AN EXPERIENCE IN JUSTICE WITHOUT PLEA NEGOTIATION

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The reasons for the termination of plea negotiation in El Paso County, Texas, are explained. The statistical consequences of doing so are discussed.

I. THE CASE AGAINST PLEA NEGOTIATION

The discussions at the Special National Workshop on Plea Bargaining showed that it is necessary to distinguish between "plea bargaining" and "plea negotiation." Some participants argued that any inducement to plead guilty, whether expressed or implied, negotiated or fixed, constituted the odious practice of plea bargaining. They seemed to perceive plea bargaining as coercion and threat rather than as inducement and lure. They apparently assumed that a plea of guilty is produced by the implied threat that, if the defendant refuses to accept what the prosecutor believes is a just sentence, the prosecutor and the judge will see to it that the defendant gets an unjustly harsh sentence, and further that this procedure elicits guilty pleas from innocent persons and punishes others for asserting their rights. In practice, however, the need to move the dockets (the cause of plea bargaining) forces prosecutors to induce pleas by the promise of exceptional leniency rather than by the threat of unwarranted harshness. One can test the validity of this assertion by trying to find a defense attorney or criminal who is opposed to plea negotiation. Therefore, since the term "plea bargaining" can be interpreted to include pleas that are entered following a sentence recommendation unilaterally determined without negotiation with the defense, it is necessary to use the term "plea negotiation" to describe the practice we have tried to eliminate in El Paso County, Texas.

The system we established was a reaction to public dissatisfaction (which we judges shared) with these aspects of plea negotiation:

1. *It inevitably produces the ridiculous result that, as crime grows worse, sentencing becomes more lenient.* Plea negotiation arose and persists for the purpose of expediting the disposition of cases. As crime grows worse, the number of cases on the criminal docket increases; in order to move those

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cases, the prosecutors have to offer progressively better deals.[1]

2. *Plea negotiation is the focal point of public distrust of the law.* People just do not like the cynicism expressed in plea negotiation. Many people are repelled by the idea that, having ceded all the protection of due process to criminal defendants, we must let them participate in the determination of their own sentences in order to keep them from asserting that protection. Furthermore, we have good reason to believe that criminals cynically count on the fact that plea negotiation will alleviate the consequences of getting caught as they go about plying their trade.

3. *Plea negotiation produces unequal justice.* Ethical justifications of plea negotiation—that it recognizes the uniqueness of each case or that it punishes some guilty defendants who, because of the weakness of the prosecution's case and the skill of the defendant's lawyer, would otherwise have gone scot free after an expensive trial—are too often offered to excuse exceptionally lenient sentences actually based on the identity of the defendant, his family or friends, or his attorney.

4. *The law says that judges are to impose sentence but under plea negotiation prosecutors assess sentences.* That it is only a legal fiction that judges assess sentences is less of a problem than is the fact that judges must take the blame for the inequity, the inadequacy, and perhaps the chicanery of negotiated sentences. There are many seminars on sentencing policies for judges. But prosecutors, who actually determine sentencing policies, don't spend much time at seminars, or anywhere else, considering the proper methods of controlling criminals. For them, plea negotiation is based solely upon political expediency: what will look good in the press in some cases and what won't look too bad in others.

To the argument that the negotiation of pleas respects the uniqueness of each case, I respond that a judge can consider all legitimate factors (such as the crime committed and the prior record of the defendant) as sensitively as any negotiators. Surely the support the defendant is receiving from his family and evidence that he has reformed can be brought out at a sentencing hearing in open court as well as it can at a plea negotiation session. Furthermore, if judges cannot be trusted to assess sentences why not relieve them of that responsibility?

On balance, it seems to me better that a criminal go free

[1] The responsible judicial answer to an increased criminal caseload arising out of a growing crime rate is to increase the number of prosecutors and judges to permit stricter rather than more pragmatic sentencing.

than that he receive unwarranted leniency in exchange for a guilty plea. Since no suspect is ever charged in most cases, it is not so tragic that a few more are exculpated because skilled attorneys can destroy weak evidence. What other result should we want if we love liberty? Therefore, to negotiate pleas upon the pragmatic ground that any sentence is better than none only cheapens the image of justice in the public mind.

People accepted the acquittal of John Connally but they have not accepted the negotiated sentence of Spiro Agnew. They understood the pragmatic justification of that negotiated sentence yet they still did not like it. The Agnew case did not *produce* the cynical attitude toward justice that pervades the land, but it did crystallize that cynicism. Knowing what trial would have cost in time and money, I cannot say that the negotiated plea in the Agnew case was wrong in its immediate context, but the sentence was a travesty in the perspective of history. The American people have the right to ask why Agnew couldn't have been tried in several days just like any other tax evader. Every judge in America has reason to be deeply grateful that Judge Sirica did not save Nixon instead of letting him sink, for the American people would have turned on judges as herds of baboons turn on marauding leopards.

Why should a criminal, by any kind of threat, be able to force the law to accept his own idea of justice? The United States Supreme Court launched a campaign about two decades ago to make certain that the poor and unsophisticated get the same kind of justice that the affluent and sophisticated have always had. One result of that noble sashay in behalf of equal justice was that the criminal law became nearly unenforceable. The way to raise the quality of contemporary justice is to restrict the power of the affluent to pervert the criminal justice process by threatening to drag out trials interminably. It took more than six months to try the Texas millionare Cullen Davis. Some may say that this was a marvelous example of the great care we take to avoid injustice. I say it is a marvelous example of idiocy. The man could have had a genuinely fair trial in two weeks. He might not have been acquitted, but the trial would not have been unfair or unjust for that reason. The threat that the trial will last six months practically guarantees that the jury will be a bunch of oddballs who are more apt to acquit than ordinary citizens.

The real problem in moving any docket is the affluent, violent, and career criminal rather than the nonviolent criminal

with a limited record. I do not think any system can induce affluent, violent, or career criminals to accept the sentences they deserve. We simply have to force justice on them, because we can only entice them to accept the pitty-pat justice that plea negotiation has produced. Therefore what I am saying is applicable to all plea negotiation systems. The judge who allows a man convicted of two prior felonies to plead guilty to a charge that carries a five-year maximum, in order not to try him for the armed robbery he actually committed, is undermining public confidence in justice and failing in his duty to exercise responsible control over criminals. Furthermore, what he does is long-range economic nonsense even if it is based upon short-term economic expediency.

The only factor that justifies plea negotiation is economic expediency. I do not admit that negotiation is a necessary evil. I do agree that it is cheap. I may be compelled to return to it, not because it is necessary but rather because it is economically expedient in the short term.

II. THE EL PASO EXPERIMENT

Using statistics from El Paso County, with a population of over 400,000 immediately adjacent to the more than 600,000 people in Juarez, Mexico, may make generalization difficult. Furthermore, Texas law is unique in permitting an accused to have his sentence, including the question of prison or probation, determined by a jury. Nevertheless, the crime rate and criminal justice statistics in El Paso are not too far from the national average. So I plunge on.

The abolition of plea negotiation in El Paso County derived, in part, from a political controversy. The prosecutor had the courts in a political bind. He refused to recommend probation for burglary, even if a seventeen-year-old boy with no record had broken into a laundromat and stolen cigarettes. That may have been a sound policy according to some theory of criminal justice, but it was completely unworkable in practice because El Paso juries grant probation in over ninety percent of nonviolent felony cases involving defendants with no prior felony convictions. This prosecutorial policy had the effect of making us judges appear to the public to be responsible for the increasing crime rate. It did not make any difference that the prosecutor's negotiated recommendations were exceptionally lenient in other kinds of cases; we judges became the whipping

boys of the press and of an irate public. The tenor of media reporting was that *judges* were granting probation in eight out of ten burglary cases despite the fact that the prosecutor was consistently recommending imprisonment.

I developed the system we used to eliminate plea negotiation in El Paso from a suggestion by Judge Sam Paxson who in turn was influenced by the system Judge Jerry Woodard constructed to determine eligibility for a personal recognizance bond. Though I acted in white-hot Irish frustration, not in sublime Indian contemplation of *Nirvana*, I do claim that I worked the idea out while sitting in a bathtub, like the excitable Greek thinker Archimedes. Don't get me wrong: I did have the modesty to refrain from shouting "Eureka".

I began with a decision about the purpose of sentencing. I rejected the idea that imposing exceptionally severe sentences on a few criminals would frighten the rest out of business and decided that, by and large, criminals must be dealt with one by one. I also rejected the demand by newspaper editors and prosecutors that "the punishment fit the crime" as nothing more than a cry for vengeance. I finally determined that the purpose of sentencing is, of all things, to try to prevent the convicted criminal from engaging in criminal behavior in the future. Therefore I adopted as the purpose of sentencing: let the control fit the criminal.

At the time of reaching this hard-nosed conclusion I was, in the innocence of my intellectual isolation, unaware of what I now call "the equal and opposite reaction" theory of sentencing that seems to have developed out of liberal frustration with the stubborn refusal of criminals to "rehabilitate." The advocates of relatively short, definite, legislatively determined sentences prudently avoid claiming that such sentences will either reform criminals or amount to much as a general deterrent. They also reject the control of future behavior as a purpose of sentencing upon the ground that the long sentences imposed by some judges on chronic repeaters unjustly punish them for crimes they have not committed (Bernstein *et al*, 1978:188).[2] They seem to think it possible to determine legislatively what is "an equal and opposite reaction" to the various crimes but nevertheless impossible to determine judicially that a convicted defendant will continue to be criminally hyperactive unless

[2] See also *Rummel* v. *Estelle* (568 F. 2d 1193, 1978), which reversed a life sentence imposed on a three time loser on the ground that it was unconstitutionally severe without even discussing the fact that the sentence was imposed because of what the defendant had been proved to be rather than as punishment for the particular crime.

incapacitated by imprisonment. I grant that this thinking arises out of compassion and concern for equal justice. But such advocates, having eliminated vengeance, reform, and incapacitation, are left with general deterrence and logical balance ("equal and opposite reaction") as the only purposes of the criminal sanction. Imposing adequate control (the goal I proposed above) incidentally produces whatever general deterrence can be achieved through punishment. Logical balance is no purpose at all. Therefore I reaffirm my original approach to sentencing: let the control fit the criminal.

Having reached that conclusion, I thought out what kind of control would constitute a reasonable compromise between the ideal and the practical under various hypothetical cases. The amount of control a judge can impose is the number of persons whose criminal behavior is suppressed by probation and imprisonment at any given time. It is relatively easy to impose probation on law-breakers. The real problem is to impose realistic incapacitation on people whose repeated or vicious past conduct clearly indicates that it would be judicially irresponsible to let them roam about, especially with their due process rights fully intact. Obviously, it would be judicially cruel, excessively cynical, and economically impossible to isolate all of these criminals permanently. The problem is to keep enough real criminals incapacitated so as to fulfill optimally the judicial duty to protect the public from criminals, within the very real and proper limitations of due process of law.

An effort to increase the amount of protection afforded involves an x and a y factor. If x represents the number of persons controlled and y represents the length of sentences, obviously an increase in both will increase the amount of protection provided. However, an increase in y will produce a decrease in x because increasing the length of sentences decreases the number of people willing to waive jury trial and plead guilty, thus decreasing the number of people convicted and incapacitated. On the other hand, a decrease in y decreases the cumulative effect of sentences: criminals get out of prison and return to criminal activity in the community at a rate that reduces rather than augments the number of criminals controlled.

In accordance with this thinking I devised a set of guidelines, now called "the point system" by unenthusiastic lawyers in El Paso, that weighs various factors that seem to me important and proper in determining both whether to grant probation or imprison and the length of sentences (see Appendix A). The

point system was contrived from desired result backwards so that the defendant and his attorney could predict what I thought a sentence ought to be for the crime committed, given the defendant's record and character as far as I could know them. The purposes of the point system are fourfold: (1) it focuses the judge's mind on the factors proper to sentencing; (2) it commits the judge in advance to the factors he will consider, thus allowing observers to see and publicize any special treatment of a criminal that violates the principle of equal justice; (3) it allows the defendant, with the help of his attorney, to predict what the judge's sentence is apt to be; and (4) it contains the express promise that the defendant can withdraw his plea if the judge believes he should impose a more severe sentence than the points indicate.

The point system does not control the sentence. Cases are decided individually. The points do not account for every factor that could possibly be involved. The judge is perfectly free to tell the defendant he may withdraw his plea because the judge will not be as lenient as the points indicate. On the other hand, the judge is free to be more lenient than the points suggest. My experience in hundreds of cases is that relevant factors are seldom involved that are not accounted for by the points in one way or the other. For instance, the point system does not assign any positive value to youth as such. It actually does not assign any positive value to any factor. Many people consider youth to be a prime reason for leniency. My thinking is this: points are assigned for previous bad conduct. The youthful offender is likely to have a relatively clean record, expressed in zero points. If, in fact, he receives points for his previous record, then his youth is a poor reason for granting leniency. A twenty-year sentence for a twenty-year-old who is already a career criminal (I am exaggerating to make a point) might be just as proper as a ten-year sentence for a thirty-year-old criminal simply because the latter will pass the crime-prone period ten years before the former. There is nothing about youth itself that guarantees that a criminal will be less active or less vicious.

The statement of policy can be interpreted as containing an inducement to the defendant to plead guilty—that is, a threat that the sentence will be harsher unless the defendant pleads guilty. Nevertheless because Texas law gives the defendant the right to have the jury impose punishment, he can eliminate this threat; furthermore, the statement of policy specifies that the judge will never punish a defendant for exercising his right to

plead innocent and be tried by a jury. Two delicate considerations are involved here. First, there is reason to give weight to a clean-breasted admission of guilt for it may be real evidence of reform. (In a few cases, the circumstances and the demeanor of the defendant have convinced me that his guilty plea helped justify leniency.) Second, I believe that if the defendant puts up an obviously fraudulent defense the judge ought to respond with a more severe sentence.

I return to the problem of the possibility of coercive inducement. The defendant cannot resort to a jury for sentencing in most states. Nevertheless, I do not think the availability of this right in Texas has much to do with whether the system illegally induces pleas of guilty. The right to demand jury determination of sentence is an alternative to the defendant; it does not alleviate any pressure on him. Furthermore, everywhere the defendant can trap the judge by demanding a jury trial and, if convicted, going to the judge for sentencing. He has his due process shot at getting off scot free and, unless he presents a fraudulent defense, still has the judge over the barrel of the latter's sentencing policies. And he has this same right in plea negotiation. In other words, a judge can no more justly penalize a defendant who exercises his right to turn down what is available in plea negotiation and go to jury trial than he can do so under the system we are using. It seems to me that the judge is bound to impose upon the defendant convicted by a jury the same sentence he would have imposed following a guilty plea[3] unless, of course, the defense is obviously fraudulent—and that is equally true under our system. After all, even without our system it would be possible for defendants to find out what is available by negotiation, then try their luck with a jury and, if convicted, demand that the judge honor the sentence he would have given upon the negotiated plea. Of course, the judge could lie and excuse a more severe sentence upon the ground that he would not have accepted the bargained plea in the particular case. So can I under our system. Furthermore, it seems to me that the legal problem discussed here was, in most respects, resolved by the United States Supreme Court in *Bordenkircher* v. *Hays* (434 U.S. 357, 1978),

[3] Since pronouncing this philosphically admirable conclusion, I have been sorely tempted by the proposition that there may be absolutely nothing wrong with giving 100 percent of justice in sentencing to the criminal who demands 100 percent of justice in determining his guilt.

which held that it was *constitutional* for the prosecution to threaten the defendant with life imprisonment as a habitual offender in an effort to secure a guilty plea and then carry out the threat when the defendant refused to plead.

The other criticism of our system is that the judge induces the plea by promising to allow the defendant to withdraw it if the judge refuses to be as lenient as the announced policies indicate. There is some truth in the statement. But every negotiated plea is induced by the implicit understanding that the judge will allow the defendant to withdraw it if the judge is unwilling to go along with the negotiated sentence. There is no difference between the two, unless the fiction is adopted that under plea negotiation there is no promise because it is not in writing. Furthermore, this point seems to be rendered moot by a recent amendment to the Texas Code of Criminal Procedure (Art. 26.13) that requires the judge to advise the defendant that he will be permitted to withdraw his plea if the judge decides to reject the recommendation of a bargained plea.

Our system of trying to handle justice without plea negotiations has gone through two important and two minor changes. For over two years we used a system that depended entirely upon the simple sentencing guidelines I developed for giving the defendant an idea of what his sentence would be. This system worked fairly well with defendants who could expect probation but not with others because the sentencing guidelines for the latter had to be vague to cover all possibilities and the defendant could not really predict his sentence. I was never able to come up with any kind of satisfactory solution to this problem. My original idea was to have two lawyers who understood the sentencing policies of Judge Jerry Woodard and myself advise other defense counsel whether they thought the defendant ought to plead. But lawyers became very upset about this procedure for they interpreted what we had done as the appointment of our own plea negotiators and feared we would be establishing the two lawyers appointed as the only ones worth hiring in El Paso. That certainly was not what we had in mind but we lacked the commercial sense to realize that our plan would be seen by criminal defense attorneys as an economic threat. We backed off from that tactic hurriedly and thereafter relied solely on the sentencing guidelines.

The recent amendment to the Texas Code of Criminal Procedure (Art. 26.13), mentioned above, stated:

> the court shall inquire as to the existence of any plea bargaining agreements between the State and the defendant and, in the event that such an agreement exists, the court shall inform the defendant whether it

> will follow or reject such agreement in open court and before any finding on the plea. Should the court reject any such agreement, the defendant shall be permitted to withdraw his plea of guilty or nolo contendere.

This provision became effective August 29, 1977. About all I saw in it at first, was ratification of our use of an express agreement to follow the guidelines or let the defendant withdraw his plea, as distinguished from the tacit understandings of plea bargaining. I did not think of another possible use of this statutory change for several months.

We were able to dispose of the large majority of the cases without plea negotiation. But it was obvious that we could not forever continue to increase the number of pending cases by 200 a year. Something had to be done. By late 1977, the two judges in charge of the criminal docket were getting all the help we could ever expect from the civil docket judges. It became necessary to do something else to accelerate the pace of disposition.

In late February of 1978, it occurred to me that we could put into effect the system that is now being used in El Paso (see Appendix B). Under this system, when a defendant is indicted, the Court Services Section of the Probation Department ascertains the official version of the offense and makes a thorough investigation of the defendant's prior record and calculates the points. If the points are fewer than ten they recommend probation and if the defendant has never before been convicted of any crime more serious than a minor traffic violation they also recommend deferred adjudication. If the points are ten or more, the assessors determine the category on the time-to-serve chart. Then, working upwards from the bottom of the punishment range indicated by the time-to-serve chart, they make a determination of the number of years they think is a responsible sentence in the case. A responsible sentence is one that is at or near the maximum amount of control that can be achieved given the practicalities of the administration of justice. The punishment ranges established by the guidelines are based upon twenty years of concentrated experience with the administration of justice in Texas.

The officials who make these recommendations are under strict orders to refrain from discussing cases with either prosecution or defense. In deciding upon a recommendation, they do not consider the strength or weakness of the prosecution's case or the ability of the prosecutor or defense attorney. Usually, they will not even know which attorneys will be involved in the case. They consider only the crime committed, the prior record

of the defendant, and the practicalities of criminal justice in El Paso County, Texas. In order to assess this last factor, we are keeping close watch on what juries have done in different kinds of cases because, since a defendant has the absolute right to have his sentence determined by juries under Texas law, their sentences are very important in making practical recommendations—recommendations that produce a reasonable number of pleas.

This system promises to do a reasonable job of moving the docket while simultaneously meeting the four objections to plea negotiation stated earlier in this essay.

1. It does not let the size of the docket determine the severity of sentences and will not produce the ridiculous result that, as crime gets worse, sentences get more lenient. Of course, the system could produce this result if the guidelines followed the size of the docket the way a plea-negotiating prosecutor does almost subconsciously. But jury verdicts are the only factor that will produce a change in the guidelines and recommendations and as crime becomes worse, jury verdicts tend to become more harsh.

2. This system eliminates public distrust of justice by eliminating its negotiation. Since neither the defendant nor his attorney is consulted in determining the recommendation, inequalities that arise from considering the probative strength of the case against the defendant, the skill of the defendant's attorney, and political and economic factors are eliminated. The sentencing guidelines are completely immune to political pressure. Unlike the prosecutor, the probation officer is not responsible for whether or not there is a conviction. He does not have to run for office and therefore is under no pressure to please defense attorneys. And the guidelines keep the probation officer from going very far astray regardless of his motivations.

3. The guidelines themselves prevent the unequal justice that often arises from plea negotiation. Like crimes and like criminals produce sentences that are generally equal. The absence of negotiation excludes such factors as the weakness of the prosecution's case, the skill or prominance of the defense attorney, and the influence of the defendant, his family, and friends. As a lawyer who detests the system told me the other day: "At least I don't have to worry about whether the person making the recommendation likes me."

4. Since the recommendation must come within the judge's guidelines, his thinking pretty well dominates it and the

sentence, for which he is responsible, is his own much more truly than it is under plea negotiation.

III. AN EVALUATION

The question persists: has our effort been worthwhile? There are several ways of answering this. On December 31, 1975, one month after we had abolished plea negotiation, there were 219 active criminal cases on the dockets of the District Courts of El Paso County; on October 26, 1978, there were 767. That is a docket increase in two years and ten months of 548 cases. There has been a total case disposition in two and one-third years of 2,148 cases. During the last nine months, with considerably more help from other District Courts, we have disposed of 755 cases, which extrapolates to 1,000 dispositions for the full year, as compared to 897 criminal cases filed in 1975, 808 in 1976, 935 in 1977, and an estimated 1,124 in 1978 (an extrapolation from the 843 filed in the first nine months).

Because of the strange increase in the number of indictments filed in 1978, a year in which the crime rate was down somewhat, we have failed to prove that we can do without plea negotiation in El Paso County, although we have shown that, with help from other District Courts, we can dispose of the average number of felony cases filed in the last four years. Furthermore, a contemplated change in the identity of the District Attorney's screening officer at the end of this year leads me to predict that the number of felony cases filed next year will be considerably lower.

Have we accomplished anything except to create a docket crisis? The one thing we can assert unequivocally is that the sentences imposed by El Paso County District Judges have been evenhanded. That is, the same legally relevant factors—the crime committed and the defendant's past record—have determined every sentence.

Furthermore, a statistical comparison shows that even though the docket expanded we have been able to increase control over criminals.[4] Table 1 presents a summary statistical description of criminal trials in the District Courts of El Paso County for the five years preceding and the three years during the experiment in abolishing plea negotiation.

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[4] An important cause of our falling behind on the docket is that we made sure that we tried the more aggravated cases, the ones least likely to plead when brought to the "lick log."

TABLE 1

SELECTED CRIMINAL JUSTICE STATISTICS BEFORE AND DURING EL PASO EXPERIMENT

Time period	Cases Filed	Number of Prison Sentences	Total Years of Prison Time	Average Length of Prison Sentence in Years	Number of Jury Trials	Percentage of Cases Receiving Probation
1971-75 (annual average)		204	1,183	5.8	103	64
1975	897	240	1,468[a]	6	154	55
1976	808	150	1,313	8.9	127	58
1977	935	185	2,725	14.2	178	56
1978						
nine months	843	243	2,667	11	174	53[c]
twelve months[b]	1124	324	3,556	11	230	

a. The official statistics give a figure of 1,308 years plus seven life sentences. All the life sentences were imposed concurrently upon one defendant because it was erroneously believed that the law required all seven sentences once the defendant had been convicted by a jury of seven counts under the habitual offender law. The sentences should have been one life and six ten-year sentences. I have, for the sake of statistical comparison, assigned 100 years to life sentences; the justification is that life is somewhat more severe than the next most severe sentence in Texas, which is 99 years.

b. These figures are an estimate established by extrapolating actual figures for the first nine months of 1978. This extrapolation is conservative, since all the judges had completed their vacations by the end of the first nine months.

c. Extrapolated from first three months of 1978.

In 1975, the last year we had plea negotiation, we produced more control over criminals than we did in any previous year. In the first full year without plea negotiation (1976), the number of jury trials fell, partly because I was hospitalized at the beginning of the year. This, combined with the termination of plea negotiation, reduced our output. Nevertheless, there was an immediate increase in the average length of sentences.[5] In 1977 and 1978, with increased help from the other judges, each of the indices increased.

As indicated previously, the bottom of line of control over criminals is the number of persons imprisoned. On December 31, 1975, one month after the moratorium on plea negotiation was imposed, there were 307 inmates from El Paso County in the Texas Department of Corrections; on September 30, 1978,

[5] There was pretty severe criticism of the length of these "Texas" sentences at the French Lick Workshop. I would explain their length as an effort to increase the number of *criminals* incapacitated by imprisonment. Under Texas parole practices, an inmate is released on good time once he has served a third or less of the sentence imposed; therefore, sentences must be rather long in order to produce any real effect. I use the term "criminal" advisedly because I do not sentence anyone to time unless I conclude it would be irresponsible to grant probation.

there were 414. This 34 percent increase shows the cumulative effect of longer sentences, since the total number of people incapacitated increased despite a decrease in persons sentenced in 1976 and 1977.

If the primary purpose of the criminal justice system is to handle cases as cheaply as possible, then the El Paso experiment in justice without plea negotiation has been a failure. But I maintain that the primary function of the criminal justice system is to protect the people from criminals, on the one hand, and from tyranny on the other. But though they are doing a conscientious job of trying to protect the people from tyranny, the courts of this county have to admit they have been doing a very poor job of protecting the people from criminals. Ironically, this failure threatens the very principles of due process that are supposed to protect the people from tyranny, for the people will demand to be reasonably safe from criminals even if it means abolishing our highly vaunted criminal justice system.

Of course we cannot measure the quality of justice only in terms of the number of years of imprisonment it imposes. However, I doubt that many serious, knowledgeable observers would say that the failures of contemporary criminal justice are failures to protect the innocent. No nation on earth has ever gone to the extremes to protect the innocent that this nation has adopted. But plea negotiation has nothing at all to do with protecting the innocent. Its sole purpose is moving the docket. What's wrong with justice in this country today is that it does not afford the people reasonable protection from crime. Plea negotiation certainly decreases the amount of control we exercise over criminals. It is bargain justice and it produces a cheap result.

The index crime rate was almost level in El Paso County in 1976 and was down slightly in 1977 and in the first half of 1978. Our system can take no credit for that result since the crime rate was down throughout much of the United States during the last couple of years. However, a very important fact needs to be added to our understanding of El Paso. The unemployment rate in El Paso reached 14 percent during 1977; and Juarez, Mexico, a city of over 600,000 immediately adjacent to El Paso, has had an unemployment rate estimated at 40 percent. These awful circumstances ought to have produced an explosion in the crime rate, but they did not.

The question that remains unanswered is: can we do without plea negotiation? We certainly cannot go on losing ground

to the docket. Do we have to return to negotiated pleas? Are they a necessary evil, inherent in our legal system? Our experience in El Paso County indicates we do not have to revert to plea negotiation in spite of the new Speedy Trial Act. Of course, the speedy trial requirements of federal and state constitutional and statutory law may be interpreted so as to require plea negotiation. If that proves to be the case, then the law deserves no more respect from the people than it gets, which is practically none.

Front-seat observation of the criminal justice system in El Paso over more than seventeen years and a close review of the statistics of that period convince me that under a system of plea negotiation, one judge working full time disposed of about 400 felonies annually. Today I doubt that a judge could accept negotiated pleas that were lenient enough to elicit guilty pleas in more than 300 dispositions without getting into serious trouble with the voting public. The detailed statistics of 1976, 1977, and the first nine months of 1978, lead to the conclusion that one judge could dispose of 200 felony cases per year under the system we were using in El Paso County prior to March 1978. Under the new system, one judge should be able to handle nearly 250 cases. For the past couple of years, we have used between two-and-a-half and nearly four judges for criminal cases and between five and six-and-a-half for civil cases (including the juvenile criminal docket). I am convinced that if we discard the concept of individual jury trial dockets and unite the civil and criminal dockets on a revolving wheel, placing a criminal case between each civil jury trial and if, every Monday morning, the trial judges march nine abreast against the jury docket, under the direction of one administrative judge, we will handle the docket better than it has ever been handled before. Alternatively, if five judges are assigned to the criminal docket, they can handle it and "condescend" to give enough help to the civil docket to keep it going pretty well. They can lend this help because the only burden the new system places on the docket is to triple the number of jury trials. Administrative duties are not increased at all. Therefore, five hard-working criminal docket judges could have time to handle some nonjury civil matters, for instance, the detested family law and juvenile docket.

Several things have to happen before that can be done:

1. Judges must stop assigning the criminal docket a lower priority and start preferring it in the allocation of resources. In 1977 the Texas legislature enacted a statute requiring all judges

to give first preference to criminal cases (Texas Code of Criminal Procedure, Art. 32A.01). That act, in my opinion, is a proper and long overdue assignment of judicial responsibility. For too long I have suffered through lectures from civil judges asserting their contempt for the nasty criminal law. I have bit my tongue on too many occasions when judges and lawyers have pompously asserted that civil law is more complex than criminal and that consequently civil cases require more trial time. That claim never was based on fact and, since the Supreme Court has become intimately involved in criminal law, the claim is the same stuff that keeps Chicago's famous stockyards from becoming a major tourist attraction.

2. Judges must stop paying so much attention to the wishes of lawyers in running their dockets. The courts do not belong to lawyers. They belong to the administration of public justice. Courts can only pay attention to what is essential in order that lawyers may render competent service to their clients. I do not make this assertion out of animosity toward lawyers, although I am convinced that they are jeopardizing the right to trial by jury through excessive zeal for their "prerogatives," such as voir dire.

3. Judges must not give super justice to the affluent. No judge in El Paso County is guilty of this. Yet the caution must be given. Letting lawyers take months to try a lawsuit is absolutely unconscionable. Whether the resources that produce long, expensive trials come from the personal wealth of the defendant (as in the Texas case of Cullen Davis) or from some political or social campaign that is helping an indigent defendant (such as the various defense funds), the courts must ensure that the right to a speedy trial means more than deliberate speed from arrest to trial; it must also mean deliberate speed from the beginning of trial to the verdict.

4. The judges must give the sentencing policies we have established rock-solid support. Permitting any plea negotiation at all or condoning any deviation from the policies before a plea is taken will utterly destroy the system.

5. The people, acting through the County Commissioners, must be willing to pay the increased costs in juror fees, extra prosecutors, appeals, and other related expenses produced by justice without plea negotiation.

Because of dissatisfaction with our insistence on controlling sentencing in order to make the system work, complaints by criminal and civil lawyers, and particularly the docket crisis

precipitated by the Speedy Trial Act,[6] the judges voted on October 28, 1978, to divide both the criminal and the civil dockets ten ways. Judge Woodard and I supported the change because we have had a surfeit of criminal cases. I suppose that the other judges, who do not share my views on plea negotiation, will institute some form of that practice in handling their criminal cases. Although Judge Woodard and I will carry on without plea negotiation, this docket split signals a partial failure of our "noble experiment." We will not be able to determine the effect of justice without negotiation on the crime rate although next year's rate ought to give some indication of whether three years without negotiated justice had any influence. The comparison between what happens to cases with and without negotiation in the same county ought to be interesting.

I believe I am more aware than most that the criminal justice system cannot actually control crime. That is basically a moral problem. We have shed our hypocrisy not by living up to our morals but rather by becoming openly and proudly degenerate. An immoral nation, such as ours, inevitably produces a surfeit of crime. Nevertheless, we judges do have a solemn duty to control in a sensible way the individual criminals we sentence. We therefore must adopt sentencing policies that will do that job, regardless of whether they produce docket crises. I firmly believe that the people, through the legislature, will respond with the means necessary to solve the docket crises if we do a good job with what we can handle.

Our effort in El Paso convinces me that we can do without plea negotiation. Whether this is so will be proved within a few years by comparing the efficiency of negotiated and nonnegotiated dockets. I hope that our experience in El Paso and the movement expressed by the discussion at French Lick will encourage courts all over the nation to curtail the power of criminals to pervert justice by threatening to exercise their due process rights. Liberty and justice, as we have known them, will perish from the earth if crime continues its rampage. Justice means more than protection of the innocent from unjust punishment and the preservation of constitutional rights. It also means doing an adequate job of protecting the public from criminals. Plea negotiation is an important flaw in American justice. Its existence is a cynical admission by our legal system that we must come to terms with crime, that we must recognize

[6] Anyone who thinks the Speedy Trial Act will produce stricter justice is out of his gourd. The effect will more likely be to require and excuse plea negotiation, and more lenient sentences.

the vested rights of crime in American society. We don't have to do that. We can summon the will and the idealism to stop the negotiation of American justice. Judges can impose sentences they consider to be just instead of sentences criminals are willing to accept.

REFERENCE

BLUMSTEIN, Alfred, Jacqueline COHEN and Daniel NAGIN (eds.) (1978) *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates.* Washington, D.C.: National Academy of Sciences.

APPENDIX A

PROBATION CHART

Murder	10 points
Aggravated Rape	10 points
Aggravated Arson	10 points
Aggravated Robbery	7 points
Burglary Habitation	6 points
2nd Degree Felony	5 points
3rd Degree Felony	4 points
Use of Firearm	3 points
Use of Other Prohibited Weapon	2 points
Death to Victim in Carrying Out Crime	5 points
Serious Injury to Victim in Carrying Out Crime	4 points
Minor Injury to Victim in Carrying Out Crime	2 points
Little Possibility of Restitution Because of Amount of Loss	4 points
Inability to Supervise Probation	3 points
Bad Rescidivism Prediction of Psychological Test	1 point
Each Previous Felony Conviction in Previous 5 Years	6 points
Each Previous Felony Conviction More Than 5 Years Prior to Act in Question	4 points
Each Previous Class A Type Misdemeanor Conviction	3 points
Each Previous Class B Type Misdemeanor Conviction	2 points
Multiple Charges	3 points
Evidence Indicating Professionalism	4 points
Evidence Indicating Professionalism in Prohibited Substance Cases	5 points

TIME TO SERVE CHART

OFFENSE	*EXPECTED RANGE*
A.	
1. Murder	5-40 years
2. Aggravated Rape	5-40 years
3. Aggravated Arson	5-40 years
4. Aggravated Robbery (no injury to victim)	5-15 years
5. Aggravated Robbery (injury to victim)	8-40 years
B.	
1. Enhanced 3rd Degree Felony	10-15 years
2. Enhanced 2nd Degree Felony	12-25 years
3. Enhanced 1st Degree Felony	20-40 years
4. Habitualized 3rd Degree Felony	12-20 years
5. Habitualized 2nd Degree Felony	20-30 years
6. Habitualized 1st Degree Felony (Defendant pleads true to only one of habitualizing counts)	25-40 years
C. Where defendant, who has no felony record, and does not qualify for probated sentence in Court's opinion in types of cases not covered under A above.	
1. 1st Degree Felony	5-10 years
2. 2nd Degree Felony	4- 8 years
3. 3rd Degree Felony	3- 6 years
D. Where defendant has a previous felony record within the past 5 years, but there is no enhanced or habitualized indictment:	
1. A-1,2,3,4,5	10-50 years
2. Burglary of a Habitation	8-15 years
3. 2nd Degree Felony	6-12 years
4. 3rd Degree Felony	3- 6 years

APPENDIX B

IN THE 34TH & 205TH DISTRICT COURTS
OF EL PASO COUNTY, TEXAS

THE STATE OF TEXAS

VS. CAUSE NO. _____

_____

The West Texas Regional Adult Probation Department, based upon our investigation of the defendant's background and prior criminal record (if any), the nature of the offense involved, jury verdicts for similar offenses in El Paso County, the needs for control of the defendant's behavior in the future and the objectives set out in Sec. 1.02 of The Texas Penal Code, recommend the disposition of this case upon the defendant's plea of guilty set out below. This recommendation does not apply to pleas of not guilty because of factors that the trial might reveal or because of the conduct of the defendant between now and the trial. Furthermore, the recommendation is subject to being revised at any time because of the defendant's conduct between now and sentencing.

	No. of Years	Concurrent	Probation	42.12,3(d)	12.44	Fine
COUNT ONE	6	Yes__No__	Yes✓No__	Yes__No__	Yes__No__	$_____
COUNT TWO	_____	Yes__No__	Yes__No__	Yes__No__	Yes__No__	$_____
COUNT THREE	_____	Yes__No__	Yes__No__	Yes__No__	Yes__No__	$_____

FRANK LOZITO, Director
West Texas Regional Adult
Probation Department

BY: xxxxxxxxxxxxxxx

THE STATE OF TEXAS
vs.
_____

IN THE DISTRICT COURT
205TH JUDICIAL DISTRICT
EL PASO COUNTY, TEXAS

No. 32410

PROBATION OFFICER'S REPORT

TO THE HONORABLE JUDGE SAM W. CALLAN, JUDGE OF SAID COURT:
205TH JUDICIAL DISTRICT

DATE OF REPORT: September 21, 1978

CRIMINAL RECORD:
___ Felony Conviction(s)
___ Misdemeanor Conviction(s)
___ Juvenile Record
___ Narcotic History
___ Arrest Transcript (Attached)

RECOMMENDATION:
___ Probation Recommended
___ Probation Not Recommended
___ Revocation Recommended
___ Revocation Not Recommended
8 TOTAL POINTS

CONDITIONS:
___ Regular
___ Additional Conditions:

TYPE OF REPORT: Pre-Plea
OFFENSE: Burglary

PLEA OF GUILTY: _____
TERM OF YEARS: _____
ATTORNEY: _____
DEFENSE ATTORNEY: _____
TELEPHONE: _____
ON BOND: No
DATE OF BOND: N/A
AMOUNT OF BOND: $2,000.00
BONDSMAN: N/A
IN JAIL SINCE: July 29, 1978
DATE OF OFFENSE: July 29, 1978
DATE OF ARREST: July 29, 1978

1._____
2._____
3._____

RESTITUTION RECOMMENDED: Yes ( ) No ( )

Restitution in the amount of $_____, payable $_____ per month beginning _____, 19__, payable to:_____

_____

TREATMENT FOR NARCOTIC ( ) ALCOHOL ( )
ABUSE/ADDICTION: Yes ( ) No ( )

COMMENTS:

The defendant is a Mexican National whose known criminal record reflects an arrest for Burglary of Business, the Instant Offense. There are no FBI returns as of this writing.

The official complaint report reveals that on the early evening hours of July 29, 1978, the witness and some of his relatives were walking around the La Villita Shopping Area when they heard what sounded like broken glass. After observing the defendant inside one of the shops, the witness called the police from a phone booth. After making the call, he returned to the shop where the defendant had last been seen. While waiting for the police to arrive, the witness observed the defendant come out of the shop in an effort to make his get away. The witness and his relatives began chasing the defendant. During the pursuit, they observed a patrol car. The officers inside the patrol car were informed of the incident and almost immediately proceeded to place the defendant under arrest charging him with Burglary of a Business.

He scores 8 points on the court's scale as follows:

Instant offense	5 points
Inability to supervise	3 points
Total	8 points

FBI:
DPS: 2498469
PD: 158127
SO: 137441
DOB: July 3, 1953
CASE: 78-36555