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The Prosecutor's Role in Plea Bargaining

Albert W. Alschuler†

Introduction

During most of the history of the common law, pleas of guilty were actively discouraged by English and American courts.¹ For centuries, litigation was thought "the safest test of justice."² The past one hundred years have, however, seen a revolution in methods of criminal procedure. Today, roughly ninety per cent of all defendants convicted of crime in both state and federal courts plead guilty rather than exercise their right to stand trial before a court or jury.³ Behind this statistic lies the widespread practice of plea bargaining—the exchange of prosecutorial and judicial concessions for pleas of guilty.

The guilty-plea system has grown largely as a product of circumstance, not choice. The volume of crime has increased in recent decades,⁴ and the criminal law has come to regulate areas of human activity that were formerly beyond its scope.⁵ At the same time, the length of the average felony trial has substantially increased,⁶ and a constitutional revolution led by the United States Supreme Court has diverted a major share of judicial and prosecutorial resources from the trial of criminal cases to the resolution of pre-trial motions and post-conviction proceedings. These developments have led in a single direc-

† Attorney, United States Department of Justice. This article was prepared before the author joined the staff of the Department of Justice, and the positions it expresses are those of the author alone.

¹ See, e.g., *Commonwealth v. Battis*, 1 Mass. 95 (1804); *United States v. Dixon*, 1 D.C. (1 Cranch) 414 (1807); F. PULTON, *DE PACE REGIS ET REGNI* 184 (1615); 2 M. HALE, *PLEAS OF THE CROWN* 225 (1736); 4 W. BLACKSTONE, *COMMENTARIES* *329; J. ARCHBOLD, *PLEADING AND EVIDENCE IN CRIMINAL CASES* 73-4 (1st Am. ed. 1824). But see M. COTTU, *ON THE ADMINISTRATION OF THE CRIMINAL JUSTICE IN ENGLAND* 94-5 (1822).

² *Wight v. Rindskopf*, 43 Wis. 344, 357 (1877).

³ D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 3 (1966).

⁴ See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT* 25-41 (1967).

⁵ See F. ALLEN, *THE BORDERLAND OF CRIMINAL JUSTICE* 3 (1964).

⁶ The President's Commission on Crime in the District of Columbia found that the length of the average felony trial had increased from 1.9 days in 1950 to 2.8 days in 1965. REPORT OF THE PRESIDENT'S COMMISSION ON CRIME IN THE DISTRICT OF COLUMBIA 263 (1966).

tion; there is today an administrative crisis of major proportions in our criminal courts.

In many cities, the criminal caseload has doubled within the past decade, while the size of the criminal bench has remained constant.⁷ The voters of America are apparently concerned about crime—but not enough to approve bond issues for new courthouses. Only the guilty-plea system has enabled the courts to process their caseloads with seriously inadequate resources. The invisible hand of Adam Smith is at work. Growing concessions to guilty-plea defendants have almost matched the growing need to avoid the burdensome business of trying cases.

As recently as the 1920's, the legal profession was largely united in its opposition to plea bargaining.⁸ As America's dependency on pleas of guilty increased, however, attitudes changed. The American Bar Association⁹ and the President's Commission on Law Enforcement and the Administration of Justice¹⁰ are among the prestigious observers who have given plea bargaining the remarkably good press that it enjoys today.¹¹ Most of these observers recognize that the guilty-plea system is in need of reform, but the legal profession now seems as united in its defense of plea negotiation as it was united in opposition less than a half-century ago.¹²

⁷ See, e.g., "City Courts Facing a Growing Crisis," *New York Times*, Feb. 12, 1968, at 41.

⁸ See, e.g., R. POUND, *CRIMINAL JUSTICE IN AMERICA* 184 (1930); R. MOLEY, *POLITICS AND CRIMINAL PROSECUTION* (1929); ILLINOIS ASSOCIATION FOR CRIMINAL JUSTICE, *THE ILLINOIS CRIME SURVEY* (1929); MISSOURI ASSOCIATION FOR CRIMINAL JUSTICE, *MISSOURI CRIME SURVEY* (1926).

⁹ AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO PLEAS OF GUILTY* (Tent. Draft 1967). This draft was approved by the American Bar Association with only minor revisions in February 1968. 2 *CRIM. L. REP.* 2419, 2422 (1968).

¹⁰ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 135 (1967).

¹¹ See *Kent v. United States*, 272 F.2d 795 (1st Cir. 1959) (Aldrich, J.); *United States ex rel. McGrath v. LaVallee*, 319 F.2d 308, 315 (2d Cir. 1963) (concurring and dissenting opinion by Friendly, J.); *Shelton v. United States*, 246 F.2d 571 (5th Cir. 1957) (Tuttle, J.), *rev'd per curiam*, 356 U.S. 26 (1958); *Brown v. Beto*, 377 F.2d 950 (5th Cir. 1967) (Wisdom, J.); *People v. Darrah*, 33 Ill. 2d 175, 210 N.E.2d 478 (1965) (Schaefer, J.); *State v. Forcella*, 52 N.J. 263, 245 A.2d 181 (1968) (Weintraub, C.J.); Steinberg & Paulsen, *A Conversation with Defense Counsel on Problems of a Criminal Defense*, 7 *PRAC. LAW. NO.* 5, at 25 (1961); Rosett, *The Negotiated Guilty Plea*, *THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE*, November 1967, at 70; Littleton, *Acceptance of Lesser Pleas: A Matter of Honest Discretion*, in 2 *MANUAL FOR PROSECUTING ATTORNEYS* 417 (Ploscowe ed. 1956); Enker, *Perspectives on Plea Bargaining*, in *PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS* 108 (1967).

¹² Even the observers most critical of today's guilty-plea system usually stop short of total condemnation of plea bargaining as an institution. See A. BLUMBERG, *CRIMINAL JUSTICE* 182 (1967); Kuh, *Plea Copping*, 24 *BAR BULL.* 160, 165 (1966-67).

The article that follows will appear, in revised form, as one chapter of my forthcoming book, *No Contest: An Anatomy of the Guilty Plea in Metropolitan America*.¹³ In the preparation of this book, I interviewed prosecutors, defense attorneys, trial judges, and other officials in ten urban jurisdictions—Boston, Chicago, Cleveland, Houston, Los Angeles, Manhattan, Oakland, Philadelphia, Pittsburgh, and San Francisco.¹⁴ My interviews did not follow a set format, and the resulting study is not a scientific survey; it is a kind of legal journalism.¹⁵

The presentation of part of this study in isolation from the whole involves a major difficulty. My own, admittedly unorthodox position is that plea bargaining should be abolished. The completed study will attempt to justify this position through a comprehensive analysis of the guilty-plea system and its alternatives. The article that follows can, of course, present only a portion of this analysis. The effect may be to reveal an unorthodox viewpoint while leaving its justification incomplete.

A. *Variations in the Offers to Guilty-Plea Defendants: The Prosecutor's Basic Motives in Granting Concessions.*

When a prosecutor grants concessions in exchange for a plea of guilty, he may be acting in any—or all—of several different roles. First, the prosecutor may be acting as an administrator. His goal may be to dispose of each case in the fastest, most efficient manner in the interest of getting his and the court's work done.

Second, the prosecutor may be acting as an advocate. His goal may be to maximize both the number of convictions and the severity of the sentences that are imposed after conviction. In this role, the prosecutor must estimate the sentence that seems likely after a conviction at trial, discount this sentence by the possibility of an acquittal, and balance the "discounted trial sentence" against the sentence he can insure through a plea agreement. Were a prosecutor to adopt this role

¹³ This book is the product of a year's study at the University of Chicago's Center for Studies in Criminal Justice, an institution whose five-year program has been financed by the Ford Foundation. I cannot adequately express my gratitude to the Center's director, Professor Norval Morris, and to its associate, Professor Frank Zimring, for the support they have given me in this project.

¹⁴ There are occasional references to other cities in this article, based on published materials and on my occasional contact with attorneys from these cities.

¹⁵ Lawyers may note that all of the information I present is hearsay, and sociologists may view my lack of method even less kindly. I believe, however, that in the absence of better information, even unverified gossip can sometimes serve a useful purpose. Its utility lies in isolating potential problems and in guiding analysis, rather than in measuring the extent of the problems it suggests. On occasion, however, my conversations revealed so complete a consensus on factual and quantitative questions that I felt justified in reporting this consensus without explicit qualification.

to the exclusion of all others, he would accept a plea agreement only when its assurance of conviction outweighed the loss in sentence severity it might entail.

Third, the prosecutor may act as a judge. His goal may be to do the "right thing" for the defendant in view of the defendant's social circumstances or in view of the peculiar circumstances of his crime—with the qualification, of course, that the "right thing" will not be done unless the defendant pleads guilty.

Fourth, the prosecutor may act as a legislator. He may grant concessions because the law is "too harsh," not only for this defendant but for all defendants.

In all of these roles except the last, the prosecutor must determine on a case-by-case basis the concessions that he will offer to guilty-plea defendants; moreover, the importance of each role may vary from one case to the next. For these reasons, "routine" plea agreements are rare.¹⁶ In practice, the benefits of a guilty plea are personalized for each defendant. Indeed, the prosecutorial functions just enumerated suggest only a few of the variables that may affect the sentence differential between guilty-plea and trial defendants in particular cases. Other variables—such as the personal relationship between the prosecutor and the defense attorney, the attitudes of police officers involved in the case, the race of the defendant, and the desires of the victim—are less directly related to the basic goals of the guilty plea process.¹⁷

When a prosecutor is asked to rank the importance of the considerations that influence his plea negotiation decisions, the question harbors a marked ambiguity. Some factors may affect the prosecutor's basic policies in an important way and, at the same time, be relatively unimportant as a variable in day-to-day decisions. The backlog of cases, which does not fluctuate greatly from one day to the next, is usually such a factor. Other factors, though unimportant in most of the prosecutor's decisions, may assume great importance in particular cases. An inability to secure a conviction at trial is often a consideration of this kind. Thus, when a prosecutor says that factor A is more important

¹⁶ But see D. NEWMAN, *supra* note 3, at 79: "Common patterns of charge reduction and sentence promise emerge wherever the practice is frequent." I am not sure that my observations are in serious conflict with those of Professor Newman on this point. Certain patterns of bargaining are routine, in the sense that some concessions are almost invariably given without intensive negotiation. As Professor Newman seems to recognize, however, *id.* at 182, these concessions are only the starting point for serious bargaining. A competent defense attorney can often better the "routine" offer, and, for that reason, the disposition of guilty-plea cases rarely follows a pattern.

¹⁷ These "extraneous" variables will be examined in another portion of my study, but not in this article.

than factor B, he may mean that when both factors are present, factor A is given more weight than factor B. He may mean instead, however, that factor A is more important only because it appears more frequently than factor B. Despite the difficulties involved, I asked this ambiguous question of the prosecutors whom I encountered in this study. My hope was that I might emerge with a sort of vector between magnitude and frequency, and a general sense of how prosecutors approach the job of plea bargaining.

Of the four major roles that prosecutors may assume in plea negotiation, only one is disavowed by a substantial number of prosecutors. Some prosecutors declare without hesitation that one of their goals in bargaining is to nullify harsh, "unrealistic" penalties that legislatures have prescribed for certain crimes.¹⁸ Other prosecutors, however, deny vigorously that it would be proper for them to allow a personal opinion of the law to influence their judgment.

A few prosecutors apparently believe that the "quasi-judicial role" should exclude all others. A Boston prosecutor says, "When I sit down with a defense attorney who knows how to be reasonable, we judge the whole man. Neither of us cares what evidence would be admissible and what would not, or which one of us would win at trial. We simply try to do the fair thing with each case."¹⁹ Every prosecutor with whom I spoke said that special equities influenced him in special cases; but with some notable exceptions, prosecutors agreed that the quasi-judicial role, like the legislative role, was relatively unimportant.

Administrative considerations are far more basic. "We are running a machine," a Los Angeles trial assistant declares. "We know we have to grind them out fast." An assistant state's attorney in Chicago notes that there are more than 2,500 indictments currently pending in the Cook County Circuit Court, the greatest number in history. He says, "I'll do anything I can to avoid adding to the backlog." A Houston trial assistant observes, "We moved more than 2,000 cases through six courts during the past three months; clearly the most important part of our job lies in making defendants think they are getting a good

¹⁸ See, e.g., D. NEWMAN, *supra* note 3, at 173, 181.

¹⁹ This attitude toward bargaining seems to be more characteristic of older prosecutors and defense attorneys than of attorneys who have recently entered the practice of criminal law. The rational calculations of the younger attorneys often give way to general, atmospheric judgments; and the rule of law is thereby denied even an indirect role in the disposition of many criminal cases.

I should note that statements that appear in the text in quotation marks represent my attempt to reconstruct in a concise, readable, and accurate way what the persons I interviewed told me. My editing has rarely been extensive; but many of these quotations are not precisely in the words of the men and women I interviewed.

deal." A Manhattan prosecutor says, "Our office keeps eight courtrooms extremely busy trying five per cent of the cases. If even ten per cent of the cases ended in a trial, the system would break down. We can't afford to think very much about anything else."

Administrative considerations are not simply a background factor equally applicable to every case. Their importance varies, for example, with the length of time a case may require at trial. A Boston attorney recalls a pair of cases that illustrate the point. The first was a simple case that the attorney ultimately tried in less than half a day. When the attorney approached the trial judge in an effort to work out a plea agreement in this case, the judge rebuffed him sharply. "This is not the shopping center, counsel," he said. A month later, the attorney came before the same judge in a case that seemed likely to require a three-week trial. Without a word from either of the attorneys, the judge called them to the bench and said earnestly, "Gentlemen, have you considered a plea in this case?" Negotiations had begun.²⁰

San Francisco's J. W. Ehrlich recalls a four-month trial in which he participated in 1939. "Today," he says "there is no such thing as a four-month trial. When one rolls along, the district attorney always finds a middle ground." Joseph M. Smith, the Assistant District Attorney in Charge of the Litigation Division in Philadelphia, says, "The first question I ask myself in deciding what to do for a defendant who might plead guilty is, 'How much time will I have to spend in the courtroom on this case?' The second question is, 'Can I prove the charge?'"

In Pittsburgh, where plea negotiation is usually an unimportant part of the criminal process,²¹ murder cases are a notable exception. First Assistant District Attorney James G. Dunn explains, "A murder case ties up a courtroom for a week, or at least for three days. We are naturally more anxious to bargain for guilty pleas in murder cases than we are in cases that might take fifteen minutes at trial."

The possible length of the trial is not the only factor that may affect the weight of administrative considerations in particular cases. Los Angeles defense attorney Luke McKissack observes, "A defense

²⁰ Philadelphia's Donald Goldberg comments that it is always a sound plea-bargaining strategy for a defense attorney to overestimate the amount of time his case is likely to consume at trial. If the case actually reaches trial, however, it may be to the attorney's advantage to conclude his defense as rapidly as possible. A defendant's sentence after a two-day trial may be more severe than his sentence after a one-day trial. *See United States v. Wiley*, 184 F. Supp. 679, 681 (N.D. Ill. 1960) ("In view of the fact that the trial was expedited by waiving a jury and by stipulation of the various items that expedited the proof I make the sentence less than I otherwise would.").

²¹ *See* text at note 36 *infra*.

attorney has to be on his guard when the prosecutor says, 'The other cases listed for trial this morning blew up; we can try yours now if you like.' " And just as there are days on which unforeseen circumstances have left prosecutors with time on their hands, there are other days on which they are more overburdened with work than usual. Johnnie L. Cochran, Jr., another Los Angeles attorney, recalls a recent case in which he and the prosecutor had been unable to reach a plea agreement. After the case was listed for trial, it lagged on the calendar for several days. Finally, the prosecutor approached Cochran and said, "Look. I'm awfully tired, and I have a bad calendar for tomorrow. Do you still want that deal you suggested?"

Because calendar considerations are so important a part of the plea-bargaining process, defense attorneys commonly devise strategies whose only utility lies in the threat they pose to the court's and the prosecutor's time. A midwestern prosecutor observes, "All any lawyer has to do to get a reduced charge is to demand a jury trial."²² It is therefore entirely routine for defense attorneys to file jury demands when they have no desire for trials of any kind. Attorneys commonly go to the point of empanelling a jury in an effort to make their threat to the court's time credible. A string of pre-trial continuances may also be useful, partly because each continuance consumes the court's time.²³

Pre-trial motions rank with jury demands as the most valuable of the defense attorneys' time-consuming strategies. These motions have their greatest impact in jurisdictions where it is the practice of prosecutors to prepare written briefs in response to procedural and constitutional claims. "It doesn't matter whether the motion has any merit," a San Francisco attorney explains. "Prosecutors naturally want to avoid doing what they are paid to do." A Boston defense attorney reports that he invents some procedural claim in every case. "It takes time to refute even a bad contention," he observes. "Every motion added to the pile helps to secure a better plea."

San Francisco's Chief Assistant District Attorney, Francis W. Mayer, reports that fifteen years ago nothing of importance occurred in most criminal cases until they were tried. "Today," he says, "there are defense attorneys who have never heard of trial. If the case ever gets that far, these attorneys have nothing to do. The usual defense strategy

²² D. NEWMAN, *supra* note 3, at 74.

²³ There are other, more basic reasons for employing continuances as a plea-bargaining strategy, including the fact that a prosecutor's case usually becomes weaker with the passage of time. See Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259 (1968).

today is to bring in a stack of motions as thick as a Sunday newspaper; defense attorneys hope that we won't have the patience to ride them out. There are, in fact, cases in which that hope may be justified. Sometimes, for example, we know that the defendant will not be sentenced to the state prison even if we spend hours in the courtroom knocking down whatever the other side throws at us. Defense attorneys use the fact that we have to move the unimportant cases as quickly as possible—it's an effective way of doing their job."

Trial strategies, too, may influence the concessions that guilty-plea defendants receive. Houston defense attorney Clyde W. Woody once represented a Negro who had murdered another Negro by shooting him between the eyes. Plea negotiation had broken down. Woody wanted a five-year suspended sentence, but the prosecutor insisted on five years' "hard time." The case came to trial, and the assistant district attorney asked that all witnesses in the case be excluded from the courtroom. Twenty-five defense witnesses stood up and walked slowly toward the exit. The assistant watched them for a moment. Then he came to Woody and said, "That 'five years' suspended' begins to look pretty good."

Most defenders of plea negotiation recognize that sentencing should be based on penologically relevant considerations; no sentence should be imposed simply because it may result in less expensive, faster resolution of the case. The defenders of the guilty plea process have therefore devised penological rationales—such as the notion that a guilty plea evidences a defendant's repentance—for treating defendants who plead guilty more leniently than defendants who go to trial.²⁴ No one, however, has suggested anything other than an administrative rationale for treating guilty-plea defendants differently because of the length of time their trials might consume, or because their attorneys have had varying success in threatening the court's time. Nor has anyone suggested a mechanism for excluding these penologically irrelevant considerations from the bargaining process. Prosecutors can hardly be expected to disregard their natural interest in conserving prosecutorial resources. Moreover, even deliberate time-consuming strategies sometimes fail to produce satisfactory plea agreements; and when prosecutors

²⁴ The asserted justifications for the sentence differential between guilty-plea and trial defendants are the subject of another chapter of my study. The guilty-plea defendant is often a person who feels no qualms about confessing to his misdeeds when he can secure something in return; the trial defendant is often a person who feels so uncomfortable about his criminal conduct that he cannot bring himself to confess—sometimes not even to himself. Paradoxically, the conscience-stricken defendant may be more likely to stand trial and find himself on the unhappy end of the sentence differential than the psychopath.

refuse to yield, defense attorneys must make good on their threats. In some cases, therefore, the guilty-plea system, far from conserving judicial and prosecutorial resources, has exactly the opposite effect.

There are a few prosecutors who discount the importance of administrative considerations in bargaining decisions. Lynn D. Compton, Chief Deputy District Attorney of Los Angeles County, declares, "The judges complain that we are too unyielding, but we do not believe in disposition for the sake of disposition." Similarly, David G. Bress, the United States Attorney for the District of Columbia, recently testified before a congressional committee: "I want to assure the Chairman that the element of the backlog in the district court has no, I won't say no consideration at all, but it has insignificant consideration in our determination [to reduce a felony charge to a misdemeanor in exchange for a plea of guilty]." ²⁵

The attitude of high-ranking prosecutors like Compton and Bress is not always the attitude of their subordinates.²⁶ A trial assistant in the District of Columbia comments, "I guess Mr. Bress does not know what happens in the Court of General Sessions. His statement is clearly wrong; and what may be worse, it is also bad politics. Someday, for example, some Congressman may object to the way we handle house burglaries around here; even a burglar with a bad record often pleads guilty to a misdemeanor with the assurance of a six-month sentence or, perhaps, a year's probation. If complaints about this practice arise, Mr. Bress may want to point to the pressures that the caseload exerts. It will be the Congressman's fault, and not ours, that there have not been enough courtrooms, judges, or trial assistants to do the job right."

Some disagreement therefore persists concerning the importance of administrative considerations in plea bargaining, but prosecutors are virtually unanimous in their emphasis on another factor that commonly affects negotiation decisions. The overwhelming majority of prosecutors view the strength or weakness of the state's case as the most important factor in the task of bargaining.²⁷

²⁵ 90th Cong., 1st Sess., Senate, Subcomm. of Comm. on Appropriations, *Hearings on H.R. 8569, District of Columbia Appropriations for Fiscal Year 1968*, pt. 3, at 3250 (1967). See also *id.* at 2918.

²⁶ See, for example, the statement of one of Compton's subordinates that is reported at text at page 54 *supra*; and see also the statements of Los Angeles defense attorneys concerning the effect of the prosecutors' workload, text at pages 55-6 *supra*.

²⁷ The ambiguity of my inquiry should be re-emphasized in connection with this conclusion: The response of a Manhattan prosecutor effectively illustrated this ambiguity. The prosecutor expressed surprise that anyone could view the strength or weakness of the state's case as the most important factor in bargaining. He commented: "More than ninety per cent of our felony cases end in bargained pleas. I certainly hope that they are not all weak cases."

When the *University of Pennsylvania Law Review* asked a group of chief prosecuting officials from various states to indicate the considerations that motivated their bargaining decisions, only 27 per cent said that sympathy for the defendant was a relevant factor. Only 32 per cent said that the harshness of the law affected their decisions; and only 37 per cent said that the volume of work was significant. The most frequently listed consideration was the strength of the state's case, and 85 per cent of the prosecutors noted its importance.²⁸

My impressions differ from the conclusions of the *Pennsylvania* survey.²⁹ Every prosecutor I interviewed considered the strength of the case relevant,³⁰ and almost every prosecutor considered "sympathy" and "the workload" relevant as well. Nevertheless, my impressions correspond with the *Law Review's* conclusions on a basic point: If tactical considerations are not the most important factor in bargaining, at least they are the factor that prosecutors are most ready to avow.

A Chicago prosecutor says, "When we have a weak case for any reason, we'll reduce to almost anything rather than lose." The State's Attorney of a downstate Illinois county declares, "We don't bargain for pleas here the way they do in Chicago. The only time we make a deal is when there is a weakness in the case."³¹ Occasionally, I encountered

²⁸ Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 901 (1964).

²⁹ My informal methods were obviously less scientific and less comprehensive than the *Law Review's* questionnaire survey. They may, however, have been more conducive to candor and less subject to semantic misunderstanding. Many prosecutors might, for example, object to the suggestion that "sympathy" influences their decisions; but they might agree that the defendant's personal situation is a relevant factor in bargaining. Eighty per cent of the prosecutors questioned by the *Law Review* maintained that at least one "quasi-judicial" factor, the defendant's prior criminal record, should be taken into account. *Id.*

³⁰ Los Angeles' Lynn D. Compton came as close as any prosecutor I interviewed to discounting the state of the evidence as a bargaining factor. He said, "My philosophy is often, 'Go ahead and try it. Let him beat it if he can.'" Compton added, "If an armed robbery prosecution turns on a doubtful issue of identification, I might agree to reduce the charge to unarmed robbery in order to secure a plea of guilty; but I would never agree to reduce the charge to simple assault." Compton's attitude on this issue, like his attitude toward the importance of administrative considerations in bargaining, is not necessarily shared by all of his subordinates. See the description of Los Angeles cases in text at note 99 *infra*.

³¹ Certainly the State's Attorney had good reason for suggesting that administrative considerations might be less important in his county than in Chicago. When I asked him how many indictments were currently pending in the felony court, I did not, of course, expect an answer in the thousands, as I would have in many major metropolitan jurisdictions. Nevertheless, his county was one of the three busiest in Illinois in terms of the volume of criminal prosecutions, and I was therefore surprised when the prosecutor picked up a clip-board from his desk and said, "Well, let's see, there's old Wiley Campbell, and the two Williams brothers, and Henry Rodrigues. . . ." The prosecutor ultimately listed no more than thirty names.

prosecutors who were defensive about the guilty-plea system and who seemed unwilling to say anything that might lead to criticism. Even these prosecutors, however, were quick to note that the state of the evidence was a major consideration in bargaining. "Half a loaf is better than none" was their philosophy. It apparently never occurred to them that the role they had assumed of "protecting society" as vigorously as possible might be criticized.

Nevertheless, the practice of bargaining hardest when the case is weakest leads to grossly disparate treatment for identical offenders—assuming, for the moment, that they are offenders. Chicago defense attorney J. Eugene Pincham comments, "When a prosecutor has a dead-bang case, he is likely to come up with an impossible offer like thirty to fifty years. When the case has a hole in it, however, the prosecutor may scale the offer all the way down to probation. The prosecutors' goal is to get something from every defendant, and the correctional treatment the defendant may require is the last thing on their minds."

A prosecutor's sentencing decisions may therefore be made on non-penological grounds for tactical as well as administrative reasons. So long as prosecutors believe that their interest lies in securing as many convictions as possible, this characteristic would seem inherent in the guilty-plea system. There is, however, a more serious criticism of the prosecutors' plea-bargaining practices. It is that the greatest pressures to plead guilty are brought to bear on defendants who may be innocent. The universal rule is that the sentence differential between guilty-plea and trial defendants increases in direct proportion to the likelihood of acquittal.³² For this reason, Professor Helen Silving suggests that the term "plea bargaining" is often too general. Many plea agreements

Somewhat surprisingly, the percentage of convictions by guilty plea in this county was higher than that in Chicago. In some small-city and rural jurisdictions, only a small minority of criminal convictions are by plea, but in others there is as high a ratio of guilty pleas to trials as in most urban centers. See Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 54 (1967).

In almost all of these smaller jurisdictions, prosecutors are employed on a part-time basis. They commonly devote a large share of their time to maintaining and developing private law practices, and their salaries as prosecutors do not vary with the amount of time they devote to their public duties. The result may be a sort of administrative pressure that is every bit as strong as the pressure that the caseload exerts in larger cities. Chicago prosecutors explain that if a trial assistant falls behind and loses even one case under the Illinois "speedy-trial" statute, he must be the mayor's son to keep from being fired. But a rural or small-city prosecutor can be entirely "current" and still experience personal, financial pressures for plea negotiation, since every hour he takes from his private law practice may involve a financial sacrifice.

³² Perhaps this universal rule is not *quite* universal. Serious, publicized cases may present an exception. See note 140 and accompanying text *infra*.

might be more precisely described as "composition payments to a dubious creditor."³³

A few cases may illustrate the exploding, plastic character that the sentence differential assumes when a prosecutor fears that he may lose at trial. San Francisco defense attorney Benjamin M. 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."³⁴

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.³⁵

A client of Los Angeles defense attorney Johnnie L. Cochran, Jr. was once charged with several felonies, including assault with intent to commit murder. There was, however, a "problem of proof" in the case; the victim of the alleged crimes had recently become an inmate of the state prison at San Quentin. The prosecutor therefore accepted a guilty plea to the misdemeanor of brandishing a weapon, and the punishment was a fine only.

In Pennsylvania's two largest cities, an expedited trial system has greatly reduced the administrative pressures for plea negotiation. In Philadelphia, only about one-fourth of the defendants convicted of crime plead guilty; and in Pittsburgh, only about one-third of all convictions are by plea.³⁶ The guilty pleas that do occur in these cities fall into two main categories. In the first category are bargained pleas

³³ H. SILVING, *ESSAYS ON CRIMINAL PROCEDURE* 254 (1964).

³⁴ Davis suggests that a defendant can sometimes secure similar concessions even when the prosecutor's case is strong. One of Davis' clients, a man with five prior felony convictions, was interrupted during a "till tapping" escapade. He ran, lost ground, and then turned and stabbed his pursuer. The charges against this defendant included grand larceny and assault with intent to commit murder; but the defendant was allowed to plead guilty to a single misdemeanor, and his prior convictions were "waived."

³⁵ The ethical problems with which the guilty-plea system confronts defense attorneys are examined in another portion of my study.

³⁶ Specter, *Book Review*, 76 *YALE L.J.* 604, 605 (1967); *ADMINISTRATIVE OFFICE OF THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, 1966-1967 ANNUAL REPORT* 16 (1967).

that prosecutors obtain in "major" cases, which seem likely to require an unusual amount of time at trial.³⁷ The second category, which is far larger, is composed of bargained pleas that prosecutors obtain when conviction at trial seems doubtful. Despite the weakness of these cases, the prosecutors' offers are usually irresistible. For defendants in custody, the almost invariable offer is a sentence to the time the defendant has already served; and for defendants on bond, the usual offer involves no jail time at all.

James G. Dunn, the First Assistant District Attorney in Pittsburgh, observes that there are many rape cases in which it seems likely that the complaining witness consented to the defendant's advances. In these cases, Dunn says, the District Attorney's office is usually ready to accept a guilty plea to the crime of fornication. Defendants charged with one of the most serious felonies in the criminal code are therefore assured that if they yield gracefully to conviction, their punishment cannot exceed a maximum \$100 fine.³⁸

Despite the prosecutors' earnest efforts to compromise weak cases, the offer of a favorable sentence is sometimes resisted. Houston prosecutor Sam H. Robertson, Jr. recalls a murder case in which the problems of proof were so substantial that the defendant was offered a five-year sentence. When the defendant rejected this offer, the prosecutor overcame his problems of proof. The defendant was sentenced to a term of thirty-five years' imprisonment. San Francisco defense attorney James Martin MacInnis recalls another "weak" murder case in which the defendant rejected a plea to voluntary manslaughter. He was ultimately put to death in the gas chamber.³⁹

When prosecutors respond to a likelihood of acquittal by magnifying the pressures to plead guilty, they seem to exhibit a remarkable disregard for the danger of false conviction. This apparent disregard is not easy to explain. It might be supposed that when a prosecutor decides to charge a defendant with a crime, he makes a personal judg-

³⁷ See text at page 55 *supra*.

³⁸ See PA. STAT. ANN. tit. 18, § 4506 (1963).

³⁹ MacInnis recalls that one of the few pieces of evidence against the defendant was a purported suicide note from one of the two victims of the crime. Handwriting experts could not prove that the note was a forgery, but it contained a curious grammatical error: "I am grateful to you, Bart, grateful to what you have done for me." Experts suggested that this sort of error was characteristic of Filipinos, and the defendant was the only Filipino who had been closely associated with the victims.

The defendant's difficulties were aggravated when he asked the court to discharge his appointed attorneys late in his trial. He explained to the judge that his grievance was not personal: "I am grateful to them, grateful to what they have done for me." A mistrial was declared; but by the time of the second trial, the state was able to present a more persuasive case than it had initially.

ment concerning the defendant's guilt or innocence. Once the charge decision has been made, the prosecutor may regard trial as a technical obstacle standing between the defendant and the punishment he deserves. To a prosecutor who entertains no doubt of a defendant's guilt, "the best he can get" will usually seem good enough. This explanation for the prosecutors' actions is undoubtedly accurate in a great number of cases. There are, however, a significant number of prosecutors who do not entertain a personal belief in the guilt of the men they prosecute.

Assistant District Attorney Joseph M. Smith of Philadelphia explains the reasoning of these prosecutors: "When a citizen whom I have no reason to doubt comes in and says, 'That's the guy,' it has to be a jury question. It is not up to me to decide whether the citizen is telling the truth. True, my job is to prosecute, not persecute; equally, however, my job is to prosecute, not judge."

San Francisco prosecutor Francis W. Mayer expresses the opposite viewpoint: "In my opinion, the one-witness identification case should *never* be tried. The victim of a crime, no matter how reputable, bases his identification on a fleeting moment, usually one of the most traumatic in his life. My experience has been that the stronger the identification, the more likely it is that the victim is wrong. Usually, of course, there is something more to go on—at least the defendant will have been found in the vicinity of the crime. Even then, however, the prosecutor should cross-examine his witness as severely as possible, and he should refuse to try the case if he entertains any doubt of the defendant's guilt."⁴⁰

Few prosecutors share Mayer's belief that the one-witness identification case should never be prosecuted. Almost without exception, prosecutors list this case as one in which unusual concessions will be given. Moreover, prosecutors who adopt Smith's adversary philosophy toward the task of prosecuting seem as ready to magnify the pressures for self-conviction in doubtful cases as prosecutors who assume a more judicial stance. If the ultimate determination of guilt or innocence were always made at trial, a prosecutor might reasonably conceive of himself as an advocate.⁴¹ Yet some prosecutors assume the validity of the

⁴⁰ Compare Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case*, 7 PRAC. LAW., No. 7, at 44, 58 (1961): "[A conscientious prosecutor] will not proceed to trial unless firmly convinced of the guilt of the defendant."

⁴¹ Even then, of course, a reasonable argument could be made that the humiliation and psychological trauma of a criminal trial are so burdensome for the defendant that the prosecutor should be personally persuaded of guilt before proceeding.

A prosecutor might conceivably bargain only in cases in which he was persuaded of the defendant's guilt, leaving all other cases for resolution by trial. This solution would,

adversary concept at the same time that they attempt to circumvent the trial of men whose guilt they have excluded from their concern.⁴²

A prosecutor's personal opinion seems, in any event, an inadequate safeguard against conviction of the innocent. If trials ever serve a purpose, their utility is presumably greatest when the outcome is in doubt. The practice of responding to a weak case by offering extraordinary concessions therefore represents, at best, a dangerous allocation of institutional responsibility. And when even the minimal safeguard of a prosecutorial judgment of guilt is lacking, as it is in a significant number of cases today, the horrors of the guilty-plea system are multiplied.⁴³

however, deny some defendants an opportunity to bargain solely because of their possible innocence. If the weakness of the state's case does not present a legitimate rationale for favoritism in bargaining, it even more clearly does not present grounds for exacting a penalty.

So long as the guilty-plea system is retained, it argues for a personal, prosecutorial judgment of guilt in every case, prior to the initiation of prosecution. If a prosecutor does not make this judgment, either he must deny some defendants an equal opportunity to bargain, or he must take the risk that the back-stops erected by the adversary system will suddenly disappear, even in cases in which he suspects that defendants may be innocent.

⁴² In the reflective atmosphere of a conversational interview, most prosecutors declare that a prosecutor should not proceed unless he is satisfied of the defendant's guilt. But some prosecutors qualify this conclusion in a significant way. They recognize a responsibility to be sure they have charged the right man, but they insist that it is not part of their job to make an independent judgment on questions of intention or questions of justification.

It may be doubted, moreover, that the prosecutors' declaration always reflect their actual practices. In the day-to-day game of prosecuting, it seems relatively easy to avoid serious reflection upon the ultimate question of guilt or innocence. When circumstances call into question a prosecutor's working assumption of guilt, he may recognize his responsibility not to proceed, but that is quite a different matter from making a personal judgment of guilt in every case.

It should also be emphasized that the decision to charge a defendant with crime is usually made by a prosecutor other than the assistant who investigates and tries the case. A trial assistant usually lacks the authority to dismiss a prosecution without first explaining and justifying his action to a superior. I have encountered some prosecutors who occasionally tried men they actively believed to be innocent, simply because it was easier to lose the case than to go through the bureaucratic obstacles preliminary to dismissal. These prosecutors presented the state's evidence in a perfunctory way in these cases, but it is open to speculation that had the verdicts been different from those they expected, the prosecutors would have concluded that their own doubts were simply ill-founded. Certainly the obstacles to dismissal after conviction would have been even more substantial than those to dismissal at an earlier stage.

I have also known a trial assistant who took seriously his responsibility not to proceed when he doubted the defendant's guilt. When his superiors refused to agree to a dismissal on one occasion, he told them angrily to reassign the case. The assistant's colleagues soon began referring to him as the best defense attorney in the office. Finally, to everyone's relief, he resigned his position after less than one year on the job.

⁴³ It might be responded that although the guilty-plea system circumvents the safeguards ordinarily associated with criminal prosecutions, it supplies others of its own. A plea

The ultimate in a weak case is no case at all, and in this situation plea negotiation commonly becomes a game of bluffing. A typical situation is that in which a critical witness has died, refused to testify, or disappeared into the faceless city. If a prosecutor hopes to extract a plea of guilty in this situation, he must exude limitless confidence in his ultimate success and keep the defense attorney unaware of the fatal defect in his case.

Sometimes the game is unsuccessful. A Chicago defense attorney says, "There are cases in which I know they can't find their fink—because I know where he is, if you know what I mean." A San Francisco attorney reports that he has sometimes received telephone calls from prostitutes after he had been retained to represent their pimps. "The D.A. bribed me to make a statement," the prostitutes say, "but don't worry. I'm in Las Vegas now."

Moreover, prosecutors may sometimes be inept at bluffing. A Los Angeles defense attorney recalls one negotiating session in which he spotted a written authorization to dismiss the case, signed by the trial assistant's superior. The assistant had foolishly left this paper uncovered in his open briefcase. Oakland's Public Defender, John D. Nunes, says that a defense attorney can usually detect a bluff from the unusually generous character of the prosecutor's offer. And a Pittsburgh public defender refers to "one asinine D.A. in particular. Whenever he wants to talk about a guilty plea, we *know* we should go to trial."

When a defense attorney is aware of a critical defect in the prosecutor's case, the bargaining session becomes more fun than a poker hand played with a royal flush. Chicago's J. Eugene Pincham reports, "The prosecutor starts out asking for five to ten. I reply that my client would never go for that. He says three to five. I say no. He says one to two. I talk about my client's family and his steady job. He says, 'All right, probation it is.' I smile and shake my head no. Then the prosecutor walks up and dismisses the case."⁴⁴

of guilty is, of course, the defendant's act, and defenders of the system maintain that men do not falsely convict themselves. In effect, these defenders would permit situations in which it is to the apparent advantage of innocent men to plead guilty, and they would then insist that nothing of the sort could occur. This argument seems to depend, not on reason, but on mysticism. Some secret force will presumably hold every defendant back, despite the fact that the concessions he was offered were deliberately calculated to overbalance his chances for acquittal.

⁴⁴ Pincham adds that he has come to rely upon the State's Attorney's reluctance to try a case that he is likely to lose. On one occasion, an arresting police officer had lost the narcotics that he had seized from the defendant. He really had. When all the bluffing was concluded, and Pincham had turned down the prosecutor's "generous" offer of probation, the case was promptly dismissed.

Pincham comments, "You know, the State's Attorney might have won that case. I

Defense attorneys have these occasional moments of glory, but the joys of secret knowledge usually belong only to the prosecutor. The resources for independent investigation available to the defense in criminal cases are usually extremely limited.⁴⁵ Moreover, even when there is enough money and enough time to investigate, a defense attorney may be unable to locate a critical witness. He cannot know whether the prosecutor is similarly disadvantaged.

In addition, the discovery privileges of the defense are highly restricted,⁴⁶ and even the limited right of discovery that the law affords may be frustrated until negotiations are concluded. A Philadelphia defense attorney reports that he is invariably allowed to examine the prosecutor's files in guilty-plea cases. The prosecutors know that he will not use the bargaining session merely as a discovery device, and they also know that he will not permit his clients to plead guilty until he has learned the details of the state's case. But most defense attorneys have apparently shared the experience of Houston's Lloyd M. Lunsford; "When we demand to see the police reports and copies of any confessions, we are told that perhaps an appellate court will let us see them. When we file a formal motion to produce, the prosecutor responds that he does not have what we're asking for. What he means is that he turned the evidence over to the arresting officer as soon as he received our motion. When we then file a strong motion to divulge or quash, we can't get a proper hearing. The judge treats the motion lightly and remarks that we can take the matter up again at trial. The result is that we are always negotiating in the dark. The atmosphere is one of chance-taking, and the tendency is always to plead people who are effectively unconvictable."⁴⁷

It is especially difficult to check the prosecutor's bluff when he resorts to deliberate misrepresentation in an effort to sustain it. A Houston defense attorney recalls a case in which negotiations had

would have objected, but the court would have allowed the officer to explain what had happened. If the prosecutor had told me frankly about his difficulties and had expressed his intention to proceed, my client would gladly have pleaded for probation."

Defense attorneys report that it is not always as easy to "call" a prosecutor's bluff as Pincham's illustration suggests. Prosecutors sometimes go to the point of empanelling a jury before dismissing a hopeless case, hoping all the while to exact a plea of guilty.

⁴⁵ See Steinberg & Paulsen, *A Conversation With Defense Counsel on Problems of a Criminal Defense*, 7 PRAC. LAW., No. 5, at 25, 26-8 (1961).

⁴⁶ For a discussion of discovery limitations and their effect on the bargaining process, see Fletcher, *Pretrial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293, 316-9 (1960).

⁴⁷ Despite Lunsford's gloomy observations, the practice of plea bargaining often does augment the information that a defense attorney may discover. Prosecutors are, however, more ready to open their files in strong cases than in cases they are likely to lose.

broken down. Suddenly the prosecutor offered to recommend an award of probation if the defendant would plead guilty.

The defense attorney, who had attempted unsuccessfully to locate the prosecuting witness for more than a year, thought that he knew what lay behind the prosecutor's offer. He replied, "So you can't find your witness. I'll take probation when I see her in the courtroom."

The prosecutor answered, "If she has to come in, we'll try the case. But I had her served yesterday, and you can check the return if you like."

The defense attorney checked, and it was as the prosecutor had reported. But the defense attorney was not Little Red Riding Hood; he suspected that the process server had been made a party to the bluff and had filed a fraudulent return. He therefore refused the prosecutor's offer, and the case was dismissed.⁴⁸

Cases of missing or reluctant witnesses are not the only situations in which prosecutors may resort to bluffing. A Philadelphia prosecutor says, "I would never tell a defense attorney that the red material on the defendant's undershorts was someone's blood when I knew the material was paint."⁴⁹ But I have sometimes misrepresented the facts in an effort to induce the compromise of constitutional defenses. In plea bargaining, the rule is *caveat emptor*, lawyer."

A very few prosecutors apparently disapprove of bluffing. Oakland's Edward O'Neill says, "When an essential witness has disappeared, that is usually the end of the case. I don't try to fool anyone about it. There are, however, a few honest defense attorneys who know that some of their clients deserve to be put away. These attorneys may agree to enter a plea to battery or some other minor offense although they know that we would have to dismiss the case at trial." O'Neill regards these attorneys as patriots: "Just as I am a citizen first and a prosecutor second, they are citizens first and defense attorneys second." Other observers might reasonably have a different opinion of the attorneys' loyalties.

Prosecutors, of course, are not alone in bluffing. "We do it too,"

⁴⁸ It seems doubtful that post-plea-of-guilty inquiry by the trial court would be more than partially effective in checking a prosecutor's deceptive sales practices. In Pittsburgh, where such inquiries are commonplace, a prosecutor recalls one occasion on which he induced a guilty plea by telling the defense attorney that a missing witness was waiting in his office for a chance to testify. After the guilty plea was offered, the prosecutor put the arresting police officer on the witness stand, and the officer presented hearsay evidence concerning the missing witness's version of the facts. The defense attorney raised no objection; he and everyone else involved in the proceedings were interested only in concluding the "formalities" as rapidly as possible.

⁴⁹ Cf. *Miller v. Pate*, 386 U.S. 1 (1967).

says Houston defense attorney Percy Foreman. "Bluffing is an inherent part of any sort of negotiation. Settling cases is a game, like basketball. The only difference is that there are no rules in plea bargaining. Something comes to you, and you try it."

A Boston defense attorney reports a case that illustrates Foreman's thesis. The defendant was charged with manslaughter, and she told a convincing story of self-defense.⁵⁰ When the defense attorney investigated the case, however, the story crumbled. Indeed, the attorney realized that if the prosecutor ever got around to talking with his witnesses, he would have a tight, brutal case of first degree murder. The defense attorney therefore sought out the prosecutor and offered to enter a guilty plea in return for probation.

When the prosecutor made a counteroffer, the defense attorney replied, "I'll try it first. I need the practice."

"O.K., try it," the prosecutor said; and the defense attorney walked away with his heart in his throat.

A week later, the defense attorney encountered the prosecutor again, and this time the prosecutor was more pliable. He would not recommend probation, but neither would he oppose it. The guilty plea was entered, a pre-sentence report was waived, and the defendant walked home. It is because of cases like this one that Los Angeles defense attorney George L. Vaughn, Jr. describes plea bargaining as "playing Russian roulette with another man's life."

Defense attorneys sometimes bluff, but they are not equal competitors in the game of deception. Just as limited opportunities for discovery and for independent investigation hinder their defensive efforts in the contest, the organized, institutional character of the prosecutor's office commonly prevents them from taking the initiative. A defense attorney must enjoy good personal relations with the prosecutor's staff if he hopes to remain effective as a plea bargainer. Prosecutors' offices, by contrast, can allow themselves the luxury of refusing to enter plea agreements with individual attorneys. A defense attorney therefore knows, first, that he needs the prosecutor's office and, second, that the prosecutor's office does not need him. Almost without exception, defense attorneys report that openness and candor are expected during plea discussions. An attorney who is less than totally honest will find himself out in the cold. And prosecutors who freely avow their own practices of bluffing, concealment, and telling only half the truth, often

⁵⁰ This case was unusual in that the initial charge was manslaughter rather than murder. Ordinarily prosecutors charge homicide defendants with murder as a matter of course, partly to guard against the dangers that this case illustrates. See text at note 94 *infra*.

report, "There are some attorneys with whom we never bargain, because we can't. We don't like to penalize a defendant because he has an ass for an attorney, but when an attorney cannot be trusted, we have no alternative." Percy Foreman seems to be wrong: There are rules in plea bargaining, and they establish a double standard.

As Chicago attorney David Long observes, "Our entire system of criminal justice is organized to avoid the difficult task of determining guilt or innocence on the evidence. The more doubtful the issue, the more likely it is to be relegated to the wastebasket of the bargained plea." Some defenders of the guilty-plea system, however, seem ready to limit the use of bargaining for this purpose. Professor Arnold Enker suggests that purely factual issues, such as issues of mistaken identification, should be distinguished from those involving "the passing of value judgments on the accused's conduct." Enker apparently maintains that basic, yes-or-no questions should be answered, not compromised. With regard to issues such as intention, provocation, responsibility, intoxication, entrapment, and self-defense, however, he argues that justice can be better achieved through compromise than trial.⁵¹ District Attorney Arlen Specter of Philadelphia suggests that quasi-legal questions raise problems of "variable guilt" and are therefore suitable for compromise.⁵² The suggestion of these observers might, however, be phrased less elegantly: In some cases the defendant may be one-quarter guilty and therefore merit one-quarter the punishment usually awarded for the crime with which he is charged. A few cases may help to test this proposition.

Los Angeles defense attorney George L. Vaughn, Jr. recalls the case of a Negro client who was charged with murder. The defendant, who had previously been convicted of a felony, reported that he had been employed as a junk-hauler by the victim, a white man. One day, a truck driven by the defendant was stopped by the police, and a citation was issued for an equipment defect. The defendant knew that if the defect were corrected and the truck inspected, the charge would be dismissed. He therefore gave the citation to his employer, who promised to take care of the matter. The employer did nothing, and a warrant was issued for the defendant's arrest. He spent a day and a night in jail before he was released by the court.

After his release, the defendant proceeded to his place of employment and asked for his paycheck. The employer informed him that he would

⁵¹ Enker, *Perspectives on Plea Bargaining*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 113-4 (1967).

⁵² Specter, Book Review, 76 YALE L.J. 604, 606-7 (1967).

not be paid for the day he had spent in jail. The defendant then resigned. When the employer proceeded to curse him, the defendant responded with his fists. The employer fell, and his head struck the curb. He was taken to a hospital, where he died twenty days later.

When the victim died, it was discovered that the hospital had provided no treatment for his internal bleeding. A pathologist from the University of Southern California was willing to testify for the defense and to offer a tentative opinion that the hospital's diagnosis had been negligent.

In these circumstances, Vaughn was hopeful, but not confident, of an acquittal. The defendant's record limited his value as a witness, and while his account of the terminal incident was confirmed by two Negro witnesses, it was disputed by a white witness. The white witness portrayed the attack as less provoked and more seriously intended than the defendant described it. Moreover, the interracial character of the crime did not aid the chances for acquittal. Despite these difficulties, Vaughn refused both the prosecutor's initial offer of a guilty plea to second degree murder and his second offer of a plea to manslaughter. The prosecutor proposed that the manslaughter plea be followed by a term of probation, on the condition that the defendant serve the first year of his term in the county jail.

"What do you want?" the prosecutor asked.

"A chance at straight probation," Vaughn replied.

"Let's talk to the judge," the prosecutor said, and discussion shifted to the trial judge's chambers. The judge proposed that the defendant plead guilty to the crime of assault with intent to inflict great bodily injury. He added that the sentence would indeed be "straight probation" if the pre-sentence report confirmed that the defendant had been steadily employed. By the time of sentencing, however, the judge had revised his opinion. The defendant, in the interim, had fought with a jail trustee, and he had struck a deputy sheriff who attempted to separate the two inmates. The defendant was therefore granted probation on the condition that he serve the first nine months of his term in the county jail.⁵³

⁵³ When the judge revised his opinion concerning the proper sentence on a plea of guilty in this case, he offered to permit the defendant to withdraw his plea, or even to plead guilty before another judge. Vaughn recalls another instance, however, in which a trial judge reneged on a plea agreement because the defendant had later been arrested for the possession of a concealed weapon. The search that uncovered this weapon was illegal, and the concealed-weapon prosecution was therefore dismissed. The trial judge nevertheless decided that he could not in good conscience fulfill his earlier promise of probation, and he sentenced the defendant to six months' imprisonment. In this case, unlike the case reported in the text, the judge refused to permit the defendant to withdraw the guilty plea that his own unfulfilled promise had induced.

This case seems to satisfy Professor Enker's test for the suitability of compromise. There was no suggestion that the prosecutor had charged the wrong man. The case presented only issues of intention, provocation, and causation—all of them doubtful. Intangible issues of this sort are, of course, basic to every civilized legal system; it is elementary that a man who acts unintentionally is as innocent as a man who does not act at all. Professor Enker does not seem to deny that quasi-legal issues are sometimes as important as preliminary questions of historic fact. He does suggest, however, that these issues are unlikely to be resolved effectively at trial. Thus he writes, "A jury can be left with the extreme alternatives of guilty of a crime of the highest degree or not guilty of any crime, with no room for any intermediate judgment. And this is likely to occur in just those cases where an intermediate judgment is the fairest and most 'accurate' (or most congruent)."⁵⁴

Plea negotiation plainly has a marked advantage over traditional forms of adjudication in that it is a more flexible method of administering justice. It affords a far greater range of alternatives than do most trial proceedings. Flexibility is, however, an advantage that all lawless systems exhibit in comparison with systems of administering justice by rules. The utility of discretion must be balanced against the utility of pre-ordained rules, which can limit the importance of subjective judgments, promote equality, control corruption, and provide a basis for planning, both before and after controversies arise. Moreover, the concept of flexibility is itself entirely independent of the concept of compromise. Even if the balance between rule and discretion that our system of criminal justice presents merits alteration, plea negotiation might remain an unsatisfactory vehicle of readjustment.

The flexibility of today's guilty-plea system would be duplicated if our society abandoned traditional legal restrictions and gave its judges the powers of Solomon. Most observers would probably resist efforts to bring into the courtroom the sort of uncontrolled discretion that plea-bargainers now exercise in the great majority of criminal cases. Nevertheless, a lawless system of courtroom justice would have most of the advantages that Professor Enker perceives in the guilty-plea system and fewer of its faults. Lawless justice in a trial court would be visible and reviewable, either by the electorate or by an equally lawless appellate court; and, much more important, discretionary justice in the courtroom would be based on an assessment of the evidence. Under the guilty-plea system, opposing bargainers usually

⁵⁴ Enker, *supra* note 51, at 113-4.

are able to reach an adjustment although the shifting and fallible bases for their conflicting assumptions are never tested. Whatever faults justice by ancient tribal kings involved, at least they usually listened.

Compromise in the case of the hapless junk-hauler might have yielded substantial justice; determining the outcome of the case by lottery might have produced a just result as well. I find it difficult to have confidence in either procedure, and the reason for my distrust, in both situations, is that no impartial observer would have attempted to develop a meaningful sense of what happened. Before the defendant in this troublesome case was sentenced or released, I would have wanted someone to hear the witnesses; I would have wanted him to assess, as best he could, the cruelty of the victim's actions in the context in which they occurred; I would have wanted him to formulate some picture of the violence involved in the defendant's act; I would have wanted him to hear medical evidence on the seriousness of the victim's injury and whether death was, at the outset, a likely consequence; and, most important, I would have wanted him to make an independent judgment concerning the defendant's thoughts when he acted. Of course, none of these things might have happened at trial. They seem far more likely to happen in a courtroom, however, than in a backroom bargaining session.

From my perspective, the more difficult the issue, the more it merits careful scrutiny. It is a prerequisite of justice in troublesome, contested cases that someone who is not committed to one viewpoint or the other listen to the evidence.

Professor Enker suggests that the insanity defense raises problems that frequently merit a compromise solution. Such a solution was provided in the publicized case of William Heirens, a seventeen-year-old college student who pleaded guilty to three separate murders and was sentenced to three consecutive life terms.⁵⁵

Heirens was arrested for burglary during a struggle in which police officers broke three flower pots over his head. He was taken to a hospital, where he was questioned, intermittently for two days and intensively during the entire night of the second day. Heirens did not respond coherently but usually stared with a vacant expression. On the third day, the State's Attorney, without the consent of Heirens or his

⁵⁵ The description of the case that follows is derived primarily from the official report in *People v. Heirens*, 4 Ill. 2d 131, 122 N.E.2d 231 (1954). Additional facts are drawn from Kennedy, Hoffman & Haines, *Psychiatric Study of William Heirens*, 38 J. CRIM. L.C. & P.S. 311 (1947), and from *THE CONCISE ENCYCLOPEDIA OF CRIME AND CRIMINALS* 182 (Scott ed. 1961).

parents, directed a psychiatrist to administer sodium pentothal in an effort to discover whether the suspect was malingering. Under the influence of this drug, Heirens described a number of crimes, including the murder of Suzanne Degnan, a six-year-old child whose dismembered body had been discovered in Chicago's sewers. Heirens attributed the crimes he recounted to a person named George. When he was asked to describe George, Heirens described himself exactly. In the meantime, the police—in what the Illinois Supreme Court called a flagrant violation of the defendant's rights—searched Heirens's room and discovered a substantial amount of incriminating evidence.

Subsequent psychiatric examinations revealed a bizarre behavior pattern. At the age of nine, Heirens began stealing women's underclothing. When this activity lost its fascination, however, Heirens began to derive sexual satisfaction from entering strangers' windows. Once inside, his sexual excitement ceased, but Heirens invariably committed burglaries and, occasionally, assaults on women he discovered inside. Headaches and dizziness usually preceded or accompanied his acts. When he touched women on the breast, Heirens experienced severe pangs of conscience, but he claimed to experience no emotion whatever when he stole or murdered. On one occasion, however, Heirens wrote in lipstick on a victim's mirror, "For Heaven's sake catch me before I kill again; I cannot control myself." On another occasion, he struck a woman several times and immediately had a sexual orgasm. He proceeded to his college room—but returned to the woman's apartment, administered first aid, and attempted to secure help by telephone.

It was obvious that Heirens suffered from a severe mental abnormality, but it was not clear that his attorneys could establish a legal defense of insanity. A psychiatrist retained by the defense concluded that Heirens could distinguish right from wrong.⁵⁶ Three psychiatrists

⁵⁶ It is doubtful that this conclusion had the significance that the defense attorneys and others associated with the case seemed to attribute to it. At the time of Heirens' trial, the law of mental responsibility in Illinois was derived primarily from the traditional M'Naughten standard. As in other "M'Naughten standard" jurisdictions, the relevant legal issue was not whether the defendant could distinguish right from wrong in an abstract way; it was whether he could "discern right from wrong as to the particular act in question." *People v. Varecha*, 353 Ill. 52, 57-8, 186 N.E. 607, 609 (1932). Moreover, the attorneys and psychiatrists apparently ignored the first branch of the M'Naughten standard. A fact finder must determine whether the defendant understood the "nature and quality of his act" at the time he committed it. It is conceivable that an actor might realize that a particular act is wrong and still not understand its nature and quality—as might have been the case, for example, if Heirens had believed that he was not acting at all but was simply "letting George do it." See *People v. Marquis*, 344 Ill. 261, 267, 176 N.E. 314, 316 (1931). Finally, Illinois had gone beyond the traditional M'Naughten standard at the time of Heirens' trial, by requiring that a defendant not merely know

appointed by the court wrote that he was "not suffering from any psychosis, nor is he mentally retarded; he has average intelligence. He has a deep sexual perversion and is emotionally insensitive and unstable. . . . He is unstable, and hysterically unpredictable, and most of his actions can be swayed from time to time by the suggestions coming from his environment."⁵⁷ Insanity was therefore a doubtful issue that, under Professor Enker's view, was suitable for compromise. And compromise there was.

One of Heirens' attorneys informed the defendant's parents that while the possibility of death in the electric chair was remote, it was foolish to take the chance. The attorneys accordingly persuaded Heirens to make a public confession. To accomplish this goal, the attorneys threatened to withdraw from the case, and they told the defendant that unless he confessed, he would probably be electrocuted.

After the defendant's guilty plea was entered, the State's Attorney acknowledged to the court the "co-operative assistance" of the defense counsel. He observed, "The small likelihood of a successful murder prosecution of William Heirens early prompted the State's Attorney's office to seek out and obtain the co-operative help of defense counsel Without the aid of the defense we would to this day have no answer for the death of Josephine Ross. Without their aid, to this day a great and sincere public doubt might remain as to the guilt of William Heirens in the killing of Suzanne Degnan and Frances Brown."

One of the defense attorneys added, "I have no memory of any case . . . when counsel on both sides were so perplexed as to the mental status of an individual. . . . I must confess that at this time there exists in my mind many doubts as to this defendant's mental capacity for crime. . . . [Both sides were] agreed that any thought on the part of the State to cause this man to forfeit his life would be unjust. It would be unfair. By the same token we were collectively agreed that any course on our part which would assist in having him returned to society would be equally unfair."

The distressing aspects of the Heirens case are several—the possible relationship between the guilty plea and the illegal search of the defendant's room, the possible relationship between the guilty plea and the illegal sodium pentothal examination of the defendant, the possible relationship between the guilty plea and the coercive tactics em-

right from wrong, but that he also have "the power to choose between them and to act according to his choice." *People v. Moor*, 355 Ill. 393, 399, 189 N.E. 318, 320 (1934).

In 1961, more than a decade after Heirens' trial, the law of mental responsibility in Illinois was substantially simplified and revised. See *ILL. REV. STAT.*, ch. 38, § 6-2 (1967).

⁵⁷ *People v. Heirens*, 4 Ill. 2d 131, 139, 122 N.E.2d 231, 236 (1954).

ployed by the defense counsel to secure a confession, and the clear relationship between the guilty plea and the defense attorneys' misconceived sense of social duty. A unanimous Illinois Supreme Court, however, found no error in Heirens' conviction.⁵⁸

It might be argued that the guilty-plea system itself tends to dilute a defense attorney's sense of adversary responsibility;⁵⁹ but in the main, these unusual, disturbing features of the case are not inherent in the process of compromise. They should play no role in evaluating Professor Enker's thesis. It is not difficult, however, to imagine a situation in which law enforcement officials possessed adequate admissible evidence against Heirens, and in which a properly motivated defense attorney might have advised a bargained plea in order to avoid the possible infliction of the death penalty. This situation would present in greater focus the question whether compromise can yield justice when issues of mental responsibility are raised.

William Heirens' culpability under traditional legal standards was doubtful, yet both the defendant and society were deprived of an authoritative resolution of this issue. Heirens is today an inmate of the Stateville Penitentiary, although no one has determined on the basis of the evidence that a prison is where Heirens belongs. Society devised the insanity defense precisely to avoid such distressing spectacles. Like other legal issues, the defense was designed to be tried, not compromised; and I fail to see how it can serve its purpose in any other way.⁶⁰

⁵⁸ *People v. Heirens*, 4 Ill. 2d 131, 122 N.E.2d 231 (1954).

⁵⁹ One may reasonably speculate, for example, about how the *Heirens* case would have been treated in continental Europe, where the plea of guilty is not available to any defendant. It seems doubtful that an attorney operating under this system would go through a trial without advancing the basic legal defenses that Heirens had available, however strongly he believed that conviction would serve the best interests of society. Only a system in which defense attorneys are encouraged to forego trial lends itself so readily to improper considerations of this sort, and the stronger the inducement for the nonadversary resolution of a case, the easier it seems to be for a defense attorney to permit subjective moral judgments to influence his conduct. Even under today's guilty-plea system, however, most attorneys undoubtedly have the necessary professionalism to rise above the conduct that characterized the *Heirens* case.

Houston defense attorney Clyde W. Woody does recall one case that may have involved conduct more unprofessional than that in the *Heirens* case, but he agrees that it is unusual. The lawyer involved in this case was a friend of the defendant's parents. When he discovered that the defendant was a heroin addict, he arranged to have him indicted. The defendant evaded arrest and was ultimately captured breaking into a drug store. The attorney then confronted him in jail and said, "You are going to do what I tell you. You are going to plead guilty to both indictments." The defendant did, and Woody is now representing him in his post-conviction proceedings.

⁶⁰ Professor Helen Silving says of the *Heirens* case, "When the court, in knowledge of what had transpired . . . , accepted a plea of guilty of this defendant, it turned the

Finally, consider the case that District Attorney Specter advances to illustrate his concept of "variable guilt." He suggests that the circumstances of most barroom killings provide strong reason for compromise:

The dictum that "justice and liberty are not the subjects of bargaining and barter"⁶¹ does not fit the realities of a typical barroom killing

There is ordinarily sufficient evidence of malice and deliberation in such cases for the jury to find the defendant guilty of murder in the first degree, which [in Pennsylvania] carries either life imprisonment or death in the electric chair. Or, the conceded drinking by the defendant may be sufficient to nullify specific intent or malice to make the case second degree murder, which calls for a maximum of 10 to 20 years in jail. From all the prosecutor knows by the time the cold carbon copies of the police reports reach the District Attorney's office, the defendant may have acted in "hot blood," which makes the offense only voluntary manslaughter with a maximum penalty of 6 to 12 years. And, the defense invariably produces testimony showing that the killing was pure self-defense.

When such cases are submitted to juries, a variety of verdicts are returned, which leads to the inescapable conclusion of variable guilt. Most of those trials result in convictions for second degree murder or voluntary manslaughter. The judges generally impose sentences with a minimum range of 5 to 8 years and a maximum of 10 to 20 years. That distilled experience enables the assistant district attorney and the defense lawyer to bargain on the middle ground of what

clock of time back to the days when the mere uttering of certain words magically produced a judgment." H. SILVING, *ESSAYS ON CRIMINAL PROCEDURE* 251-2 n.70 (1964).

The compromise of the insanity defense through plea bargaining is not unusual. A West Coast defense attorney recalls a fairly typical case in which a defendant with no prior history of criminal activity had smashed his daughter's head with a hammer. A sodium pentothal examination by a psychiatrist, whom the District Attorney had often used, and whom he respected, revealed that the defendant had blacked out and had dreamed he was committing suicide when the incident occurred. The result of this disclosure of psychological disturbance was a guilty plea, confinement for a ninety-day diagnostic period, and a term of probation.

A Chicago prosecutor reports that a case involving "the clearest insanity defense I ever saw" ended in a bargained guilty plea and a sentence of one to twenty years' imprisonment. As in the *Heirens* case, the prosecutor and defense attorney agreed that despite his possible lack of culpability, the defendant should be isolated from society in a prison.

⁶¹ *Shelton v. United States*, 242 F.2d 101, 113 (5th Cir. 1957) (Rives, J.), *rev'd en banc*, 246 F.2d 571 (5th Cir. 1957), *rev'd per curiam*, 356 U.S. 26 (1958).

experience has shown to be "justice" without the defense running the risk of the occasional first degree conviction . . . and without the Commonwealth tying up a jury room for 3 to 5 days and running the risk of acquittal.⁶²

This argument seems to rest on the notion that when a man has seen one barroom killing, he has seen them all. If juries return divergent verdicts in this sort of case, the verdicts must reflect the idiosyncracies of the juries rather than any differences in the facts with which the juries were confronted. It would be easy to dismiss this sort of analysis with the observation that prosecutors may be too ready to seek quick, comfortable pigeonholes for every case. The evidence might not be as irrelevant as the prosecutors seem to assume.⁶³

Nevertheless, Specter's argument is a forceful one. In the homicide area particularly, scholars have long advanced psychological, moral, and jurisprudential justifications for the distinctions drawn by the criminal code.⁶⁴ These justifications seem plausible enough; but plausible distinctions sometimes prove too fine for workable, everyday application. When serious treatment consequences turn on overly fine distinctions, the idiosyncracies of fact finders may indeed exert an unreasonable influence. In both homicide cases and other cases, therefore, the men who administer our criminal law seem anxious to avoid the issues suggested by the criminal code. In practice, the attention of prosecutors, defense attorneys, and the trial judges turns to another set of basic questions: Did the defendant injure personal interests or property interests? If the crime was against personal interests, was it motivated by considerations of gain, or was the defendant simply ready to use violence in the resolution of personal disputes? Most important, did the defendant use a gun? What was the extent of the victim's injury?⁶⁵ And finally, do the defendant's record and his *modus operandi* indicate that he is a confirmed criminal?

⁶² Specter, Book Review, 76 YALE L.J. 604, 606-7 (1967).

⁶³ Cf. J. SKOLNICK, JUSTICE WITHOUT TRIAL 241 (1966): "As accused after accused is processed through the system, participants are prone to develop a routinized callousness, akin to the absence of emotional involvement characterizing the physician's attitude toward illness and disease. . . . [T]he most respected attorneys, prosecuting and defense alike, are those who can 'reasonably' see eye-to-eye in a system where most defendants are guilty of some crime."

⁶⁴ See, e.g., Michael & Wechsler, *Rationale of the Law of Homicide* (pts. 1 & 2), 37 COLUM. L. REV. 701, 1261 (1937).

⁶⁵ In some jurisdictions, this consideration is expressed in a "stitch rule." When the victim of an assault requires a certain number of stitches, usually more than thirty but less than sixty, the defendant is ordinarily required to plead guilty to some form of felonious assault. When the victim requires fewer stitches, a reduction of the charge to a misdemeanor is a matter of course. See H. SUBIN, CRIMINAL JUSTICE IN A METROPOLITAN COURT 36 n.16 (1966).

In the daily operation of the criminal courts, these questions tend to be the real ones. All other issues tend to be viewed as superstructure—offering an occasion for technical gamesmanship, but nothing more. From the perspective of the men who administer criminal justice, even carefully considered trial verdicts may therefore fail to accord with common sense. If the perspective of these practitioners is sound, the best solution to the defects they perceive in the trial system does not lie in a shift from trial procedures to off-stage compromises. It lies instead in a simplification of the criminal code to reflect “everyday reality” rather than common-law refinement.

A defender of the Specter viewpoint might respond that reform of the criminal code is difficult; he might argue that in a world of second-best solutions, plea negotiation makes sense. This argument might, of course, be restated: If the criminal code cannot be reformed, its overly refined distinctions should be compromised out of existence.

Not only does this argument raise theoretical problems under the constitutional doctrine of separation of powers, but it seems doubtful that plea negotiation can eliminate the irrationalities of the criminal code without substituting more serious irrationalities of its own. It might make sense to establish a new crime called “barroom killing,” with a minimum penalty of five to eight years imprisonment and a maximum penalty of ten to twenty years imprisonment. (Frankly, of course, I doubt it.) Plea negotiation, however, does not effectively establish this new crime category. Most barroom killings seem to end in bargained pleas to voluntary manslaughter; but some end in bargained pleas to second degree murder; some end in bargained pleas to various categories of felonious assault; and I know of one barroom shooting that was resolved by a guilty plea to the crime of involuntary manslaughter, which, under the circumstances, seemed to be the last crime in the code of which the defendant might be guilty. It is therefore not clear that plea negotiation leads to greater uniformity of result than trial by jury.

Juries, of course, have biases, but the rules of evidence attempt to direct their attention to relevant issues. There are no rules of evidence in plea negotiation; individual prosecutors may be influenced not only by a desire to smooth out the irrationalities of the criminal code but by thoroughly improper considerations that no serious reformer of the penal code would suggest. Moreover, there is a basic difference between the personal biases of juries and the institutional biases of prosecutors. Juries may react differently to the circumstances of indistinguishable crimes, but at least they react to the circumstances of the crimes. A jury is unlikely to seek conviction for the sake of con-

viction, to respond to a defense attorney's tactical pressures, to penalize a defendant because he has taken an inordinate share of the court's and the prosecutor's time, to do favors for particular defense attorneys in the hope of future cooperation, or to attempt to please victims and policemen for political reasons.

Finally, there seems to be no way in which plea negotiation can be confined to situations in which the criminal code is irrational. It is one thing to suggest distinctions between factual issues and quasi-legal issues; it is another thing to make that distinction part of a working system of plea bargaining. It seems unrealistic to expect prosecutors to offer unusual concessions when the defendant may have acted in self-defense, but to withhold all concessions when it appears, in addition, that the defendant may not have fired the fatal shot.

A prosecutor's case may be weak because identification of the criminal is in doubt, or it may be weak because a quasi-legal element of the accusation is doubtful. At the end of the spectrum are purely legal issues. A defendant's guilt may be clear, but procedural or constitutional defenses may prevent the introduction of decisive evidence. In criminal cases, the goal of evidentiary rules is often to insure that justice is administered in accordance with basic standards of decency. When legal issues are compromised through plea bargaining, the public's interest in enforcing the law against the law enforcers is often compromised as well.

Plea negotiation may thwart the goals of procedural rules in two inconsistent ways, which correspond with two basic, inconsistent approaches that defense attorneys may adopt toward the task of bargaining. Every defense attorney must make a basic strategic judgment concerning the most effective way to win concessions for his clients. Either the attorney can be good—and win concessions because prosecutors fear defeat at trial—or he can be nice—and win concessions because prosecutors are willing to accommodate him in an atmosphere of reciprocity. These two approaches can be combined, but only at the cost of sacrificing some of the benefits of each.

The easier, more comfortable path to success in bargaining lies in cultivating favorable personal relationships with prosecutors and other influential members of the court bureaucracy. When an attorney carries this approach to extremes, he may never advance procedural defenses at all. In the San Francisco Bay area, the plea-negotiation process seems to depend on considerations of personal reciprocity to a greater extent than it does elsewhere in the nation. An Oakland defense attorney explains, "I never use the Constitution. I bargain a case on

the theory that it's a 'cheap burglary,' or a 'cheap purse-snatching,' or a 'cheap whatever.' Sure, I could suddenly start to negotiate by saying, 'Ha, ha! You goofed. You should have given the defendant a warning.' And I'd do fine in that case, but my other clients would pay for this isolated success. The next time the district attorney had his foot on my throat, he'd push too."⁶⁶

Most defense attorneys insist that it is better to be good than to be nice.⁶⁷ Some of these attorneys advance every procedural claim that their ingenuity can devise—even claims that lack any chance for success, but which threaten to occupy the court's and the prosecutor's time.⁶⁸ Procedural defenses may, indeed, as a class, be more effective than factual defenses in inducing concessions. Legal issues are more likely than claims of innocence to lead to appellate litigation, and appellate litigation increases both the tactical and the administrative problems that prosecutors face.⁶⁹

San Francisco defense attorney Gregory S. Stout observes, "There is a tendency on both sides to walk away from a cloudy point," and in practice most procedural defenses are doubtful. Search and seizure questions, for example, probably constitute the largest single area of procedural litigation at trial. Yet the factual circumstances of search and seizure cases are almost invariably in dispute, and the legal standards by which searches are evaluated are usually less than precise.⁷⁰

Vagaries of judicial personality sometimes contribute to the doubtful character of constitutional defenses. A Houston defense attorney reports that he is quick to sacrifice almost any procedural claim in return for prosecutorial concessions. "Given the attitude of the judges here," he says, "I know that I will have to hit a federal forum before even the simplest constitutional argument will prevail. When I can get some-

⁶⁶ The attorney explains that his reluctance to present constitutional defenses is simply a special instance of his general reluctance to emphasize the weakness of the prosecution's case. An unfavorable comment on the merits of a prosecutor's case may be resented, and even if it is not, the prosecutor may be encouraged to respond in kind when the defense attorney's case is weak.

⁶⁷ Of course this response is more likely than its alternative to appeal to an interviewer from academia. It need not be taken at face value.

⁶⁸ See text at notes 22-23 *supra*.

⁶⁹ If a prosecutor estimates that a factual defense has a fifty per cent chance of success at trial, he is likely to conclude that its chances of success on appeal are close to zero. If he estimates that a legal defense has a fifty per cent chance of success at trial, he may—given the differing attitudes of trial and appellate judges in many jurisdictions—conclude that its chances for success on appeal are even greater. Even if a prosecutor has little doubt of his success on appeal, moreover, the costs of appellate proceedings tend to encourage concessions.

⁷⁰ See LaFave, *Search and Seizure: "The Course of True Law . . . Has Not Run Smooth,"* 1966 ILL. L. F. 255.

thing for my client *now*, I take it." The attorney illustrates his contention with a remark that he attributes to a Houston trial judge. "Don't quote that United States Supreme Court opinion to me," the judge is supposed to have said. "It is not the law of Texas until the Court of Criminal Appeals says so."

Moreover, when the benefits of a guilty plea are made attractive enough, even the slightest doubt concerning the validity of a procedural defense may lead to compromise. 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 the slight chance of a felony conviction was sufficient, however, to induce the defendant to plead guilty to a misdemeanor.⁷¹

When a procedural defense has not been previously litigated, it is, of course, especially doubtful. In this situation, plea negotiation provides an effective mechanism for circumventing the development of new law. Boston defense attorney Joseph S. Oteri expresses surprise, for example, that the well-known case of Danny Escobedo⁷² ever reached the Supreme Court. "I had a case that presented exactly the same situation several years earlier," Oteri says. "My trial briefs were written, but I never had to use them. The prosecutor told me, quite forcefully, that he thought my argument was bad law. I replied that a great many recent judicial decisions had seemed to him bad law. 'Why give the courts another chance to make your life difficult?' I asked. The two of us reached a very satisfactory agreement."⁷³

⁷¹ 90th Cong., 1st Sess., Senate, Subcomm. of Comm. on Appropriations, *Hearings on H.R. 8569, District of Columbia Appropriations for Fiscal Year 1968*, pt. 3, at 3238-9 (1967).

⁷² *Escobedo v. Illinois*, 378 U.S. 478 (1964).

⁷³ The extent to which procedural defenses are compromised varies from jurisdiction to jurisdiction. In Chicago, plea negotiation often occurs in a conference in the trial judge's chambers. There is rarely more than one conference per case, and defense attorneys usually do not request a conference until their pretrial motions have been litigated. As a result, the compromise of procedural and constitution defense seems less common in Chicago than in most other cities. Warren D. Wolfson, the "attorney behind the glass door," in the *Escobedo* case, reports that there was never any suggestion from either side that Danny Escobedo might plead guilty. Wolfson notes that the only evidence against the defendant was his partial confession, and, in addition to the right-to-counsel claim that ultimately prevailed in the Supreme Court, the defendant advanced a claim that this confession was involuntary under traditional law. The defendant was confident enough of success that he was not interested in a plea agreement during the period when such an agreement might have been possible.

Many exclusionary rules are designed, at least in part, to discourage illegal conduct by insuring that this conduct will not contribute to successful prosecution.⁷⁴ Under the guilty-plea system, however, unconstitutional behavior frequently does contribute to successful prosecution. Our system of criminal justice continues to exact a price for illegal action, but the price is of a very different sort from that apparently intended by the authors of exclusionary rules. Convictions are not lost; instead, sentences become less severe. Moreover, the guilty-plea system exacts its reduced price not only when conduct is found to be illegal but even when conduct is only arguably invalid. A critical question, therefore, is whether a reduction in sentence, even in a large number of cases, can achieve a deterrent effect similar to that produced by the elimination of conviction in a few.⁷⁵

It may aid speculation to distinguish two types of police decisions. Policemen must sometimes choose between performing a task in a legal manner and performing it illegally. When the choice is to search with or without a warrant, for example, it seems plausible that even the inducements of the guilty-plea system could sometimes cause policemen to observe legal requirements. It is conceivable, at least, that an officer might think, "If I go in without a warrant, some defense attorney may holler about it; and the prosecutor may therefore agree to a sentence of fifteen years rather than fifty. There is a dangerous man in that apartment who deserves to be put away for a long time; I'd simply better do the job right."

In theory, however, a request for a warrant may sometimes be refused;⁷⁶ and when the issue is not how—but whether—an invasion of privacy should occur, the fourth amendment's guarantee against unreasonable searches and seizures assumes its greatest significance. In this situation, policemen may confront a different sort of choice—a choice between acting illegally and not acting at all. Effective deterrence seems far more difficult to achieve in this situation. When the

In Los Angeles, defense attorneys report, the compromise of procedural defenses has become less common since November 8, 1967, when state law began requiring defense attorneys to litigate motions to suppress evidence prior to trial. The habit of delaying negotiation until the day of trial has generally persisted, and by that time, most procedural issues have been resolved.

⁷⁴ See *Linkletter v. Walker*, 381 U.S. 618, 636-7 (1965).

⁷⁵ Another argument that is sometimes advanced for exclusionary rules is simply that there is a basic unfairness in convicting a defendant on the basis of illegally obtained evidence. Cf. *Terry v. Ohio*, 392 U.S. 1, 12-13 (1968). If this argument is accepted, the incompatibility between the compromise of procedural defenses and the purposes of exclusionary rules needs no demonstration.

⁷⁶ Practice may not correspond to this theory. See W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* 502-3 (1965).

issue is one of action or inaction, the exclusionary rule, at best, merely yields the same results as inaction. An officer may therefore conclude that he has nothing to lose and everything to gain by acting.⁷⁷ Only a thorough-going demonstration that illegal conduct will be unproductive seems likely to influence his behavior in these circumstances. An officer should be discouraged from thinking, "I know that it is probably illegal to enter this apartment; but the prosecutor may nevertheless be able to make something of the case. He seems able to get some kind of guilty-plea from almost every defendant, and I can therefore be reasonably confident that the defendant will be convicted of something."

The compromise of procedural rights takes a special form when the right to appeal becomes the subject matter of a trade.⁷⁸ This special form might be described as the post-trial, post-conviction, post-sentence bargained plea. Chicago attorney Norman Lapping recalls an illustrative instance. One day, a group of civil-rights demonstrators entered a public recreation area and began to remove the signs that designated this area "Washington Park." The demonstrators had signs of their own. They proposed to relabel the facility "Malcolm X Park." The defendant, a news photographer, watched the demonstrators from inside the park; then he attempted to leave the park in order to photograph their activities from across the street. A policeman told the defendant to stay where he was, but he refused. In the altercation that followed, several of the defendant's ribs were broken.

One of the charges against the defendant was "mob action." He was convicted of this crime and sentenced to an eighteen-month term of probation, with the first sixty days to be served in custody.

Lapping was convinced that he had grounds for a successful appeal. Not only was the mob-action statute of dubious constitutionality; but the concept of mob action seemed inapplicable to the defendant, who had not only failed to act in concert with the demonstrators but who had never gotten close to them.

⁷⁷ Compare J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 239-43 (1966).

⁷⁸ In a sense, of course, all plea bargaining involves a compromise of the right to appeal. A guilty plea works as a waiver of all "nonjurisdictional" violations of the defendant's rights, and it may therefore prevent those violations from becoming the basis for an appeal. See 8 J. MOORE, *FEDERAL PRACTICE* ¶ 11.02(2) (2d ed. 1967).

A defense attorney can often argue, however, that prior violations of the defendant's rights "coerced" the plea of guilty. If the attorney invokes the right rubric, he can therefore avoid the impact of the stated rule in a great many cases. In New York, recent statutes specifically permit the appeal of pretrial rulings despite a plea of guilty. N.Y. CODE CRIM. PROC. §§ 813-c, 813-g (1968). When preliminary rulings have effectively concluded the case against a New York defendant, he need not insist on an otherwise functionless trial simply to preserve his right to appellate review.

Both county and city prosecutors told Lapping frankly that the defendant's appeal would probably be successful, and when the defense attorney submitted his motion for a new trial, negotiations began in earnest. The prosecutors told Lapping that if the defendant changed his plea to guilty, he would be fined \$100 and immediately released from custody. In addition, his term of probation would be reduced from eighteen months to one year. Lapping conferred with his client and reported that the defendant would not plead guilty. He would, however, forego an appeal if the sentence were reduced as the prosecutors proposed.

Usually, in this sort of case, a three-step procedure is used to implement a post-conviction bargain. A new trial is awarded, a guilty plea recorded, and the promised sentence imposed.⁷⁹ This procedure provides iron-clad assurance that errors in the initial trial cannot be made the basis of an appeal. In this case, however, the promise of Lapping and his client was apparently good enough. The counter-proposal was accepted.

Philadelphia public defender Vincent J. Ziccardi recalls a more serious case in which the defendant was convicted of armed robbery and sentenced to a term of ten to twenty years' imprisonment. When Ziccardi filed his motion for a new trial, the judge called the attorney to his chambers. He asked Ziccardi if he would withdraw his motion and offered, in return, to reduce the defendant's sentence to the time he had already spent in custody—one and one-half years. Ziccardi withdrew his motion, and the defendant left the jail.⁸⁰

Post-conviction bargaining is not an everyday occurrence, but most defense attorneys have apparently participated in one or two last-minute compromises of this sort. On some occasions, guilty pleas were exacted; on others, defendants merely yielded to the convictions already recorded. In basic outline, however, the two forms of post-conviction bargaining are similar to each other and to pre-trial bargaining as

⁷⁹ Chicago attorneys report that the same procedure is sometimes employed when a judge decides, for equitable reasons, to reduce a sentence that he has previously imposed. If the sentence were simply reduced, the defendant's right to appeal would remain intact, and the judges seem to believe that there is no reason to do anything that favors the defendant without securing something in return.

⁸⁰ Milton Adler, the Assistant Attorney in Charge of the Legal Aid Society of the City of New York, recalls an almost identical case. Again, the charge was armed robbery; and again, the sentence after a conviction at trial was ten to twenty years' imprisonment. Adler and the private attorney who ultimately represented the defendant on his motion to set aside the verdict were, however, less successful in Manhattan than Ziccardi had been in Philadelphia. In return for foregoing an appeal and entering a plea of guilty to grand larceny in the second degree, the defendant's sentence was reduced to two to five years' imprisonment.

well. When criminal cases are compromised, the rule of law is invariably sacrificed to the rule of convenience.

B. *The Problem of Overcharging.*

Before a prosecutor can reduce the charge against a defendant in exchange for a plea of guilty, he—or someone else—must have formulated the initial charge. The charge is the asking price in plea bargaining, and the drafting of accusations is therefore an integral part of the negotiating process.

Defense attorneys in almost every jurisdiction claim that prosecutors “overcharge.”⁸¹ Houston’s Clyde W. Woody observes, “It is like horse trading anywhere. Of course both sides start out asking for more than they expect to get.” Prosecutors in almost every jurisdiction deny that their initial charges are inflated.

The disagreement between prosecutors and defense attorneys does not concern what prosecutors do, so much as it concerns what sorts of accusations are justified. Prosecutors are quick to condemn overcharging, but they define overcharging as a crude form of blackmail—accusing the defendant of a crime of which he is clearly innocent in an effort to induce him to plead guilty to the “proper” crime. If a cool, calculated threat of false conviction is an essential ingredient of the vice of overcharging, it seems certain—with few exceptions—that the prosecutors’ denials of overcharging are accurate.⁸²

When defense attorneys use the term overcharging, however, they usually refer to different, but equally serious, problems. Sometimes, the defense attorneys refer to what might be called “horizontal overcharging”—multiplying “unreasonably” the number of accusations against a single defendant. When defense attorneys condemn this practice, they usually do not disagree with the prosecutor’s evaluation of the quantum of proof necessary to justify an accusation. Usually, they concede, there is ample evidence to support all of the prosecutor’s charges.

The attorneys observe, however, that fifty charges are not usually filed against a single defendant because the prosecutor is interested in securing fifty convictions. The charges may be filed instead in an effort to induce the defendant to plead guilty to a few of the charges, in exchange for dismissal of the rest. A Boston defense attorney says,

⁸¹ Manhattan seems to be an exception, not because charging practices there are substantially different from those in other jurisdictions, but because defense attorneys have come to accept these practices as natural and proper.

⁸² It is doubtful, in fact, that wholly fabricated charges would work as a powerful lever for guilty pleas, absent fabricated evidence to support them.

"Prosecutors throw everything into an indictment they can think of, down to and including spitting on the sidewalk. They then permit the defendant to plead guilty to one or two offenses, and he is supposed to think it's a victory." When the only reason for filing a charge is to induce a plea of guilty to some other charge—and even when prosecutors have other, purely tactical reasons for multiplying the number of accusations⁸³—defense attorneys view the practice as "overcharging" despite the sufficiency of the prosecutor's evidence.

Sometimes defense attorneys refer to what might be called "vertical overcharging"—charging a single offense at a higher level than the circumstances of the case seem to warrant. The allegedly extravagant charge usually encompasses, as a "lesser included offense," the crime for which the prosecutor actually seeks conviction. In this situation, as in cases of horizontal overcharging, the claim is not that prosecutors charge crimes of which the defendant is clearly innocent; it is instead that they set the evidentiary threshold at far too low a level in drafting their initial allegations. Usually, defense attorneys claim, prosecutors file their accusations at the highest level for which there is even the slightest possibility of conviction.

Prosecutors, of course, have a broad discretion in determining how much evidence justifies the filing of a complaint or information, and how much justifies a recommendation to the grand jury that an indictment be returned.⁸⁴ The charge decision is usually made well in advance of preparation for trial, and prosecutors agree that full, decisive evidence of a defendant's guilt is not required at this early stage of the proceedings. "We may not know all we need to know at the time the information is filed," says Los Angeles' Lynn D. Compton in what most prosecutors would regard as a statement of the obvious. At the same time, prosecutors agree that it is improper to charge a defendant with crime unless he may be guilty—not only of some offense but of the specific crime charged.

Obviously the middle ground between "not knowing all we need to know" and believing that the defendant "may be guilty" is a broad one; the line between "proper" charging and "overcharging" is far from clear. The substance of the defense attorneys' complaint is that while prosecutors may apply a standard of "substantial evidence" or

⁸³ See text at notes 95-101 *infra*.

⁸⁴ There seems to be universal agreement in urban areas that prosecutors effectively control the actions of grand juries. Only occasional "runaway" grand juries fail to rubber-stamp the prosecutor's recommendations, and these "runaways" are extremely infrequent in cases that do not involve misconduct by public officials or other spectacular forms of crime. In rural jurisdictions, however, prosecutors still complain on occasion that "the grand jury wants to try every case."

"probable cause" in deciding whether to accuse the defendant at all, they do not apply that standard in determining what crimes to charge. Indeed, the bare possibility that evidence may emerge to justify an allegation usually causes prosecutors to "play it safe," and to hope that defendants "play it safe" as well by entering pleas of guilty to reduced offenses.

Both in situations of horizontal overcharging and in situations of vertical overcharging, therefore, defense attorneys are usually concerned about the threat that is no bluff. They are concerned about the threat that may be executed if the defendant fails to cooperate by pleading guilty.

There are two major types of horizontal overcharging. First, a defendant may be charged with a separate offense for every criminal transaction in which he has allegedly participated. When an embezzler has made false entries in his employer's books over a long period of time, for example, it is not difficult for a prosecutor to prepare a fifty-or one-hundred-count indictment. And when a first-offender has passed a dozen bad checks, a prosecutor may file a dozen separate accusations. Oakland defense attorney John A. Pettis, Jr. reports that in urban jurisdictions, where separate charges are invariably filed for every check, prosecutors invariably accept a guilty plea to a single offense.⁸⁵ Oakland prosecutor Edward O'Neill agrees. "That sort of agreement is so routine," he says, "that the public defender would not even bother to sit down." Prosecutors thus attempt to burden the defendant with a long record only if he stands trial.

Second, prosecutors may fragment a single criminal transaction into numerous component offenses. In Cleveland, "bad check artists" are usually charged, not only with one, but with three separate offenses for each check: forgery, uttering, and obtaining property by false pretenses. In Boston, the pattern is the same, except that a fourth offense is occasionally added; the defendant may also be charged as a "common and notorious thief."⁸⁶

In Manhattan, before a recent revision of the New York Penal Law, it was routine to charge an alleged armed robber with four separate crimes: robbery in the first degree, assault in the first degree, grand larceny in the first degree, and an unlawful weapons count.⁸⁷ In some

⁸⁵ Pettis adds that a first offender in a "bad check" case is invariably placed on probation.

⁸⁶ MASS. GEN. LAWS ch. 266, § 40 (1932).

⁸⁷ Polstein, *How to "Settle" a Criminal Case*, 8 PRAC. LAW., No. 1, at 35, 38 (1962). I do not know whether this practice has persisted since the implementation of the new penal code.

jurisdictions, the last offense may be fragmented further; the robber may be charged not only with illegally possessing a concealed weapon but with wantonly pointing a firearm. In California, an armed robber usually faces charges of both robbery and kidnapping. Under the California statute, he is technically guilty of kidnapping if he points a gun at his victim and tells him to back up.⁸⁸ Moreover, if the victim of the robbery is injured, the "kidnapping" becomes a capital offense. Los Angeles' Chief Deputy Public Defender, Paul G. Breckenridge, Jr., reports that even in cases involving serious injury, the District Attorney's office invariably dismisses the kidnapping charge when a defendant is willing to plead guilty to robbery. He therefore describes the addition of the kidnapping charge as an instance of overcharging.

Vincent J. Ziccardi, the First Assistant Public Defender in Philadelphia, once represented a defendant charged with burglary, rape, statutory rape, robbery, and larceny—all for a single transaction with a single victim. The defendant ultimately pleaded guilty to the single crime of statutory rape.⁸⁹ Boston defense attorney Paul T. Smith recalls a case that arose in Worcester County when four men entered a bank, drew their guns, told the customers not to move, and took money from each of seven tellers' cages. Each of the defendants was charged with seven counts of armed robbery, one for each of the tellers, and with nineteen counts of "confining or putting in fear," one for each of the customers in the bank. Then, for good measure, a conspiracy count was added.⁹⁰

Many prosecutors might balk at some of the charging practices just recounted. Nevertheless, when prosecutors are asked to describe their charging philosophies in general terms, they invariably report that

⁸⁸ CAL. PEN. CODE §§ 207-9. One Oakland prosecutor comments, "If a robber forced his victim to move from a desk to a chair, I probably would not charge him with kidnapping. If he forced the victim to move from a front room to a back room, I would probably file a kidnapping charge."

⁸⁹ The sentence was a term of eleven and one-half to 23 months' imprisonment. This sentence may provide some indication of whether the initial charges were seriously intended.

⁹⁰ A conspiracy charge may have a significant effect on the punishment of a defendant convicted at trial. In the Brinks robbery case, some of Boston attorney Paul T. Smith's clients were sentenced to seven consecutive terms of life imprisonment, and that was not enough. In addition, the defendants were sentenced to two and one-half year terms on charges of conspiracy, to be served in the county jail "on and after" the expiration of the last life sentence. This additional sentence was not as functionless as it might appear, Smith reports. A detainer from a county institution has the effect of denying a state prisoner certain privileges, including the privilege of exercising in the prison yard. As major armed robberies go, the Brinks robbery was characterized by a notable lack of brutality, but because the million-dollar theft received an enormous amount of publicity, the trial judge may have sought political profit in severity.

they charge the "highest and most" that the evidence permits. When the prosecutors are asked why, they usually regard the question with a degree of impatience. "Because the defendant did it," they commonly answer. "What else could we do?" they ask. Almost without exception, prosecutors seem to regard the drafting of accusations as a task that requires the exercise of a technical, rather than an equitable, discretion. A prosecutor must base his charge decisions on a professional, lawyer-like assessment of the evidence—and nothing more.

When the issue is not what charges to file initially, but what charges to retain when a defendant is willing to plead guilty, the prosecutors' philosophy undergoes a remarkable change. One Manhattan prosecutor, who says that "of course" a defendant should be charged with forty armed robberies "if there are that many," reports that he rarely insists on a plea of guilty to more than one count, even of a forty-count indictment.⁹¹ The only issue in practice, he says, is how serious the single count should be. In defense of this practice, the prosecutor argues that a single conviction at the highest level usually allows the court "adequate scope for punishment," for even the most serious offender. It has apparently never occurred to the prosecutor that the same reasoning might be applied from the very beginning, or that it might be applied to defendants who stand trial.

Vertical overcharging, like horizontal overcharging, usually follows a fairly uniform pattern. Defense attorneys in various jurisdictions complain that prosecutors charge robbery when they should charge larceny from the person, that they charge grand theft when they should charge petty theft, that they charge assault with intent to commit murder when they should charge some form of battery, and that they charge the larceny of an automobile when they should charge "joy-riding," a less serious offense that does not involve an intention to deprive the car owner permanently of his property.⁹² In general,

⁹¹ The prosecutor notes one exception to this practice, an exception that he says has been created for the benefit of defendants. Defendants sometimes plead guilty to two counts in an indictment, although the counts are so closely related that multiple convictions are precluded. The court then has the option of sentencing the defendant on either the lesser or the greater offense.

The prosecutor observes that in this situation, a plea of guilty to two offenses is more advantageous to a defendant than a plea of guilty to the greater offense alone. Defense attorneys, however, detect a degree of hypocrisy in this sort of prosecutorial generosity. In practice, they say, the court never fails to sentence the defendant on the lesser offense. A prosecutor knows that, for all practical purposes, the plea he exacts to the greater offense is window-dressing. It is designed to protect the prosecutor against charges of leniency, while affording him all the benefits that leniency provides.

⁹² Los Angeles' Lynn D. Compton reports, for example, that his office invariably charges both "Grand Theft Auto" and "Felony Joyriding" when a defendant has allegedly taken another person's car, even for a brief period. Compton notes that the

defense attorneys in some cities say, prosecutors charge "the first degree of everything" but accept a guilty plea to "the second degree of any crime" without serious negotiation.⁹³

One form of vertical overcharging seems especially common. In almost every jurisdiction, all homicides except those involving the negligent use of an automobile are charged initially as first-degree murder. Houston attorney Percy Foreman observes, "There hasn't been an indictment for murder without malice [voluntary manslaughter] for as far back as I can remember"—and Foreman's memory goes back more than forty years. In every city I visited except Boston, defense attorneys made virtually identical statements.⁹⁴

Prosecutors have many reasons for setting their charges at the highest level, and for multiplying the number of accusations against each defendant. Some concede frankly that one motivating factor is the effect of the charge on the bargaining process. "Sure, it's a lever," says one San Francisco prosecutor, referring to his office's practice of charging every non-automobile homicide as murder. With unusual candor he adds, "And we may charge theft, burglary, and the possession of burglar's tools, because we know that if we charged only burglary there would be a trial."

There are, however, other basic reasons for overcharging. When a homicide case goes to trial, a charge of first-degree murder enables a prosecutor to qualify the jury to inflict the death penalty, by asking each juror whether he will consider the imposition of capital punish-

sentence prescribed for "Grand Theft Auto" is one to ten years' imprisonment, and that the sentence prescribed for "Joyriding" is one to five years' imprisonment. He argues that because the penalties for the two offenses are only slightly different, no substantial leverage for pleas of guilty results.

Defense attorneys suggest that this analysis overlooks the actual sentencing practices of the court. One attorney explains, "When a car thief is willing to plead guilty, the charge is always dropped to 'count two,' the joyriding count, and the defendant is always referred for probation. It wouldn't matter if the defendant had five 'murder priors' on his record; the deal would be the same. The reduction of the charge may therefore make the difference between a sentence of one to ten years in the state prison and a term of probation, possibly on the condition that the defendant serve a few months of this term in the county jail. Of course defendants feel the pressure."

⁹³ This generalization is applicable to jurisdictions like Los Angeles and Manhattan, where bargaining focuses primarily on the level of the charge; it is not applicable to jurisdictions like Chicago and Houston, where bargaining focuses primarily on the defendant's sentence.

⁹⁴ Even in Boston, some defense attorneys maintain that non-automobile homicides are invariably charged as first-degree murder; but I did not find the consensus on this point that I found in other cities. This article has already reported one Boston case that seems inconsistent with a general pattern of overcharging in homicide prosecutions, see text at note 50 *supra*, but there are Boston cases in which it seems doubtful that the prosecutor's initial charge of murder was seriously intended.

ment in the case before him.⁹⁵ Even if a prosecutor desires only a conviction for voluntary manslaughter, he may find it advantageous to have a "hard-nosed" jury in the box,⁹⁶ and prosecutors often report that they have sought "death-qualified" juries when they did not wish to see the ultimate penalty imposed. Moreover, when a homicide case is tried, a first-degree murder charge permits a prosecutor to avoid accounting to the victim's family, the press, and the public for what may seem to them an unreasonable leniency. "The jury may make it manslaughter," the prosecutor may say, hoping in fact that the jury will, "but we won't do it for them."

The addition of a conspiracy charge not only provides the prosecutor with additional leverage in bargaining, but usually permits the introduction of evidence that would otherwise be inadmissible, should the

⁹⁵ In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the United States Supreme Court ruled that prospective jurors could not be excluded "for cause" merely because they were generally opposed to the death penalty. To exclude them, the Court said, would result in a jury that is biased on the issue of penalty. The Supreme Court indicated, however, that prospective jurors who were unwilling even to consider the imposition of capital punishment in the case before them might remain subject to challenge.

It is not entirely clear what it means to ask a juror whether he will consider the imposition of capital punishment in a specific case. If the juror knows nothing about the case, he can presumably answer in the affirmative if he might ever overcome his general scruples against the death penalty. A juror might, for example, be willing to consider the execution of officials responsible for a national policy of genocide but not one else, or he might be willing to consider the execution of Negroes but not of white men. If a particular case does not involve Adolph Eichmann, a Negro, or some other special object of a juror's hatred, it is hard to see why the juror should be entitled to sit on a jury from which others opposed to the infliction of the death penalty in that case have been excluded; his prejudgment on the issue of penalty seems as pronounced as theirs.

If, however, the juror is expected to know the general outline of the state's case before declaring his intention to consider the imposition of capital punishment, very few jurors might be qualified to inflict the death penalty in certain sorts of cases—those, for example, involving the mercy killing of a beloved, suffering spouse or those in which a defendant is guilty of "felony murder" simply because a policeman has killed one of his confederates. In short, it is unclear, under *Witherspoon*, whether a juror must be willing to consider the execution of the specific defendant before him—whether male or female, young or old, charged with murder or charged with rape—or whether any "pet hate" will do, however irrelevant to the case at hand.

⁹⁶ In *Witherspoon v. Illinois*, which is cited and discussed in the preceding footnote, the Supreme Court found no unfairness in the defendant's conviction by a jury from which all opponents of capital punishment had been excluded; only the sentencing of the defendant by such a jury was ruled impermissible. The Court reported that the scientific data before it was too incomplete to show whether "death-qualified" juries are more inclined to favor the prosecution on questions of guilt or innocence than juries that include opponents of the death penalty. Thus, the Justices of the Supreme Court apparently refused to know as scientists what all observers of the criminal courts know as men. The fact that a "death-qualified" jury tends to be more "tough-minded" than a jury not so qualified does not seem open to serious dispute. The Court should have confronted the difficult question whether this fact has any legal significance.

case go to trial.⁹⁷ Moreover, if a multiplication of charges fails to induce a plea of guilty, it may lead instead to a multiplication of convictions. During banquets and election campaigns, chief prosecuting attorneys seem fond of recounting the number of convictions that members of their staffs have secured.

Probably the chief reason for overcharging is simply the desire to "play it safe." A downstate Illinois State's Attorney freely avows his policy of charging every homicide as first-degree murder, but he denies that a desire to secure guilty pleas motivates this policy in any way. "I may think that the defendant should be convicted of manslaughter," the State's Attorney comments, "but circumstances may emerge after jeopardy has attached that make the crime murder. If the defendant knew that I had made a mistake, he might even enter a guilty plea immediately; then, of course, it would be too late for me to correct the error. It is elementary law that no one can be convicted of a greater offense than the one charged, and it is also elementary law that the court or jury may convict a defendant of a lesser included offense. I simply prefer the course that admits of correction if, when all the evidence is in, it appears that the charge was inaccurate."⁹⁸

The prosecutor's reasoning on this point seems to be accepted by most members of his profession.⁹⁹ If his argument has force, however, it should presumably be directed to the state legislature. An Illinois statute, which, with some variation in language, seems to be duplicated in every other state, provides that before a man is tried for a specific offense, there must be probable cause to believe him guilty.¹⁰⁰ This

⁹⁷ See MODEL PENAL CODE § 5.03, Comment (Tent. Draft No. 10, 1960). California prosecutors and defense attorneys report that indictments for conspiracy are much less common today than they were a dozen years ago, simply because liberalized rules of evidence have made these charges unnecessary as an evidentiary aid at trial. The possible influence of conspiracy charges in encouraging pleas of guilty has apparently not been a sufficient reason, in itself, to make them a regular part of the pattern of overcharging.

⁹⁸ For an indication that the danger emphasized by this prosecutor is a real one, see the Boston case reported at text accompanying note 50 *supra*.

⁹⁹ A notable exception is Los Angeles' John W. Miner, who, alone among the prosecutors I interviewed, does not define the term "overcharging" in terms of the crimes that the evidence might establish, but in terms of the crimes that the prosecutor actually desires to press to conviction. For example, Miner considers it overcharging when the perpetrator of a mercy killing is charged with murder rather than manslaughter. The critical factor is not that the prosecutor would be satisfied with a manslaughter conviction; it is that he would be unhappy if the defendant were convicted of the greater crime of which he is technically guilty. Miner rejects the common argument that a prosecutor never knows what the evidence might show at trial. "Usually," he says, "the prosecutor does know. He is unlikely to prove a stronger case than the one his witnesses have described."

¹⁰⁰ ILL. REV. STAT. ch. 38, §§ 109-3, 112-4(c) (1967); see L. ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 67-68, 162 (1947).

statute, like the rules emphasized by the State's Attorney, states elementary law.

A desire to "play it safe" may also influence a prosecutor in the multiplication of charges. Francis J. DiMento, a Boston defense attorney, observes that if the prosecutor did not charge every possible crime, a defense attorney would try to "whipsaw" his way to an acquittal. "My client may be guilty of something," the attorney would argue, "but he is not guilty of the crime for which he is now on trial." Houston defense attorney Donald H. Flintoft recalls a case in which the District Attorney charged only a single crime, aggravated assault. Flintoft comments, "The District Attorney simply couldn't make it at trial. Had he included a 'pistol' charge, however, he would have made it in a 'New York minute.' And even an 'aggravated pistol' charge would have been a 'laydown.' " There are, therefore, reasons for overcharging apart from a desire to secure pleas of guilty; but whatever a prosecutor's motives, the effects of his practices are the same.

Before a felony case is tried in any American jurisdiction, a member of the prosecutor's staff will, in effect, have made the charging decision. In misdemeanor cases and at the early stages of felony prosecutions, however, there are many jurisdictions in which cases proceed on the basis of charges formulated by arresting police officers.¹⁰¹ Policemen have their own reasons for overcharging. For one thing, they are not usually versed in the subtleties of the law, and their desire to "play it safe" may therefore lead to charges that even prosecutors regard as extravagant.¹⁰² In addition, the law requires a policeman to secure a warrant before making an arrest for a misdemeanor that has not occurred

¹⁰¹ The stage at which a prosecutor effectively makes the charge decision varies from jurisdiction to jurisdiction. In Los Angeles, the District Attorney's "complaint bureau" usually prepares a charge soon after a defendant's street arrest and before his preliminary hearing. In Chicago, a preliminary hearing usually proceeds on the basis of a charge prepared by an arresting officer, but the prosecutor, after considering the evidence at this hearing, may suggest that the defendant be "bound over" on a different charge. In Houston, although members of the District Attorney's staff participate in "examining trials," they rarely suggest any revision of the arresting officer's charge. Instead, the District Attorney's office effectively makes the charge decision only in its recommendation to the grand jury.

Even in cities where a prosecutor prepares the initial complaint against a defendant soon after his arrest, it is often possible for a defense attorney to begin negotiations before the prosecutor's charge decision has been made. In Los Angeles, for example, a telephone call to the District Attorney's "complaint bureau" produces a "stop order" and halts the filing of a complaint until a defense attorney has had an opportunity to confer with a member of the prosecutor's staff. Negotiations prior to the filing of any charge are informal, and they seem to turn more on quasi-judicial considerations than on notions of quid pro quo. Absent special equities, however, most prosecutors are reluctant to engage in bargaining at this early stage; the defense attorney will often be told, "Wait and see what happens; this is not plea time."

¹⁰² See 90th Cong., 1st Sess., Senate, Subcomm. of Comm. on Appropriations, *Hearings*

in his presence. Probable cause, without a warrant, usually justifies a felony arrest. A policeman may therefore charge an offender with a felony, simply because the offender would have a valid procedural defense if he were charged with a lesser crime.¹⁰³

When a policeman overcharges simply to secure pleas of guilty, his dual capacity as draftsman of the charge and as a witness may sometimes cause defendants to fear that he will present false evidence to support his inflated allegations. A downstate Illinois State's Attorney¹⁰⁴ reports that his predecessor in office invariably reduced charges of driving while intoxicated to charges of reckless driving in exchange for pleas of guilty. Policemen observed this practice and soon began charging every reckless driver with driving while intoxicated. The officers simply ridiculed any defendant who, at the time of his arrest, denied that he had touched a drop. The policemen were apparently anxious to avoid court appearances, and they discovered that even the soberest defendant would plead guilty to the lesser crime under these circumstances. To correct this practice, the State's Attorney has instituted a rule that drunk-driving charges can never be reduced. Policemen now know that a court appearance is the almost inevitable concomitant of a charge of driving while intoxicated. When the officers have fully learned their lesson and, perhaps, have begun to "undercharge," the prosecutor will adopt a more flexible policy.¹⁰⁵

Overcharging may even be done for a defense attorney's benefit. Bernard Goldstein, a Milwaukee attorney, reports that he was once called to a local police station by a defendant who proved to be indigent. When Goldstein expressed his interest in taking the case without compensation, the arresting officer told him that he need not serve without a fee. The officer would charge the defendant with a felony rather than a misdemeanor, and the attorney could then receive the statutory compensation that the state allows appointed attorneys in felony cases, but not in misdemeanor prosecutions. In this case Goldstein told the officer not to do him any favors, and a misdemeanor complaint was prepared.¹⁰⁶

on H.R. 8569, *District of Columbia Appropriations for Fiscal Year 1968*, pt. 3, at 3250 (1967) (statement of Judge Warren E. Burger).

¹⁰³ See *id.* at 3247 (statement of Chief Judge Harold H. Greene).

¹⁰⁴ The same man who charges murder rather than manslaughter simply to "play it safe." See text at note 98 *supra*.

¹⁰⁵ This prosecutor maintains that uniform patterns of plea negotiation are always dangerous and subject to abuse. Under the guilty-plea system, he seems to say, like cases cannot be treated alike.

¹⁰⁶ Apparently the attorney could have received the authorized compensation even if the case were ultimately resolved by a guilty plea to a misdemeanor. The level at which

In a sense, overcharging and subsequent charge-reduction are often the components of an elaborate sham, staged for the benefit of defense attorneys. The process commonly has little or no effect on the defendant's sentence, and prosecutors may simply wish to give defense attorneys a "selling point" in their efforts to induce defendants to plead guilty.¹⁰⁷ John W. Miner, a Los Angeles prosecutor, observes: "The number of counts is far less significant in the bargaining session between the prosecutor and the defense attorney than it is in the bargaining session between the defense attorney and his client. Our office usually reduces the number of charges without serious negotiation, because we know that this action will not affect the amount of time the defendant has to serve. But a defense attorney can justify his fee by saying, 'Look, Mr. Defendant, there were four felony charges against you, and I persuaded the prosecutor to go all the way down to one. Now that I've gotten you this special break, please don't blow it.'"

Philadelphia's First Assistant Public Defender, Vincent J. Ziccardi, recalls a case in which a defendant was charged with fifty armed robberies and permitted to plead guilty to twelve. Because of this concession, which the prosecutor called "generous," the defendant was subject only to 240 years' imprisonment, rather than one thousand. A reduction in the number of accusations need not leave a defendant subject to indefinite imprisonment of course, but even when the prosecutor's action seems to limit the court's sentencing power in a significant way, the practical effect is usually insubstantial. In most jurisdictions, consecutive sentences are rare. "They are reserved for the defendant who is going away forever anyway," observes Oakland defense attorney Stanley P. Golde. Moreover, when a judge sentences a defendant on a single count, he invariably knows whether other charges have been dismissed as part of a plea agreement. He is likely to consider the dismissed charges in sentencing, and they are likely to have almost the same effect as additional charges on which the defendant has been convicted.¹⁰⁸ Robert J. Collins, the First Assistant United States Attorney in Chicago, notes that a dismissal of charges can only help a defendant; it can never hurt him. Nevertheless, as Oakland defense attorney John A. Pettis, Jr. observes, "When a prosecutor dismisses some of the charges in a multi-count indictment, he is giving the defendant the sleeves from his vest."

a charge is filed determines the attorney's right to compensation, not, of course, the level at which a conviction is recorded.

¹⁰⁷ The goals of defense attorneys in a plea negotiation are discussed in a separate portion of my study.

¹⁰⁸ It should be emphasized, however, that even additional charges on which the defendant has been convicted commonly have a minimal impact on his sentence.

A reduction in the number of accusations seems unlikely to influence a judge in sentencing, and it is equally unlikely to influence a parole board in determining the ultimate date of a defendant's release. "The parole board cares what the defendant did," says Philadelphia prosecutor Joseph M. Smith. "It does not care what label his crimes may bear when they emerge from the plea-bargaining process." San Francisco defense attorney Benjamin M. Davis adds, "All the charges against a defendant may be dismissed except one. But if the defendant is sentenced to the penitentiary and comes before the Adult Authority, those super-judges will want to know all about the ten robberies." In the terminology of California defense attorneys, every dismissed charge stands as a "silent beef." The only dispute among practitioners—in California and in most other jurisdictions—concerns whether the abandoned charges have exactly the same effect on the defendant's sentence as the crimes of which he has been convicted, or whether their influence is slightly less because they have formally been dismissed.

Oakland's Stanley P. Golde declares, "My philosophy is to give the prosecutor his five convictions, and in return, to get something in the way of a sentence concession." Houston's Lloyd M. Lunsford also notes that a defense attorney may actually help his client by refusing the prosecutor's offer to dismiss certain charges. In his opinion, "Guilty pleas are cheaper by the dozen."¹⁰⁹

Professional criminals realize, of course, that additional charges are usually dismissed during the bargaining process. After an arrest for a crime of which he seems sure to be convicted, a confirmed criminal may therefore conclude that he has a license to commit additional offenses while on bond "for free." The Los Angeles District Attorney's office has adopted a formal policy designed to correct this attitude: A defendant must plead guilty to some part of every information or indictment accusing him of a crime committed after his release; if the defendant refuses to enter the multiple pleas of guilty that the prosecutor demands, he cannot secure a plea agreement at all. Los Angeles

¹⁰⁹ There is another sense in which guilty pleas may be cheaper by the dozen. The defendant may be rewarded for confessing to a great number of crimes, thereby improving the police department's "clearance rate," even when some of his confessions do not result in pleas of guilty.

Professor Jerome H. Skolnick reports a major burglary case in which four defendants were implicated. One of the defendants confessed to the burglary in question and to more than 400 others. He spent less than thirty days in custody on a sentence that had previously been imposed, and was then released. A second defendant also "cleared" several prior offenses. He spent a total of four months in custody. The two defendants who did not "cooperate" were sentenced to substantial terms of confinement in the state prison. One of them had been charged merely as an accessory after the fact. J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 174-81 (1966).

prosecutors note, however, that because sentencing is in the hands of the judiciary, the District Attorney's policy does not insure that the commission of additional offenses will actually affect the defendant's sentence. And in other jurisdictions, subsequent charges seem to be dismissed as freely as the charges initially filed. To avoid the burden of trial, prosecutors regularly sacrifice what they concede to be the sound deterrent philosophy expressed in the Los Angeles policy.¹¹⁰

Prosecutors commonly maintain that a reduction in the "level" of a charge, like a reduction in the number of accusations, rarely affects the defendant's sentence. Other observers dispute this contention. A judge may, of course, have the power to impose the same sentence on a reduced charge that he would have imposed had the defendant been convicted of a greater offense, but the existence of this power offers no guarantee that it will be exercised. Charge reduction does occur, and seems relatively unimportant, in jurisdictions where bargaining focuses directly on the defendant's sentence.¹¹¹ In jurisdictions like Manhattan, however, where bargaining concerns the level of the charge rather than the prosecutor's sentence recommendation, certain customary sentences seem to be associated with every offense.¹¹² A judge may even remark from the bench, "Because the prosecutor has chosen to treat this offense as the attempted possession of dangerous drugs in the fourth degree,¹¹³ the sentence will be only six months. Personally, however, I think the defendant deserves a longer term."

Prosecutors, of course, are anxious to discount the effect of charge reduction on sentencing; they want to avoid any suggestion that plea negotiation leads to undue leniency for offenders. Nevertheless, the common contention that charge reduction does not affect the defendant's sentence merely places prosecutors on the opposite horn of a dilemma, for it amounts to a claim that prosecutors dupe defendants into surrendering the right to trial for nothing.¹¹⁴ As a Boston prose-

¹¹⁰ The Los Angeles policy might, of course, operate unfairly in some situations—those, for example, in which a defendant could present a substantial claim of innocence or procedural unfairness in connection with one or more charges, but not in connection with the initial accusation.

¹¹¹ Of course, charge reduction is important in these jurisdictions in some situations—particularly those in which the initial charge carries a significant mandatory minimum penalty and those in which a felony charge may be reduced to a misdemeanor.

¹¹² These customary sentences may vary from judge to judge.

¹¹³ N.Y. PEN. LAW § 220.05. I observed one Manhattan case in which a defendant with a long record of narcotics violations dating back for more than ten years was charged with several counts of selling narcotics, and was nevertheless permitted to plead guilty to this crime.

¹¹⁴ In Detroit, for example, a single prosecutor conducts all of the city's plea negotiations, and the same trial assistant has performed this function for years. He comments, "By reducing a charge, everyone seems to be happy. The defendant and his

cutor explains, "I always give the defense attorney an idle gesture when this gesture will avoid a trial." Even in the law of private contracts, "illusory promises"—promises that provide no actual benefit to a promisee—have long been considered unfair. The prosecutors seem to maintain that their bargains should, under traditional law, be declared "void for want of mutuality."¹¹⁵

It should be noted, in fairness to defense attorneys, that even when overcharging poses no threat of a more severe sentence, it may nevertheless provide rational incentives for a plea of guilty. The reason is that overcharging has both an economic and a psychological effect at trial, and may therefore make trial a less attractive alternative. When multiple charges are filed against a defendant, his attorney must often prepare separate pre-trial motions for each indictment, and the cost of preparing these motions is only the first of a series of expenses that overcharging may inflict. When the defendant's case comes to trial, all of the accusations are read into the record, and the court must resolve disputes over what evidence is admissible on which charges. Finally, separate instructions to the jury must be prepared and argued by the attorneys—and presented by the court—for each accusation. Not only do these practices consume the defense attorney's time; they also increase the expense of daily trial transcripts and of transcripts for appeal.

The psychological effect of overcharging may be even more significant than its economic effect, for a trial commonly begins with a reading of the accusations to the jury. "A long indictment enhances a weak case," observes Boston defense attorney Paul T. Smith. "The jurors may simply be overwhelmed by the magnitude of the prosecutor's allegations." Los Angeles attorney Al Matthews adds, "When a jury

attorney feel that they have accomplished something by being able to plead to an offense less severe than that for which there was actual guilt . . . , [and] society is happy because the defendant, if sentenced, is put away for the same amount of time as if he had pleaded to the original charge" AMERICAN BAR FOUNDATION, *LAW ENFORCEMENT IN THE METROPOLIS* 135 (McIntyre ed. 1967). See also Worgan & Paulsen, *The Position of a Prosecutor in a Criminal Case*, 7 PRAG. LAW. NO. 7, at 44, 52-3 (1961): "It may be that a plea of guilty to the lesser offense will result in the same punishment. If the end result will be the same, there is no point in going to trial with all the attendant expense to the state and to the witnesses."

¹¹⁵ See A. CORBIN, *CONTRACTS* § 152 (1952). Under the "peppercorn theory of consideration," a plea agreement might be considered valid even when it provides no real benefit to the defendant; the defendant receives something—a reduction of the charge—even though he does not receive something of value. An analysis of private contracts cases suggests, however, that when the notion of reciprocity is taken seriously, peppercorns will not do. In many cases of plea negotiation, not only does the defendant receive a very tiny peppercorn, but he is led to believe that it will have some effect in unlocking the door to his cell.

hears an endless list of charges, they tend to think, "The District Attorney could be wrong once, but no one could be wrong this often." "

Prosecutors are usually as anxious to threaten the defense attorneys' time as defense attorneys are to threaten theirs.¹¹⁶ They may therefore file multiple charges when the law of double jeopardy or the canons of statutory construction preclude multiple convictions,¹¹⁷ and they may also multiply the number of accusations when a state statute allows multiple convictions but forbids multiple sentences.¹¹⁸ Indeed, prosecutors sometimes state the same offense in a variety of ways. A defendant in Cleveland was recently accused of murder, of murder during the course of a robbery, and of murder during the course of a burglary, all for the same act. In Los Angeles recently, the prosecutor's office filed an indictment charging the defendant with possessing heroin in a certain room; it then filed a second indictment charging the defendant with possessing the same heroin in a certain bag. Sometimes even nonexistent offenses are added, although they can be stricken on the defense attorney's motion.¹¹⁹ The process of filing and arguing a motion consumes the defense attorney's time, and a plea agreement may therefore simplify his tasks.

The practice of overcharging varies, both in nature and extent, from jurisdiction to jurisdiction. In cities like Chicago, where the criminal code gives trial judges a broad discretion in sentencing and where most plea bargaining focuses directly on the amount of time a defendant will be required to serve, complaints about overcharging are relatively infrequent and mild.¹²⁰ When the trial judge's discretion is limited, however, and when bargaining relates only to the level of the charge, the problem usually assumes more serious proportions.

¹¹⁶ See text at notes 22-23 *supra*.

¹¹⁷ "The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304 (1932).

This legal standard limits the practice of overcharging to a very slight extent, if it has any effect at all. The United States Supreme Court has, for example, applied this standard in ruling that three separate convictions for a single sale of illicit drugs violates neither the Constitution nor Congress' purpose in creating the three distinct crimes. *Gore v. United States*, 357 U.S. 386 (1958).

¹¹⁸ See CAL. PEN. CODE § 654.

¹¹⁹ In Houston, for example, a defendant was once charged with the burglary of a certain building, and with the burglary of a safe inside the building. The second accusation did not state a crime. One Houston defense attorney explains the inclusion of such spurious charges by suggesting that a lazy civil lawyer, appointed to represent an indigent defendant, might be led into a plea agreement without realizing the existence of any defect in the indictment.

¹²⁰ Chicago attorneys do complain that homicides are invariably charged as murder and that "joyriders" are charged with theft rather than "criminal trespass to property."

In Cleveland, complaints about overcharging seem especially common and severe. Under the Ohio criminal code, trial judges lack the power to determine a convicted felon's term of imprisonment.¹²¹ If the felon is not placed on probation, he must be sentenced to the penitentiary for a term that is set by statute. This statutory term is of a "limited indeterminate" nature; the minimum period of imprisonment and the maximum period of imprisonment are usually far apart. Because neither the minimum term nor the maximum term is within the trial judge's control, however, the period of confinement is determined solely by the parole board.

This statutory scheme was probably enacted from the highest motives of a reformatory jurisprudence. Expert penologists, who could evaluate an offender's conduct in prison, probably seemed to the statutory draftsmen better able than trial judges to perform the sentencing function. As Professors Lloyd Ohlin and Frank Remington once observed, however, the draftsmen of criminal codes are usually preoccupied with substantive objectives and fail to predict the impact of their proposals on the day-to-day administration of justice.¹²² In Cleveland, the state legislature's idealism seems to have yielded unanticipated results.

It is, of course, impossible for a defendant to bargain with the parole board prior to his conviction. The pressures of the caseload are unusually severe in Cleveland, however, and prosecutors and judges have therefore sought some way to introduce discretion at the trial level and thereby develop a working system of plea negotiation. Fortunately for these officials, the practice of overcharging has provided the necessary leverage to maintain a steady flow of guilty pleas.

Cleveland's prosecuting attorneys regularly prepare forty- and fifty-count indictments that are reminiscent of the pleadings of the middle ages;¹²³ and Cleveland's trial judges do their part by imposing consecutive sentences far more frequently than judges in other jurisdictions. When consecutive sentences are imposed, the statutory minimum terms are added together, and the maximum terms are aggregated as well. The result is that a defendant may be sentenced to an absurd

¹²¹ The description of the Ohio Code that follows is applicable to most offenses, but there are a few exceptions.

¹²² Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

¹²³ Defense attorney J. Frank Azzarello showed me several indictments, many of which were as thick as an ordinary trial transcript. One, however, contained only five counts, each accusing the defendant of rape of the same girl on the same day. Azzarello suggests that a trial judge need only read this indictment to find reasonable doubt as a matter of law.

term of twelve to 230 years;¹²⁴ and in many cases, judges can insure that defendants sentenced under Ohio's indeterminate-sentencing laws will never be released from prison. A reduction in the number of charges is therefore a central feature of plea bargaining in Cleveland, and the dismissal of charges seems to assume a far greater significance than it does in other cities.

Professor Samuel Dash once suggested that the vices of the guilty-plea system could be eliminated by "the divorcement of the sentencing power from the court."¹²⁵ Cleveland's experience suggests, however, that efforts to implement this cure are likely to aggravate the disease. So long as the administrators of justice consider it necessary to develop a system of plea bargaining, only direct review of their conduct seems likely to produce a change for the better in the guilty-plea system.

In California, too, trial judges lack the power to determine a convicted felon's term of confinement in the penitentiary. If an offender merits penitentiary treatment, the judge must sentence him to the Department of Corrections "for the term prescribed by law"; and the California Adult Authority must then determine the length of his sentence. Unlike judges in Ohio, however, California judges have at their command a wide range of dispositions that do not involve penitentiary confinement.¹²⁶ In California, the guilty-plea system has

¹²⁴ This was the sentence imposed in the case of Mildred Charvat, who had stolen \$94,150 in union funds. *Cleveland Plain Dealer*, June 10, 1955, at 1.

¹²⁵ Dash, *Cracks in the Foundation of Criminal Justice*, 46 ILL. L. REV. 385, 404 (1951).

¹²⁶ Some of the trial court's choices are as follows:

(1) If the defendant is less than 21 years of age, the court may commit him to the custody of the California Youth Authority, rather than that of the California Adult Authority. CAL. WELFARE & INST'NS CODE § 1731.5.

(2) The court may require a 90-day period of study by the Department of Corrections, before it chooses one of the other sentencing alternatives. CAL. PEN. CODE § 1203.03.

(3) The court may award probation, either by imposing a penitentiary sentence and suspending it, or by "suspending the proceedings" and granting probation. The second technique gives the court greater flexibility in fashioning a penalty, should a violation of the conditions of probation occur. With either technique, the court may require a period of jail confinement, not to exceed one year, as a condition of probation. CAL. PEN. CODE §§ 1203.1-2.

(4) In some cases, the court may simply sentence the defendant to the county jail, thereby converting his crime from a felony to a misdemeanor. CAL. PEN. CODE § 17.

(5) In some cases, the court may order "mentally disordered sex offender" proceedings under the California Welfare and Institutions Code. This disposition may result in confinement for the rest of the defendant's life, even if he was convicted only of a misdemeanor. It is not a disposition that guilty-plea defendants often seek. CAL. WELFARE & INST'NS CODE §§ 5500 et. seq. (Supp., 1967).

(6) If a defendant without a prior record is a narcotics addict or in danger of becoming a narcotics addict, the court may commit him to the California Rehabilitation Center under a procedure analogous to that used for sex offenders. This disposition is more popular than "mentally disordered sex offender" proceedings, for it usually results in

been maintained, not by threatening offenders with consecutive terms of imprisonment, but primarily by limiting the sentences in guilty-plea cases to the lesser penalties that judges control.

In San Francisco, most plea discussions focus directly on the sentences that defendants will be required to serve. In many cases, for example, defendants are ultimately placed on probation on the condition that they serve a portion of their terms in the county jail. The period of jail confinement cannot exceed one year, but a trial judge can often augment this period by ordering the defendant confined for a ninety-day diagnostic period before he imposes the final sentence. The diagnostic period is sometimes used, not primarily for its intended purpose, but as a form of punishment.

Probation officers commonly maintain that a preliminary period of jail confinement is incompatible with the goals of probation as a method of treatment.¹²⁷ In California as elsewhere, however, correctional goals are sometimes subordinated to the necessities of the guilty-plea system. The judges' sentencing patterns permit bargaining about the period of confinement without sacrificing the possibility of a felony conviction. If jail sentences as a condition of probation were precluded, there might be an increase in both the number of bargained guilty pleas to misdemeanors and in the number of felony trials.

In Los Angeles, the pattern of bargaining is similar, except that most prosecutors consider it improper to bargain about sentencing directly.¹²⁸ Instead, discussion usually concerns the level of the charge.

a limited period of confinement and in meaningful treatment. Commitment to the Rehabilitation Center is therefore a common basis for plea negotiation. CAL. WELFARE & INST'NS CODE §§ 3050, 3104, 3105, 3106, 3107 (Supp. 1967).

¹²⁷ See, e.g., Scudder, *In Opposition to Probation With a Jail Sentence*, 23 FED. PROBATION No. 2, at 12 (1959). The probation officers' arguments are not necessarily decisive; there may be occasions on which defendants should be given a brief "taste" of penal confinement and then returned to society under some form of supervision. Even the most confirmed advocate of "split sentences" might, however, be reluctant to defend the way in which these sentences are used in California. A judge may impose a "split sentence" only because the defendant is unwilling to plead guilty to a felony unless he is assured of a county jail sentence. The term of probation may be added because it provides the only way to couple a felony conviction with a sentence to the county jail, and not because probation is likely to serve any rehabilitative purpose.

¹²⁸ Most Los Angeles prosecutors seem persuaded that any promise concerning the defendant's sentence, even if phrased only in terms of a "recommendation," renders a subsequent guilty plea involuntary. One prosecutor reports, however, that he frequently agrees to recommend an award of probation in return for a plea of guilty; he simply instructs defense attorneys not to inform their clients of this promise. In outlying "branch and area" offices of the Los Angeles District Attorney, the pattern of bargaining is often significantly different from that in the City of Los Angeles itself. In Long Beach, for example, bargaining about the prosecutor's sentence recommendation seems quite common.

When a defendant is charged with a felony, his attorney may attempt, first, to secure a reduction of the charge to a misdemeanor. If he succeeds in this effort, the attorney can be reasonably confident that his client's sentence will not exceed six months' imprisonment. If the attorney fails, however, he may seek a reduction of the charge to a "felony-misdemeanor," a crime that the trial judge can treat either as a felony or as a misdemeanor by sentencing the offender either to the state prison or to the county jail. If this effort, too, is unsuccessful, the attorney may seek a bargained plea to a lesser felony, one that usually results in an award of probation on the condition that the defendant serve a portion of his term in the county jail. If even this sort of bargain is unavailable (and it rarely is), there is usually nothing to gain by further negotiation. It is at this point that the discretionary power of the court ends and that of the California Adult Authority begins.¹²⁹

The way in which a refusal to bargain directly about sentencing may encourage the practice of overcharging is illustrated by a Los Angeles charging practice. Defense attorney Luke McKissack notes that a person convicted of possessing narcotics "for purposes of sale" faces a mandatory five-year-to-life sentence—exactly the same penalty that is prescribed for second-degree murder. A person convicted simply of possession faces a one-to-ten year sentence.¹³⁰ Recently, McKissack reports, the District Attorney's office began charging "possession for purposes of sale" even when the defendant had in his possession only a few marihuana cigarettes. "This practice is designed to, and does, scare everyone," McKissack comments, "but the structure of the criminal code leaves the District Attorney with no practical alternative. If he charged only possession, the common plea agreement of 'going down to count two' would result in a misdemeanor conviction. In view of the public attention that has focused on narcotics offenses, it would be bad politics for the District Attorney to consent to misdemeanor convictions. 'Possession for purposes of sale' is the next highest offense that the criminal code makes available. The District Attorney

¹²⁹ One Los Angeles defense attorney adds a caveat to this conclusion. He maintains that even when a defendant is sentenced to the state prison, it is to his advantage to avoid consecutive sentences. The Adult Authority considers these sentences a mandate to hold the defendant for an unusually long term. There is general agreement, however, that in ordinary circumstances, plea negotiation is futile when a defendant must be sentenced to the state prison. A reduction in the number of accusations might, of course, have an effect on the application of a habitual offender statute if the defendant were convicted of a new offense after his release from prison, but this contingent benefit usually seems remote at the time of bargaining.

¹³⁰ A first offender may be placed on probation under either statute; a repeated offender may not.

must charge that crime if he wishes to permit a plea agreement that leads to a felony conviction. Prosecutors believe that they must leave room for some sort of agreement; for they maintain that a defense attorney would otherwise be unable to sell his client on a plea."

McKissack's statement demonstrates that accidents of "spacing" in the criminal code can greatly affect the pressures brought to bear on a defendant to plead guilty. Penal codes are rarely designed with the guilty-plea system in mind, and their logical designs for a system of adjudicative justice may make their own contribution to the capriciousness of plea negotiation.

Whatever its dangers, most defense attorneys concede that overcharging serves its basic purpose. Defendants are encouraged to plead guilty, and judicial and prosecutorial resources are thereby conserved. A few distinguished attorneys, however, such as Cleveland's John P. Butler and Boston's Paul T. Smith, doubt that overcharging has even the virtue of economy. These attorneys note that in a significant minority of cases, defendants refuse to yield to the pressures that overcharging exerts. As a result, the courts are burdened with prolonged trials on inflated, and seemingly innumerable, charges.¹³¹ Whether, as these attorneys suggest, the effect of these lengthy trials fully offsets the time-saving effected by the encouragement of guilty pleas is far from clear. Nevertheless, overcharging undoubtedly leads to a waste of resources when a prosecutor must make good on his extravagant threats. In this respect, overcharging resembles the defense attorney's strategy of threatening the court's time with functionless motions and jury demands.¹³² In some ways, the praise that the guilty-plea system has received as a masterpiece of efficiency seems notably misplaced.

Somewhat analogous to the practice of overcharging is the practice of "overrecommending." In jurisdictions where bargaining focuses on the prosecutors' sentence recommendations, it is common for trial assistants to begin negotiations by suggesting sentences more severe than the ones they actually desire. This practice usually poses fewer dangers than the practice of overcharging. An unknowledgeable defense attorney may, of course, like a tourist at a Latin American bazaar, yield to a suggestion that was made only for effect; and a prosecutor may feel bound to present his extravagant recommendation—or even a higher one—if the defendant insists on a trial.

Nevertheless, while trial judges sometimes encourage the practice of overcharging, they usually take steps to check the practice of over-

¹³¹ The growth of the practice of overcharging may be one reason for the dramatic increase in the length of felony trials in recent years. See text at note 6 *supra*.

¹³² See text at notes 22-23 *supra*.

recommending. Consistently high sentence recommendations may force a judge to assume responsibility for the leniency necessary to induce pleas of guilty, and judges prefer to receive "reasonable" recommendations in every case. When a judge can simply follow a prosecutor's suggestions, public responsibility for sentencing, as a practical matter, is shifted from the courts; no one expects a trial judge to be more severe than the prosecutor.

Judges are aware, of course, of the bargaining practices of the trial assistants who appear before them, and they can usually tell from an assistant's recommendation what sentence he has in mind. If the recommendation is only slightly inflated, judges in some cities simply enter an appropriate mental discount. If the prosecutor's recommendation is more seriously exaggerated, however, a judge is likely to conclude that the prosecutor is evading his responsibility. In that event the judge may employ various techniques to bring the prosecutor "back to reality." Whether the prosecutor's initial recommendation is seriously or only slightly inflated, it is unlikely to injure a defendant whose attorney appeals to the trial judge before accepting an agreement that is not entirely favorable.

C. *The Prosecutor as Guardian of the Public Interest.*

Some observers suggest that plea bargaining is inherently compatible with the public interest in securing adequate punishment for offenders, and they advance this argument almost as a matter of definition. Public prosecutors have traditionally enjoyed a broad discretion to determine the extent of society's interest in particular criminal prosecutions, and this discretion has been sanctioned by the courts.¹³³ Defenders of the guilty-plea system therefore argue that when a prosecutor enters a plea agreement, his conclusion that it serves the public interest should be accepted as conclusive.¹³⁴

This argument reaches what should be an empirical conclusion by pulling on the bootstraps of a legal theory. Even as a matter of theory, moreover, the argument seems unsound. It leaps from the prosecutor's traditional power to exercise a unilateral discretion to the conclusion that he may also engage in bilateral exchanges: he may trade his unilateral discretion for a defendant's waiver of his constitutional rights. Under traditional law, prosecutors are usually trusted to evaluate the extent of the public interest in particular prosecutions, but they usually

¹³³ See, e.g., *Brack v. Wells*, 184 Md. 86, 40 A.2d 319 (1944).

¹³⁴ See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY 63 (Tent. Draft 1967); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 878-80 (1964).

have nothing to gain by agreeing to a lenient disposition for a particular defendant. In plea negotiation, however, prosecutors gain something of value for deciding that a certain punishment is adequate, and there may therefore be greater reason for mistrust.¹³⁵

As a factual matter, the suggestion that plea bargaining sometimes leads to undue leniency for offenders may seem somewhat implausible. The penalties prescribed for most offenses by American law are unusually severe;¹³⁶ and, as a class, prosecutors seem unlikely to be motivated by an undue sympathy for offenders. So long as a prosecutor is satisfied with a bargain, the argument might go, an objective observer would be unlikely to find reason for complaint.

In evaluating this conclusion, it is important to consider the political character of most prosecutors' offices. The following observations of the Wickersham Commission seem as appropriate today as they did in 1931, when they were first published:

The system of prosecutors elected for short terms, with assistants chosen on the basis of political patronage, with no assured tenure yet charged with wide undefined powers, is ideally adapted to misgovernment. It has happened frequently that the prosecuting attorney withdraws wholly from the courts and devotes himself to the political side and sensational investigatory functions of his office, leaving the work of prosecution wholly to his assistants. The "responsibility to the people" contemplated by the system of frequent elections does not so much require that the work of the prosecutor be carried out efficiently as that it be carried out conspicuously. Between the desire for publicity and the fear of offending those who control local politics, the temptation is strong to fall into an ineffective perfunctory routine for everyday cases with spectacular treatment of sensational cases.¹³⁷

In political terms, it is far more important for a prosecutor to secure convictions than it is for him to secure adequate sentences. Conviction statistics seem to most prosecutors a tangible measure of their success.¹³⁸

¹³⁵ If what the prosecutor gains is of as much benefit to society as it is to him, of course there is no reason to fear a sacrifice of the public interest through bargaining. The remainder of this article is designed to demonstrate that the interests of prosecutors and of society do not automatically coincide.

¹³⁶ See M. PAULSEN & S. KADISH, *CRIMINAL LAW AND ITS PROCESSES* 137-40 (1962).

¹³⁷ NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *REPORT ON PROSECUTION* 15 (1931).

¹³⁸ Houston defense attorney Percy Foreman comments, "Like the Indian braves of old, prosecutors seem to believe that the scalps on their belts enter their souls. I know. I was the worst prosecutor in the world forty years ago."

Statistics on sentencing do not. Indeed, detailed sentencing statistics are rarely compiled. Only in Houston, of the cities considered in this study, does the clerk of court prepare a grisly annual report on the total number of man-years that the courts have exacted from the defendants who appeared before them during the preceding twelve months.¹³⁹ Grisly annual reports on the total number of convictions are, of course, commonplace.

Sentencing may assume political importance in serious, publicized cases, and in these cases plea agreements are unusually difficult to secure. "We watch the 'public cases' like a hawk," says San Francisco's Francis W. Mayer, "and we are slow to grant concessions in these cases in return for pleas of guilty." Many prosecutors note, moreover, that even the weakness of the state's case has little weight as a bargaining factor when the defendant is, in the words of one high-ranking prosecutor, "a bad, bad man, who simply must receive the punishment he deserves."

As a matter of logic, the distinction that the prosecutors advance between "serious" and "ordinary" cases seems unsound. The argument that "half a loaf is better than none" seems fully as applicable to the "bad, bad man" as it does to more routine offenders. It may, of course, be especially important that the serious offender receive a severe punishment, but it should be equally important that he not be released without any punishment at all.

The distinction that the prosecutors draw can be better explained by political than by logical considerations. It is politically embarrassing for a prosecutor to consent to a light sentence for a serious offender, even as part of a plea agreement. It is usually easier, in fact, for a prosecutor to explain an acquittal than it is for him to explain a plea agreement in a publicized case; an acquittal can be attributed to the finder of fact. In routine cases, by contrast, there is little danger that sentencing will attract public attention. A prosecutor can maximize the political value of these cases by securing the maximum number of convictions, regardless of the price he pays in sentencing concessions.¹⁴⁰

¹³⁹ In 1967, for example, six Houston trial courts imposed five sentences of death and 32 sentences of life imprisonment. In addition, they sentenced felony offenders to a total of 11,745½ years' confinement in the state penitentiary, and other offenders to various terms in the county jail. Unpublished statistics supplied by R. J. Roman, Clerk's Office, Harris County District Courts.

¹⁴⁰ One might hope that increasing public sophistication would reduce the emphasis of prosecutors' offices on conviction statistics. San Francisco's J. W. Ehrlich maintains, however, that the disease of prosecutorial "statistics consciousness" is more acute today than at any time in his memory. "As a result," Ehrlich says, "it is easier for a defense attorney to

When a prosecutor can avoid any direct role in sentencing decisions, he is usually delighted; when this role is unavoidable, the prosecutor may be more concerned about the appearance of severity than about the practical effect of the defendant's punishment. A Chicago prosecutor reports, for example, that he commonly employs a very simple bargaining technique in his discussions with defense attorneys. He asks the attorneys for permission to set each defendant's maximum term of imprisonment; and in return, he offers to permit the defense attorneys to set the minimum terms. This proposal is almost invariably accepted, and negotiations are concluded within a short period of time.

When the prosecutor first described this practice, I expressed surprise. Defense attorneys in Chicago had told me without exception, "In plea bargaining, the minimum is the thing."¹⁴¹ In this respect, their observations were identical to those of their counterparts in every other city I had visited—save only a few cities in which the minimum and maximum terms of imprisonment are not determined by the trial court.¹⁴² Given the crowded conditions of most penitentiaries and the customary practices of most parole boards, the attorneys report that the minimum term is usually the critical factor in determining the date of an offender's release. In the vast majority of cases, the maximum

secure concessions in 'run of the mill' cases today than at any time in the past. But it is far more difficult for an attorney to secure concessions in cases involving serious, television crimes." (The term "newspaper crimes," Ehrlich suggests, is an outdated expression.)

Houston's Percy Foreman adds, "The amount of publicity a case receives has a far greater effect on its outcome than anything in the Constitution of the United States or anything that the defendant did."

¹⁴¹ *But see* D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 185 (1966): "The defendant responds to the maximum; he seeks to lessen the most that can happen to him." *See also id.* at 181: "[A]s one prosecutor remarked, '[M]ost plea bargaining is a matter of dickering with the maximum.'" Professor Newman's emphasis on the maximum term seems inconsistent with my further impression that the minimum term is all-important in plea bargaining, and with my impression that many defense attorneys virtually ignore the maximum term in evaluating an agreement. Perhaps an explanation lies in the fact that Professor Newman's data was gathered five years before the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963). His study often focused on bargains struck by unrepresented defendants, who, conceivably, might be terrified by the higher numbers of the maximum term. The practice of appointing attorneys to represent indigent felony defendants before accepting their pleas of guilty is now all but universal. This practice may have altered the pattern of bargaining, and produced a new emphasis on the minimum term.

¹⁴² In Texas, for example, a defendant becomes eligible for parole upon the expiration of one-third of his maximum term, which is set by the trial judge within certain statutory limits. TEX. CODE CRIM. PROC. ANN. art. 42.12, § 15(a) (1967). The minimum term set by statute seems virtually functionless, except as a lower limit on the maximum term. The Texas Court of Criminal Appeals has ruled, however, that if a trial judge fails to mention the minimum term when imposing sentence, the entire sentence is invalid and must be reformed. *See, e.g., Orange v. State*, 76 Tex. Crim. 194, 173 S.W. 297 (1915).

term is simply irrelevant. Attorneys in some jurisdictions estimate that eighty per cent of the defendants sentenced to the penitentiary are paroled after their first appearance before the parole board. It is, of course, the minimum term that determines the date of this initial appearance.

When I repeated this analysis to the prosecutor, he replied that I had simply made his point for him. Defendants care about when they will "hit the streets," and the State's Attorney cares about a sentence that looks severe. The low-minimum, high-maximum sentence thus satisfies the interests of both sides. If a paroled offender commits a serious offense after his release, the prosecutor notes, his premature release cannot become the State's Attorney's political problem. The plea agreement that the prosecutor secured gave the parole board authority to hold the defendant for an adequate period; and if the board did not choose to exercise that power—if only to free the offender's bed for an incoming prisoner—the political responsibility is theirs.

Almost as an afterthought, the prosecutor offered a penological rationale for his bargaining practices. He reported that he is seriously concerned only about a small number of violent, incorrigible offenders who invariably become disciplinary problems inside the prison. The maximum term is likely to be more significant for these offenders than the minimum term in determining the date of their release.¹⁴³

Political considerations may, on occasion, make it important for a prosecutor to secure a conviction for a particular crime, and plea negotiation may provide the only practical means of achieving this objective. Another Chicago prosecutor recalls a murder case that illustrates the potentialities of plea bargaining in these circumstances. The defendant and her boyfriend, who were wanted in connection with a brutal armed robbery committed a week before, were involved in an automobile chase with the police. Suddenly the defendant jumped from the car and began running, and a few moments later the boyfriend emerged from the car and fatally discharged a shotgun into a police officer's stomach. Within a few hours, the boyfriend had been killed and the defendant captured. She was indicted for armed robbery and for the murder of the officer.

A shotgun container was found on the side of the car from which

¹⁴³ Defense attorneys recognize the existence of this sort of offender, of course, and they also recognize that some of their clients will probably be returned to serve the remainder of their sentences even if they are paroled. These considerations rarely alter the attorneys' bargaining practices. As one Boston attorney explains, "My job is to make it possible for the defendant to return to society as quickly as possible. If he gets in trouble in prison or if he commits another crime once he's on the outside, that is his problem."

the defendant had emerged, and the state's murder case depended entirely on the inference that the defendant had handed the gun to her boyfriend.¹⁴⁴ Essentially, therefore, as the prosecutor admits, the state had no murder case at all, but a conviction on the armed robbery charge seemed certain.

When negotiations were concluded in this case, the defendant pleaded guilty to armed robbery and to voluntary manslaughter,¹⁴⁵ and concurrent sentences of eight to twenty years' imprisonment were imposed. The prosecutor claims that this plea agreement was to the defendant's advantage, because the sentence she received was less severe than that she might have received after a trial for the armed robbery alone. The agreement was also to the prosecutor's advantage, because a conviction in connection with the policeman's death was important for political reasons. The prosecutor was nevertheless concerned that his bargain might be criticized; so he secured the approval of the dead policeman's fellow officers, of his family, and of a businessman's group in the community where the officer had grown up before he finally entered the agreement.¹⁴⁶

A trial assistant's sentence concessions may be influenced not only by the political objectives of the prosecutor's office but by his own career objectives. Richard H. Kuh, who served until recently as Administrative Assistant to the District Attorney in Manhattan, notes that a position as a trial assistant in a felony court is among the most valued assignments a young prosecutor can secure. Most assistants serve a substantial apprenticeship—drafting complaints and indictments, trying misdemeanors and preliminary hearings, presenting cases to the grand jury, and perhaps briefing and arguing appeals—before they are given the opportunity to try felony cases. The competition for felony-court assignments is therefore keen, and trial assistants who have climbed the ladder of success sometimes fear that if they lose a significant number of cases, they will be replaced. In Manhattan, Kuh says,

¹⁴⁴ Although the car in which the defendant and her boyfriend were riding had been stolen, neither that fact, nor the prior armed robbery, nor the police chase could give rise to a felony-murder prosecution under Illinois law.

¹⁴⁵ It is conceivable, of course, that the defendant might have been involved in the policeman's murder, but by no stretch of the imagination could she have been guilty of voluntary manslaughter. Under the guilty-plea system, voluntary manslaughter is often redefined as an outside chance that the defendant might be guilty of murder.

¹⁴⁶ This case suggests the possibility that an unscrupulous prosecutor might persuade a defendant to plead guilty even in a case in which he was wholly uninvolved. The prosecutor might, for example, forego the prosecution of other charges on which the defendant would probably be convicted in return for the defendant's unusual political contribution. In a Southern novel, of course, the prosecutor would himself have committed the explosive offense for which conviction was imperative.

the rumors to this effect are false; the District Attorney looks to much more than an assistant's batting average at trial in measuring his ability. Nevertheless, the rumors persist with undiminished force year after year.

Most prosecutors have, of course, taken their positions primarily to secure trial experience, but when an assistant a few years out of law school confronts an able and experienced defense attorney, a degree of timidity is an entirely natural reaction. The fear of embarrassment is reinforced by the thought that repeated failure at trial may lead to replacement. As a result, a trial assistant is usually grateful for a plea agreement that eliminates the risk of defeat; and he may offer concessions beyond those that the merits of the case could justify to maintain his own sense of security. Few prosecutors deliberately disregard their sense of public duty, Kuh suggests, but rationalization is a natural instinct of mankind.

Kuh also notes that few prosecutors intend to make a career of prosecuting. Most assistants enter the prosecutor's office shortly after graduating from law school, and they remain no longer than four or five years. Most members of the prosecutor's staff probably plan to become defense attorneys; and for them, good relations with members of the defense bar seem extremely important. Other prosecutors hope to become judges, and these prosecutors commonly attempt to impress both bench and bar with their reasonableness and objectivity. Judges and defense attorneys naturally measure reasonableness by their own standards; they do not judge this quality by evaluating a prosecutor's adherence to his own sense of duty. In this way, career objectives usually reinforce the prosecutor's natural desire to be liked—and both considerations may lead to unwarranted generosity.

The personal and political interests of prosecutors frequently diverge from the interests of the public in securing adequate punishment for offenders, but whether most plea agreements result in overly lenient treatment is a question that turns, in large measure, on subjective values.¹⁴⁷ The important point is simply that under the guilty plea

¹⁴⁷ From my own subjective perspective, only one routine sort of plea agreement merits criticism on this ground—that resulting in county jail sentences for confirmed felony offenders. Correctional facilities in America are generally tragic, but county jails are more tragic than the rest. When an offender has the record and the *modus operandi* of a confirmed criminal, a county jail sentence seems utterly incapable of achieving any of the objectives of the criminal law. It is much more likely to be destructive of anything the criminal law might hope to achieve. The boredom and brutality characteristic of America's county jails often reinforce an offender's hatred of society, and even the prosaic activity that occupies a convict's hours in most state prisons seems more likely to do good, and far less likely to do harm. It is, in my opinion, neither "liberal" nor "charitable" to sentence a confirmed felon to a year's term in a county jail, even when the

system, an objective evaluation of treatment goals never occurs. Plea bargaining, at its best, merges the tasks of administration, adjudication, and sentencing into a single conglomerate judgment. And at its usual worst, plea negotiation depends on the personal interests of prosecutors, judges, and defense attorneys as well.¹⁴⁸

If the criminal law is to achieve its objectives, careful attention should be focused on each of its basic issues. Questions of guilt or innocence and questions of treatment should be viewed neither as sub-categories of each other nor as sub-categories of the problem of administration. In addition, moral exhortation should not become a substitute for procedures designed to minimize the importance of personal interests in the daily administration of public justice.

The guilty-plea system does not, in my opinion, merit sweeping condemnation as either too harsh or too generous. It might, however, be described by words that Justice Benjamin N. Cardozo once used in a different context: This method of determining the fate of men accused of crime is "stern often when it should be mild, and mild often when it should be stern. . . . It is as irrational in its mercies as in its rigors."¹⁴⁹

alternative is a substantially longer term in a state prison. I should note, however, that many California counties have inaugurated "work-release" programs that permit offenders serving county jail sentences to hold jobs during the day. Under these programs, the functionless cruelty of a prolonged county jail sentence may be greatly alleviated, or even reversed.

¹⁴⁸ The personal interests of judges and defense attorneys are discussed in separate chapters of my study.

¹⁴⁹ Cardozo, *What Medicine Can Do for Law*, Address before The New York Academy of Medicine, Nov. 1, 1928, in *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 371, 378-9 (M. Hall, ed. 1947).