Plea Bargaining

Plea bargaining is that practice which involves negotiation between the prosecutor and the defendant or his attorney. The negotiation most often results in the defendant's entering a plea of guilty in exchange for the prosecutor reducing the charges or promising to recommend a more lenient sentence than the defendant would ordinarily receive. This practice is very prevalent in the criminal justice system. The most often quoted statistic states that 90% of all criminal cases are disposed of by some type of plea bargain.

In theory, the negotiation of criminal cases is guarded against in the administration of criminal justice. One example of this is a special crime called a compounding crime. This makes it illegal to accept anything of value in return for not prosecuting one guilty of crime. This compounding crime includes a person who has been robbed and who drops the charges against the alleged robber just to recover the stolen goods. The crime also includes an uninjured person who conceals information concerning a felony.

However, there is a great contrast between theory and reality. In actual practice, compromises are very prevalent. The prosecutor can do many things with a case. Among other things, he can dismiss the case during preliminary hearings, promise immunity in return for the accused turning "state's evidence", move for nolle prosequi in the trial court, or even consent to continuances and finally let the case drop out of sight for maldisposition. The prosecutor can dismiss all remaining
charges if the accused pleads guilty to one charge, or dismiss the original charge for a plea of guilty to a lesser offense. In fact, the prosecuting attorney has a great deal of discretion, and can almost do whatever he wants to with any given case. There is really no question that such discretion is necessary. The question that is raised, however, is how this discretion should be exercised and how it should be controlled.4

The criminal justice system of the United States is theoretically based on an adversary system. This involves a judge, or jury, who determines the guilt of innocence of the accused after hearing evidence provided by the prosecuting attorney and by the defense attorney.5 The adversary system assumes that the truth to any case is discoverable, and that it can be discovered through this process. It also assumes that each side of a case, the prosecution and the defense, wants to win the case, and that each side has the resources necessary to make it a contest.6 However, the assumptions are very ambiguous. The fact is that they are not always true. Frequently, one side has greater resources, or greater determination to win. Even granting all the assumptions about the parties involved in a case, there is no absolute proof that this system, running ideally, is able to discern the truth.

Plea bargaining has only recently been acknowledged. It still has not been totally accepted. However, it has been around for quite awhile. In 1926, in Cook County, Illinois, 13,117 felony prosecutions entered preliminary hearings. Of these, only 492 resulted in completed jury trials. Of these 492, 283 were acquitted, 25 were convicted for a lesser offense, and only 184 were convicted for the original offense. This means that 96% of the cases were decided without the use of a jury.7
Some of these cases not decided by juries were decided by judges, but a majority of them were simply bargained away.

Once plea bargaining became a part of the system, it became a very important part. It was then perpetuated mainly by a process of socialization. Each new assistant district attorney relied on the other members of the district attorney's office for training and advice. These other members then led their new colleague along the same path they were taking, this path was the path of plea bargaining.8

The fact that even experienced attorneys regularly ask their colleagues for advice contributes to a substantial level of homogeneity in sentence recommendations as well as a considerable amount of communication between the attorneys and the judge. Thus the attorneys know the judge and what types of bargains he will accept. This also leads to the continuation of the plea bargaining system. The greatest single influence on the sentencing record of a court appears to be the relationship between the assistant district attorney and the defense attorneys.9 If they get along well and are able to reach satisfactory bargains, then the amount of plea bargaining will be substantial, and thus the sentencing record will reflect this situation.

One question of great magnitude that is frequently asked about plea bargaining is whether it is constitutional. The problem centers around the fact that the right to a speedy and public trial by an impartial jury is guaranteed by the Sixth Amendment to the Constitution and made binding on the states by the Fourteenth Amendment.10 The question is whether plea bargaining, which involves giving up these rights, is done freely. There are several Supreme Court cases that relate to this question.
The first case, Machibroda v United States, decided in 1962, says that in order to be valid a guilty plea must be freely, knowingly and understandingly made. In 1969, the Supreme Court said, in McCarthy v United States, that the court must address the defendant personally in order to determine whether the plea of guilty was entered voluntarily and intelligently. Also, the court must determine that there was indeed a factual basis for the guilty plea. In 1969 the Court also decided Boykin v Alabama. Here they ordered that the trial record must demonstrate that the defendant understood the consequences of the plea.

In 1970, Brady v United States decreed that a guilty plea in a capital case used to avoid a possible death penalty was not to be considered an involuntary guilty plea in violation of the right against self-incrimination. North Carolina v Alford, decided in the same year, said that a murder defendant's claim of innocence did not preclude the court's acceptance of a plea of guilty to second degree murder when the plea was made with the advise of counsel, supported by substantial evidence, and motivated by a desire to avoid the death penalty.

Another interesting pair of Supreme Court cases is Shelton v United States and Santobello v New York. The first of these cases, Shelton v United States, was decided in 1957. It involved a man who was promised certain concessions if he pleaded guilty to one charge. Shelton insisted on his innocence throughout the bargaining period, but when threatened with a prolonged wait if he demanded a trial, Shelton, who had already spent time waiting in county jails, gave in and pleaded guilty. In his appeal, Shelton argued that the concessions promised him had not been carried out.
The question considered by the Court was whether or not the plea was made voluntarily. The decision said, "There is no doubt, indeed it is practically conceded, that the appellant pleaded guilty in reliance on the promise of the Assistant U.S. Attorney that he would receive a sentence of only one year. The court, before accepting the plea, did not ascertain that it was in truth and in fact a voluntary plea not induced by such promise. It necessarily follows that the judgment of conviction must be set aside and the plea of guilty vacated.

"It is not necessary to consider the other promises, nor the question of their fulfillment vel non, litigated below. Justice and liberty are not the subject of bargaining and barter."^17

The second case, Santobello v New York, was decided fourteen years later. It held that plea bargaining "is an essential component of the administration of justice," and,"properly administered, it is to be encouraged."^18 It also held that when a plea of guilty rests in a significant degree on a promise or agreement by the prosecutor, to the extent that it can be said to be part of the inducement or consideration, then such promise must be fulfilled.^

These last two cases show how far the Court has come over the years. These cases, in addition to the other cases cited, show that the Court is very concerned that pleas be made voluntarily. They also seem to show that plea bargaining is not seen by the Court as unconstitutional. However, the question is still debated by legal scholars.

There are several types of plea bargaining. One type is charge reduction. This concession is brought about when the prosecutor agrees to drop all charges if the defendant will plead guilty to the remaining
charge, or when the prosecutor agrees to reduce the charge from a more serious crime to a less serious one. This is the most sought after bargain because it leaves a less serious record than if the charges were not reduced or dropped. 

"Thus, when the defendant has actually reached the point where his guilt has been determined, in most cases he is not found guilty of the crime of which he was originally charged." The most frequently reduced crimes are robbery, burglary, and larceny, and these are most often reduced to petit larceny. However, such personal crimes as homicide and rape are usually not reduced, but punished in keeping with the original charge. All in all, the reduction most sought after is from a felony charge to a misdemeanor, because that leaves a less damaging record.

Another common bargain is for sentence reduction. The prosecutor can only promise to recommend a lesser sentence to the judge, he cannot guarantee a lesser sentence. However, most judges, in order to aid the speed with which their court calendar is cleared, agree to most recommended sentence reductions. There are, also, several ways that a prosecutor can affect the sentence besides a recommendation. He can drop charges, consolidate counts, or not inform the court of prior convictions.

Other bargains include deals for bail, information, kickbacks, and efficiency. Deals for bail occur when the accused pleads guilty in order to be allowed bail, as opposed to staying in jail while awaiting trial. Negotiations for information are quite common because the police have only two main sources of information, undercover police and informers. Using undercover police is noneconomical and potentially very dangerous, so using informers is more desirable. "Deals offered by the police to
offenders that involve less than full invocation of the criminal process in exchange for information leading to the arrest and conviction of other, more serious offenders were perceived as reflecting a standard police procedure; the police allegedly used such deals whenever they suspected the offender might possess information of value.27

Deals for kickbacks involve a concession made by the prosecution in return for the return of merchandise by the accused. Since part of the duty of the police is to recover stolen goods, and the easiest way to achieve this is to obtain the location of the goods by bargaining with the person who took the goods, or with someone else who knows where they are, this type of deal is utilized often.28

Still another type of deal, for efficiency, is used. However, deals for efficiency are different from those for information or kickbacks, because they are not directly related to the goal of crime prevention.29 There are two times when deals for efficiency are normally introduced. The first is when the authorities realize, without any action by the accused, that to go to trial will mean inefficiency. An example of a deal would be when the prosecutor would agree to drop a few charges which are multiple charges and when their sentences would run concurrently anyway, if the defendant would plead guilty to the remaining charge or charges.30

The second reason for a plea bargain for efficiency is when the accused, by his actions, causes inefficiency, by asking for a jury trial on a number of different charges, which means that the prosecutor would have to prove each charge separately, and the witnesses might be worn down.31 The prosecutor may not think that the case is worth taking to
trial, and may agree to bargain instead.

The above types of plea bargaining are the most widely used. However, there are other types. "In addition to avoiding inappropriate maximum sentences, concessions are commonly made in cases in which there are codefendants of unequal culpability."32

Each participant in the plea bargaining system, from the police and the judge, to the prosecutor and the defense attorney, has different duties. Each also has different types and amounts of power and discretion with which to carry out his duties.

The policeman's duty is to enforce the laws. Because of the practical inability of any police department to arrest every criminal, each policeman has discretion over who to arrest and who to warn. In reality, he also has the option of totally overlooking lawbreakers' actions. Furthermore, while an arrest is being made, the policeman has the power to make his report reflect favorably or unfavorably toward the accused.33 The policeman's initial record of arrest can be very influential in determining how vigorously the district attorney will prosecute a case.

The duties of the judge, in the absence of a jury, include determining the guilt or innocence of the accused, and passing sentence on the convicted defendants. Generally there is much discretion allowed the judge in his sentencing. The judge can use this discretion to greatly affect the bargaining system. If he follows the recommendations of the prosecutor, and/or gives more lenient sentences to defendants who plead guilty than to those found guilty by the court, then by his actions he will be encouraging bargaining.34

The job of the prosecutor is to prosecute those accused of crimes.
In this role, he has a tremendous amount of discretion to help or hinder bargains. He usually determines what charges a defendant will be charged with, and then he can alter or drop charges as he sees fit. He can either push a case very hard, or ignore it. He also has the power to recommend a lenient or harsh sentence to the court. 35

The defendant, represented by his attorney, also has a great deal of power. Possibly one of his greatest areas of power is that of creating inefficiency. In some jurisdictions a decrease in the pleas of guilty could result in the collapse of the entire court system. The defendant also has potential power in the information he has, or has access to. The police rely heavily on information supplied by criminals. 36 In addition, the defendant can utilize kickbacks of stolen property in order to obtain a good deal for himself. 37

When all of these participants come together, each with his own objectives, it seems as if it would be impossible to reach a bargain. However, deals are made in approximately 90% of all cases. A plea bargain is reached whenever the defendant feels that the deal offers his an alternative better than that of trial, and the prosecutor feels the same way. 38 There are many factors, including and besides the actual participants, which influence any bargain.

A major factor in determining which type of plea bargaining takes place is the penalty structure of each state. In those states where a judge has little or no discretion over what sentence he must give, the bargaining is for a charge which carries a lesser maximum sentence. 39 Actually, bargaining for a lesser charge will most frequently be the case wherever the law allows for a wide variety of charges as well as degrees
of those charges, and when each charge carries a high degree of predictability as to the sentence it carries.**40** In comparison, in those states where a judge has a great deal of sentencing discretion, bargaining will most likely be for a lenient sentence recommendation by the prosecutor. Frequently all a defense attorney needs to do to force a bargain is to threaten to request a jury trial as opposed to a trial by the judge. This is because jury trials are much more expensive and time consuming than trials by judge.**41** In addition to the initial expense of a trial by jury, there is the added threat of a series of appeals which would be possible if the defendant is found guilty by trial but not if he voluntarily pleads guilty.**42**

A good defense attorney can use strong evidence to force a more favorable plea bargain for his client.**43** This is possible because in the face of strong evidence for the defense, the prosecution will be more worried about the possibility of loosing the case, and, therefore, more willing to bargain for a guaranteed conviction even if it requires some compromise. On the other hand, a less skilled or less committed defense attorney may not be willing to spend as much time on a case, and so may just agree to whatever bargain is offered by the prosecutor.**44**

The prosecutor takes many factors into consideration when deciding what kind of bargain to offer to the defendant. He considers the nature of the crime, the intent and motivations of the defendant, as well as the defendant's criminal record, if any. The prosecutor also takes into account the current average sentence that a jury would impose under similar conditions, and, if he wants to get rid of the case quickly, he will offer a slightly lower sentence.**45** To a lesser degree, the prosecutor
looks at such elements as the strength of the evidence, the age and personal background of the defendant, the feelings of the victim of the crime, and the public opinion concerning the type of crime committed. 46 The prosecutor may be influenced by a need to dispose of cases quickly, for one reason or another. The attitude of the defense attorney and his client also plays a role. If the defense attorney or the defendant is irritating to the prosecutor, a bargain acceptable to all parties will be harder to reach. 47

What the prosecutor views as his major role is of great consequence in determining how he bargains cases. If he sees his duty as that of an administrator, then his main concern may be to clear cases quickly. If his main priority is to be an advocate, then he is more apt to haggle over cases. Likewise, the prosecutor who sees himself as a judge will be concerned with being fair and equitable. The prosecutor who believes himself to be a legislator may feel it his duty to work around those laws that he sees as too severe. 48

Any changes in the judicial process can affect a deal, depending on how the changes are involved in the alternatives. If any one factor is changed, such as the reliability of the judge to grant recommended lenient sentences, the defense attorney or the prosecuting attorney may feel differently about plea bargaining because what he is bargaining for or against may have changed as a result. 49 For example, if the system is changed so that defendants are more easily let out on bail, or on their own recognizance, then bargaining for pretrial release will decline.

It seems as though plea bargaining is a very unreliable process. It can be affected by almost any little change in the judicial system.
However, every participant has what he considers compelling reasons to continue the process. The prosecutor has several reasons. He must win most of the cases he takes to court, or else his reputation will suffer. Bargaining eliminates the risk of losing a clear cut case at a jury trial. Bargaining also assures convictions with a minimal amount of time and expense. Another benefit is that through dealing, a prosecutor can use a weak case, that would probably lose in trial, as an opportunity to gain valuable information on criminals that the defendant might know.

The defense attorney also has his reasons for continuing the bargaining process. By use of compromise, an attorney can appear to obtain a good deal for his client, while actually achieving about the same sentence as would be secured through a judge or jury, but without the time and expense of a trial. Also, the attorney is spared the risk of losing a case for his client by going to trial. The defense attorney can win a dismissal of charges, a charge reduction, or a promised sentence for his client. Bargaining also allows for less time spent in jail waiting for trial.

There are reasons for the judge's participation in the bargaining process also. Because of plea bargains, a judge has less work to do. Instead of lengthy court trials, the judge merely has to decide, usually in his chambers, whether to accept the plea and the bargain, or to reject them. Most judges accept almost all plea bargains brought to them, and thus they save expense, and clear their calendars faster. It has been projected that if even a fraction of the felony arrests that are now being bargained would go to trial, the court would not be able to function.

The court itself has reasons for perpetuating compromise, besides
the one stated above. The fact that there are so many quick guilty pleas makes it possible for more attention to be given to the few jury trials that remain. The benefit for those who do have a substantial question as to their guilt and so go to trial is that the courts have more time to deal with them. Also, if every case went to trial without a substantial issue, then judges and juries would become so used to guilty defendants that they could possibly become very skeptical about all defendants. This would result in a "guilty until proven innocent" belief. Indeed, in cases where there is little or no question about the guilt of the defendant, bargaining is a fast way to operate. The court's duty, from this perspective, is to screen out those defendants who are unlikely to be convicted, and to rapidly convict the rest. Some people argue that in the face of strong evidence for the defense, it is better to bargain to assure at least some small punishment than to risk acquittal by a jury.

Another reason offered for continuing plea bargains is that often an accused is charged with a more serious offense than he actually committed, in order to scare him, so a plea for a lesser charge more accurately reflects the true crime. Also, it is contended that justice can sometimes best be served by compromise because it removes the shame and injury of a public trial from juveniles and innocent persons. Also, a defendant who pleads guilty has, by admitting his guilt, shown remorse and should be given a break, while a defendant who pleads innocent but is found guilty anyway has added perjury to his original crime.

In addition to these reasons, plea bargaining is good because when a defendant pleads guilty to a crime there are none of the nagging doubts that linger on, as when a person who claims his innocence all the way
through a trial is found guilty. Furthermore, rehabilitation can not begin until a person recognizes and admits his problems, so an inmate or a probationer who continually claims innocence is hard to deal with. 61

Those who are opposed to plea bargaining propose several reasons why compromise is bad for the court system. They argue that bargaining allows a prosecutor too much discretion, when his conviction record only stands to gain by numerous guilty pleas. Also, deals may be made in too many cases where parole would be a better answer. 62

Opponents argue that plea bargaining appears very shady because it is done in a semi-secret atmosphere, and that it carries little public responsibility because it is rarely subject to scrutiny by a higher court. 63 The fact that the bargaining is done secretly by the attorneys for the prosecution and the defense is also subject to such criticisms as, "'As time goes on there is always a larger room for discretion in the laws of procedure; but discretionary powers can only be safely entrusted to judges where impartiality is above suspicion and where every act is exposed to public and professional criticisms.' "64 Another objection is that the differential leniency in sentencing given to those who plead guilty penalizes those who exercise their constitutional right to a trial. 65

The jury system as well as the judicial system, is very much affected by plea bargaining. There are advantages as well as disadvantages to bargaining. Some of the advantages for the judicial system have already been stated. It makes little or no sense for a judge to sit in court all day deciding cases where there are no important issues. If the case is clear-cut, then it should be disposed of quickly, either by a dismissal, if the defendant is clearly innocent, or by a plea bargain, if
the defendant is clearly guilty. Bargaining is much more efficient than trials are, in terms of speed, and therefore the rehabilitation of criminals can be begun faster. Also, when a defendant admits his guilt the government, and society in general, feels better about punishing him. If guilty defendants can be handled quickly by compromise, then there are less people in jails awaiting trials, so jails are freer to deal with convicted criminals. Plea bargains mean that policemen do not have to spend a lot of their time testifying in court, but can be out stopping more crime instead. 

The court system is better able to individualize laws to particular circumstances under a system of bargaining than under a system where each charge carries a specific sentence. In addition, if criminals are to be conditioned by painful punishment, then it should be inflicted as soon after the crime as possible to be effective. Waiting months or years for a trial or an appeal widens the gap between crime and punishment and so removes some of the effectiveness of the punishment.

Some of the disadvantages that the bargaining system places on the judicial process include the fact that the prosecutor usually has more power behind him than the defendant, such as the criminal justice system, but he cannot guarantee, only promise, a sentence. The prosecutor may be so caught up in bargaining for guilty pleas that he disregards the danger of false convictions. If plea bargaining becomes too widespread it may be forced on innocent people. The fact that no record is kept of many plea bargains makes it almost impossible to prove, in an attempt at an appeal, that there ever was a deal, and that it was not just a voluntary admission of guilt. Also, bargaining often bypasses
legislation, by reducing charges and sentences, and therefore frustrates legislative intent.\textsuperscript{75}

There is considerable evidence that the jury system is on the decline. Part of this is due to a greater dependency on trials by a judge instead of a jury. However, a greater part of this decline is due to the rise in bargained pleas.\textsuperscript{76} Much of the decline can also be related to criticisms of the jury system itself, but whether or not the jury system is better than the plea bargaining system remains to be seen, because there are also many problems with bargaining.

One question that is frequently asked is, "Is a promise by a prosecutor to 'recommend' probation really any different from a threat to 'throw the book' at a defendant if he pleads not guilty?"\textsuperscript{77} Even if this question can be rationalized away by referring to the efficiency that bargaining offers, there is still a problem. Joint trials are more efficient, they save time and money, but they are not allowed because the fundamental principles of constitutional liberty are more important. Involuntary confessions are frequently more efficient, but they are not allowed. Not providing counsel for indigents would be less expensive but it is provided.\textsuperscript{78} So even if plea bargaining is faster and cheaper and more efficient overall, should these be determining factors in its admissibility?

Another problem is that bargains for kickbacks may actually create crime because sometimes criminals steal certain commodities in order to use them for deals should they be arrested.\textsuperscript{79} "A system of negotiated justice in which concessions are made to offenders in exchange for the return of stolen property or for the prevention of greater and perhaps
more serious crime, can help to achieve certain legitimate law enforce-
ment goals. At the same time, achieving these goals accentuates the
value of certain goods and material and may inadvertently confer power
upon certain offenders seeking to avoid the consequences of full enforce-
ment of the law. By overstating the importance of these goals, the gains
actually obtained by law enforcement officials through the kickback may
be more apparent than real. Taken to its logical conclusion, the
consequence of emphasizing such goals may actually encourage the commis-
sion of criminal acts."80 In addition, a New York City public defender
claims that, "those who are aware of what the situation is like are some-
times going so far as telling the court what sentences would be satisfac-
tory."81

Still another problem is that plea bargaining may lead to over-
charging. This occurs when an accused is charged with a more serious
crime than he committed in order to bargain the charge down. "A defenda-
ent is required to plead guilty and thereby give up his right to trial in
order to be indicted on the proper charge."82 More common than over-
charging is fracturing. This is when an accused is charged with the
most serious crime plausible and all inclusive crimes with the intent of
bargaining away the inclusive crimes.83

Some argue that plea bargaining allows for too much discretion by
the prosecutor which should be reserved for the judge.84 Others say
that it permits the prosecutor to avoid making decisions which he is
morally and legally required to make. A prosecutor may bargain a weak
murder case. However, merely because a person pleads guilty to man-
slaughter does not prove that he is actually guilty, but the prosecutor
is spared having to prove his guilt.\textsuperscript{85}

A final problem with plea bargaining is that it makes corruption in the prosecutor’s office easier. When cases are bargained away as a matter of course, it is relatively difficult to check on each case to make sure it was handled legitimately than when such reductions and dismissals are less frequent.\textsuperscript{86} Besides corruption, inexperience and neglect can result in bad plea bargains, and it is also difficult to keep track of these.\textsuperscript{87}

It seems, with all of these problems, that there must be some alternatives for plea bargaining. In Arizona, a new tactic was utilized. In cases involving marijuana, narcotics and drugs, no plea bargains were allowed. This did not result in an increase in trials, as expected, but actually some decrease.\textsuperscript{88}

Next a program was started which allowed for five lawyers to prosecute the ten worst defendants. As each defendant was disposed of, another was added to the list. No plea bargaining was allowed, and severe jail sentences were asked for, however, 70\% of these defendants pleaded guilty to the charges. After a year, the rate of conviction was 93.3\%.\textsuperscript{89}

In May, 1973, the top-ten program was expanded into a full-scale ban on plea bargaining in cases of murder, manslaughter and robbery. A before and after comparison showed that there were more guilty pleas after the plea bargaining was discontinued. Because of the success rate, the ban on plea bargains was then extended to even more types of cases, with the same result.\textsuperscript{90}

If nothing as drastic as banning plea bargaining altogether is acceptable, then other alterations of the system could be tried. Some
possibilities would be allocating more court personnel, or decriminalizing some forms of behavior to cut down on the number of cases the court has to handle. Another idea is for the legislature to eliminate harsh mandatory minimum sentences and to allow the judge more discretion in sentencing.91

Whether any alternatives to plea bargaining will become prevalent is for the future to decide, but for today, the government is mainly trying to set up guidelines to help make plea bargaining as fair as it can be. The Supreme Court, in Santobello v New York, has set down seven guidelines. The first is that the defendant must have benefit of counsel, unless he wished to waive this right. Second, there must be a factual basis for the plea of guilty. Next, the plea must be voluntary. Fourth, as an exercise of judicial discretion the court may reject the plea bargain. Fifth, if the plea is made as a result of promises made by the prosecutor, such promises must be kept. Sixth, if one member of the prosecutor's office makes an agreement with the accused, then he has an obligation to inform any other member of the prosecutor's office who handles the case, of the nature of the agreement. Last, if these guidelines are not met, then the accused has the opportunity to withdraw his plea of guilty.92

Another list of requirements used on the federal level contains five guidelines. First, the plea must be voluntary. The defendant must be admonished, in court, of the consequences of his plea. Second, the bargaining must be done without the participation of the judge,93 because involvement would bring the full weight of his office behind him, and the defendant could easily believe that the judge agreed with the plea bargain and would therefore give the maximum sentence allowed if the plea bargain were rejected and the defendant were still found guilty.94 Third, the
plea must be understandingly made. The defendant must be aware of the consequences and aware that the court is not legally bound by any recommendations. Fourth, fair play must be used. Fifth, there must be a factual basis for the plea.95

In addition to these guidelines, there are many recommendations for the future of the plea bargaining system. In 1973, the National Advisory Commission on Criminal Justice Standards and Goals issued a report. It called for the total abolition of plea bargaining over a five year period.96 Other reformers are not quite so drastic.

The American Bar Association's Standards Relating to Pleas of Guilty does not argue for the elimination of plea bargaining, but does describe a modified kind of negotiated justice. It states that plea agreements should be allowed under certain standards and under the condition that they are used in cases "in which it appears that the interest of the public in the effective administration of justice would thereby be served."97

Furthermore, the A.B.A. describes the process of plea negotiation as a discussion between the prosecutor and the defense attorney. In return for a plea of not guilty, the prosecutor can offer a favorable recommendation concerning the sentence, or a dismissal of the charge or other charges. The bargain must not be finished without consulting the defendant or without his consent. The court is required to make certain that the defendant understands what this plea means, what the charges against him are, the implications of waiving his right to trial, the sentence, and other ramifications of his actions.98

Also, the court must make certain that the plea is voluntary. It must question, for the record, the prosecutor and the defense attorney
about the concessions each made, as well as question the defendant if any coercion was used and tell him that the prosecutor's recommendations are not legally binding on the court.99

The A.B.A. continues by saying that the judge has the ultimate power in plea bargaining. He can, at any time, withdraw his support of the bargain and refuse to honor it. The standard set for the judge concerning whether to grant the proposed sentence or charge reduction allows him to agree with the bargain if it increases the rehabilitative potential of the defendant, or if it makes the court more efficient in processing cases.100

The President's Crime Commission bases its recommendations on the assumption that ours is no longer a court system based on trials. The Commission does not enthusiastically support the use of plea bargaining, but it resigns itself to what it sees as the most used way of settling cases.101 Therefore, the Commission suggests that provisions be made for adequate discovery, with the understanding that if there is enough exchange of information a more equitable bargain can be reached. Also, records should be kept at every stage of the negotiation.102 This record should include a statement of the facts of the offense as related by each side, the opening position of the parties, the terms of the agreement, the information relevant to the correctional decision, and an explanation of why the negotiated disposition is appropriate.103

The Crime Commission also recommends that the prosecutor advertize his bargaining procedures in addition to sharing information with the defense attorney. The role of the judge, according to the Commission, is that of overseeing the disposition to make sure it's fair, but not that
of actively participating in the bargaining itself. The judge should follow the guidelines as set down by the A.B.A. as described above. The Crime Commission, however, proposes that the judge assess the plea agreement as comparable to a sentencing decision, which does not usually include the consideration of efficiency for the court as the A.B.A. proposes.\footnote{104}

In August, 1974, the Supreme Court published a number of amendments to the Federal Rules of Criminal Procedure. The rule concerning the procedure for guilty pleas was "designed to give recognition to the propriety of plea discussions, to bring the existence of a plea agreement out into the open in court, and to provide a method for court acceptance or rejection of a plea agreement."\footnote{105} These rules apply to all criminal cases in federal courts.

There are several more general reforms. Advocates of procedural reform hope that new regulations, that would assure a just disposition for the individual defendant as well as shape the court as an institution, will constrain the behavior of court personnel.\footnote{106} Advocates of administrative reform stress the need to increase the efficiency of the courts so eventually the pressures that cause corruption in the courts, as well as plea bargaining, can be alleviated.\footnote{107}

Advocates of still another type of reform hope to create a system of appeal from a plea of guilty. There is a practice in Massachusetts that allows defendants to "admit to facts sufficient to warrant a finding of guilty" without actually surrendering their right to appeal.\footnote{108}

One very pessimistic observer says that in some instances doing anything might be worse than doing nothing. In the juvenile justice system
workers are discovering that doing nothing to a delinquent or predelinquent youth is less harmful than doing something that stigmatizes the youngster out of proportion to his offense. So all the money that is being poured into research to reform the criminal justice system may come up with a system more harmful than what is present now. 109

Still, not all people believe that plea bargaining is inherently bad. For these people, "The important thing is not that there shall be no 'deal' or 'bargain', but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of his plea, and is neither deceived or coerced." 110 Also for these people, "If plea bargaining could be made to result in a settlement that would approximate the one arrived at through trial by narrowing the plea bargaining through mutual discovery, flat sentencing, more pretrial release, and better resources to the prosecution and the defense, then one could have the main benefit of plea bargaining - reduction in delays - without its main defect - sentences that deviate too much from those arrived at through trial." 111
FOOTNOTES


3 Ibid.


8 Johnson, p. 992.

9 Ibid., p. 993.

10 Ibid., p. 996.

11 368 US 487 (1962)

12 394 US 459 (1969)

13 395 US 238 (1969)

14 397 US 742 (1970)

15 400 US 25 (1970)

16 242 F. 2d. 101, 113 (5th Circuit 1957)

17 Ibid.

18 404 US 257 (1971)

19 Ibid.

20 Newman, p. 211.

21 Moley, Politics and Courts, p. 177.
22 Ibid., p.179.
23 Ibid.
25 Ibid.
27 Ibid., p.47.
28 Ibid., p.19.
29 Ibid., p.59.
30 Ibid., p.64.
31 Ibid., p.65.
32 Newman, p.213.
33 Klein, p.17.
34 Ibid., p.18.
35 Ibid.
36 Ibid., p.19.
37 Ibid., p.20.
39 Klein, p.8.
40 Ibid., p.9.
41 Ibid., p.62.
42 Ibid., p.64.
44 Ibid.
45 Heath, p.987.
46 Ibid., p.988.
47 Ibid., p.989.
48 Johnson, p.972.
49 Nagel and Neef, p.1021.
50 Schwartz, p.85.
51 Heath, p.434.
52 Ibid., p.433.
53 Schwartz, p.85.
54 Ibid.
55 Moley, Politics and Courts, p.185.
56 Buckle and Buckle, p.28.
57 Ibid., p.11.
58 Moley, Politics and Courts, p.186.
59 Ibid.
60 Newman, p.267.
62 Moley, Politics and Courts, p.188.
63 Ibid., p.189.
64 Ibid., p.192.
65 Newman, p.266.
67 Heath, p.433.
68 Rosett and Cressey, p.148.
69 Heath, p.978.
70 Ibid., p.433.
71 Rosett and Cressey, p.148.
72 Heath, p.434.
73 Johnson, p.979.
74 Heath, p.434.
75 Ibid., p.436.
79 Klein, p.20.
80 Ibid., p.38.
81 Ibid., p.59.
82 Johnson, p.979.
83 Ibid., p.980.
85 Ibid., p.621.
86 Ibid., p.622.
87 Ibid.
88 Ibid., p.623.
89 Ibid.
90 Ibid.
91 Buckle and Buckle, p.27.
92 Klein, p.12, 13.
93 Johnson, p.973.
94 Buckle and Buckle, p.23.
95 Johnson, p.975.
97 Buckle and Buckle, p. 43.
98 Ibid., p. 44.
99 Ibid.
100 Ibid., p. 45.
101 Ibid.
102 Ibid., p. 46.
103 Ibid., p. 47.
104 Ibid., p. 48.
105 Rosett and Cressey, p. 7.
106 Buckle and Buckle, p. 34.
107 Ibid., p. 37.
108 Ibid., p. 169.
109 Rosett and Cressey, p. 185.
110 Correz v United States, 337 F. 2d. 699, 701 (9th Circuit 1964)
111 Nagel and Neef, p. 1022.
BIBLIOGRAPHY


Cortez v United States, 337 F. 2d. 699, 701 (9th Circuit 1974).


