneficial to reduce the costs of running a criminal justice system, but not by utilizing procedures that are irrational and unfair, if not unconstitutional. The frequent assertion that plea bargaining introduces much needed dispositional flexibility into an overly rigid trial system is similarly incomplete: flexibility may be a virtue, but it surely should not be obtained through methods that conflict with substantive goals of the penal law or with constitutional requirements of due process.

The conception of plea bargaining applied in this analysis is very broad, and consists of two elements: (1) the defendant's decision not to assert his innocence, and (2) a systemwide expectation that such cooperative defendants will ultimately receive less severe sentences than those who demand a formal

adversarial determination of guilt. A plea bargain may be an explicit *quid pro quo* or merely a tacit understanding. So long as defendants routinely expect to receive some form of sentencing consideration in exchange for an admission of guilt, the essence of a system of bargain justice is present. This inclusive definition is adopted here because it reduces the practice to its lowest common denominator. Focus on a sentence discount both emphasizes the key element that critics most decry and avoids the artificial distinctions of a more limited perspective based upon the nature of the bargaining (explicit versus implicit; "higgling" versus exchange of nonnegotiable offers) or the currency in which it is conducted (charge or sentence).[1]

Most critics of plea bargaining accept the theoretical framework of the Anglo-American adversary system. Within this context, it is my contention that the case for the inherent impropriety of plea bargaining is groundless. A system that confers sentence discounts on those defendants who waive an adversarial determination of guilt need violate neither the tenets of rationality in the penal law nor the constitution. Negotiated dispositions in a properly constructed system will approximate the probable results of trial, and any remaining distance between a bargained disposition and what "would have been" the result of trial involves no inherent illegitimacy. The following two sections discuss, in turn, the allegations that plea bargaining is unfair to defendants and that it subverts rational sentencing goals. I will reply that neither charge is applicable to a plea bargaining system that meets four basic requirements:[2] (1) The defendant must always have the alternative of a jury trial at which both verdict and sentence are determined and can be justified solely on the merits of the case. (2) The defendant must be represented throughout negotiations by competent counsel. (3) Both defense and prosecution must have equal access to all available information likely to bear on the outcome of the case should it go to trial. (4) Both

[1] The focus of this analysis is on sentencing because plea bargaining is conceptualized primarily as a sentencing process. The "currency" of the negotiation may be the number or seriousness of charges, but charge is of importance primarily because of its direct effect on sentence.

Bargains are also diverse in the degree of certainty they provide: some assure a specific sentence lower than what would be expected upon conviction at trial; some involve only the guarantee of a sentence lower than the maximum that *could* be imposed after trial. Because plea bargaining is typically discussed by both practitioners and critics *as though* defendants received a sentence discount for pleading guilty, this form of bargaining will serve as the focus of the analysis that follows. If so clear and unambiguous a differential in disposition is justifiable, lesser distinctions should readily pass muster.

[2] These requirements are discussed at greater length in the final section of this paper.

should possess sufficient resources to take the case to trial if an acceptable agreement does not result from the negotiations.

I am aware that these conditions are not always met in American jurisdictions. And it is not my contention that operationalization of these conditions will produce a flawless criminal justice system. *I am simply arguing that such a system of plea bargaining is no less rational or constitutional than the trial process upon which the negotiation is based.* I will argue in a final section that the most fruitful direction of reform in the operation of our system of criminal courts is to seek to achieve these conditions rather than attempt to eliminate plea bargaining. The discussion that follows is of necessity very general: I make no distinctions between different plea bargaining mechanisms and practices. My thesis is that plea bargaining in its broadest sense—the implicit or explicit exchange of sentencing consideration for a defendant's admission of guilt—need not be unfair to either the defendant or the public.

I. PROCEDURAL FAIRNESS AND THE DEFENDANT

The basis of the due process critique of plea bargaining is summed up in the following passage from the report of the U.S. National Advisory Commission on Criminal Justice Standards and Goals (1973:48).

> [A] major cost involved in plea negotiation is the burden it inevitably places upon the exercise of the rights involved in trial—the rights to jury trial, to confront and cross-examine witnesses, to have the judge or jury convinced of guilt beyond a reasonable doubt, and similar matters. . . . It is inevitable that exercising these rights often will involve financial costs to defendants, time commitments, and the emotionally unpleasant experience of litigation. But it is wholly unacceptable to add to this the necessity of forfeiting a discount that could otherwise be obtained.

Since this argument speaks to the plight of the individual criminal defendant, an evaluation of its validity can best begin by examining the concrete situation of a person indicted. Any criminal defendant faces unpleasant alternatives: he can either plead guilty or defend himself at trial. The overriding motivation of most defendants confronting this choice is to minimize postconviction sanction. In a plea bargaining situation the defendant must weigh the sentence he expects will follow a trial conviction, discounted by the possibility of acquittal, against the sentence expected after a guilty plea. The greater the guilty plea sentence discount, the more attractive that alternative becomes—at least for those defendants with some significant chance of being convicted. In practical terms, when a

defendant elects to plead guilty he trades his chance of acquittal for a reduction in the expected posttrial sentence. Viewed in this way, much of the talk about the burden that plea bargaining places on the right to a jury trial is irrelevant. It can hardly be contended, at least from the perspective of the individual defendant, that a jury trial is somehow intrinsically beneficial independent of its result. Trials are costly and psychologically unpleasant. Our adversary process was hardly designed to be otherwise. Criminal trials produce one "winner" and one "loser." As the uncertainty of that result increases, so does the incentive for both sides to find some mutually satisfactory accommodation in which the benefits of success at trial are discounted by the possibility of failure.

Although there are obvious differences, plea bargaining operates in a manner roughly analogous to pretrial negotiations in a civil suit. A plaintiff may offer the defendant a chance to "settle" the suit by paying less than the amount sought at trial. Like the criminal defendant, the civil defendant faces a mandatory trial with an uncertain outcome and judgment should he decline the settlement offered. The attractiveness of a particular offer will depend on the strength of the plaintiff's case. Yet surely it would be nonsensical to argue that the civil defendant's constitutional right to a jury trial is "burdened" by these negotiations, even though they are supported, indeed encouraged, by the legal system. The criminal defendant, like the civil defendant, possesses the right to a jury trial up to the time he decides it would be preferable to accept a nontrial disposition. It is precisely his possession of that right—with the uncertainty for both sides that its exercise necessarily entails—that allows bargaining to occur. If the sole benefit a defendant expects from a jury trial is the chance for acquittal, it is difficult to argue that the state somehow burdens the right to trial merely by posing an alternative that may be more attractive.

Other procedural rights of criminal defendants are formally protected only at trial: the right to have illegally obtained evidence excluded from consideration by the trier of fact, for example, or the right to cross-examine witnesses. This fact has led some critics to maintain that plea bargaining is an essentially lawless process in which important evidentiary protections are irrelevant. An extension of this argument is the frequently expressed concern that innocent defendants are encouraged to plead guilty through bargaining. Again, in the words of the U.S. National Advisory Commission:

> By imposing a penalty upon the exercise of procedural rights in those cases in which there is a reasonable likelihood that the rights will be

> vindicated, the plea negotiation system creates a significant danger to the innocent. Many of the rights it discourages are rights designed to prevent the conviction of innocent defendants. To the extent these rights are rendered nonoperative by the plea negotiation system, innocent defendants are endangered. [1973:48]

This assertion that "there are no rules of evidence in plea negotiation" (Alschuler, 1968:78) ignores the fact, documented by almost every published study of plea bargaining, that the primary determinant of any plea agreement is the assessment by counsel of the probable outcome of a trial. Thus if a confession or other crucial item of evidence is likely to be ruled inadmissible, any bargain struck will almost certainly reflect the altered probabilities of conviction, at least if both attorneys are informed and diligent.

A major problem in evaluating the alleged danger of plea bargaining to an innocent defendant is the singular ambiguity of the key term. "Innocent defendant" can refer either to a person objectively innocent of the crime charged (but who still presumably has some risk of conviction at trial) or to a person who would be acquitted were a trial held (whether objectively innocent or not). With apologies to the late Herbert Packer[3] I will term the former defendant "factually innocent," the latter "legally innocent." Albert Alschuler, a leading academic critic of bargain justice, cites examples of the effect of plea bargaining on both types of defendants. The factually innocent defendant:

> San Francisco defense attorney Benjamin Davis recently represented a man charged with kidnapping and forcible rape. The defendant was innocent, Davis says, and after investigating the case Davis was confident of an acquittal. The prosecutor, who seems to have shared the defense attorney's opinion on this point, offered to permit a guilty plea to simple battery. Conviction on this charge would not have led to a greater sentence than thirty days' imprisonment, and there was every likelihood that the defendant would be granted probation. When Davis informed his client of this offer, he emphasized that conviction at trial seemed highly improbable. The defendant's reply was simple: "I can't take the chance." [1968:61]

The legally innocent defendant:

> Before his appointment to the bench, Judge Harold Leventhal of the United States Court of Appeals for the District of Columbia Circuit once represented an indigent sailor charged with the unauthorized use of a motor vehicle. The only evidence against the defendant was his confession, and Judge Leventhal estimated that the odds against the admission of this confession in evidence were approximately three to one. Even this slight [?] chance of a felony conviction was sufficient, however, to induce the defendant to plead guilty to a misdemeanor. [*Ibid.*]

In both circumstances, plea bargaining operated to make a guilty plea seem more attractive than a trial, even though it appears that the former defendant had not committed the act

[3] See his discussion of "legal guilt" and "factual guilt" (1968: ch. 8).

charged, and the latter defendant, although factually guilty, had a decent chance of acquittal.

The problem with the case against plea bargaining from the perspective of the factually innocent defendant is that the critics seem to assume that such blameless defendants are necessarily exonerated at trial. It is a sobering fact that this is not always the case. Trials do involve a risk that the factually innocent defendant may be found legally guilty. Legal innocence is merely an attorney's prediction prior to a trial. And the most competent attorney can err in predicting success on the basis of procedural defenses such as exclusion of incriminating evidence, or entrapment, alibi witnesses, and the like. If most defendants did not face a very real chance of conviction at trial, all incentive to bargain would be eliminated, and with it this criticism of plea bargaining. It is therefore somewhat disingenuous to argue that the innocent defendant suffers from being offered an alternative to the high stakes of a trial. So long as the choice of trial or plea rests with the defendant, competently advised by informed counsel, the alternative posed by the state of a certain but less severe sentence need not improperly encourage or coerce a guilty plea from "innocent" defendants any more than it does from "guilty" ones. Benjamin Davis, counsel for the defendant in the rape case cited above, puts the problem into perspective. According to Alschuler:

> Davis reports that he is uncomfortable when he permits innocent clients to plead guilty; but in this case it would have been playing God to stand in the defendant's way. The attorney's assessment of the outcome at trial can always be wrong, and it is hard to tell a defendant that 'professional ethics' require a course that may ruin his life. [1968:61]

Indeed. It is equally difficult to argue that concern for the individual defendant dictates a system in which there can be no alternative to that potentially ruinous course of action. Whether the substantive goals of the penal law require an end to the practice of offering sentences discounted for the uncertainty of the trial result will be examined in the following section. It cannot be maintained that posing such an alternative is inherently unfair to the defendant.

II. PLEA BARGAINING AND THE PUBLIC WELFARE

Most academic "abolitionists" adopt the civil libertarian stance discussed in the preceding section. In the more intensely political environment of the local criminal justice system, however, the case against bargain justice is typically based upon the widespread view that plea bargaining results in

excessive and undeserved leniency in the sentencing of admitted criminals. This concern was echoed in the report of the U.S. National Advisory Commission (1973:44): "Since the prosecutor must give up something in return for the defendant's agreement to plead guilty, the frequent result of plea bargaining is that defendants are not dealt with as severely as might otherwise be the case. Thus plea bargaining results in leniency that reduces the deterrent impact of the law." Again it is argued that this alleged problem can only be solved by eliminating the sentencing differential between plea and trial convictions.

This argument clearly has a kind of crude plausibility. If the sentences regularly meted out by judges after trial are defined as those that best serve the goals of the penal system, then any lesser sentence following a guilty plea appears irrationally lenient almost by definition. Like the due process critique of plea bargaining, however, this argument ignores the uncertainty and risk of trial—in this case, the prosecutor's concern that a factually guilty defendant may be acquitted.

To defend plea bargaining in this context, one must come to grips with the pervasive prosecutorial assumption that the vast majority of criminal defendants—at least by the time they reach the plea bargaining stage—are factually guilty. Such a perspective appears to contradict a justly cherished, but often misunderstood, principle of our criminal justice system: the presumption of innocence. The mandate that all defendants must be presumed innocent until proven guilty applies to a presumption of *legal*, not factual, innocence. The rights to bail, to the writ of habeas corpus, to a speedy trial are all grounded in the principle that criminal defendants are to be treated *as if* they were innocent until they are adjudged guilty through due process of law. The presumption of innocence is thus a normative directive to criminal justice personnel; it does not require legal officials to assume that all criminal defendants are *factually* innocent. Indeed, we surely would not want a prosecutor, for example, to hale into court people whom he believed to be innocent of wrongdoing.[4]

In our adversarial system, the prosecutor's role is ambiguous. He is an advocate, to be sure, facing the defense and putting forth the "people's" case as strongly as he can. But he has a quasi-judicial role as well. Studies of prosecuting attorneys

[4] I am indebted to Herbert Packer's discussion of the "presumption of innocence" in the preceding analysis (1968: ch. 8).

across the country regularly reveal their almost universal concern for making sure that dispositions are appropriate and, particularly, for ensuring that no factually innocent defendant is convicted (see Carter, 1974; Rosett and Cressey, 1976; Utz, 1978). As a society we obviously are not prepared to accept the prosecutor's judgment as final in such matters; hence, the right to trial by jury. The point is, however, that at the time of plea negotiations a criminal case has progressed through a police investigation, a prosecutorial (and at least a formal judicial) determination of "probable cause," and the final review of the evidence by a prosecutor prior to plea discussions with defense counsel. At this point most prosecutors assume that those defendants remaining in the system are very probably factually guilty of the offense charged, or of one closely related to it. Whether a particular defendant will be found guilty at trial, however, is subject to the uncertainties of judicial rulings on admissibility of evidence, the availability and persuasiveness of witnesses, the rhetorical ability of opposing counsel, and the unpredictable vagaries of the jury. A conscientious prosecutor, mindful of his responsibility to protect the public welfare, might rationally conclude that the certainty of a lower sentence might better serve the public than the risk of acquittal at trial. In this sense, the prosecutor does not make the defendant a concession for his plea any more than the civil defendant receives a concession from the plaintiff who agrees to an out-of-court settlement. Both defendants exchange their chance of complete exoneration for the security of a judgment less onerous than that which might be imposed after trial. Each party thus trades the possibility of total victory for the certainty of avoiding total defeat.

Our judicial system contains significant protections against the conviction of factually innocent defendants: the fundamental rights to trial by jury, to counsel, to hear and cross-examine witnesses; the constitutional, statutory, and common law rules of evidence; the requirement that guilt be proved beyond a reasonable doubt. The system reflects Blackstone's dictum that "it is better that ten guilty men go free than that one innocent man be convicted." Although no empirical evidence on this point is available, it would be extraordinary if a system guided by so single a purpose did not have the expected effect: factually guilty defendants undoubtedly are freed by the courts more often than factually innocent defendants are convicted. If we assume that the trial system will acquit a predictable number of factually guilty defendants, as it is designed to do,

the public policy question is not whether defendants who plead guilty receive sentences lighter than optimum for deterrence purposes. Rather, we must ask whether it is necessarily irrational or otherwise detrimental to the deterrent function of the criminal law to allow procedures in which (1) proportionately more criminal defendants are convicted than would be if all cases went to trial, but (2) the sentences imposed are less severe. Given the recent discussion of the importance of sure (although not necessarily harsh) punishment for effective deterrence of criminal behavior (see, e.g., Twentieth Century Fund, 1976; Wilson, 1975: ch. 8), a choice for more convictions is, at the very least, not inherently irrational.

III. REFORM

As I indicated at the outset, no attempt is made here to defend any existing plea bargaining system, much less the totality of varied practices found in American jurisdictions. Plea bargaining, particularly when judge or prosecutor manipulates posttrial sentences to "punish" those who refuse to plead guilty, can operate to coerce or unfairly encourage guilty pleas. And bargain justice in a court whose resources are inadequate to its caseload may very well result in excessively lenient sentences. These are serious problems, and warrant immediate remedial action. Contrary to what is coming to be conventional wisdom, however, I have argued that these pathologies are not inherent in plea bargaining, that it is quite possible to construct a system of plea negotiation that is at least as defensible as the trial process upon which it is based. In this section I will outline the requirements for such a system. I should indicate that these requirements, like the original definition of plea bargaining, are phrased in very broad terms. I have made no attempt to indicate the specific currency in which plea bargaining should operate (charge reduction or sentence assurance) or who the primary official participant should be (judge or prosecutor). These complex issues are important but not central to my present argument.

The negotiation processes discussed here are centered entirely upon predictions by counsel of the likely trial outcome. This view of plea bargaining is substantiated by a number of recent studies of both prosecutors and defense attorneys: although practitioners admit that considerations such as docket backlog, the economic costs of trial, or pretrial publicity may affect plea negotiations, they are virtually unanimous in asserting that the primary influence in most nontrial dispositions is

predicted trial outcome (see Mather, 1974, 1979; Vera Institute of Justice, 1977; Lachman and McLaughlan, 1977). The conceptualization of plea bargaining discussed in this essay thus has considerable basis in the reality of American criminal procedure.

Four theoretical assumptions concerning the operation of bargaining processes underlie the defense set forth above. These requirements, their rationale, and some suggestions for implementing them must now be discussed. First, those cases that go to trial must be decided on the merits, without penalizing the defendant for not pleading guilty. In other words, trial sentences must be objectively *deserved* according to whatever sentencing philosophy is embodied in the penal code. Plea bargaining should therefore result in sentences *less than* this theoretically correct sentence. Posttrial sentences that include a surcharge for refusal to plead guilty would very probably constitute the unconstitutional burden on the right to trial that, critics charge, inheres in all plea bargaining.

In the real world of criminal court operation most trial judges are virtually unfettered in their sentencing decisions, with few statutory guidelines aside from maximum (and occasional minimum) sentences. It is thus virtually impossible to determine whether any individual sentence includes a penalty for demanding a trial. Changes in the sentencing system designed to confine and structure judicial discretion, such as current proposals for "flat time" sentences, would significantly limit opportunities to subvert this standard.[5] In addition, the motivation for imposing a sentence surcharge on those defendants convicted after trial could be reduced substantially if the judges presiding over criminal trials had no professional stake in the success or failure of prior plea negotiations. Creation of two separate benches—one for supervising plea negotiations and one for conducting trials—might be a step toward such a goal, particularly if the trial bench possessed staff adequate to handle all trials in timely fashion. Eliminating prosecutorial sentence recommendations to trial judges would also further the goal of insulating the trial process from recriminations by official participants in the previous plea negotiations.

Second, every defendant should be represented by counsel

[5] I am aware that these proposals are not without their difficulties. For a review of the relevant literature, emphasizing the expected impact of plea bargaining on sentencing reform, see Alschuler (1978).

throughout the negotiations. If these focus on the likely outcome at trial, it is obviously crucial that a defendant be represented by an attorney with the competence to assess the factual and legal elements of the prosecution's case and to advise him on the relative merits of trial and negotiated settlement. I am not unaware of the growing body of literature that posits an inherent conflict of interest between defendant and defense attorney, which may limit the effectiveness of this requirement (see Blumberg, 1967; Casper, 1972; Skolnick, 1967). A court system in which prosecutor, judge, and defense counsel interact on a continuing basis motivates all participants to cooperate rather than maintain strictly adversarial roles. And this cooperation—of which plea bargaining is the most visible symbol—may result in injustice to the interests of individual defendants and of society at large. Obviously no system of "enlightened plea bargaining" can address this problem. But the institution of plea bargaining is not the cause, nor would its abolition be a cure, for this possible disharmony between the interests of defendants and their attorneys. The incentive to reduce conflict among regular system participants exists equally at trial—as "slow pleas of guilty" and the like well illustrate (see Mather, 1974).

Third, if plea negotiations are to focus on predicted trial outcome, all information and evidence bearing on that outcome should be available equally to prosecution and defense. Procedures for pretrial discovery of relevant evidence held by an adversary are not as fully developed in criminal cases as they are in civil cases, and need improvement. The accuracy and rationality of negotiated pleas could also be enhanced if more complete personal information about the defendant were available at the time of plea negotiations. Information of this sort is generally compiled only after conviction, in a presentence report by the probation department.

The final requirement for a defensible plea bargaining system may be the most difficult to achieve. Participation in a trial is always costly. The problem for plea bargaining is not that the alternative of a trial may cost the parties something but that one party may be unable to absorb these costs. Such circumstances can give the adversary an unfair advantage and any settlement reached may not reflect predicted trial outcome. The fourth requirement, then, is that each side possess sufficient resources to take the case to trial if it believes that the settlement offered does not adequately reflect the likely trial result.

It is important to emphasize that the prosecutor and the defendant may both be plagued by inadequate resources. Large urban jurisdictions often provide the prosecution with insufficient staff to take more than a handful of cases to trial. If the defense can pose a credible trial threat, a defendant very likely to be convicted at trial on a serious charge may be able to bargain for an inappropriately lenient sentence because the prosecution cannot afford an additional trial. To solve this problem it is not necessary to increase staff and courtrooms to provide every defendant with a trial but only to expand the resources of the prosecutor so that his bargaining position reflects the evidentiary strength of his cases and not the size of his backlog.

The problem for the defense is more complex. Theoretically, at least, all defendants have a right to trial. Unfortunately, this view is simplistic. An indigent can demand a trial and be assured that the state will provide the necessary resources to see it through, but a lengthy trial may virtually bankrupt a defendant of moderate means. Flexibility is clearly needed in the concept of indigence to allow some financial assistance to defendants who may be able to absorb limited legal costs but not the expense of a full jury trial.

Public defenders or private attorneys assigned to represent indigent defendants are similarly under economic constraints that may lead them to prefer a guilty plea to a trial, regardless of the facts of the case or the bargaining power of the prosecutor. Public defenders often labor under the same intense caseload pressures experienced by their counterparts in the prosecutor's office. As a result they may urge their clients to settle for a less advantageous bargain than the facts warrant because a trial would constitute an unacceptable drain on scarce resources. When indigent defendants are represented by private court-appointed counsel, a similar situation may arise. Assigned counsel typically are woefully underpaid in comparison to the fees they charge private clients. Compensation for trials is particularly low and defense attorneys therefore maximize their earnings by disposing of an assigned case as quickly as possible through a plea bargain. Trial disincentives could be lessened by increasing public defender staffs and raising the fees paid to appointed counsel. These reforms may not entirely equalize the costs of trial to prosecution and defense but they would help to prevent resources from dictating the level of criminal sentences.

IV. CONCLUSION

In the preceding pages I have tried to show that negotiated settlements of criminal cases need not involve either violations of due process or unjustifiable leniency. The underlying requirement for such a system is that pretrial negotiations be influenced solely by informed predictions of counsel as to the likely result of a fair trial on the merits of the case. The bargaining positions of the parties should thus be based upon strengths or weaknesses in the case itself and not on unequal access to information or unequal ability to hold out for a trial in the event that a mutually satisfactory settlement cannot be reached. I do not believe these conditions are utopian. As with any reform of the courts, the attempt to implement them must contend with the "local discretionary system" (Nimmer, 1976) of existing relationships and practices among attorneys, prosecutors, and judges. But the basic model of plea bargaining put forward is consistent with nearly every prior study of the practice I have seen. And unlike the call of the "abolitionists," the conditions for a defensible system of plea negotiation need not run counter to the existing structure of incentives and interrelationships in a court.

As indicated at the beginning, this paper is premised on two observations drawn from the growing body of behavioral research on the operation of criminal court systems: the difficulty of eliminating plea bargaining and the positive aspects of less formal adjudication procedures reported in many jurisdictions. These factors mandate a careful rethinking of the case against plea bargaining. It clearly makes considerable difference whether reform efforts over the next decade are directed at the substantial task of abolishing the predominant mode of disposition of criminal cases throughout the country or at achieving less fundamental changes.

My major thesis is that a system of negotiated justice can be as defensible as the trial system upon which the negotiations are based. Our judicial system, for better or worse, is based on the proposition that just resolution of disputes will flow from the clash of interests of litigants whose legal fates are committed almost entirely to the hands of professional counsel. Much of the criticism of plea bargaining is more aptly directed at this laissez-faire model of adjudication than at the informal dispositional procedures that may very well be its logical outgrowth. A necessary accompaniment to arguments for the abolition of plea bargaining is distrust of the capacity of both

prosecutor and defense attorney adequately to advance the interests they formally represent. If such distrust is justified, it is unclear how the trappings of formal trial will protect those interests any more effectively than informal negotiation, at least as long as the conduct of the case remains primarily in the hands of lawyers.

If an unavoidable and pernicious disharmony exists between the goals of attorney and client, the only conceivable solution is not abolition of plea bargaining but rather a significant reallocation of responsibility for the conduct of the case from counsel to judge, possibly along the lines of the continental "inquisitorial" system. A certain longing for the judicial oversight and administrative rationality of the civil law countries can be detected in many criticisms of plea bargaining.[6] I do not believe the evidence warrants so drastic a step, however, and I suspect that most of the critics would agree. If such a massive change is not contemplated, this essay argues that an attempt to purify the existing system of bargain justice constitutes a more rational public policy than an expensive—and very possibly futile—effort to abolish plea bargaining.

REFERENCES

ALSCHULER, Albert W. (1968) "The Prosecutor's Role in Plea Bargaining," 36 *University of Chicago Law Review* 50.

———(1975) "The Supreme Court, the Defense Attorney, and the Guilty Plea," 47 *University of Colorado Law Review* 1.

———(1976) "The Trial Judge's Role in Plea Bargaining, Part I," 76 *Columbia Law Review* 1059.

———(1978) "Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals for 'Fixed' and 'Presumptive' Sentencing," 126 *University of Pennsylvania Law Review* 550.

AMERICAN BAR ASSOCIATION. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (1967) *Standards Relating to Pleas of Guilty.* New York: Institute for Judicial Administration.

AMERICAN LAW INSTITUTE (1972) *A Model Code of Pre-Arraignment Procedure, Tentative Draft No. 5.* Philadelphia: American Law Institute.

BLUMBERG, Abraham S. (1967) "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession," 1 *Law & Society Review* 15.

CARTER, Lief H. (1974) *The Limits of Order.* Lexington, Mass.: Lexington Books.

CASPER, Jonathan D. (1972) *American Criminal Justice: The Defendant's Perspective.* Englewood Cliffs, N.J.: Prentice-Hall.

CHURCH, Thomas W., Jr. (1976) "Plea Bargains, Concessions, and the Courts: Analysis of a Quasi-Experiment," 10 *Law & Society Review* 377.

DAVIS, Kenneth Culp (1971) *Discretionary Justice: A Preliminary Examination.* Urbana, Ill.: University of Illinois Press.

ENKER, Arnold (1967) "Perspectives on Plea Bargaining," in President's Commission on Law Enforcement and the Administration of Justice.

HARVARD LAW REVIEW (1970) "The Unconstitutionality of Plea Bargaining," 83 *Harvard Law Review* 1387.

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[6] See, for example, the suggestions for reform of plea bargaining suggested by Alschuler (1976). If accomplished, the resulting system would closely resemble the continental model.

HEUMANN, Milton (1975) "A Note on Plea Bargaining and Case Pressure," 9 *Law & Society Review* 515.

——— (1978) *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys*. Chicago: University of Chicago Press.

IOWA LAW REVIEW (1975) "The Elimination of Plea Bargaining in Black Hawk County: A Case Study," 61 *Iowa Law Review* 1053.

KIPNIS, Kenneth (1976) "Criminal Justice and the Negotiated Plea," 86 *Ethics* 93.

LACHMAN, Judith and William McLAUGHLIN (1977) "Models of Plea Bargaining," in Stuart Nagel (ed.) *Modeling the Criminal Justice System*. Beverly Hills, Calif.: Sage Publications.

MATHER, Lynn (1974) "Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles," 8 *Law & Society Review* 187.

——— (1979) *Plea Bargaining or Trial? The Process of Criminal Case Disposition*. Lexington, Mass.: Lexington Books.

NIMMER, Raymond (1976) "A Slightly Moveable Object: A Case Study in Judicial Reform in the Criminal Justice System," 48 *Denver Law Journal* 206.

PACKER, Herbert (1968) *The Limits of the Criminal Sanction*. Stanford, Calif.: Stanford University Press.

PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE (1967) *Task Force Report: The Courts*. Washington, D.C.: Government Printing Office.

ROSETT, Arthur I. and Donald R. CRESSEY (1976) *Justice by Consent: Plea Bargains in the American Courthouse*. Philadelphia: Lippincott.

SKOLNICK, Jerome (1967) "Social Control in the Adversary System," 11 *Journal of Conflict Resolution* 52.

TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING (1976) *Fair and Certain Punishment*. New York: Twentieth Century Fund.

U.S. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS (1973) *Courts*. Washington, D.C.: Government Printing Office.

UTZ, Pamela (1978) *Settling the Facts: Discretion and Negotiation in Criminal Court*. Lexington, Mass.: Lexington Books.

VERA INSTITUTE OF JUSTICE (1977) *Felony Arrests: Their Prosecution and Disposition in New York City's Courts*. New York: Vera Institute of Justice.

WILSON, James Q. (1975) *Thinking about Crime*. New York: Vintage Books.