

University of Chicago Law School

## Chicago Unbound

---

Journal Articles

Faculty Scholarship

---

1974

### The Defense Attorney's Role in Plea Bargaining

Albert Alschuler

Follow this and additional works at: [https://chicagounbound.uchicago.edu/journal\\_articles](https://chicagounbound.uchicago.edu/journal_articles)



Part of the [Law Commons](#)

---

#### Recommended Citation

Albert Alschuler, "The Defense Attorney's Role in Plea Bargaining," 84 Yale Law Journal 1179 (1974).

This Article is brought to you for free and open access by the Faculty Scholarship at Chicago Unbound. It has been accepted for inclusion in Journal Articles by an authorized administrator of Chicago Unbound. For more information, please contact [unbound@law.uchicago.edu](mailto:unbound@law.uchicago.edu).

# The Yale Law Journal

Volume 84, Number 6, May 1975

## The Defense Attorney's Role in Plea Bargaining\*

by Albert W. Alschuler†

The criminal defense attorney is often seen as a romantic figure—a sophisticated master-of-the-system whose only job is to be on the defendant's side. The attorney's presence can, in this view, be an antidote to the fear, ignorance, and bewilderment of the impoverished and uneducated defendant, not only in the courtroom but throughout the criminal process.<sup>1</sup> In accordance with this view, it is common to regard the right to counsel as a primary safeguard of fairness in plea bargaining. Judge J. Skelly Wright has described the defense attorney as the "equalizer" in the bargaining process.<sup>2</sup> Professor Donald J. Newman, the author of a comprehensive American Bar Foundation study of plea negotiation, has reported that the presence of counsel usually assures a court that a guilty plea is truthful, based on consent, and entered with an awareness of the consequences and of the defendant's rights.<sup>3</sup>

\* The research for this study was conducted under the auspices of the Center for Studies in Criminal Justice at the University of Chicago, and I am particularly grateful to Professors Norval Morris and Frank Zimring of the Center for their encouragement and guidance. I am also grateful to the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration, which supported the writing phase of the project through its Pilot Grant Program. Grant NI 71-116-PG, authorized by the Omnibus Crime Control and Safe Streets Act of 1968, 42 U.S.C. §§ 3711-95 (1970). The opinions and conclusions expressed herein are, of course, my own and are not necessarily shared by any of these individuals or organizations.

† Professor of Law, University of Texas.

1. See, e.g., *Miranda v. Arizona*, 384 U.S. 436, 466 (1966): "The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege [against self-incrimination]. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion."

2. Wright, *The New Role of Defense Counsel Under Escobedo and Miranda*, 52 A.B.A.J. 1117, 1120 (1966). See Halworth, *The Myth of the Jury Trial*, COMMONWEAL, Apr. 25, 1969, at 161-64; Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1391 (1970); Kerson, Book Review, 42 IND. L.J. 449, 450 (1967).

3. D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 200 (1966); cf. *id.* at 51, 198.

The President's Commission on Law Enforcement and Administration of Justice has observed, "Whether or not plea bargaining is a fair and effective method of disposing of criminal cases depends heavily on whether or not defendants are provided early with competent and conscientious counsel." PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 78 (1968).

In three important guilty-plea cases decided in 1970, the United States Supreme Court adopted a similarly optimistic view of the defense attorney's role.<sup>4</sup> In essence, the Court shifted the central issue in guilty-plea litigation from voluntariness to the effective assistance of counsel. Indeed, in a dissenting opinion joined by two other Justices, Mr. Justice Brennan maintained that the Court had attached "talismanic significance to the presence of counsel. . . . As long as counsel is present when the defendant pleads, the Court is apparently willing to assume that the government may inject virtually any influence into the process of deciding on a plea."<sup>5</sup>

The Supreme Court and other observers of the plea bargaining process have relied heavily on the assumption that criminal defense attorneys will, almost invariably, urge their clients to choose the course that is in the clients' best interests. Although this assumption is entirely natural and corresponds to the function that defense attorneys are intended to perform in our system of justice, it merits examination in terms of the actual workings of the criminal justice system. This article therefore explores the extent to which the presence of counsel does provide a significant safeguard of fairness in guilty-plea negotiation. It concludes that current conceptions of the defense attorney's role are often more romanticized than real.

The point of this article is not simply that the legal profession includes some people who are false to its ideals and some who are incompetent. That statement would probably be true of any large group. Instead, the thesis is that the plea bargaining system is an inherently irrational method of administering justice and necessarily destructive of sound attorney-client relationships. This system subjects defense attorneys to serious temptations to disregard their clients' interests—temptations so strong that the invocation of professional ideals cannot begin to answer the problems that emerge. Today's guilty-plea system leads even able, conscientious, and highly motivated attorneys to make decisions that are not really in their clients' interests.

From my perspective, nothing short of the abolition of plea bargaining promises a satisfactory resolution of the problems that this article will discuss. While the article does not fully develop this thesis, it will indicate some of the serious problems and incongruities that the guilty-plea system has created.<sup>6</sup>

4. *Brady v. United States*, 397 U.S. 742, 756-58 (1970); *McMann v. Richardson*, 397 U.S. 759, 768-74 (1970); *Parker v. North Carolina*, 397 U.S. 790, 794-98 (1970); cf. *Tollett v. Henderson*, 411 U.S. 258, 266-69 (1973).

5. *McMann v. Richardson*, 397 U.S. 759, 778, 784 (1970) (Brennan, J., dissenting).

6. As I use the term, plea bargaining consists of the exchange of prosecutorial, judicial, or other official concessions for pleas of guilty. This definition excludes unilateral exercises of prosecutorial or judicial discretion (such as an unqualified dismissal of charges), and it

## The Defense Attorney's Role in Plea Bargaining

The research for this article was conducted during the 1967-1968 academic year, when I visited ten major urban jurisdictions—Boston, Chicago, Cleveland, Houston, Los Angeles, Manhattan, Oakland, Philadelphia, Pittsburgh, and San Francisco. In each city, I talked with prosecutors, defense attorneys, trial judges, and (usually) other criminal justice officials. My interviews did not follow a set format, and the resulting study is not a scientific survey. As I noted in an earlier article based on the same interviews,<sup>7</sup> I have engaged in a kind of legal journalism.<sup>8</sup>

The utility of this kind of study seems to me to lie primarily in its ability to guide analysis and to permit an evaluation of the inherency of the problems that it suggests. Most of what I report is hearsay, and individual stories and observations may therefore be suspect. Even unverified gossip may be valuable, however, when it “makes sense”—when reflection indicates that our current system of criminal justice would inevitably lead to behavior of the sort described in more than a few cases. Moreover, the hearsay tends to become credible when similar observations are reported by persons with different and opposing roles in the criminal justice system and by persons in independent jurisdictions across the nation.

In assessing the role of defense attorneys in the guilty-plea process, I begin with privately retained attorneys and then turn my attention to public defenders, to other appointed attorneys who represent indigent defendants, and to defendants who represent themselves in the bargaining process. I conclude by considering two major ethical problems which confront all defense attorneys involved in plea bargaining.<sup>9</sup>

### I. The Retained Attorney

To understand the role of the private defense attorney, it is necessary to understand something of the economics of criminal defense

also excludes the exchange of official concessions for information, testimony, restitution, or other actions by defendants that do not involve their self-conviction. Plea bargaining is, of course, the method by which the overwhelming majority of criminal convictions are obtained. *See, e.g.,* D. NEWMAN, *supra* note 3, at 3 (“roughly 90 percent of all criminal convictions are by pleas of guilty”).

7. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968).

8. Statements that appear in the text in quotation marks are not always exact quotations. I have attempted to recreate in a concise, readable and accurate way what the persons I interviewed told me. My paraphrasing has rarely been extensive, and I hope and believe that it has retained both the substance and the style of the men and women with whom I talked. Whenever requests for anonymity did not preclude this course, I have indicated the sources of specific observations.

9. Of course one goal of this article is to compare the institutional advantages and limitations of the different groups of defense representatives. For that reason, the article's subheadings are somewhat misleading. Discussion of the private defense attorney, for example, continues throughout the article; the sections devoted primarily to public defenders and to appointed counsel necessarily include extensive comparative discussions of the conduct of private attorneys.



work. There are two basic ways to achieve financial success in the practice of criminal law. One is to develop, over an extended period of time, a reputation as an outstanding trial lawyer. In that way, one can attract as clients the occasional wealthy people who become enmeshed in the criminal law. If, however, one lacks the ability or the energy to succeed in this way or if one is in a greater hurry, there is a second path to personal wealth—handling a large volume of cases for less-than-spectacular fees. The way to handle a large volume of cases is, of course, not to try them but to plead them.

These two divergent approaches to economic success can, in fact, be combined. Houston defense attorney Percy Foreman observed that the "optimum situation" for an economically motivated lawyer would be to take one highly publicized case to trial each year and then to enter guilty pleas in all the rest. "One never makes much money on the cases one tries," Foreman explained, "but they help to bring in the cases one can settle." As Boston attorney Monroe L. Inker less elegantly described this facet of law-practice economics, "A guilty plea is a quick buck."

To describe how economically motivated lawyers would behave is not, of course, to say that most lawyers care only about their pocket-books. Some of them do, however, and an evaluation of the guilty-plea system should include frank recognition of this fact. Every city has its share of what Los Angeles attorney George L. Vaughn called "professional writ-runners and pleaders"—lawyers who virtually never try a case.<sup>10</sup>

10. In Manhattan, a group of lawyers whose offices are located in close proximity to the criminal courthouse are sometimes referred to as "the Baxter Street irregulars." The *New York Times* once reported, "The philosophy of these lawyers, according to one of Manhattan's top prosecutors, is simple: 'Whatever the defendant can scrape up, that's the fee, and from then on all the lawyer is interested in is disposition of the case as fast as possible.'" Burks, *City Courts Facing a Growing Crisis*, N.Y. Times, Feb. 12, 1968, at 41, col. 1, 44, cols. 6-7. See D. NEWMAN, *supra* note 3, at 74; Mackell, *Streamlining Procedure for Guilty Pleas*, 4 THE PROSECUTOR 75 (1968).

Judge Harold Rothwax of the New York City criminal court once told a reporter: Yesterday, a lawyer came up to the bench to plea-bargain—that is to see what I would reduce the charge to if his client pleaded guilty. The lawyer had never set eyes on his client and he simply didn't know the law. Now, that was a legal-aid lawyer. Private lawyers are usually even worse. Many of them hang around the criminal courts and pick up clients who are bewildered and desperate. These lawyers charge anywhere from a hundred dollars to five hundred dollars a case, and they often take in fifty to sixty thousand dollars a year—for doing next to nothing and doing it very badly. I know some of them who have practiced in the criminal courts for thirty years and have never gone to trial. They don't even read the papers in the cases they handle.

Harris, *Annals of Law in Criminal Court—I*, THE NEW YORKER, Apr. 14, 1973, at 45, 76.

This phenomenon has not escaped the attention of offenders themselves. See B. JACKSON, *OUTSIDE THE LAW: A THIEF'S PRIMER* 130 (1972): "Most of these lawyers . . . can't fight their case. They don't know how to fight. A lot of them haven't tried a case for the last fifteen or twenty years."

## The Defense Attorney's Role in Plea Bargaining

Stories about the "pleaders" are common among members of the bar. In Philadelphia, for example, an often repeated story concerns "Plead 'em Guilty" Fenn,<sup>11</sup> who has been known to "represent" a client for as little as a bottle of whiskey. On one occasion, a client resisted his advice and refused to plead guilty to a charge of rape. Terrified of trying the case himself, Fenn finally approached a younger member of the bar and asked him to do it.<sup>12</sup> "There's seven-fifty in it for you," Fenn announced. When the younger lawyer took the case and won an acquittal, Fenn kept his bargain—but contrary to the younger lawyer's expectations, Fenn paid him, not \$750, but \$7.50, half of the total retainer.

"Plead 'em Guilty" Fenn may be satisfied with such trivial fees, but, in this respect at least, he is unusual. In the main, the "wholesalers" of the criminal bar seem to make a very good living. As Chicago attorney J. Eugene Pincham observed, "When a lawyer handles five cases a day and earns \$50 for each one, his annual income will be substantially in excess of \$50,000."<sup>13</sup> Moreover, some lawyers manage to enter more than five guilty pleas each day,<sup>14</sup> and in felony courts at least, \$200, \$300, and \$500 fees for routine guilty-plea cases seem far more common than \$50 fees.<sup>15</sup> John W. Miner, a Los An-

11. Fenn, of course, is a fictional name.

12. When confronted with a client who absolutely insists on a trial, it is apparently quite common for a "cop-out lawyer" to refer the case to some other attorney. Several attorneys, after confirming the existence of a substantial "cop-out bar" in their cities, reported that they had been the beneficiaries of this sort of referral.

13. Cf. M. MAYER, *THE LAWYERS* 161 (1967).

14. The members of a two-person Oakland firm offered the highest estimate of a private attorney's caseload that I heard. They claimed that during the preceding year they had appeared in 5,000 felony and misdemeanor cases. "We plead almost all of them," one of the lawyers said, "but only because today's deals are irresistible. During the entire year, only three of our clients were sentenced to the state prison."

A Texas lawyer told an interviewer that during the previous week he had handled 52 criminal cases. Comment, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys*, 50 TEXAS L. REV. 60, 111-12 (1971) (prepared by J. Battle) [hereinafter cited as *In Search of the Adversary System*]. Cf. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 5 (1970).

15. Indeed, legal fees in simple guilty-plea cases often exceed these estimates. Ryan L. Petty sent written questionnaires to 1000 criminal defense attorneys in Texas concerning their fee-setting and fee-collection practices, and he received more than 300 answers to the following question: "Approximately what fee would you charge for representing a professional burglar who has been charged as a habitual offender after being caught red-handed during a store burglary?" Responses varied greatly, but the average of all responses was \$2,603. In view of the fact that almost all of the lawyers included in the sample considered the likelihood of a guilty plea a relevant factor in fee-determination, see p. 1200 *infra*, and in view of the fact that Mr. Petty's hypothetical case would commonly be resolved through a simple plea agreement involving a dismissal or reduction of the habitual offender charge, this figure seems strikingly high. R. Petty, *Fee-Setting and Fee-Collection Practices among Criminal Defense Attorneys in the State of Texas*, Fall 1973, at 18 (unpublished paper on file at the University of Texas Law School Library).

The mechanics of a financially successful criminal law practice are sometimes amazing to behold. One notorious "wholesaler" in Austin, Texas, is a solo practitioner who employs four secretaries. This lawyer is so "well-connected" at various central Texas jails

geles prosecutor, recalled a defense attorney who sometimes entered as many as 25 guilty pleas in a single day and whose standard fee was \$200. Another Los Angeles prosecutor, perhaps referring to the same defense attorney, reported that officials of the Internal Revenue Service had approached him to investigate a claim that the attorney's annual income was approximately \$400,000. The prosecutor added, "This lawyer hadn't tried a case in years."<sup>16</sup>

I found no consensus among the attorneys whom I interviewed concerning the portion of the criminal bar who could fairly be characterized as "cop-out lawyers," in the sense that they invariably urged their clients to plead guilty regardless of the circumstances of particular cases.<sup>17</sup> At one extreme was the viewpoint of San Francisco's Nathan Cohn: "So far as I can tell, *all* lawyers who work full-time in the criminal courts are primarily interested in moving cases as fast as they can. Only a few lawyers who, like me, are not involved

that he need not spend his own time hustling business. Moreover, the secretaries are so well-versed in handling routine matters (including fee collection) that the lawyer can usually arrange to meet his client for the first time in the courtroom on the day set for trial. One of the secretaries simply informs the client, "Mr. X will be the man with the red tie and the red socks." (The attorney's striking and invariable uniform may seem to some observers a mark of his colorful country character, but it actually serves a more vital function in his kind of practice.) In many cases, this lawyer manages to "earn" \$250 or more with an investment of less than 15 minutes of his own time. Indeed, in one recent case, this lawyer secured his fee without ever entering an appearance for his client. The client, charged with first offense driving while intoxicated (a misdemeanor), reported to a Georgetown, Texas, courthouse on the morning of the day set for trial. He discovered that the attorney would not arrive until the afternoon and that all of the attorney's cases would be heard then. Because the client could not be excused from work for the afternoon, he telephoned the attorney's office and asked what to do. The secretary who had earlier told the client that the attorney would "take" his case advised him to plead guilty and to pay his fine. The client did so; his sentence was the same as that of virtually every other defendant who enters a guilty plea in a case of this sort in Georgetown, whether represented by counsel or not. The client had paid the attorney's usual \$250 fee for a first offense drunk driving case, but he had never met the attorney nor talked with him on the telephone. The attorney did appear in Georgetown during the afternoon and entered guilty pleas for eight other defendants. Letter from Thomas W. Choate, third-year law student at the University of Texas and an intern with the District and County Attorneys of Williamson County, Texas, to the author, June 9, 1972 (information based on Choate's conversation with the client and consistent with the attorney's *modus operandi* as described to me by several Austin attorneys).

16. Luke McKissack, a Los Angeles defense attorney, said that he knows one local "cop-out lawyer" who earns around \$250,000 per year. (McKissack, too, may have been referring to the same defense attorney as either or both of the Los Angeles prosecutors.) McKissack estimated the annual income of most of the "pleaders" at \$25,000 or \$30,000. See A. BLUMBERG, CRIMINAL JUSTICE 109, 112 (1967); B. JACKSON, *supra* note 10, at 131-32.

The "money grabbers" of the criminal bar enjoy economic advantages apart from the volume of fees that they collect. For one thing, their overhead is low; they usually operate out of low-rent offices near the courthouse and, of course, see little need to purchase lawbooks. In addition, because these attorneys almost invariably collect their fees in cash, they are sometimes remarkably conservative in reporting their incomes to the Internal Revenue Service. See M. MAYER, *supra* note 13, at 161; B. JACKSON, *supra* note 10, at 132. Of course the "pleaders" may incur substantial expenses if they split their fees with the "runners" who bring them business. See pp. 1188-89 *infra*.

17. The difficulty involved in defining precisely the subject matter of this inquiry may have accounted for the wide divergence of responses that I encountered, quite as much as variations in the attorneys' perceptions of the underlying reality.

## The Defense Attorney's Role in Plea Bargaining

in criminal cases on an everyday basis have a genuine sense of the duty of representation." Another San Francisco defense attorney, Gregory S. Stout, was more restrained: "Of the 40 or 50 lawyers who regularly appear in criminal cases in this city, there are perhaps 20 quick-buck artists."

Donald Kahn, as Assistant State Attorney General in Boston, claimed, "Half of the regular defense bar are guys who plead out constantly." Defense attorney Paul T. Smith made a similar estimate and added, "The practice of criminal law is just a little above shop-lifting in this city."<sup>18</sup>

"There are pleaders by the score in Houston," said defense attorney Richard Haynes. "Of the lawyers who sometimes appear in criminal cases here, there are no more than five whom I would hire. There may be 30 others who do a more-or-less conscientious job. And there are probably 50 or 55 cop-out lawyers." However, Percy Foreman took a different view: "Most defense attorneys in Houston—the vast majority—are not deliberately dishonest. There are no more than 10 or 11 who hustle business, never see their clients, and plead all of them guilty. At the same time, however, at least half of all defense attorneys never take a case *intending* to prepare for trial."<sup>19</sup>

In other cities, assessments of the size of the "cop-out bar" ranged from more than 50 percent of all defense attorneys to 10 percent or—very rarely—even less.<sup>20</sup> Nevertheless, even those observers who set the

18. Whatever the current status of the practice of criminal law, older defense attorneys agree that it has become far more respectable than it was 20, 30, or 40 years ago. "When I started," reported San Francisco's Benjamin M. Davis, "a criminal defendant had no right of discovery at all—unless he had a \$10 bill. Ten dollars would secure full discovery from the best police force that money could buy. Moreover, it was especially important for lawyers to 'take care of' the booking officers at the stationhouse, for these officers gave the lawyers most of their business. Cases of whiskey for probation officers were also a necessity, and it was sometimes advantageous to bribe even newspaper reporters whose recommendations could be influential with certain judges." Another San Francisco attorney, James Martin MacInnis, recalled a former prizefighter who became an attorney and worked out of a bondsman's office. This attorney would commonly offer half his fee to a police inspector to arrange a plea agreement, and if the inspector turned him down, the attorney would return the money to his client. "In that respect, this attorney was more honest than most of the guys in the criminal courts 35 years ago," MacInnis concluded.

As Houston's Percy Foreman summarized the situation, "In the past, dishonesty was the norm. A small number of crooked lawyers were mopping-up. Some good lawyers entered the field, however, and they attracted others. Everyone had to work harder to maintain his share of the business. In the process, many of the oldtime sharpsters fell by the wayside."

19. The estimate of Houston's Lloyd M. Lunsford came closer to Haynes's than to Foreman's: "Seventy percent of the defense bar are far too ready to plead their clients guilty."

20. Manhattan attorney Richard H. Kuh said that "purely for economic reasons a majority of the defense bar are too ready to plead their clients guilty." By contrast, prosecutor Jerome Kidder estimated that only 10 or 15 percent of Manhattan's defense attorneys were "chiefly concerned with getting rid of the case through a plea."

figure as low as 10 percent commonly estimated that the "pleaders," with their extremely high caseloads, probably appeared in a majority of all criminal cases in which defendants were represented by retained attorneys. Almost everyone agreed that the conduct of these attorneys posed a major problem for the criminal justice system.<sup>21</sup>

The "pleaders" not only offer their clients misleading advice on the question of whether to plead guilty; in addition, they probably secure less satisfactory plea agreements than other lawyers. "All one ever gets in the law," said Percy Foreman, "is what one can take from the other side."<sup>22</sup> A prosecutor has little incentive to offer concessions when he knows that a guilty plea will be forthcoming in any event.<sup>23</sup>

Philadelphia prosecutor Joseph M. Smith maintained that there were only two private attorneys in Philadelphia who "plead all their clients." Smith added, however, "There are only 20 or so attorneys who regularly appear in criminal cases." The estimates of Philadelphia defense attorney Bernard Segal and of Public Defender Vincent J. Ziccardi were similar.

Pittsburgh prosecutor James G. Dunn said that of the six or seven private attorneys who work in the criminal courts every day, "three or four run their offices like collection agencies." Pittsburgh Public Defender George H. Ross observed, "Of the 10 to 12 private attorneys in Pittsburgh with active criminal practices, five plead virtually all of their clients guilty. There were once more attorneys in the 'cop-out' category, but our office destroyed two or three of them."

Los Angeles defense attorney Ned R. Nelsen claimed that "far more than half of all defense attorneys work for fees that do not permit them to go to trial." Prosecutor Lynn D. Compton said, however, that he could "count the number of 'cop-out lawyers' on the fingers of both hands."

Oakland defense attorney John A. Pettis said that "only a few lawyers take a predatory attitude toward their clients," and prosecutor Edward O'Neill agreed that the number of "cop-out lawyers" in Oakland was very small.

Chicago defense attorney Sam Adam declared, "Of the working defense bar of something fewer than 50 attorneys, there are probably a dozen 'cop-out lawyers.'"

Joseph Donahue, a Cleveland prosecutor, said, "Let me put it this way. There are a great many attorneys in Cleveland who have done nothing but criminal work for years and who have never met a jury."

21. There was also general agreement that this problem had diminished in importance with the growth of public defender systems. Many jurisdictions require little more than a defendant's say-so to classify him as indigent and therefore eligible for free defender services. See Note, *Comparison of Public Defenders' and Private Attorneys' Relationships With the Prosecution in the City of Denver*, 50 DEN. L.J. 101, 110 (1973) (by J. Battle) [hereinafter cited as *Comparison of Defense Relationships*]; Lobenthal, Book Review, 26 STAN. L. REV. 1209, 1211-12 (1974). Some defendants who might otherwise have paid small fees to the "hangers-on" of the criminal bar are now apparently represented by public defenders instead.

22. "The same process is at work in both civil and criminal cases," Foreman added. He reported that he had recently entered a two-year-old personal injury suit previously handled by a firm in Lubbock, Texas. Although this firm specialized in personal injury matters, the defendant's highest settlement offer had been only \$10,000. As soon as the defendant's lawyers learned that Foreman was representing the plaintiff, they called with an offer of \$25,000. "Their offer will be \$50,000 by the time the case is ready for trial," Foreman concluded.

23. Professor Phillip E. Johnson, a sometime prosecutor in Ventura County, California, recalled a "cop-out lawyer" who frequently telephoned with a plaintive request: "Phil, could you dismiss the priors [prior convictions] if my man pleads? Now, of course, we'll plead anyway, but I just wondered if you could dismiss the priors." Invariably Johnson's answer was that he simply could not dismiss the priors "in view of the circumstances of the case."

## The Defense Attorney's Role in Plea Bargaining

Not only an attorney's willingness to take his cases to trial, but his ability as a trial advocate<sup>24</sup> and his willingness to appeal unfavorable verdicts<sup>25</sup> can apparently influence the concessions that his clients receive.<sup>26</sup>

"A lawyer always gets more by fighting," claimed Boston attorney Paul T. Smith, "but most lawyers don't know how." Houston's Richard Haynes observed, "A lawyer who scares the D.A.'s office gets better fees and better pleas. My philosophy is always to give the prosecutors the long-form treatment and the full-court press."<sup>27</sup>

These same lawyers noted, however, that an attorney's reputation as a trial advocate could grow to the point that, paradoxically, it might diminish his ability to bargain successfully. Foreman, for example, said that his national reputation had probably limited his effectiveness in criminal cases: "Perhaps the prosecutor wants to show that he is not afraid, or perhaps he wants to write his mother that he lost a case to Percy Foreman. Whatever the reason, I now have to try cases that I could have settled over the telephone 40 years ago."<sup>28</sup>

24. White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 445, 446 (1971) (many Philadelphia prosecutors admitted that they are more willing to grant concessions when a defense attorney's skill decreases the chance of conviction).

25. Sam Adam, a defense attorney in Chicago, maintained that most lawyers fail to recognize the bargaining leverage provided by a willingness to appeal:

Appealing cases is not so hard and time-consuming as most lawyers think it is, and when a lawyer develops a reputation as an appellate advocate, prosecutors offer lighter sentences during plea bargaining to avoid the burden of appellate proceedings. In addition, if a case does go to trial, a defense attorney's recognized willingness to appeal usually makes the trial itself a lot fairer.

26. Some defense attorneys maintain, however, that successful plea negotiation turns more on personal relationships than on a lawyer's willingness to try cases or his potential ability to succeed at trial. In the view of these attorneys, a "fighting posture" costs a defense attorney more than it gains. Moreover, seven of the 10 private defense attorneys who were interviewed by Jackson B. Battle maintained that "contacts" were more important in a successful criminal law practice than knowledge of substantive law or procedure. *In Search of the Adversary System*, *supra* note 14, at 66.

27. See D. NEWMAN, *supra* note 3, at 74; D. NEUBAUER, *CRIMINAL JUSTICE IN MIDDLE AMERICA* 219 (1974); Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 58 (1967).

28. Similarly, Haynes, who at one point in his career specialized in driving while intoxicated cases, found that he was unable to bargain successfully after he had secured successive acquittals in 183 of these cases. A law school classmate who had joined the prosecutor's office explained, "You are now a Number One Cat, and if I can lay you in the dust at trial, I'm a champ."

Some prosecutors seem as influenced by a spirit of gamesmanship as by the merits of their cases or any rational administrative concerns. It is interesting in this respect to compare Foreman's description of the effect that his reputation as a trial lawyer has had in civil cases, *see* note 22 *supra*, with his description of its quite different effect in criminal cases. When a lawyer represents a specific, paying client, he may be more reluctant to indulge his personal whims (for example, that it would be "fun" to try a case against a famous opponent) than when he represents the state as part of its criminal justice machinery. There may, accordingly, be checks on the rationality of the civil settlement process that are lacking in the plea bargaining process. Interestingly, most of the attorneys who participated in Jackson B. Battle's study maintained that "contacts" were more important in a criminal than in a civil practice. *In Search of the Adversary System*, *supra* note 14, at 67.

Defendants who pay for and accept the self-serving advice of the "cop-out lawyers" obviously exhibit bad judgment. One might expect "con wise" defendants to be alert to this danger and to recognize that representation by a public defender is ordinarily more advantageous. In view of the easy availability of this alternative,<sup>29</sup> it may seem somewhat surprising that the "pleaders" remain in business at all, let alone that they secure such a high portion of non-indigent defendants as their clients. Two critical questions are thus how the "pleaders" obtain their clients and how they induce them to enter pleas of guilty.

The bail bondsman is a less important figure in the administration of criminal justice today than he was a decade or two ago,<sup>30</sup> but all too often it is still the bondsman who brings lawyers and clients together in criminal cases. The process is simple: when a defendant's family emerges from their first visit to the jail, their dominant concern is, of course, to secure the defendant's release as quickly as possible. And as the family stands in the jailhouse door, they see a possible answer; they confront a world of advertisements with such messages as "Free Parking For Ben's Bail Bonds." Typically, the family seeks out a bondsman, and as the interview proceeds, the bondsman asks, "Tell me, have you found a lawyer for the boy?" When the answer is negative, the bondsman may respond with an understanding smile, "Well I know just the man; and don't worry, he won't cost you too much." The bondsman commonly receives a share of the lawyer's fee in return for his services.<sup>31</sup>

29. In practice, nonindigent defendants are frequently able to qualify for public defender assistance. See note 21 *supra*.

30. Illinois has, for example, effectively "socialized" the bail-bonding business, and the private bondsman has become virtually extinct in Chicago. See *Schilb v. Kuebel*, 404 U.S. 357 (1971); ILL. REV. STAT. ch. 38, §§ 110-7, 110-8 (1970). In other jurisdictions, personal bond programs have made the services of bondsmen unnecessary for a substantial number of defendants.

31. One Los Angeles attorney told me that he had an "ethical" business arrangement with certain bondsmen: "When they have a client who needs a lawyer, they send him to me, and when I have a client who needs a bond, I send him to them." But see ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 2-103(B). This same Los Angeles lawyer estimated that 75 percent of all defense attorneys maintain some sort of business relationship with one or more bondsmen.

In Texas, the situation is even worse than elsewhere, for defense attorneys may themselves serve as bondsmen. See *Opinions of the State Bar of Texas Committee on Interpretation of the Canons of Ethics*, 18 BAYLOR L. REV. 195, 327 (1966). One local Texas bar association, concerned that lawyers who were hired initially as bondsmen might thereby solicit legal business for themselves, has provided that a lawyer may serve as a bondsman only when a lawyer-client relationship has come into existence *before* any bondsman-client relationship. Lawyer-bondsmen chuckle about this rule, for it has aggravated the problem that it was designed to solve. When a prospective client calls one of these lawyers in search of a bond, the lawyer is likely to reply, "I'm sorry, I would like to write

## The Defense Attorney's Role in Plea Bargaining

"Runners" in the jails and police stations are another fruitful source of business, and the runners are sometimes public officials. An Austin, Texas lawyer claimed to have overheard the sheriff of a neighboring rural county tell a prisoner, "Mr. X [a notorious 'cop-out lawyer'] can get you probation on a plea."<sup>32</sup> Houston prosecutor Sam H. Robertson reported, "In the bad old days, a lawyer might appear at a police station and ask for a prisoner whom we had done our best to hold incommunicado. The prisoner had not been allowed to make even one telephone call, but the lawyer was obviously on good terms with the desk sergeant."

Jail trustees often have supervisory responsibility over other prisoners, and they too may serve as hustlers for the "cop-out lawyers." An Oakland defense attorney said that he once visited a client in the county jail and was present when another lawyer arrived. He heard a jail trusty shout out, "Lawyer's here!", and several prisoners gathered to answer the lawyer's question, "Have you got any money?"

The "pleaders" may even employ their own clients as runners on a "commission" basis. A lawyer may say, for example, "My fee for this case will be \$700, but I'll make it \$100 less for every new client you send me."

Some lawyers "work" the courthouses as well as the jails. A Chicago prosecutor recalled that he once entered a courthouse elevator and saw a middle-aged black man studying a legal document. A defense attorney who had entered the elevator with the prosecutor approached the man and asked, "You got trouble?" "Oh man, have I got trouble!" the black man replied. "Well, perhaps I can help," said the lawyer, and he handed the man a business card as the prosecutor left the elevator.

your bond, but bar association rules prevent me from doing so unless you first hire me as your attorney." The rule thus enables lawyers to make the tie-in more explicit than it was before the rule's enactment. See E. Tucker, Client Selection of Criminal Defense Lawyers in Austin, Texas, May 27, 1970 (unpublished paper on file at the University of Texas Law School Library).

In addition to dangers of unethical solicitation, Texas's toleration of bond-writing by lawyers promotes serious conflicts of interest on the part of many defense attorneys. A lawyer's duty is, of course, to obtain as low a bond for his client as possible, but because a bondsman's fee is usually a fixed percentage of the bond amount, his interests lie in the opposite direction. In addition, it is often to a defendant's advantage to delay the date of his trial, *see* pp. 1230-31 *infra*, but because delay prevents prompt return of the bond and increases the risk of flight and of bond-forfeiture, a bondsman's interests always favor a speedy trial. The "see no evil" attitude of Texas bar associations toward these problems can best be explained in terms of the fondness of Texas lawyers for money.

32. The sheriff referred to the lawyer whose practice is described in note 15 *supra*. See B. JACKSON, *supra* note 10, at 134: "Most of these lawyers in these little towns, they have a little agreement with the chief jailer or someone, and they give him a cut. So if he makes \$100 off you, he gives him \$20."



All of these techniques for obtaining legal business are of course unethical, but it is not always necessary to solicit clients so directly. As the same Chicago prosecutor explained, "When a man stands in a courthouse corridor carrying an alligator briefcase and wearing a diamond tie pin, a black silk suit, a white-on-white shirt, and Italian shoes, he does not need a neon sign reading 'Lawyer Available.'"

Moreover, the general reputation of the "cop-out lawyers" among criminal defendants does not seem to correspond to reality. These lawyers are usually flamboyant figures who cultivate an image of knowing the right people and of being willing to collaborate with their clients in devious ways. As New York defense attorney Stanley Arkin explained, "They thrive on folklore about judges' mistresses and unseen passageways." The style of these attorneys is thus carefully designed to appeal to people with a corrupt and cynical view of the world, exactly those people who are most likely to become defendants in criminal cases.<sup>33</sup> Burton Marks, another Los Angeles attorney, spoke of a "cop-out lawyer" who appeared with great frequency in homosexual solicitation cases. "The defendants in these cases are usually such suckers for a show of emotional concern," Marks said, "that they remain satisfied customers long after their lawyer has sold them down the river."

Even when a lawyer enters guilty pleas for all of his clients, he may do so, as one prosecutor explained, "with a squawk." The lawyer may, for example, file a series of frivolous pretrial motions and argue these motions with great vigor in an effort to demonstrate that he has earned his fee. Los Angeles defense attorney Luke McKissack observed, "Pretrial motions are some lawyers' basic form of advertise-

33. See M. MAYER, *supra* note 13, at 162: "Private lawyers are to some extent paid to be sympathetic. Part of this sympathy comes out in a protective coloration of self-proclaimed corruption, because a criminal likes to hear his lawyer say he has the D.A. or judge in his pocket...."

The attorneys interviewed by Jackson B. Battle spoke about their clients in a way that tended to confirm this observation:

They usually want a fixer—especially the guys who have been through it before.

They know how it all works.

[Older offenders] accept everything that goes on. They've grown up in another era.

To them everything is "who you know" and the law is the same way.

When a man hires me, he hires me to win, and he doesn't care how I do it—underhanded, overhanded, any way I can.

*In Search of the Adversary System*, *supra* note 14, at 110-11, 113.

Harry Subin reports that when a Washington, D.C. judge appointed two prominent members of the bar to represent indigent defendants, both defendants refused the appointments and asked instead to be represented by one of the "regulars." H. SUBIN, *CRIMINAL JUSTICE IN A METROPOLITAN COURT* 94 (1966). See B. JACKSON, *supra* note 10, at 130: "When you want a lawyer, you don't want a trial lawyer; you want a fixer."

## The Defense Attorney's Role in Plea Bargaining

ment.”<sup>34</sup> As Houston's Lloyd M. Lunsford put it, “Most defendants know from nothing. The sophistication of the jailhouse lawyers who tell them what to do is tremendously overrated.”

“Cop-out lawyers” may therefore obtain clients on the basis of reputation in much the same way as other attorneys,<sup>35</sup> and they may also induce their clients to plead guilty by using the same techniques as other lawyers. The “cop-out lawyers” are simply less discriminating in using these techniques and less honest in formulating the advice that they give their clients.

The process commonly begins at the initial interview when the lawyer asks his client for the facts of the case. Almost invariably, the lawyer describes the attorney-client privilege and adds a strong appeal for an honest answer. If the client admits his guilt, the lawyer may report at the following interview that the prosecutor has an unbeatable case and that the defendant's only hope lies in a plea agreement. The lawyer may, in addition, extol the “special character” of the bargain that his connections have enabled him to obtain, contrasting this bargain with the severe treatment that he is certain will follow a trial.<sup>36</sup>

When a client initially denies his guilt, some lawyers use surprisingly harsh techniques to secure a confession.<sup>37</sup> These lawyers emphasize the importance of knowing “the full truth” in preparing a defense, but at the same time, a client who confesses is probably at a greater psychological disadvantage in resisting a lawyer's advice to plead guilty than a client who denies his guilt. Whether or not a lawyer seeks a confession, however, and whatever the outcome of his efforts, the process remains essentially the same. The lawyer may say, “You tell

34. Chicago defense attorney Sam Adam maintained that one can often detect the “cop-out lawyers” from their practice of filing an elaborate series of pretrial motions, ending with a motion for a presentence report. “No one asks for a presentence report before trial unless he is sure that there will not be a trial,” Adam explained.

35. Very frequently, in fact, a lawyer does not know why a particular client has selected him. A Chicago defense attorney described a tawdry incident that illustrated this fact. The lawyer had been called to a jail late at night by a man whom he did not know. The man sat in an interview room, refused to look at the lawyer, and moaned, “I'm sick, I'm sick.” When the defendant failed even to acknowledge the lawyer's questions, the lawyer rose to leave. At this point, however, the defendant looked up and said, “Cop me out, man. Oh God, I'm sick.” The interview continued and the lawyer asked whether the client had any money. The client responded that if the lawyer would go to his apartment, he would find a pair of gray wash pants with two \$100 bills in the pocket. The only difficulty was that the client, a narcotics addict, could not remember where he had placed the apartment key. Eventually the lawyer found the defendant's father, and together they entered the apartment. There were the gray wash pants with the lawyer's retainer in the pocket. I later watched the lawyer earn his fee by carrying out his client's instructions.

36. See Alschuler, *supra* note 7, at 95 (quoting Los Angeles prosecutor John W. Miner).

37. See pp. 1286-87 *infra*.

me that you are innocent, and I am inclined to believe you. But here is how it looks." The lawyer may then recite the evidence, and no matter how weak it is, he may announce that no jury in his experience would fail to convict on evidence of this sort.<sup>38</sup> If necessary, the lawyer may mock and cajole the defendant: "That policeman has a shield to back his story. What have you got? Are you employed? Don't you have a record?" Finally, the lawyer may threaten to withdraw from the case: "If you are not willing to accept my advice, let some other lawyer get you that 40 years you'll serve if this case ever goes to trial."<sup>39</sup>

If the lawyer's own efforts are unsuccessful, he may turn to the defendant's family and attempt to bend their shame and discomfort to his advantage. The lawyer may treat the family as understanding collaborators who "of course" recognize the sensible course for the defendant to take—although the defendant (a problem for his family as always) blindly refuses to cooperate with those who want to help him.<sup>40</sup> The calculated use of family members to induce pleas of guilty has occasionally become the subject of appellate litigation, and this stragem was well illustrated in *United States ex rel. Brown v. LaVallee*,<sup>41</sup> a case which the United States Court of Appeals for the Second Circuit decided in 1970.

The defendant in *Brown* was charged with murder, but he maintained that he had acted in self-defense. Contrary to the advice of his attorneys, he refused to plead guilty. The attorneys, in turn, neglected to take the case to trial. As the Second Circuit explained,

The matter remained at this impasse for over ten months, with defense counsel unable to sway petitioner from his determination to go to trial.

38. One lawyer explained that his practice was to accept a client's story without question for the first several interviews. Once the client's confidence had been established, however, the lawyer would begin an interview by saying in a very soft voice, "My friend, you're going to jail." The lawyer would then recite the evidence that the client had failed to reveal, and the client would usually be so unsettled by the process that he would be receptive to the lawyer's advice: "But it won't be too bad if we enter a plea of guilty. I've talked to the prosecutor, and he happens to owe me a favor...."

39. Cf. Lobenthal, *supra* note 21, at 1216:

After having allowed the client to ripen in jail for some time, [the lawyer] starts explaining how airtight the prosecutor's case is and what the sentencing consequences of going to trial are likely to be compared to the far more favorable consequences of striking an early bargain. The process is worked equally on those who concede their "guilt" and those who protest their innocence.... [T]his process is fraught with the dangers of having to make split-second decisions on the basis of wrong or incomplete information provided by the lawyer and with some additional risk of his downright treachery.

40. See A. BLUMBERG, *supra* note 16, at 66; cf. *United States ex rel. Curtis v. Zelkner*, 466 F.2d 1092 (2d Cir.), *cert. denied*, 410 U.S. 945 (1972).

41. 424 F.2d 457 (2d Cir.), *cert. denied*, 401 U.S. 942 (1970).

## The Defense Attorney's Role in Plea Bargaining

[Finally,] in the hope that she might be able to persuade Brown to plead, the lawyers brought Brown's mother, Mrs. Parker, to New York. She arrived from Texas on Monday, . . . and defense counsel attempted to make clear to her the gravity of her son's situation. She accepted their assessment that it was the most dangerous folly for her son to chance a jury trial and the death penalty . . . and then was taken to visit him.

The confrontation was stormy and emotional.<sup>42</sup>

The court continued its description of the circumstances by quoting the testimony of the defendant's mother:

"Well, I asked him if he would plead guilty, and he said no. I said, 'Well, don't you care anything about me or consider my feelings or your brothers and sisters?' And we talked all like that for a little while, and he begin to kind of look like he had a soft feeling for me. And I realized that maybe he was changing his mind . . . .

"I brought out the fact that it would be awfully hard on the family to come here and have to claim a body that had been electrocuted, for a mother to have to do something like that."<sup>43</sup>

The defendant's testimony was similar:

"She told me that she had talked to the lawyers about the case, that they had told her that I was going to the electric chair if I didn't plead guilty.

"I tried to explain to my mother that I didn't believe that the jury was going to find me guilty of murder, that I wanted a jury trial, and that she didn't have anything to worry about.

"However, she had already talked to the lawyers and her mind was made up on that point, that I was going to the electric chair, and she explained to me about the other members of the family; my two brothers and a sister, that were younger than I, and she said, 'You should at least think about them.'

"She kept pleading with me to plead guilty and I kept telling her that I was not going to do it. She finally became hysterical and very upset, and I said, 'All right, try to be calm. I'll plead guilty. You won't have nothing to worry about.'"<sup>44</sup>

The defendant's lawyers immediately induced him to sign a letter expressing his intention to plead guilty. Two days later, his guilty plea was accepted by the trial court. Although the defendant recon-

42. *Id.* at 459.

43. *Id.*

44. *Id.* at 459-60.

sidered his action and moved to withdraw his plea prior to sentencing, his motion was denied.

The court of appeals accepted the uncontradicted testimony of the defendant and his mother, but it reversed a trial judge's determination on habeas corpus that the defendant was entitled to a trial. "In our view the plea was voluntary in every respect," the court concluded. "In the mouths of the prosecutor or trial judge, these statements might have been coercive; coming from [the defendant's] lawyers and his mother, they were sound advice."<sup>45</sup> The court thus echoed the sentiments of other courts that have considered this issue.<sup>46</sup>

"Cop-out lawyers" sometimes go beyond misadvice and emotional cajolery. On occasion, they "con" their clients by offering them misinformation.<sup>47</sup> In a relatively mild form, some of this misinformation might be characterized as "puffing." A lawyer might, for example, exaggerate the extent of his friendship with the prosecutor or trial judge; he might claim that a routine plea agreement represented an unusual concession; or he might inflate somewhat his prediction of the likely sentence following a trial.

Other, more serious sorts of misinformation might be characterized as "tall stories." A lawyer might emerge from a conference with the trial judge in an angry mood: "You didn't tell me that you shot

45. 424 F.2d at 461. The court's statement seems backwards; the psychological impact of the highly emotional importuning to plead guilty was certainly not lessened because it came from the defendant's mother. It is interesting to contrast the courts' attitude toward the use of family members to induce pleas of guilty with their attitude toward the use of family members to induce out-of-court confessions. See *Culombe v. Connecticut*, 367 U.S. 568, 630 (1961) (Frankfurter, J., concurring) (condemning "the crude chicanery of employing persons intimate with an accused to play upon his emotions").

46. A similar case is *Parrish v. Beto*, 414 F.2d 770 (5th Cir.), cert. denied, 396 U.S. 1026 (1969). The defendant, charged with rape, was 21 years old and had a sixth-grade education. The prosecutor had threatened to "burn his butt"; he was held without trial for 19 months; and his mother got down on her knees, clutched his leg, and begged him in Spanish to save himself from the electric chair. The court, which set forth the facts somewhat less vividly than I have on the basis of the record, described the defendant's guilty plea as "voluntarily made after consultation with both his family and his attorney." See *St. Clair v. Cox*, 312 F. Supp. 168 (W.D. Va. 1970); *Denson v. Peyton*, 299 F. Supp. 759 (W.D. Va. 1969); *State v. Maloney*, 434 S.W.2d 487 (Mo. 1968).

47. A defense attorney may "con" his client for reasons other than the obvious economic ones. He may be persuaded that a trial would accomplish nothing, embarrass both the attorney and the client, and lead to a more severe sentence. When, in this situation, a client refuses to accept his attorney's advice and insists upon asserting his constitutional rights, the attorney may convince himself that he is merely serving his client by defrauding him. To some attorneys, a client's freedom of choice seems less important than his interest in avoiding a severe sentence, and these attorneys claim to know, almost to an absolute certainty, the consequences of a client's foolish choice.

Only one of the attorneys whom I interviewed admitted that he himself would occasionally "bullyrag and con" a client into entering a guilty plea. The attorney insisted, however, that he would deceive a client in only one situation—that in which the client planned to take the witness stand to present perjured testimony. "I know that this is not the textbook method for handling the problem," the attorney conceded, "but it works better."

## The Defense Attorney's Role in Plea Bargaining

that guy in the *leg*. It just so happens that the judge was wounded in the leg himself during the war, and if you are convicted at trial, he is going to *lose* you. But the prosecutor is an old law school classmate of mine, and he still owes me some money that I loaned him to pay his wife's medical bills. Here's what we can work out if you plead guilty."

A lawyer may report that the prosecutor or trial judge has threatened some action that neither official has threatened at all; he may lie about the strength of the prosecutor's case; he may even lie about the terms of the plea agreement that he has secured. A Chicago prosecutor reported that it is common to see a defense attorney argue for probation in the courtroom after he and the trial judge have agreed in the judge's chambers to a guilty plea and a prison term. The prosecutor added that no one ever objects to the defense attorney's effort to "put on a show" for his client, although the attorney has plainly informed his client that the bargain he obtained left open an option that it had, in fact, foreclosed.<sup>48</sup>

In private contract law, when two parties assent to materially different contracts because of the fraud of an agent, there is no binding agreement between them.<sup>49</sup> Nevertheless, when a defendant and a prosecutor assent to materially different plea agreements because of a defense attorney's misrepresentation, most courts have refused to hold the resulting guilty plea invalid. Even when an attorney has given his "word of honor" that the defendant's sentence would be less severe than the sentence actually imposed, these courts have disposed of the case by remarking that an erroneous "prediction" by defense counsel does not render a guilty plea involuntary.<sup>50</sup>

48. For a similar situation, see *State v. Edmondson*, 438 S.W.2d 237 (Mo. 1969); see generally A. BLUMBERG, *supra* note 16, at 114.

49. *Vickery v. Ritchie*, 202 Mass. 247, 88 N.E. 835 (1909); 3 A. CORBIN, *CONTRACTS* § 599 (2d ed. 1960). Similarly, when an attorney's misrepresentation leads to a default judgment against a client in a civil case, the judgment can be set aside. *Searles v. Christensen*, 5 S.D. 650, 60 N.W. 29 (1894).

50. *Davison v. State*, 92 Idaho 104, 437 P.2d 620 (1968); *Masciola v. United States*, 469 F.2d 1057 (3d Cir. 1972); *United States v. Parrino*, 212 F.2d 919 (2d Cir.), *cert. denied*, 348 U.S. 840 (1954) (false assurance by defense attorney, a former Commissioner of Immigration, that defendant would not be deported if he pleaded guilty); *Dorsey v. Gill*, 148 F.2d 857 (D.C. Cir.), *cert. denied*, 325 U.S. 890 (1945) (false assurance that defendant would be permitted to join armed forces if he pleaded guilty); *Jones v. United States*, 307 F. Supp. 208 (D. Conn. 1969) (false assurance that defendant would be sentenced by a particular judge); *United States ex rel. Wilkins v. Banmiller*, 205 F. Supp. 123, 127 (E.D. Pa. 1962), *aff'd on different grounds*, 325 F.2d 514 (3d Cir. 1963) (deliberate misrepresentation that attorney had obtained statements from witnesses that would convict defendant and that he had secured a plea agreement that would result in a conviction of less than first degree murder—"the due process standard is solely whether or not the state played any part in the wrong done the accused"); *People v. Gilbert*, 25 Cal. 2d 422, 438, 443, 154 P.2d 657, 665, 668 (1944) (false statement that "[t]here is no question now about its being a gamble; it's a certain thing . . . You're guaranteed life before Judge McKay"—held that "[m]ere

There are, however, some rulings that take a different view.<sup>51</sup> In *United States ex rel. Thurmond v. Mancusi*,<sup>52</sup> a defense attorney in-

advice and persuasion . . . will not suffice to vitiate the plea. Neither will unwarranted or even willfully false statements of factual matters by his attorney suffice"); *Ex parte Dye*, 73 Cal. App. 2d 352, 353, 166 P.2d 388 (Dist. Ct. App. 1946) (misrepresentation that attorney had "fixed" the case and that defendant would not be imprisoned); *McCrane v. State*, 242 So. 2d 202 (Fla. Dist. Ct. App. 1970) (false assurance that co-defendants would be acquitted if defendant pleaded guilty); *People v. Scott*, 10 N.Y.2d 380, 381, 223 N.Y.S.2d 472, 473, 179 N.E.2d 486 (1961) ("Assuming the truth of the allegation . . . that [defendant's] attorney told him that if he pleaded guilty he would receive a maximum sentence of 5 years [when maximum sentence was in fact 20 years], it would be necessary for him in order to succeed to establish that the allegedly broken promise had been made to his attorney by the Judge or District Attorney"); *People v. Cowen*, 68 Misc. 2d 660, 328 N.Y.S.2d 111 (Sup. Ct. 1971) (false assurance that trial judge had promised a lesser sentence than he ultimately imposed); *State ex rel. Richmond v. Henderson*, 222 Tenn. 597, 439 S.W.2d 263 (1969) (misrepresentation that defendant's wife would not be prosecuted if he pleaded guilty).

51. *United States v. Valenciano*, 495 F.2d 585 (3d Cir. 1974); *Mosher v. LaVallee*, 491 F.2d 1346 (2d Cir.), *cert. denied*, 416 U.S. 906 (1974); *Moorhead v. United States*, 456 F.2d 992 (3d Cir. 1972); *Ross v. Wainwright*, 451 F.2d 298 (5th Cir. 1971), *cert. denied*, 409 U.S. 884 (1972); *Castro v. United States*, 396 F.2d 345 (9th Cir. 1968); *Gilmore v. California*, 364 F.2d 916, 918 (9th Cir. 1966) (by implication); *United States v. Schnee*, 194 F.2d 598, 600 (3d Cir. 1952) (dictum); *Tarnabine v. Warden*, 331 F. Supp. 975 (E.D. La. 1971); *People v. Walker*, 250 Ill. 427, 95 N.E. 475 (1911); *Long v. State*, 231 Ind. 59, 106 N.E.2d 692 (1952); *State v. Rose*, 440 S.W.2d 441 (Mo. 1969); *State v. Stephens*, 71 Mo. 535 (1880); *State v. Casaras*, 104 Mont. 404, 66 P.2d 774 (1937); *State v. McAlister*, 96 Mont. 348, 30 P.2d 821 (1934); *State v. Tunender*, 182 Neb. 701, 157 N.W.2d 165 (1968); *cf. United States v. Simpson*, 436 F.2d 162 (D.C. Cir. 1970) (false assurance that particular sentence would follow guilty plea does not render plea invalid but false assurance that attorney had entered plea agreement with trial judge does invalidate plea).

One judge has suggested that an attorney's "mere prediction" should itself invalidate a guilty plea in certain circumstances. In *People v. Gray*, 29 Mich. App. 301, 304, 185 N.W.2d 123, 124 (1970), the defendant had been sentenced to a term of three to 10 years. He testified with the support of other witnesses that his attorney had assured him of an award of probation if he pleaded guilty. The attorney, however, testified that he had told the defendant only that there was a "reasonable chance for probation." In a separate concurring opinion, Judge Charles L. Levin observed:

Far too frequently claims of this kind are made and, while many, perhaps most, are baseless, as long as we permit, indeed encourage by the plea-bargaining process, lawyers to "merely predict" to their clients that they may be placed on probation, we must expect that accused persons, grasping for straws, will not stop to scrutinize with lawyer-like care the words used by a trusted representative and confidant, an officer of the court, and will share their lawyer's mere "hope" and act on it.

....  
[T]he issue is not whether particular words were used; the true question is, *was [the defendant] led to believe that he would be placed on probation?*

The line between a promise and an expression of hope, expectation or a mere prediction, can be most subtle. . . . [A]t various times in our lives we all justifiably rely and act upon assurances which could not technically be called unconditional promises.

Here the expression was by a seasoned lawyer to his youthful client. In such a case, I would think that a strong disclaimer by the lawyer should be required to avoid misleading the client; not a mere incantation of words: "It is, of course, up to the judge."

29 Mich. App. at 307; 185 N.W.2d at 126.

Judge Levin would probe more deeply into the lawyer-client relationship than most other judges. Under the guilty-plea system, a lawyer would plainly be derelict in his duty if he *failed* to offer a prediction of the consequences of a client's choice of plea, and most courts are understandably reluctant to police the sufficiency of the explanation that a lawyer provides to supplement his prediction. It may be doubted, moreover, that even a "strong disclaimer" would make very much difference, in light of the psychological considerations that Judge Levin described.

52. 275 F. Supp. 508 (E.D.N.Y. 1967).

## The Defense Attorney's Role in Plea Bargaining

duced a plea of guilty by assuring the defendant that he would not be sentenced to jail, but the defendant was later sentenced to a two-and-one-half to five-year term of imprisonment. Judge Jack B. Weinstein wrote:

[V]oluntariness connotes a state of mind of an actor. If the actor—i.e., the defendant—believes that a promise has been made, the effect on his state of mind is exactly the same as if such a promise had in fact been made.

....

It cannot always be assumed that the presence of counsel automatically insures that the defendant has not been misled into pleading guilty. Recent writings suggest that there are instances where defense counsel have considered their own rather than their clients' interest in disposing of a case by guilty plea.<sup>53</sup>

A particularly profitable form of defense-attorney fraud is the representation that "the fix is in."<sup>54</sup> Judge Arthur L. Alarcon of Los Angeles said that he was "shocked out of his shoes" when a court official reported overhearing the statement of a defense attorney following a conference in chambers concerning a request for a continuance. "It's in the bag," the attorney told his client, "but it will cost you an extra \$500." After this incident, Judge Alarcon began insisting on the presence of the defendant at every chambers conference.<sup>55</sup>

53. *Id.* at 516, 518. The Second Circuit has, however, disavowed the *Thurmond* standard as "wholly subjective" and as an invitation to "use a guilty plea as a mere trial balloon to test the trial judge's attitude." *United States ex rel. LaFay v. Fritz*, 455 F.2d 297, 303 (2d Cir.), cert. denied, 407 U.S. 923 (1972). But see *Mosher v. LaVallee*, 491 F.2d 1346 (2d Cir. 1974).

54. See Newman & McMoyr, *Issues of Propriety in Negotiated Justice*, 47 DEN. L.J. 367, 398 (1970).

55. Judge Alarcon recognized that when a defense attorney's goal is to "con" his client, he can, of course, fabricate other meetings and other transactions.

Los Angeles prosecutor John W. Miner recalled a "cop-out lawyer" whose regular practice was to emerge from a conference in the trial judge's chambers and place his arm around the prosecutor's shoulders. He would then say something like, "How are you, John? Let's get together for lunch one of these days." Miner suspected, however, that the conversation would be reported rather differently to the defendant: "I got the deal, but you'd better come up with an extra 1000 for the judge and 300 for the prosecutor."

There is some evidence that offenders themselves have begun to use the term "fixer" to refer, not just to the middleman in a bribery transaction, but to any lawyer who specializes in bargaining pleas. B. JACKSON, *supra* note 10, at 141 n.10. From the worldly perspective of these offenders, there is apparently not much difference between securing a "break" by paying cash and doing the same thing by conferring an economic benefit upon the people who finance (or fail to finance) criminal trials.

Of course, offenders may conclude that their attorneys have engaged in bribery even when the attorneys themselves have made no effort to convey that impression, and the ordinary workings of the guilty-plea system may sometimes lend color to this assumption. Peter Petkas, a University of Texas law student, interviewed inmates of the Diagnostic Unit of the Texas Department of Corrections in 1970. He found that questions about judges, policemen, jailers, and prosecutors rarely generated a more intense response than, "He was all right," or "I guess he was doing his job." Questions about defense attorneys, however, evoked stronger opinions. Many inmates were bitter about the rep-



Percy Foreman said of the cop-out lawyers, "They are worse than hijackers. They steal not only money but life and liberty as well. Moreover, the hijacker is not such a hypocrite. He does not pretend that his theft is in the victim's interest." As the poet John Gay observed 250 years ago:

An open foe may prove a curse,  
But a pretended friend is worse.<sup>56</sup>

Today's guilty-plea system provides extraordinary opportunities for dishonest lawyers. Not only does it permit a rapid turnover of paying clients and depend to a significant extent on personal relationships, but the lawyer renders his most important service in an informal bargaining session behind closed doors. His performance is not subject to review by the people who pay for it or by anyone else. Although occasional dishonesty would undoubtedly occur in any system of criminal justice, a system in which all or most cases went to trial would probably offer fewer opportunities for abuse. Some lawyers might, of course, continue to handle their cases with the minimum effort in such a system.<sup>57</sup> Nevertheless, the established forms and procedures of the trial process, coupled with the greater visibility of the attorney's performance, would probably make this minimum very different from what it is today.<sup>58</sup>

resentation that they had received; others viewed their attorneys with admiration. Typical of the latter category was an inmate serving a five-year sentence who claimed to have paid his attorney 2200 dollars in cash as well as a house and lot worth 5000 dollars. The inmate said of his lawyer, "For me he's next to Jesus Christ. . . . Of course something must have gone under the table since they had all the evidence they could have wanted to put me away for life." P. Petkas, *Attitudes of Newly Arrived Inmates at the Texas Department of Corrections*, Spring 1970 (unpublished paper on file at the University of Texas Law School Library); cf. Newman & NeMoyer, *supra* note 54, at 398:

All that a defendant may know is that he has paid his attorney a certain set sum, and in return the lawyer has been able to obtain some sort of "deal" which results in a lesser charge or sentence (or both) than he expected when arrested. It has been suggested that some attorneys permit this misapprehension of a "fix" to exist in order to justify fees. In short, they do not disabuse the client of his belief that the court, the police officers, and/or the prosecuting attorney have been "taken care of" in order to obtain the lesser charge or the lenient sentence.

See also ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION § 3.3, comment at 207-08 (1970) [hereinafter cited as ABA STANDARDS].

56. J. GAY, *Fables: The Shepherd's Dog and the Wolf*, in *THE POETICAL WORKS OF JOHN GAY* 249 (G. Faber ed. 1969), quoted in *Spano v. New York*, 360 U.S. 315, 323 (1959).

57. Cf. *People v. Bennett*, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972). This case reveals that a lazy lawyer may undertake a trial despite a total lack of preparation, but the case also illustrates how incongruous this behavior becomes in contexts other than the guilty-plea system.

58. Some observers seem to reject automatically any suggestion that institutional arrangements can affect human behavior; from their perspective, no failure that can be attributed to human shortcomings can ever reflect adversely upon "the system" as well. E.g., H. SUBIN, *supra* note 33, at 114:

## The Defense Attorney's Role in Plea Bargaining

In addition and perhaps more importantly, the guilty-plea system subjects even honest and conscientious lawyers to temptations that have no place in a rational system of administering justice. I therefore turn to examine the financial pressures on responsible and ethical private defense attorneys. For obvious practical reasons, defense attorneys in criminal cases attempt to collect their fees in advance.<sup>59</sup> Like other lawyers, their primary asset is their time, but unlike other lawyers, they cannot wait until they have rendered a particular service and then submit a bill reflecting the number of hours they have spent. Only 13 of the 311 defense attorneys who responded to a survey by Ryan Petty said that they ever based their fees on an hourly rate, and none of these 13 lawyers said that they used this method in a majority of their cases.<sup>60</sup> With the usual method of billing clients in civil cases virtually eliminated, there are only a few standard ways in which a defense attorney can set his fee.

The attorney may, at the initial interview, announce a fee only for the preliminary hearing or for the period before trial.<sup>61</sup> He may tell his client, "If the case goes upstairs [or to trial], I'll talk to you again." This sort of fee-setting results in a relatively small fee when the lawyer does not invest the substantial amount of time required for a trial, but only a few defense attorneys reported that they set their fees in this manner. Most attorneys noted that they did not want to go through the fee-collection process twice. Other lawyers pronounced this method "impractical." They observed that trial judges commonly refuse to allow an attorney to withdraw from a case once his appearance has been entered and that a lawyer might therefore find himself impressed into a trial for which he had not been paid.<sup>62</sup> Defense attorney Stanley S. Arkin of Manhattan added that he considered it "unethical for a lawyer to enter a case without the will to see it

If the prosecutor is merely trying to make his case with a minimum of effort, and the defense counsel is attempting to earn his fee the same way, there is no fair bargain and the gains to the defendant are likely to be illusory. But this situation is a function of poor representation by counsel rather than the unalloyed evil of the plea bargain.

Subin seems to overlook the fact that the very purpose of plea bargaining is to conserve resources and to enable attorneys "to make their cases with a minimum of effort."

59. See A. BLUMBERG, *supra* note 16, at 112; M. MAYER, *supra* note 13, at 161.

60. R. Petty, *supra* note 15. Petty used the mailing lists of the Texas Criminal Defense Lawyers Association and the Criminal Procedure Section of the State Bar of Texas to send questionnaires to 1000 criminal defense attorneys.

61. See A. BLUMBERG, *supra* note 16, at 113.

62. The attorneys noted that this judicial reluctance to permit withdrawals had increased greatly in recent years. Nevertheless, 71 percent of the lawyers who participated in the Petty study reported that trial courts in their jurisdictions ordinarily permitted withdrawals when the lawyers had been unable to collect their fees. R. Petty, *supra* note 15, at 16.

through," and Boston's Joseph S. Oteri rejected this method of fee determination on the ground that he "would not want to be tempted to take a case to trial simply because more money might be involved." Forty-eight percent of the attorneys who participated in the Petty survey said that they almost never set their fees "by stages" in this manner, and only 19 lawyers (six percent) said that they used this method in as many as 90 percent of their cases.<sup>63</sup>

The alternative to this sort of pay-as-you-go financing is for the lawyer to set a single fee—before he knows whether the case will be resolved by a guilty plea or by a trial.<sup>64</sup> Sixty-eight percent of the lawyers surveyed by Petty said that, in more than half of their cases, they set "a single fee at the outset of each case to cover all legal services through trial and sentencing."<sup>65</sup> This alternative plainly leads to the opposite temptation from that noted by Mr. Oteri: once the lawyer has collected his fee, his personal interests lie in disposing of the case as quickly as possible.

Lawyers who set a single fee at the outset of each case approach the task in somewhat different ways. Some lawyers maintain that they "smell" a case at the initial interview and request a lower fee when they anticipate a guilty plea than when they anticipate a trial. Indeed, only eight percent of the defense attorneys who participated in the Petty survey said that they considered the likelihood of a guilty plea irrelevant in determining their fees.<sup>66</sup> Nevertheless, a number of the lawyers whom I interviewed reported that they made no effort to assess the probability of a guilty plea at the time that they determined their fees. Instead, they set their fees as though each case were definitely going to trial. These lawyers commonly rationalized the windfalls that guilty pleas brought them by focusing on results: "Sure, I make a lot of money on a plea, but if the case went to trial, the defendant's sentence would probably be twice as long. How could I justify charging more for that?"<sup>67</sup>

63. *Id.* at 6.

64. Cf. Skolnick, *supra* note 27, at 61: "Usually, defense attorneys charge a set fee for a defense regardless of whether a trial takes place."

In 1966, the Houston Bar Association published a *Recommended Minimum Fee Schedule* for private attorneys to observe in criminal cases. Under this schedule, fees were established for different "types" of cases, and these fees remained the same whether or not a trial was required. Thus the recommended minimum fee was \$300 for an "ordinary felony," \$750 for a "second offender felony," and \$1,000 for a "habitual criminal felony." The schedule suggested that when a defense attorney appeared in a federal court he should "add minimum 20% to all equivalent charges for State Courts."

65. R. Petty, *supra* note 15, at 5-6.

66. *Id.* at 8.

67. The attorneys also noted that they sometimes "lose money" on exceptionally lengthy trials. "I have yet to see anyone rush in to reimburse me when I do," one attorney declared.

When a defense attorney sets a low fee because he "smells" a guilty plea, his initial assessment of the case undoubtedly tends to become a self-fulfilling prophecy. (The attorney's fee may, in fact, be inadequate to pay even the expenses of a trial.) Moreover, the problem does not entirely disappear when the attorney sets his fee at a higher level. Once the fee has been collected, a number of considerations may influence the attorney to accept a plea agreement that is not really in his client's interests. For one thing, unanticipated work may become necessary, and the attorney may think, "My fee was only \$1,000; I've made almost a dozen court appearances already; the trial may take five days; and the deal the district attorney is offering isn't too bad."

In addition, most lawyers find it difficult to turn away paying clients, and as a result they commonly undertake more work than they can effectively handle. Even lawyers of unquestioned integrity admit that the pressures of their office caseloads sometimes influence their judgment. As Los Angeles defense attorney Luke McKissack observed, "We tend to think of our clients as apples in a barrel. Although I try to do my best for each client, I am afraid that I sometimes think, 'Once I'm through with this case, I'll have more time for the others.' This temptation affects even the best of us, because the more time a lawyer puts in on any case, the more his other clients suffer." Houston's Percy Foreman agreed that "every lawyer feels the temptation." He added, "It is simply a matter of time. Many lawyers persuade themselves that they are serving their clients' interests when their dominant motivation, conscious or unconscious, is that a guilty plea saves days of work."

The problem is aggravated when a client has limited funds with which to pay his lawyer. I asked defense attorneys how large a fee they considered necessary before they could regard even the simplest trial as profitable.<sup>68</sup> Responses varied greatly, but more than half mentioned figures of \$1,000 or more.<sup>69</sup> Virtually all attorneys agreed that

68. I prefaced this question by noting that of course lawyers were not motivated exclusively by economic concerns and that they might appear in many trials that could not be regarded as profitable. My purpose was to explore the economic aspects of the problem and not to suggest that other aspects were unimportant.

69. I cannot claim that my sample was in any sense representative. Although I tried to interview defense attorneys of various ages, income brackets, and types of practice, my interviews undoubtedly included more than a random share of "well established" trial attorneys. One of these attorneys responded to my question about the sort of fee necessary for a trial by remarking that his own "basic retainer" for a routine case was \$5,000 and that it "would often be more." Another attorney, by contrast, said that a \$500 fee could make a simple trial "profitable for the average attorney." When lawyers seemed reluctant to mention any specific figure, I asked whether \$1000 would represent a realistic estimate of the fee necessary to make even a one-day trial financially rewarding. Some lawyers thought that this figure was "about right," and others maintained that when a lawyer's expenses and preparation efforts were taken into account \$1000 was "a low figure."

a guilty plea could be profitable when the defense attorney's compensation was a fraction of the amount necessary for a trial. Clients with limited resources may therefore find that they can pay an adequate fee for negotiating a guilty plea, but not enough to make a trial financially rewarding for a defense attorney.

In this in-between situation, some lawyers, such as Chicago's Jay I. Messinger, inform a prospective client, "You know, this money is not enough to pay for a trial." If the client does not then indicate a willingness to plead guilty, these lawyers refuse to take his case. A client's limited financial resources may, in this way, provide a further source of pressure for a plea of guilty.<sup>70</sup> Other attorneys, however, reject this approach. They sometimes undertake the defense of a client who cannot pay for a trial, but when they do, they are prepared to take the case to trial and to "lose money" if a satisfactory plea agreement cannot be arranged. This attitude of client-before-self is commendable. Nevertheless, as Los Angeles public defender Paul G. Breckenridge noted, "A lawyer may be consciously devoted to his client's welfare, but there probably remains some tendency for him to give only the service that he has been compensated for giving."

If a relatively small fee poses a special temptation for a guilty-plea disposition, no fee at all poses an even greater temptation. Percy Foreman observed, "When a lawyer sets his fee and then finds that he cannot collect it, he is particularly likely to persuade himself that a guilty plea is all he can afford." At a plea-negotiation session that I observed in the chambers of a Chicago trial judge, the defense attorney's representation of his client consisted of a single sentence: "I haven't been paid in this case, so I'm agreeable to whatever you want to do." Neither the prosecutor nor the trial judge seemed at all disturbed by this open confession of professional irresponsibility (although the judge did cast a quick glance in my direction).<sup>71</sup>

One highly respected defense attorney, who certainly did not countenance any form of cop-out profiteering, made a virtue of the fact that economic considerations sometimes limited the quality of the

70. Cf. Steinberg & Paulsen, *A Conversation With Defense Counsel on Problems of a Criminal Defense*, PRAC. LAW., May 1961, at 25, 33: "A great many persons charged with crime have some money, enough to make them ineligible to receive a free assignment of counsel, but not enough to finance the kind of defense that may be necessary."

71. The problem of the defaulting client may not be quite so common as the complaints of some defense attorneys make it seem. Most of the lawyers surveyed by Ryan Petty agreed that fewer than 30 percent of their clients ultimately paid less than the agreed-upon fee. Most lawyers noted that they ordinarily requested full payment before beginning work. R. Petty, *supra* note 15, at 15.

## The Defense Attorney's Role in Plea Bargaining

defense that he provided. Harris B. Steinberg of Manhattan said in 1961:

The defense counsel has to cut his cloth to the pattern of the fee that can be paid. It is just not feasible to put in \$10,000 worth of time and work in cases where the accused has \$500 to spend. This sounds cold-blooded and heartless but it is just a fact. No matter how much free work one wishes to do—no matter how much work at half-pay one wishes to do (and we do a good deal)—nevertheless, the sad fact is that lawyers must make a living for their families and themselves. In a curious way, a good lawyer is very realistic and quite objective about such matters. The very hard-headedness that makes him budget his time very carefully in some kind of relationship to his fee . . . is exactly the same kind of practicality that will make him a good defense lawyer.<sup>72</sup>

When the economic reality that Steinberg described is combined with the reality of the guilty-plea system, impartial defense representation seems more and more an abstract ideal. A majority of the lawyers who participated in the Petty survey reported that the energy which they devoted to a case sometimes varied with the amount of the fee that they were able to collect.<sup>73</sup>

The guilty-plea system is so engineered that a recommendation of a guilty plea almost always reflects a plausible evaluation of the defendant's interests.<sup>74</sup> If, for example, the case against the defendant is extraordinarily weak, that circumstance means only that the defendant will be offered extraordinary concessions in exchange for his plea.<sup>75</sup> By careful design, the apparent benefit of a guilty plea will usually match or exceed the apparent benefit of a trial. Thus, despite an attorney's most agonizing effort to predict the unpredict-

72. Steinberg & Paulsen, *supra* note 70, at 32. A recent *New Yorker* cartoon depicted a lawyer in conference with his client. The caption read, "You have a pretty good case, Mr. Pitkin. How much justice can you afford?" *NEW YORKER*, Dec. 24, 1973, at 52, *quoted in* Lobenthal, *supra* note 21, at 1221 n.22.

73. R. Petty, *supra* note 15, at 17.

74. For this reason, professional discipline probably does not represent a realistic approach to the problem of controlling the conduct of "cop-out lawyers." An attorney may have entered guilty pleas in hundreds of cases without ever taking a case to trial, but because the choice between a trial and a guilty plea almost invariably turns upon difficult questions of judgment, it would usually be difficult to show that the lawyer failed to represent his client's interests in any particular case. Were professional discipline then to be based upon a purely statistical inference of the lawyer's unwillingness to try meritorious cases, the effect might, at most, be to induce "cop-out lawyers" to meet a minimum "quota" of trials. The quality of representation that these lawyers provided in the great majority of cases would remain unchanged. Absent any effective mechanism to discern when a lawyer has sacrificed a client to his own financial interests, professional discipline seems inherently inadequate. A more workable answer lies in reforming the guilty-plea system itself.

75. See Alschuler, *supra* note 7, at 58-64; White, *supra* note 24, at 445, 451-52 (1971).

able, his final recommendation to his client will usually reflect his own temperament as much as the circumstances of the case. When the attorney also has a direct financial interest in his decision, it seems unlikely that anyone could entirely exclude this consideration from the decision-making process.

Sound policy cannot simply ignore conflicts of interest and rest instead upon a blind presumption of discipline and devotion to professional ideals. In 1927, the United States Supreme Court considered a state statutory scheme under which mayors sat as trial judges in criminal cases and received \$12 in "costs" for every defendant whom they convicted and fined but no compensation for cases that ended in acquittal.<sup>76</sup> At least one lower court had rejected a claim that this sort of compensatory scheme violated the due process clause by subjecting judicial officers to conflicts of interest: "We cannot recognize the force of this suggestion, founded as it is upon the assumption that justices will violate their oaths and the duties of their office . . . ."<sup>77</sup> Moreover, the state had argued that the amount of the mayors' fee was de minimis—so small that it was unlikely "to influence improperly a judicial officer in the discharge of his duty."<sup>78</sup>

The Supreme Court ruled, however, that although there was no proof of prejudice in the case at hand, a fee system contingent upon a trial judge's decisions necessarily violated the Fourteenth Amendment. Chief Justice Taft observed:

There are doubtless mayors who would not allow such a consideration as \$12 costs in each case to affect their judgment in it; but the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.<sup>79</sup>

Under today's guilty-plea system, it may be even more important that a defendant receive the impartial advice of an attorney than that his case be heard by an impartial judge. Nevertheless, a direct financial interest threatens this impartiality. Once again, this danger cannot be answered "by the argument that men of the highest honor and the greatest self-sacrifice" might advise their clients "without danger of injustice."<sup>80</sup>

76. *Tumey v. Ohio*, 273 U.S. 510 (1927).

77. *Herbert v. Baltimore Co.*, 97 Md. 639, 644, 55 A. 376, 378 (1903).

78. 273 U.S. at 524.

79. *Id.* at 532.

80. See generally *Ward v. Village of Monroe*, 409 U.S. 57 (1972); *Peters v. Kiff*, 407 U.S. 493, 502-04 (1972) ("[E]ven if there is no showing of actual bias . . . , this Court has

## The Defense Attorney's Role in Plea Bargaining

Noneconomic considerations may also influence well-motivated defense attorneys to recommend plea agreements that are not truly in their clients' interests.<sup>81</sup> When an attorney lacks confidence in himself, is not entirely certain how our informal system of criminal justice operates, or simply takes seriously his responsibility for a defendant's liberty, a plea of guilty is likely to appear the safe and secure course. A decision to go to trial is, in effect, a decision to "go for broke," and thus is not a choice that a cautious and careful lawyer—alert to the danger of reprisal—can lightly undertake.

The plea bargaining system plainly rests on the fact that defendants convicted at trial usually receive more severe sentences than defendants convicted by guilty pleas.<sup>82</sup> When a defense attorney takes a case to trial and loses, it can therefore be seen in retrospect that he probably made the wrong decision for his client. The attorney's apparent error in judgment becomes especially vivid when he has rejected a plea agreement calling for a specific sentence only to find, after trial, that this choice has cost the defendant several years of his life. Because the choice between a guilty plea and a trial cannot be based on certain knowledge, the attorney might, of course, make exactly the same decision again in the same circumstances, and he might be entirely wise to do so. On the occasion in question, however, he undeniably gambled with another person's liberty and lost.

A decision to enter a plea agreement, by contrast, can never be proven "wrong"; whatever the bargain, the attorney can always tell

held that due process is denied by circumstances that create the likelihood or the appearance of bias.... It is in the nature of the practices here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce"; *In re Murchison*, 349 U.S. 133, 136 (1955) ("Fairness of course requires an absence of actual bias.... But our system of law has always endeavored to prevent even the probability of unfairness").

When a fee arrangement may lead a lawyer to demand a trial that is not truly in his client's interests, a court may be much quicker to find a conflict of interest than when the opposite problem is presented. In *United States ex rel. Simon v. Murphy*, 349 F. Supp. 818 (E.D. Pa. 1972), a defense attorney agreed to collect his fee from life insurance proceeds that would be paid only if the defendant were acquitted of murder. The court said of this contingent-fee arrangement: "It is hard to imagine a more striking example of blatant conflict between personal interest and professional duty.... A conflict of interest arises where the lawyer is faced with the task of giving advice to the client on optional courses of action where the lawyer stands to benefit personally from the adoption of one course to the exclusion of the other." *Id.* at 823.

81. If, for example, a lawyer doubts his ability as a trial advocate, a negotiated plea is likely to seem especially appealing. Several defense attorneys told me that the longer they had practiced, the more likely they had become to reject prosecutorial offers and to take their cases to trial. Contrary to my original expectation that younger lawyers would, as a rule, be more attracted to the prospect of appearing before a jury, these lawyers explained that they now "knew better how to try a case," that they were "alert to triable defenses that they might have overlooked in the past," and that they had "developed more confidence in themselves in the courtroom."

82. See, e.g., ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 1971, at 13-14 (1973) (exhibits VII & VIII) [hereinafter cited as *FEDERAL OFFENDERS IN U.S. DISTRICT COURTS*].



himself that the situation would probably have been worse had the defendant stood trial. The visibility of a "wrong" decision to stand trial may, in this way, provide a further psychological impetus for lawyers to recommend pleas of guilty to their clients. Virtually every aspect of today's system of criminal justice, in short, seems designed to influence defense attorneys to adopt the motto: when in doubt, cop him out.

## II. The Performance of the Public Defender Compared With the Performance of the Private Attorney

The economic interests of private defense attorneys almost invariably favor pleas of guilty. Public defenders, by contrast, are salaried lawyers whose income does not depend upon the amount of time devoted to individual cases or the methods by which cases are resolved.<sup>83</sup> Nevertheless, in most jurisdictions, public defenders enter guilty pleas for their clients as frequently as private attorneys,<sup>84</sup> and in some jurisdictions, more often.<sup>85</sup>

83. In this article, I use the term public defender to refer to any salaried lawyer whose full-time job is representing indigent defendants in criminal cases. This use is, of course, somewhat imprecise, for it includes the "private defender" whose income comes mainly from charitable contributions or other nongovernmental sources.

Although only 28 percent of state court jurisdictions have established public defender systems, these systems provide the most common source of indigent representation in large cities. As a result, public defenders now serve almost two-thirds of the United States population. NATIONAL LEGAL AID AND DEFENDER ASS'N, *THE OTHER FACE OF JUSTICE* 13 (1973) [hereinafter cited as *THE OTHER FACE OF JUSTICE*].

84. The San Francisco Committee on Crime noted "a deep-seated antagonism toward the San Francisco Public Defender's Office among minority groups" and found that "by far the most persistent criticism is that the office is reluctant to go to trial for its clients." Nevertheless, the Committee concluded that this criticism was unjustified. 4.2 percent of all felony defendants represented by the public defender went to trial; the overall trial rate for felony defendants was only slightly higher—4.9 percent. SAN FRANCISCO COMMITTEE ON CRIME, *A REPORT ON THE SAN FRANCISCO PUBLIC DEFENDER'S OFFICE* 4-7, A-2 (1970) [hereinafter cited as *REPORT ON THE SAN FRANCISCO PUBLIC DEFENDER'S OFFICE*].

During 1970, 96 percent of all convictions in cases in which the Legal Aid Society of New York City appeared were by plea of guilty. LEGAL AID SOCIETY OF NEW YORK, *NINETY-FIFTH ANNUAL REPORT* 7 (1970). At the same time, 96 percent of *all* convictions in the felony courts of New York City were by plea of guilty—a fact which suggests that retained attorneys probably entered guilty pleas at about the same high rate. JUDICIAL CONFERENCE OF THE STATE OF NEW YORK, *SEVENTEENTH ANNUAL REPORT* A77 (1972) (table 12). Abraham Blumberg found that although retained attorneys in Manhattan were ultimately as likely to recommend guilty pleas to their clients as Legal Aid attorneys, the Legal Aid attorneys were much more likely to recommend guilty pleas at the initial client interview. A. BLUMBERG, *supra* note 16, at 93 (data based on interviews with convicted defendants).

85. Lee Silverstein studied 30 counties with defender systems in 1962. He found that in 20 of these counties the clients of public defenders pleaded guilty more frequently than did the clients of private attorneys. In five counties, this pattern was reversed, and in the remaining five counties, there was no significant difference in the guilty-plea rates of the two groups of defendants. L. SILVERSTEIN, *DEFENSE OF THE POOR IN CRIMINAL CASES IN METROPOLITAN STATE COURTS* 53 (1965).

## The Defense Attorney's Role in Plea Bargaining

Some public defenders seem even to make a virtue of their special readiness to enter pleas of guilty. Sheldon Portman, the Public Defender in San Jose, told a National Defender Conference in 1969:

In an organized defender service, attorneys . . . attempt to settle their cases whenever possible and thereby avoid needless trials. An example of this is shown in our community in Santa Clara County, where, before the adoption of the defender system, an average of 11% of all felony cases were being tried, whereas the trial rate of our department has been an average of only 6%. . . . A former presiding judge of our Superior Court Criminal Division who was initially opposed to adoption of a public defender system recently expressed wholehearted approval for the program, stating that defendants are getting excellent representation and that trials are being cut to a minimum. The current presiding judge has stated that our defender program has "materially assisted the court in the administration of justice . . . at considerable savings to the taxpayers of Santa Clara County." . . . It is also noteworthy that, during the last fiscal year, all but one of our homicide cases were settled without trial.<sup>86</sup>

Dallin H. Oaks and Warren Lehman reported that public defenders in Chicago entered guilty pleas for 82 percent of the felony defendants whom they represented; the comparable guilty-plea rate for retained attorneys was only 68 percent. D. OAKS & W. LEHMAN, *A CRIMINAL JUSTICE SYSTEM AND THE INDIGENT* 156-67 (1968).

In the United States District Court for the Southern District of New York in fiscal 1966, 80 percent of all defendants with appointed attorneys (most of whom were public defenders) entered pleas of guilty. Only 58 percent of the defendants with privately retained counsel pleaded guilty. D. OAKS, *THE CRIMINAL JUSTICE ACT IN THE FEDERAL DISTRICT COURTS* 238 (Subcomm. on Constitutional Rights of the Senate Judiciary Comm., 90th Cong., 2d Sess., Comm. Print 1969).

In Philadelphia in 1965, only 27 percent of all criminal convictions were by plea of guilty. Specter, Book Review, 76 *YALE L.J.* 604, 605 (1967). The next year, the Defender Association of Philadelphia reported that a significantly higher proportion of the convictions in cases in which it had appeared had been by guilty plea—48 percent. *DIRECTORS OF THE DEFENDER ASSOCIATION OF PHILADELPHIA, THIRTY-THIRD ANNUAL REPORT* 26 (1967). But see Note, *Client Service in a Defender Organization: The Philadelphia Experience*, 117 *U. PA. L. REV.* 448, 468 (1969) (only 17 percent of defender cases ended in guilty pleas, a smaller figure than the overall percentage in Philadelphia).

The National Legal Aid and Defender Association (NLADA) recently reported on the basis of a national survey, "[T]he national average rate of guilty pleas was 68.5% among all felony defendants. . . . The rate of guilty pleas for reporting defenders in felony cases was 53.4%." *THE OTHER FACE OF JUSTICE*, *supra* note 83, at 30. In view of the fact that the guilty-plea rate of public defenders in almost every jurisdiction for which data are available seems to match or exceed the overall guilty-plea rate for that jurisdiction, these figures probably do not suggest that public defenders enter guilty pleas less frequently than private attorneys. They may at most suggest that public defenders enter guilty pleas less frequently than appointed attorneys in jurisdictions without defender systems. The method by which the NLADA calculated its averages (for example, averaging prosecutors' estimates of the guilty-plea rates in their own jurisdictions without "weighting" the responses to reflect the number of cases in each jurisdiction) may make any conclusion on the basis of these data somewhat suspect.

86. S. Portman, *The Necessity for an Organized Defender Office in a Highly Populated, High Crime Area* 2, 4-5, 1969 (unpublished). An edited version of Portman's talk appears in *REPORT OF PROCEEDINGS OF THE NATIONAL DEFENDER CONFERENCE* 55 (1969). Portman also declared:

The cost savings from the operation of a defender system on a cost-per-case basis

Although it is disturbing to see a defense attorney boast of the frequency with which he pleads his clients guilty, statistical comparisons of the guilty-plea rates of defendants represented by public defenders and those represented by private counsel cannot reveal the quality of service provided by either group of lawyers. Public defenders represent only the indigent, and to a far greater extent than defendants able to hire their own attorneys, these clients seem likely to exhibit the disadvantages associated with prior criminal records, pretrial incarceration, lack of education, and minority-group status. Different guilty-plea rates may therefore reflect only a different mix of clients for each group of lawyers. Moreover, a public defender, however capable and energetic, may be at a disadvantage in preparing a defense because his clients have not selected him. As an attorney appointed by the court, he is not an individual in whom his clients have chosen to place their personal confidence but simply represents the luck of the draw. In light of these differences and others that this article will explore, undifferentiated statistical comparisons of the work of public defenders and private attorneys cannot provide a meaningful basis for evaluating defender performance.<sup>87</sup>

Just as it is difficult to determine whether a public defender is more or less likely than a private attorney to recommend a plea of guilty in a particular case, it is difficult to determine empirically whether public defenders commonly obtain "better" or "worse" plea agreements than private attorneys. Lee Silverstein found that the clients of private attorneys were more likely to receive awards of probation than were the clients of public defenders, and he also found that, in many counties, the clients of private attorneys pleaded guilty to lesser

are considerable. During fiscal 1967-68, court-appointed counsel fees in cases where the Public Defender could not represent multiple defendants because of conflict of interests averaged \$150 in Santa Clara County. In contrast, the cost-per-case handled by our department was about \$50 per case.

At the same time, as mentioned before, our jury trial rate is 6%, compared to an average trial rate of about 11% before the establishment of a Public Defender system. In comparison, our neighboring county of San Mateo without a defender program had a 30% trial rate during 1967. Considering that the average cost for jury trials is about \$300 per day for judges, jurors and court attaches, this represents a considerable savings in a high-crime jurisdiction.

See also Eckart & Stover, *Public Defenders and Routinized Criminal Defense Processes*, 51 J. URB. L. 665, 666 (1974) (defenders' goal is to obtain a "satisfactory" rather than an "optimal" resolution of each case).

At oral argument in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), Bruce S. Rogow successfully urged extension of the right to counsel to all defendants threatened with imprisonment. He maintained that a public defender could handle 1000 misdemeanor cases per year, and he also argued that with an extended right to counsel "there could be a lot more guilty pleas." 10 CRIM. L. REP. 4201 (1972).

87. This point has been made elsewhere in greater detail. E.g., Dahlin, *Toward a Theory of the Public Defender's Place in the Legal System*, 19 S.D.L. REV. 87 (1974); D. OAKS, *supra* note 85, at 238-40; Skolnick, *supra* note 27, at 64, 67.

## The Defense Attorney's Role in Plea Bargaining

offenses more often than did the clients of public defenders.<sup>88</sup> However, Silverstein's study for the American Bar Foundation did not control for such variables as the offense charged, the defendant's bail status, and his prior criminal record. Studies that have controlled for these variables have usually found only minor differences in sentencing outcomes between cases in which public defenders were appointed and cases in which private attorneys were retained.<sup>89</sup>

Finally, statistical comparisons of public defenders and private attorneys suffer from their generality. Private attorneys commonly include the most respected trial practitioners as well as the most pathetic "cop-out hacks." To say that the performance of a defender office matches the "standard" of the private bar may thus be only to say that most defenders are neither as bad as the worst hangers-on nor as good as the best private attorneys. Professor Jerome H. Skolnick has suggested that attorneys should simply be classified as "cooperative" or "adversary" on the basis of their styles of practice. In a study of a major California jurisdiction, Skolnick found that the overwhelming majority of both private attorneys and public defenders fell into the "cooperative" category, and he concluded that general comparisons of public defenders and private attorneys were very likely to be misleading.<sup>90</sup> Moreover, the quality of defender offices varies greatly from one jurisdiction to the next, and although variations in performance within a single defender office usually seem less extreme than those within the private defense bar, these variations remain significant. Jackson B. Battle observed that in the Denver Public Defender office,

88. L. SILVERSTEIN, *supra* note 85, at 53-57.

89. See G. SMITH, A COMPARATIVE EXAMINATION OF THE PUBLIC DEFENDER AND PRIVATE ATTORNEYS IN A MAJOR CALIFORNIA COUNTY (1969) (apparent advantage of private attorneys in sentencing disappeared when other variables were held constant, but private attorneys remained somewhat more likely to secure dismissals or acquittals for their clients than public defenders); Taylor, Stanley, deFlorio & Seekamp, *An Analysis of Defense Counsel in the Processing of Felony Defendants in Denver, Colorado*, 50 DEN. L.J. 9 (1973) (even with other variables held constant, private attorneys retained an advantage in sentencing when defendants charged with felonies pleaded guilty to misdemeanors; in all other situations, the apparent advantage of private attorneys disappeared); Taylor, Stanley, deFlorio & Seekamp, *An Analysis of Defense Counsel in the Processing of Felony Defendants in San Diego, California*, 49 DEN. L.J. 233 (1972) (retained counsel secured more sentences of probation and fewer prison sentences than public defenders even with offense held constant, but bail status explained this disparity). Compare REPORT ON THE SAN FRANCISCO PUBLIC DEFENDER'S OFFICE, *supra* note 84, at 6, A2-A4 (defenders secured "more lenient" plea agreements than private attorneys but fewer acquittals); D. OAKS & W. LEHMAN, *supra* note 85, at 164 (table 32) (defenders' clients placed on probation more frequently than clients of retained attorneys) with Banfield & Anderson, *Continuances in the Cook County Criminal Courts*, 35 U. CHI. L. REV. 259, 303 (1968) (table 12) (charge reduction more likely when defendant represented by private attorney); Nagel, *Effects of Alternative Types of Counsel on Criminal Procedure Treatment*, 48 IND. L.J. 404, 415-16 (1973) (table 2) (suspended sentence more likely when defendant represented by private attorney).

90. Skolnick, *supra* note 27.

"one felony court defender incurred the displeasure of the entire judiciary partly because he took as many as 20 percent of his cases to trial. At the other extreme was a defender who had been assigned to felony court for three months and had yet to try a case."<sup>91</sup>

Nevertheless, the public defender does occupy a significantly different position in the criminal justice system than the private defense attorney. Although he is, of course, subject to many of the same pressures and temptations as the private attorney, he is free of others; and he also confronts some pressures, problems, temptations, limitations, and opportunities of his own. His institutional position apparently gives him both advantages and disadvantages in the plea-bargaining process, and I therefore turn to an assessment of this position.<sup>92</sup>

#### A. *Bureaucratic Symbiosis: The Question of Trade-Outs*

Perhaps the most common criticism of public defender systems is that defenders sacrifice some clients for the benefit of others. A defender assigned to a particular courtroom may well see more of the prosecutor assigned to that courtroom than he does of his wife, and when adversaries in the criminal justice system become too close, they may choose to help each other at the expense of the persons and the interests that they have been hired to serve. Moreover, with a grinding, overwhelming caseload, a public defender may "play for the average" and fail to represent individual clients with the vigor demanded by elementary concepts of professional responsibility. Edward Bennett Williams has put this indictment of defender systems as well as anyone:

[T]he public defender and the prosecutor are trying cases against each other every day. They begin to look at their work like two wrestlers who wrestle with each other in a different city every night and in time get to be good friends. The biggest concern of the wrestlers is to be sure they don't hurt each other too much. Apply that to the public defender and prosecutor situation, and it is not a good thing in a system of justice that is based on the adversary system.<sup>93</sup>

The crudest and most obvious form of favoritism for certain clients might be a kind of express bargaining, the trade-out, in which a de-

91. *Comparison of Defense Relationships*, *supra* note 21, at 123.

92. Of course, I do not dispute Skolnick's thesis that individual attorneys respond to institutional pressures and opportunities in widely different ways.

93. D. McDONALD, *THE LAW: INTERVIEWS WITH EDWARD BENNETT WILLIAMS AND BETHUEL M. WEBSTER* 10 (1962).

## The Defense Attorney's Role in Plea Bargaining

fender agrees to a guilty plea or a severe sentence for one client in exchange for a dismissal of charges or a lenient sentence for another.<sup>94</sup> I have, however, seen no evidence whatever that public defenders engage in this kind of bargaining even in isolated instances.<sup>95</sup> To be sure, I have seen public defenders mention past favors in seeking concessions for their clients. "Come on, my friend," a defender may say. "I went along with you in that burglary case last week. It's your turn to be reasonable." Private attorneys employ the same tactic, however, and with bargaining at this level of generality, it is usually difficult to tell whether past favors have truly affected the result.

Somewhat surprisingly, the only express trade-outs of which I am aware have involved retained attorneys rather than public defenders. In these cases, prosecutors and defense attorneys went beyond a general invocation of the spirit of reciprocity and explicitly conditioned a benefit for one defendant upon an action harmful to another. The cases all arose when private attorneys represented two or more defendants allegedly involved in a single criminal transaction. "In this situation," observed Boston attorney Joseph S. Oteri, "the district attorney always singles out one guy whom he believes to be the ring-leader. The D.A. doesn't care what he gives the other defendants so long as he gets a tough sentence for this one. A lawyer who represents multiple defendants is thus under strong pressure to sacrifice one of his clients for the benefit of the group."<sup>96</sup>

94. I have heard the term "trade-out" used simply as a synonym for plea bargaining, but the more common meaning seems to be the one suggested at this point in the text.

95. *Accord*, D. NEUBAUER, *supra* note 27, at 220; *Comparison of Defense Relationships*, *supra* note 21, at 131.

96. "A lawyer is *always* offered a package deal in a joint trial situation," agreed Oakland's Herman W. Mintz. He proceeded to describe a case in which he had even abandoned an appeal for a convicted client in exchange for a dismissal of charges against another.

In *United States v. Truglio*, 493 F.2d 574 (4th Cir. 1974), a defense attorney arranged a "package plea agreement" for five defendants. Under the agreement, two defendants pleaded guilty to felonies and one to a misdemeanor, while charges against the remaining two defendants were dismissed. Before the pleas were entered, the attorney told the court that one of the defendants, Truglio, had been reluctant to accept the agreement and to plead guilty to a felony. The Assistant United States Attorney immediately objected that if any of the defendants' guilty pleas were withdrawn or rejected by the court, "all bets were off."

Truglio did plead guilty, but he reconsidered and filed a motion to withdraw his plea prior to sentencing. He testified without contradiction about the pressures that his attorney had employed to induce the plea. The attorney had told Truglio that if he refused to accept the proposal, all five defendants would go to the penitentiary. More specifically, Truglio would be responsible for the fact that Karen Bonacci would serve 10 years in prison rather than a term of probation. In addition, the attorney threatened to withdraw as Truglio's counsel if he did not "cooperate." In this situation, the Fourth Circuit ruled that the attorney suffered from a conflict of interest and that the trial court should have permitted Truglio to withdraw his plea. *See Gallarelli v. United States*, 441 F.2d 1402 (3d Cir. 1971); *McCranie v. State*, 242 So. 2d 202 (Fla. Dist. Ct. App. 1970).

Oteri's analysis of the pressures encountered in representing more than one defendant was confirmed by attorneys in several jurisdictions, but Chicago's Sam Adam recalled a case in which the prosecutor's goal was not to insure severe punishment for a particularly culpable defendant but simply to maximize the number of convictions that he might obtain. The case involved two brothers charged with purse-snatching. One had a long criminal record, and the evidence against him was overwhelming. The other had no criminal record, and Adam maintained that he was innocent. "The State's Attorney exerted great pressure to get me to plead them both," Adam reported. "He offered the guilty brother an incredible deal, but it was available only if both defendants copped out. I refused to go along and, I am pleased to say, eventually won an acquittal for the innocent defendant."

Many appellate courts have formally sanctioned the trade-out process, at least when the defendants involved understood the situation. The leading case is *Kent v. United States*,<sup>97</sup> in which a defendant had allegedly pleaded guilty in exchange for a promise not to charge his fiancée as an accessory. Judge Bailey Aldrich wrote for the United States Court of Appeals for the First Circuit:

We are not prepared to say that it can be coercion to inform a defendant that someone close to him who is guilty of a crime will be brought to book if he does not plead. If a defendant elects to sacrifice himself for such motives, that is his choice . . . . Petitioner must show that he was subjected to threats or promises of illegal action.<sup>98</sup>

Judge Aldrich's analysis seems remarkably insensitive. If a person elects to pay a blackmailer for not revealing embarrassing information, that too is his choice. Despite the fact that it would not be "illegal action" for the blackmailer simply to reveal this information, the courts have refused to view the transaction as an opportunity for the blackmail victim to exercise his powers of choice and to "sacrifice himself" for motives that, to him, are valid. To the contrary, in innumerable contract situations, courts have insisted that there are some binds and boxes in which human beings should not be placed. Moreover, judges have often held out-of-court confessions involuntary when they were induced by threats to prosecute friends or relatives,<sup>99</sup>

97. 272 F.2d 795 (1st Cir. 1959).

98. *Id.* at 798-99.

99. *E.g.*, *People v. Trout*, 54 Cal. 2d 576, 584-85, 354 P.2d 231, 236, 6 Cal. Rptr. 759, 764 (1960); *Barnes v. State*, 199 Miss. 86, 23 So. 2d 405 (1945); *Bosket v. State*, 31 Wis. 2d

## The Defense Attorney's Role in Plea Bargaining

and quite apart from the quality of the choice involved, it is hard to see how trade-outs of one defendant for another further any rational objective of the criminal process. The fact that a person has "chosen" to go to prison in place of someone else surely cannot be sufficient reason for sending him there.<sup>100</sup> Nevertheless, courts have repeated Judge Aldrich's language in numerous cases in which defendants have "taken the heat" for confederates, friends, and family members.<sup>101</sup>

586, 598, 143 N.W.2d 553, 559 (1966). See generally *Lynum v. Illinois*, 372 U.S. 528, 531 (1963) (confession involuntary when suspect was threatened that she "could get 10 years and the children could be taken away"); *Rogers v. Richmond*, 365 U.S. 534 (1961) (threat to interrogate suspect's wife—conviction invalidated because trial court used improper standard in judging voluntariness). There are, however, some contrary cases. See generally 3 J. WIGMORE, EVIDENCE § 839 n.4 (J. Chadbourne rev. 1970).

100. In Dickens's *A Tale of Two Cities*, Sydney Carton used stealth to take the place of Charles Darnay at the guillotine:

"Are you dying for him?" she whispered.

"And his wife and child. Hush! Yes."

"O you will let me hold your brave hand, stranger?"

"Hush. Yes, my poor sister; to the last."

Had the jurisprudence of the guilty-plea system been accepted by French Revolutionary tribunals, there would have been no need for hushes. This noble transaction might have been entirely open. "If a person elects to sacrifice himself for such motives, that is his choice," a judge might have said.

101. For example, in *Latham v. State*, 439 S.W.2d 737, 739 (Mo. 1969), the defendant and his stepsons were charged with stealing soybeans from a schoolhouse. The defendant pleaded guilty to this crime and was sentenced to a five-year term of imprisonment. On a motion to vacate his conviction, he maintained that he was innocent and that he had pleaded guilty only in response to a promise that his stepsons would be released on probation—an action that permitted the stepsons to care for the defendant's wife. The state apparently conceded the making of the promise, and the stepsons supported the defendant's claim of innocence by admitting that they alone had broken into the schoolhouse. The Missouri Supreme Court nevertheless concluded that these circumstances did not constitute "a sufficient reason in law to invalidate a plea of guilty." *Accord*, *United States v. Carlinio*, 400 F.2d 56 (2d Cir. 1968), cert. denied, 394 U.S. 1013 (1969); *Allen v. Rodriguez*, 372 F.2d 116 (10th Cir. 1967); *Cortez v. United States*, 337 F.2d 699 (9th Cir. 1964), cert. denied, 381 U.S. 953 (1965); *McGuffey v. Turner*, 267 F. Supp. 136 (D. Utah 1967); *Padgett v. United States*, 252 F. Supp. 772 (E.D.N.C. 1965); *Thomas v. Warden*, 236 F. Supp. 499 (D. Md. 1964), aff'd, 350 F.2d 395 (4th Cir. 1965); *People v. Duran*, 498 P.2d 937 (Colo. 1972); *State v. Baumgardner*, 79 N.M. 341, 443 P.2d 511 (1968); *State v. Hansen*, 79 N.M. 203, 441 P.2d 500, 504 (1968); *Combs v. Turner*, 25 Utah 2d 397, 483 P.2d 437 (1971).

James Vorenberg, Reporter for the American Law Institute's *Model Code of Pre-Arraignment Procedure*, once proposed that the Code prohibit concessions to any person other than the defendant as an inducement for the defendant's plea of guilty. The Council of the Institute, however, unanimously rejected this suggestion. ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE 68, 106-07 (Tent. Draft No. 5, 1972).

A law school casebook asserts, "There is no doubt that threats...of prosecution of family members will invalidate a plea of guilty made in response to those threats." The book cites no authority, however, and its statement is apparently based on wishful thinking. F. REMINGTON, D. NEWMAN, E. KIMBALL, M. MELLI & H. GOLDSTEIN, CRIMINAL JUSTICE ADMINISTRATION 568 (1969).

At least three courts have questioned Judge Aldrich's analysis in *Kent v. United States*, although they have not had occasion to disavow the *Kent* ruling. In *Crow v. United States*, 397 F.2d 284 (10th Cir. 1968), the defendant alleged that a prosecutor had threatened to file charges against an alleged accomplice unless the defendant pleaded guilty. The court of appeals held that the defendant was entitled to an evidentiary hearing on the truth of this assertion, because the prosecutor's threat, coupled with other circumstances, might have coerced the defendant's plea.

Similarly, in *State ex rel. White v. Gray*, 57 Wis. 2d 17, 203 N.W.2d 638 (1973), the defendant alleged that he had pleaded guilty in exchange for a dismissal of charges against his younger brother. The Wisconsin supreme court ordered an evidentiary hearing



Even if one wished to invest the kind of choice involved in a trade-out with the sanctity of contract, it would be necessary to insure that the choice was exercised by the defendant himself, not by an attorney seeking some advantage for his other clients.<sup>102</sup> Often, however, courts have seemed blind to the basic conflicts of interest that arise when a lawyer represents two or more defendants in a single case. They have, in the main, approached this problem by looking to the trial process and by asking whether the defenses available to a lawyer's various clients are compatible.<sup>103</sup> As Los Angeles defense attorney Luke H. McKissack observed, however, "The plea-negotiation and sentencing stages are much more important, and at both of these stages there is *always* a conflict of interest. The relative culpability of the defendants is always at issue, and when comparative judgments must be made, a lawyer cannot fairly represent more than one client."<sup>104</sup>

on this issue and said, "We conclude that the voluntariness of a plea bargain which contemplates special concessions to another—especially a sibling or loved one—bears particular scrutiny...." Nevertheless, the court found it unnecessary to decide whether these concessions were inherently improper.

The Pennsylvania supreme court questioned the *Kent* analysis in the context of a case in which the defendant had denied his guilt at the time that he pleaded guilty. *Commonwealth v. Dupree*, 442 Pa. 219, 222, 275 A.2d 326, 328 (1971). The court held that if a promise not to prosecute the defendant's wife constituted the "primary reason" for the defendant's plea of guilty, the plea would be invalid. *See also* *People v. Hollman*, 12 Mich. App. 231, 162 N.W.2d 817 (1968); *People v. Smith*, 37 Mich. App. 264, 194 N.W.2d 561 (1971) (hearing required on whether promise not to prosecute defendant's wife rendered plea involuntary).

102. *See* ABA STANDARDS, *supra* note 55, § 6.2(c): "It is unprofessional conduct for a lawyer to seek or accept concessions favorable to one client by any agreement which is detrimental to the legitimate interests of any other client."

103. *E.g.*, *United States v. Lovano*, 420 F.2d 769, 772 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970); *Chavira Gonzales v. United States*, 314 F.2d 750 (9th Cir. 1963); *Commonwealth v. Resinger*, 432 Pa. 398, 248 A.2d 55 (1968).

Some courts have suggested that conflicts of interest are less likely to arise in the guilty-plea process than in the trial process—a view that this article contends is exactly backwards. *Williams v. State*, 214 So. 2d 29 (Fla. Dist. Ct. App. 1968); *Mitchell v. State*, 213 So. 2d 289 (Fla. Dist. Ct. App. 1968); *State v. Reppin*, 35 Wis. 2d 377, 151 N.W.2d 9 (1967). A few courts have also refused to find conflicts of interest in guilty-plea cases under circumstances in which it would plainly have been improper for an attorney to represent a particular defendant at trial. *E.g.*, *Pressly v. State*, 220 Md. 558, 155 A.2d 494 (1959). And other courts have employed an even more direct method of shunting aside claims of conflict of interest in guilty-plea cases. They have held that a voluntary guilty plea simply waives any claim of conflict of interest. *United States v. Harbolt*, 426 F.2d 1346 (5th Cir. 1970); *Curry v. Burke*, 404 F.2d 65, 67 (7th Cir. 1968); *Vanater v. Boles*, 377 F.2d 898 (4th Cir. 1967); *Dukes v. Warden*, 161 Conn. 337, 288 A.2d 58 (1971), *aff'd*, 406 U.S. 250 (1972). This approach would, perhaps, be unobjectionable if courts automatically concluded that a conflict of interest on the part of a defendant's attorney rendered the defendant's guilty plea involuntary. That circular formula, however, is not what the courts have had in mind.

104. Although this conflict of interest at the plea bargaining and sentencing stages constitutes a significant reason for prohibiting multiple representation altogether, the practice also presents other dangers:

The prosecutor may be inclined to accept a guilty plea from one of the co-defendants, ...but this might harm the interests of the other defendant. The contrast in the dispositions of their cases may have a harmful impact on the remaining defendant;

## The Defense Attorney's Role in Plea Bargaining

Both the accuracy of McKissack's perception and the reluctance of the courts to accept it were illustrated by a decision of the United States Supreme Court in 1972. The defendant in *Dukes v. Warden*<sup>105</sup> had hired an attorney to represent him in a narcotics prosecution, but the attorney ultimately secured a plea agreement that, if fully carried out, would have resolved several other prosecutions pending against the defendant as well. In one of these other cases, the attorney had been retained by two alleged accomplices of the defendant. There was no direct evidence that this circumstance had influenced the advice that the attorney gave his client, but the attorney conceded that he had been "maybe a little forceful" in urging the defendant to plead guilty despite his own protestations of innocence. After the defendant's guilty plea had been entered, the attorney entered guilty pleas for the two alleged accomplices and appeared on their behalf at a sentencing hearing. At this hearing, he argued that the alleged accomplices had "come under the influence" of the defendant and that this influence was "the cause of the whole situation." The attorney added that the co-defendants merited favorable consideration because their cooperation with the authorities had "capitulated [the defendant] into taking a plea on which he will shortly be removed from society." The attorney felt competent to advise the court in this way because, he said, "I was on both sides of the case."<sup>106</sup> Thereafter, the attorney represented the defendant at the defendant's own sentencing hearing.

The Supreme Court found no constitutional violation in this situation, and its opinion recited a variety of circumstances in support of this conclusion. Among them was the fact that the defendant had known of the attorney's representation of the alleged accomplices and had nevertheless expressed satisfaction with his counsel at the time that he pleaded guilty. If, however, the Court had been persuaded of the inadequacy of the defense attorney's representation, it seems doubtful that it would have found in this statement a waiver of the

the one who pleads guilty might even, as part of the plea agreement, consent to testify against the co-defendant. Moreover, the very fact of multiple representation makes it impossible to assure the accused that his statements to the lawyer are given in full confidence. Defense counsel necessarily must confront each with any conflicting statements made by the other. . . . In this situation he may find that he must "judge" his clients to determine which is telling the truth, and his role as advocate would inevitably be undermined as to one if not both defendants.

ABA STANDARDS, *supra* note 55, § 3.5, comment at 213-14. The "standard" to which this commentary is attached merely provides: "The potential for conflict of interest in representing multiple defendants is so grave that ordinarily a lawyer should decline to act for more than one of several co-defendants except in unusual situations when, after careful investigation, it is clear that no conflict is likely to develop and when the several defendants give an informed consent to such multiple representation."

105. 406 U.S. 250 (1972).

106. *Id.* at 254.

Sixth Amendment right to the "untrammelled and unimpaired" assistance of counsel.<sup>107</sup>

There were plainly two stages of the proceedings at which the defendant might have been prejudiced by his attorney's representation of the co-defendants—choice of plea and sentencing. Apparently, however, the Court did not consider whether the defendant had been deprived of adequate representation by virtue of the fact that his attorney had disparaged him before the judge who later determined his sentence. The Court asserted that "petitioner's sole contention in this proceeding" was that the conflict of interest had "affected his plea."<sup>108</sup>

So stated, the issue seems extremely difficult to resolve. The defense attorney himself might not have known his mental processes well enough to determine what influenced his advice to the defendant,

107. See *Glasser v. United States*, 315 U.S. 60, 70 (1942). In *Dukes*, the defendant, prior to pleading guilty, had sought unsuccessfully to discharge his attorney, and his "yes sir" expression of satisfaction was apparently exacted by the trial court as a condition of receiving his plea. Moreover, a criminal defendant cannot be truly aware of the dangers of multiple representation until he knows the twists, the turns, and the subtleties of the plea-negotiation and sentencing processes, and it therefore seems doubtful that many defendants are in a position to make an intelligent choice. See *Campbell v. United States*, 352 F.2d 359, 360 (D.C. Cir. 1965) ("defendants are unlikely to be sufficiently aware of their rights to object to a possible conflict of interest"); *Holland v. Boles*, 225 F. Supp. 863 (N.D.W. Va. 1963) (waiver of conflict of interest requires, not merely an awareness of the facts, but a full appreciation of the legal consequences). In *Dukes*, the Supreme Court did not focus on this question of waiver, just as it did not focus on any of the other issues in the case. Instead, it recited a number of factual circumstances that seemed adverse to the defendant and announced its result.

108. The Court thus avoided a difficult issue. If a defense attorney were to disparage a client long after the client had been convicted and sentenced, the attorney's action—however unseemly—would surely provide no basis for invalidating the already final conviction. If, however, in the absence of a plea agreement, an attorney were to disparage a client before a judge who would soon determine the client's sentence, it would seem plain that the client had not received the effective assistance of counsel in the sentencing process.

The situation in *Dukes* falls somewhere between these two illustrations. In legal theory, of course, it closely resembles the second case: although the defense attorney had secured a plea agreement, the defendant had merely agreed to plead guilty in exchange for a recommendation by the prosecutor concerning his sentence. The bargain was in no sense binding upon the court, and the judge remained free to impose a sentence either more lenient or more severe than that contemplated by the agreement. The attorney's harsh remarks about his client thus seemed likely to prejudice the client before the judge who was about to sentence him.

In reality, however, trial courts so rarely depart from the sentences recommended by prosecutors pursuant to plea agreements that the situation in *Dukes* may more closely resemble the first case. When the defense attorney disparaged his client, he probably assumed that the client's case had been finally resolved through plea bargaining and that his remarks could therefore not harm the client's interests. In all probability, moreover, the defense attorney was right: the chance that his disparagement influenced the defendant's sentence seems remote.

To adopt this "realistic" analysis would be to recognize that today's guilty-plea system has largely converted such things as presentence reports and sentencing hearings into pious gestures designed to ratify foreordained results. The Supreme Court might therefore have been torn between a desire to preserve the fiction that judges still have a significant role in the sentencing process and a desire not to allow a defendant who "got a good deal" to escape on the basis of the "technicality" that he had not yet been sentenced.

## The Defense Attorney's Role in Plea Bargaining

and the Supreme Court was certainly in no position to read his mind. It does seem entirely possible that the defendant in *Dukes* suffered no injury because his lawyer represented the alleged accomplices. The lawyer may, indeed, have been a master of manipulation—first securing the best possible agreement for the defendant, then turning this agreement to the advantage of his other clients, and finally maneuvering his way through the defendant's sentencing hearing without upsetting the earlier bargain. However, it is also possible that from the outset the lawyer saw the defendant's guilty plea as a "selling point" for his other clients. If these clients did in fact "capitulate" the defendant into his plea, the lawyer just might have had a hand in it.

In a sense, therefore, the ultimate issue in *Dukes* was who bore the burden of proof on the question of prejudice. Without discussing this issue explicitly, the Court resolved it by observing that "nothing in the record" indicated that the attorney's alleged conflict of interest had influenced the defendant's plea.

This statement and others in the Court's opinion depart significantly, at least in tone, from what had previously been the leading decision on conflicts of interest in criminal cases. In its 1942 decision in *Glasser v. United States*,<sup>109</sup> the Supreme Court relied upon a defense attorney's "possible" conflict of interest to invalidate a conviction. It said:

To determine the precise degree of prejudice sustained by [the defendant] . . . is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.<sup>110</sup>

The problems inherent in representing more than one defendant in a single case seem almost never to arise for public defenders, and the reason is simple. Whenever two or more indigent defendants appear in a single case, public defenders are quick to suggest a conflict of interest. Without any real examination of the compatibility or incompatibility of the various defendants' interests, most trial courts unhesitatingly appoint separate counsel for each defendant.

109. 315 U.S. 60 (1942).

110. *Id.* at 75-76. I do not mean to suggest that the question of burden of proof must go all one way or all the other. In my view, the United States Court of Appeals for the District of Columbia has articulated a sound and workable approach:

[O]nly where "we can find no basis in the record for an informed speculation" that appellant's rights were prejudicially affected" can the conviction stand. . . . In effect, we adopt the standard of "reasonable doubt" . . . .

*Lollar v. United States*, 376 F.2d 243, 247 (D.C. Cir. 1967).

The reason why private attorneys do not follow the same procedure is equally simple. Two clients usually pay more than one, and three pay more than two. This reason seems plainly inadequate to justify multiple representation, in light of the inherent conflicts of interest that arise during plea negotiation and sentencing proceedings. At these stages of the criminal process, it is almost invariably to each defendant's advantage to cast the primary blame upon "the other guy"—or, at least, to minimize such charges if they are made against him. One way or another, the relative culpability of each individual defendant is always an underlying issue.<sup>111</sup>

111. The failure of the courts simply to prohibit multiple representation is not easy to explain. Judicial opinions have recognized that "the possibility of a conflict of interest between two defendants is almost always present to some degree," *Morgan v. United States*, 396 F.2d 110, 114 (2d Cir. 1968), that there is, in fact, "usually a probability of conflicting interests," *Maye v. Commonwealth*, 386 S.W.2d 731, 733 (Ky. Ct. App. 1965), that "an individual defendant is rarely sophisticated enough to evaluate the potential conflicts," *Campbell v. United States*, 352 F.2d 359, 360 (D.C. Cir. 1965), and that "the burden placed upon the trial judge . . . to decide before trial whether separate counsel for co-defendants are required is an exceedingly onerous one," *Ford v. United States*, 379 F.2d 123, 125 (D.C. Cir. 1967). Moreover, even post-trial claims of conflict of interest remain difficult to resolve. The United States Court of Appeals for the District of Columbia Circuit once suggested the predicament of an appellate court in a statement that has special force for guilty-plea cases: "Like the famous tip of the iceberg, the record may not reveal the whole story." *Lollar v. United States*, 376 F.2d 243, 246 (D.C. Cir. 1967).

Despite this recognition of the problem, courts have failed to adopt the obvious solution. Without asserting any affirmative justification for multiple representation, they have insisted that a *per se* rule would be inappropriate. *E.g.*, *United States v. Alberti*, 470 F.2d 878 (2d Cir. 1972), *cert. denied*, 411 U.S. 919 (1973); *Pressly v. State*, 220 Md. 558, 155 A.2d 494 (1959). On the very rare occasions when the courts have sought justification for multiple representation, moreover, they have merely observed that this practice tends to simplify the trial process and to preserve a defendant's freedom to select the attorney he desires, even one retained by another party in the same case. *See Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965). It could equally be argued that when, in the interest of economy, both parties to a divorce action or other civil case seek to hire the same attorney, they should be allowed this "freedom of choice."

The attitude of many state courts concerning problems of joint representation is one of utter indifference. *See, e.g.*, *People v. Seymour*, 512 P.2d 635 (Colo. 1973); *McCrannie v. State*, 242 So. 2d 202 (Fla. Dist. Ct. App. 1970); *Delany v. State*, 475 S.W.2d 102 (Mo. 1971), *cert. denied*, 406 U.S. 948 (1972); *but see Commonwealth v. Breaker*, 456 Pa. 341, 318 A.2d 354 (1974); *Commonwealth ex rel. Whitling v. Russell*, 406 Pa. 45, 176 A.2d 641 (1962). Nonetheless, a few federal courts have adopted partial procedural solutions. One has said that under the Federal Criminal Justice Act, 18 U.S.C. § 3006A(b) (1970), separate counsel should initially be appointed for each indigent co-defendant, *Ford v. United States*, 379 F.2d 123 (D.C. Cir. 1967), and another has said that, in any case of joint representation, the trial judge should conduct a "careful inquiry," to satisfy himself "that no conflict of interest is likely to result and that the parties involved have no valid objection." *United States v. Deberry*, 487 F.2d 448 (2d Cir. 1973); *United States v. Alberti*, 470 F.2d 878 (2d Cir. 1972); *United States v. Lovano*, 420 F.2d 769, 772 (2d Cir.), *cert. denied*, 397 U.S. 1071 (1970); *Morgan v. United States*, 396 F.2d 110, 114 (2d Cir. 1968); *see Campbell v. United States*, 352 F.2d 359 (D.C. Cir. 1965).

However, a "careful inquiry" into potential conflicts of interest does not provide an adequate solution. It obviously consumes judicial resources that could be saved by a *per se* rule, and it is not apparent that the procedure gains anything that justifies the cost. To the contrary, even the defenders of multiple representation would not maintain that the presence of separate counsel would work serious injustice in any case. A pretrial hearing, by contrast, is necessarily predictive and prone to error, and despite the best efforts of a trial judge, unforeseen conflicts of interest may develop at trial or sentencing proceedings. Indeed, what was not apparent at a pretrial hearing may become apparent

## The Defense Attorney's Role in Plea Bargaining

The allegation that public defenders bargain away the rights of some defendants in return for concessions to others thus might better be leveled at some private defense attorneys. At a more subtle, psychological level, however, charges of public-defender favoritism for certain clients are harder to refute. A New York prosecutor put it this way:

A public defender cannot help but evaluate his clients, and the vigor of his advocacy does vary from case to case. It would be wrong, however, to conclude from this fact that the public defender provides less *effective* representation than the private attorney. If a public defender says to a prosecutor, "Look, I really think that this person is innocent," the prosecutor will usually take a hard look at the case. The odds are strong that the case will be dismissed—stronger than if the defendant had hired a private attorney. Thus a public defender may provide *more* effective representation for the one client in one hundred who really is innocent.

This analysis of the relationship between prosecutors and public defenders was confirmed by no less a figure than Chief Justice Earl Warren. In 1927, as District Attorney of Alameda County, California, Chief Justice Warren was instrumental in establishing a public de-

only upon appellate review. Litigation and relitigation may thus become necessary to resolve a problem that could easily have been eliminated at the outset. *Cf. Lollar v. United States*, 376 F.2d 243, 248 (D.C. Cir. 1967) (Bazelon, C.J., dissenting). Finally and most importantly, a pretrial hearing on potential conflicts of interest requires inquiry into the facts of the case, the available evidence, and the plans and strategies of the various defendants and their attorney or attorneys. As Judge Leonard P. Moore has observed, a pretrial inquiry into defense strategies seems likely to violate the defendant's Sixth Amendment right to counsel. *United States v. DeBerry*, 487 F.2d 448, 456 (2d Cir. 1973) (Moore, J., dissenting). Before adopting its current requirement of a careful pretrial inquiry into possible conflicts of interest, the Second Circuit had expressly rejected this approach for reasons similar to Judge Moore's, *United States v. Paz-Sierra*, 367 F.2d 930, 932 (2d Cir. 1966), *cert. denied*, 386 U.S. 935 (1967), but the Second Circuit did not advert to this objection when it changed its rule two years later.

The administrative simplicity of a *per se* rule does not constitute the primary reason for its adoption. Rather, Chief Justice Traynor made the basic point in an opinion for the California Supreme Court:

Conflicts of interest necessarily exist when the jury must fix the penalty for more than one defendant. Often the strongest argument that separate counsel can make on the issue of penalty is that his client was less culpable than the others.... In addition, he must be free to stress particular mitigating elements in his client's background or other individual mitigating factors that may not apply to a codefendant. Counsel representing more than one defendant is necessarily inhibited in making such arguments and in presenting evidence to support them. He cannot simultaneously argue with any semblance of effectiveness that each defendant is most deserving of the lesser penalty.

*People v. Chacon*, 69 Cal. 2d 765, 775, 447 P.2d 106, 112, 73 Cal. Rptr. 10, 16 (1968). Although the standard of conflict of interest articulated in this opinion is far more sensitive than that of most jurisdictions, a recent decision of the California supreme court emphasized that even that court has not adopted a *per se* rule against representing more than one defendant in a single sentencing proceeding. *In re Watson*, 6 Cal. 3d 831, 494 P.2d 1264, 100 Cal. Rptr. 720 (1972).

fender office for his county. Willard Shea was appointed as the first public defender, and in an address in 1969, the Chief Justice recalled their association:

When [Shea] was appointed, he came over to my office to become better acquainted. I said to him, "Mr. Shea, you and I are going to be sitting on opposite sides of the table for a long time, I hope, and we are going to have different viewpoints on the cases that come up. But I want to assure you that I do not want to convict any innocent man. And I am going to give you credit for not wanting to have any jail deliveries here, either. There ought to be a *modus vivendi* for us so that we can both do our duty, and, at the same time, be considerate of each other and of each other's duties."

He said, "That is fair enough, and I agree with that."

So, we made the agreement that, if at any time he believed in his heart that he was representing an innocent man, he could come to me, tell me so, and I would show him everything we had in the case. And if, after seeing the complete file, he still adhered to his belief that he had an innocent man, I would go with him to the judge and tell the judge that his, the public defender's, belief alone constituted a reasonable doubt in my mind as to the guilt of the man, and I would move to dismiss the case in the interest of justice. Mr. Shea said that that arrangement was agreeable to him.

During the seven or eight years we worked together, he would come to my office about five or six times a year and tell me that he thought he had an innocent man. And I would say to him, "Now, Willard, don't tell me that I have a weak case, don't tell me that I can not convict this man. You must tell me that, in your heart, you believe you are representing an innocent man."

Mr. Shea would reply, "Yes, that's right."

I would then show Mr. Shea everything we had in the file and ask him what he thought about it. Well, in more than half the cases, he would change his mind and would say, "Well, I guess we will go to trial." But, two or three times a year, he would adhere to his belief that he had an innocent man, and every time we would go down to the trial judge. I would show the trial judge what we had and would tell him that the opinion of the public defender was sufficient to create a reasonable doubt in my mind, and in the minds of the jurors as well, and I would request the judge to dismiss the case in the interest of justice. The judge always complied with my request. We went along for seven or eight years in that manner having a most pleasant association but, I assure you, a very active one, because he was vigorous in the defense of his clients.<sup>112</sup>

112. *Remarks of the Chief Justice to the National Defender Conference*, in REPORT OF THE PROCEEDINGS OF THE NATIONAL DEFENDER CONFERENCE 109, 110-11 (1969).

## The Defense Attorney's Role in Plea Bargaining

The kind of personal relationship that Chief Justice Warren described may influence the administration of justice in many contexts. Just as a trusted public defender may secure a dismissal by expressing his personal belief in a defendant's innocence, he may secure a lenient plea agreement by announcing, "I have come to know this defendant well, and I believe that he has truly reformed." To be sure, in most cases of plea negotiation, opposing lawyers do not plead for particular results on quite so personal a basis. Nevertheless, the lawyers' respect for each other's desires and judgments may remain a major factor in the bargaining process. A relationship of trust like the one between Chief Justice Warren and Mr. Shea seems natural, warm, human, and decent. It does, however, depart from the classic ideal of professional representation in criminal cases.

However unattractive—and guilty—a criminal defendant may be, our constitutional ideals suggest that he is entitled to the services of a knowledgeable individual whose job is to be unreservedly on his side. The Code of Professional Responsibility says simply, "A lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means,"<sup>113</sup> and implicit in this statement is the judgment that it is no part of a lawyer's job to evaluate his clients and to "push harder" for some than for others. If every defendant is equally entitled to the wholehearted advocacy and unreserved loyalty of his attorney, some clients cannot be more equal than others.<sup>114</sup>

When a lawyer seeks a special favor for a particular client on the basis of his own subjective evaluation, he inserts himself into the state's administrative criminal justice machinery and becomes a judge.<sup>115</sup> He also seriously undercuts the confidentiality of the attorney-client relationship. An attorney who urges his clients to "level" with him promises (at least implicitly) that a client's disclosures will not harm his interests. If, however, the attorney reserves the power to judge

113. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-101(A)(1). Of course this rule does not apply when a lawyer considers the "available means" unlawful or when his purpose in waiving a legal right is simply to advance his client's interests.

114. Cf. Harris, *supra* note 10, at 82: "A legal-aid lawyer in New York told me that if he thought a client was a 'good guy,' he did his best for him in court. 'If I don't think so,' he went on, 'I motion behind his back to the D.A. to raise his bail.'" See also Platt, Schechtner & Tiffany, *In Defense of Youth: A Case of the Public Defender in Juvenile Court*, 43 IND. L.J. 619, 630 (1968).

115. At trial, it is plainly improper for a lawyer to express his personal belief in a defendant's guilt or innocence. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-106(c)(4). However strongly a defense attorney is tempted to plead for a particular client on the basis of his own belief in the client's innocence, he is expected instead to confine himself to the evidence and to present himself as an advocate rather than as a judge or a "crime expert." It is unclear why different rules should apply in plea bargaining, although the casual and informal nature of the process would certainly undercut any effort to enforce this traditional limitation of the advocate's role.



the merits of each client's case and to vary his representation accordingly, his promises to his clients are false. The attorney may simply place a premium upon his clients' ability to "con" him, or at least the clients themselves may see it that way.<sup>116</sup> In any event, this approach to the practice of law converts an attorney's clients into supplicants. It encourages each defendant to view his lawyer as one more official who must be persuaded to be on his side. Under the classic view, by contrast, the lawyer should be there to begin with.<sup>117</sup>

Public defenders "may provide more effective representation for the one client in one hundred who really is innocent," but they also pay a price.<sup>118</sup> The practical consequences of "mutual trust" between a prosecutor and a defender (not of each other's honesty but of each other's concepts of justice) may become indistinguishable from those of a massive trade-out. An advantage to one client arises because the defender does not make the same effort for the others. Although never expressed in terms of explicit bargaining, this implicit trade-out may supply a basic governing principle in most negotiations between public defenders and prosecutors. As a convict in Connecticut summarized his perceptions of our system of criminal justice, "One hand washes the other."<sup>119</sup>

116. See generally J. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE*, ch. 4 (1972); *Comparison of Defense Relationships*, *supra* note 21, at 131: "A remark often heard from inmates at county jail was that public defenders were 'cop-out men' who would 'sell them down the river.' These clients seemed especially afraid that if they admitted their guilt to a defender and told him the truth, he would cooperate in seeing them punished."

117. Of course the admonition to serve one's clients rather than judge them runs counter to ordinary human instincts. It would probably be unrealistic to expect any attorney's representation—in any system of justice—to be wholly unaffected by his own evaluation of his clients and their conduct. In this respect, the admonition not to judge one's clients seems no different from other ethical principles—for example, the commandment not to covet thy neighbor's wife. The fact that an ethical principle contravenes natural instincts and probably could never be fully realized does not render it less valuable.

118. "I am going to give you credit for not wanting to have any jail deliveries here, either," said Chief Justice Warren, and if the Public Defender, Mr. Shea, had ever acted to call this assumption into question, the "modus vivendi" to which the Chief Justice referred might not have persisted throughout seven or eight years of a "most pleasant association."

Six of nine public defenders interviewed by Donald C. Dahlin in San Bernardino County, California, expressed agreement with the following proposition: "A Public Defender should strengthen his relationship with the District Attorney's office over a series of felony cases by contending only major points in negotiations." Dahlin, *supra* note 87, at 98.

119. J. CASPER, *supra* note 116, at 105. The convict explained that if the prosecutor and defender could "ease the caseload by the prosecutor giving a few, the public defender giving a few, it's a little better for everyone concerned." For example, a defender might not press a "little technicality" in the case of a plainly guilty defendant, and he might justify this action to himself by asking a favor for a "young kid." Casper's study indicates that this convict's impressions of the relationship between prosecutors and public defenders are shared by many "consumers" of defender services in Connecticut.

## The Defense Attorney's Role in Plea Bargaining

Private attorneys, too, may evaluate their clients and represent some more vigorously than others. The guilty-plea system encourages all lawyers to view themselves partly as administrators and as judges rather than solely as advocates. Indeed, private attorneys may sometimes pick and choose among their clients on a far more invidious basis than public defenders. Jackson B. Battle reports this statement of a Texas lawyer:

"You naturally use what influence you have for the client who pays you well. If the D.A. owes you a favor, you don't waste it on a court-appointed case. You've got to convert your connections into money. Maybe you shouldn't but you will. . . .

"Say Jose Gonzales is charged with assault and I'm appointed to defend him. Well, the D.A. might owe me a favor. But I'm not going to use that favor to get Jose off. Hell no! Because Roberto Sosa is paying me a substantial fee to defend him against a charge of D.W.I. Now which case do you think I'm going to try to get dismissed? If I spent my influence on Jose and then tried to get a favor done for Roberto, the D.A. would tell me, 'Uh-uh, now you owe *me* one.'"<sup>120</sup>

Although it is offensive enough for even one lawyer to pick and choose among his clients on the basis of the fees they have paid,<sup>121</sup> this style of representation does not seem at all characteristic of the private defense bar. Retained attorneys must "sell themselves" to their clients in a way that public defenders need not,<sup>122</sup> and the economic constraints that force private attorneys to *appear* as champions for their clients have some tendency to induce all but the consciously dishonest to *think* of themselves that way as well. Chicago's Sam Adam, for example, insisted that as a private attorney he could secure better plea agreements than could a public defender:

A particular Assistant State's Attorney is unlikely to handle more than a half-dozen of my cases during a single year. If I am on good terms with this Assistant, I can go to him with every one of these cases, make my pitch, ask for a favor, and probably persuade him to give every last one of my clients a break. A public defender may be on equally good terms with the prosecutor. He may even have been the prosecutor's law school roommate. But he just cannot do that with fifteen cases a day.

120. *In Search of the Adversary System*, *supra* note 14, at 114.

121. And unfortunately, the lawyer interviewed by Battle is not unique. In *Walker v. Caldwell*, 476 F.2d 213 (5th Cir. 1973), a defense attorney admitted on the witness stand that he followed "a substantially different practice when representing fee clients rather than appointed clients." See note 244 *infra*.

122. See pp. 1243-44 *infra*.

Although I do not accept Adam's conclusion that his style of bargaining yields more favorable overall results than public defenders can obtain, I believe that his statement does capture a general difference in approach between most private attorneys and most public defenders. One can sense this same difference in the statements of public defenders themselves. Boston's Edgar A. Rimbald, for example, maintained that as a public defender he could secure more favorable bargains than could a private attorney:

We have been dealing with the prosecutors for a long time, and they know we are not going to ask them to do something they should not do. Moreover, we have a reputation for being able to evaluate a case. They trust us.<sup>123</sup>

Jerome Kidder, the Assistant District Attorney in Charge of the Supreme Court Bureau in Manhattan, revealed that prosecutors also sense a basic difference between the two types of lawyers:

We are inclined to be considerate of the Legal Aid lawyers. We have confidence in them, just as they have confidence in us. We recognize that they have no ax to grind and that they are usually trying to do the fair thing.

A defense attorney without an ax to grind seems far from the model espoused by the Code of Professional Responsibility, but the extent of the difference between public defenders and private attorneys should not be exaggerated. The conclusion of Los Angeles Public Defender Paul G. Breckenridge corresponds to my own impressions:

Public defenders must be selective in deciding when to press hard for a favorable disposition, but so must private attorneys. Although there is a difference between the two sorts of lawyers, it is only one of degree and not as great as some people seem to imagine.

#### B. *Discovery*

The extent to which a defense attorney can learn the strength of the prosecutor's case against his client has an important influence on the plea-negotiation process, and in general, prosecutors seem

123. Rimbald's position seems to be that if he is fair to the District Attorney in "evaluating" a case, the District Attorney will be fair to him. Implicit in this position, however, is the possibility that Rimbald and his staff may fail to secure the most lenient treatment that they can for their clients when doing so would be "unfair" to the state.

## The Defense Attorney's Role in Plea Bargaining

more ready to disclose their evidence to public defenders than to private attorneys. "Officially our files are closed to everyone," said Philadelphia prosecutor Joseph M. Smith, "but unofficially we are usually ready to share information with the public defender."<sup>124</sup> Public defenders usually confirmed that they enjoyed this advantage in the bargaining process, and most private attorneys conceded the advantage to them.<sup>125</sup>

Recent studies indicate, however, that the benefit of informal discovery results not from an attorney's position as a public defender but simply from the attorney's personal relationship with individual prosecutors.<sup>126</sup> The general advantage that public defenders seem to enjoy may merely reflect their close daily contact with the prosecutors and perhaps, as New York defense attorney Stanley Arkin put it, "the fact that their relationship with their clients does not depend on filthy lucre." Some private attorneys are more favored than most public defenders in the discovery process, and some defenders cannot, as one of them observed, "get the sweat off the D.A.'s you know what."<sup>127</sup>

Participants in the criminal justice system commonly assert that "rapport" is the most important determinant of a prosecutor's willingness to disclose information;<sup>128</sup> when asked how to develop and maintain rapport, they usually offer such answers as, "By not acting like a horse's ass."<sup>129</sup> Although a prosecutor's decision whether to disclose information may indeed be made on this sort of basis, defense attorneys sometimes seek to encourage disclosure by granting reciprocal concessions to the prosecutors. At least three possible concessions by defense attorneys merit separate evaluation—disclosure of the defense evidence or of confidential information supplied by a client, refusal to use in-

124. Most private attorneys in Philadelphia did, however, report that they too obtained useful information from the prosecutors, and in at least a few categories of cases, the District Attorney's files are not "officially closed." See J. Maynard, *Criminal Discovery in Philadelphia: The Law, The Practice, A Proposal*, Jan. 5, 1970 (unpublished paper on file at the University of Texas Law School Library).

125. Nevertheless, only 22 of 49 defenders surveyed by the American Bar Foundation reported that it was easier for them to obtain information from prosecutors than it would be for other attorneys. Five thought that they had a more difficult time; three said that they did not know; and 19 thought that they were treated in the same fashion as other attorneys. L. SILVERSTEIN, *supra* note 85, at 48. But see M. MAYER, *supra* note 13, at 165.

126. J. Maynard, *supra* note 124; Skolnick, *supra* note 27, at 52; *Comparison of Defense Relationships*, *supra* note 21, at 11-18; *In Search of the Adversary System*, *supra* note 14, at 67-80.

127. *Comparison of Defense Relationships*, *supra* note 21, at 112. Indeed, in Denver, a few combative public defenders may have so antagonized the prosecutor's office that the general advantage in discovery probably belongs to private attorneys. See *id.* at 117, 118-19.

128. J. Maynard, *supra* note 124, at 6.

129. *In Search of the Adversary System*, *supra* note 14, at 73.

formation supplied by a prosecutor in a way that will embarrass him at trial, and the entry of pleas of guilty.

Few prosecutors explicitly condition discovery upon a defense attorney's disclosure of his client's story or the details of the defense case. Nevertheless, my impression is that many defense attorneys violate their clients' confidences in plea bargaining and do, in fact, view discovery as a two-way street.<sup>130</sup> "Of course my sonofabitching client is guilty," I heard one defense attorney proclaim. "None of us are trying to pin any medals on his chest. Still, we've got to give him some hope." An attorney may, in fact, not only reveal his client's version of the alleged criminal transaction but disparage it on the basis of his personal opinion: "The kid says A-B-C. But we know E-F-G."<sup>131</sup> When defense attorneys reveal their clients' stories, they believe, of course, that they are acting in their clients' interest. They apparently assume implicit authority to reveal any information that may tend to create an atmosphere of trust and encourage prosecutorial concessions. If, however, defendants were entitled to attend the bargaining sessions that determined their fate, the tenor of much defense representation might change remarkably.<sup>132</sup> The authority that defense attorneys as-

130. Several of the attorneys interviewed by Jackson B. Battle conceded that they made reciprocal disclosures to their opponents:

But remember, this discovery relationship works *both ways*. He [the D.A.] gets information from me that he would never, ever, be entitled to otherwise. *Id.* at 76. Most of the attorneys whom Battle interviewed in his Texas and Colorado studies did not, however, adopt this position. As Battle explained, "The general response was that an attorney had to be truthful with a prosecutor, had to maintain a reputation for credibility, but didn't have to reveal information that could be detrimental to his client. . . . This sounded good when they said it fast." *Id.* at 77. See generally Platt, Schechtner & Tiffany, *supra* note 114, at 630-31.

Of course a defense attorney's ignorance and lack of preparation may limit his ability to disclose information that would be damaging to his client. A public defender in Denver reported:

There's usually not much danger of my revealing facts detrimental to my client because I usually know little or nothing about my client or the situation until I talk to the district attorney. . . . I never know enough about the case at the plea bargaining stage to give up anything that could hurt him.

*A Comparison of Defense Relationships*, *supra* note 21, at 128.

131. *In Search of the Adversary System*, *supra* note 14, at 78. The attorney who described this tactic explained that he would use it only in "a rare case." See also the statement of a Denver lawyer in *A Comparison of Defense Relationships*, *supra* note 21, at 128:

My way of pitching to the D.A. may entail making them think that I dislike a client, that I think he's a bum, that he's just as much a burden to me as he is to them. This is just using psychology to make them think we're both working toward the same ends. The D.A.'s wield so much power that you have to learn how to play them.

132. One court has reacted negatively to the prospect that defendants might attend plea-negotiation sessions in the chambers of trial judges:

We recognize that occasional situations may arise where it is considered necessary for the attorneys to discuss [negotiated pleas of guilty] with the judge. However, in those instances the defendant should never be present. This because of the ever-present danger that he may not understand the legal discussion and may be misled

## The Defense Attorney's Role in Plea Bargaining

sume on behalf of their clients does not always reflect the clients' desires.

I repeat, however, that there is usually no firm or automatic understanding in plea negotiation that discovery must be a reciprocal process, and similarly, there is usually no firm or automatic understanding that a defense attorney should not use at trial what he discovers.<sup>133</sup> Nevertheless, some implicit limitations often develop. A Philadelphia prosecutor reported, for example, that he would refuse to reveal police offense reports to a defense attorney who might "blow out of proportion" disparities between those reports and police testimony at trial. He explained that offense reports were prepared hastily and that minor inaccuracies were simply to be expected. Nevertheless, the prosecutor plainly reserved to himself the power to determine what use a defense attorney might properly make of the information that the prosecutor had supplied.<sup>134</sup>

Although the discovery process may be influenced by a defense attorney's own disclosures to the prosecutor and by his circumspection in using at trial what he discovers, a far more important factor is the defense attorney's willingness to enter guilty pleas on behalf of his clients. This factor assumes its importance, not because prosecutors expect guilty pleas in exchange for discovery privileges, but because tactical considerations strongly favor disclosure in most cases in which guilty pleas seem likely.<sup>135</sup>

When defense attorneys are allowed to examine the prosecutor's files, they do so with different objectives. Some, of course, are primarily interested in learning the weaknesses of the prosecution case and in gathering information that will be helpful in preparing a de-

thereby, and may also erroneously conclude that he could not obtain a fair trial in the event he should later go to trial before that judge.

State v. Tyler, 440 S.W.2d 470, 474 (Mo. 1969).

133. Apparently, however, there are exceptions. See H. SUBIN, *supra* note 33, at 47 ("there is a sort of standing rule that confidences shared during the negotiations will not be used in court").

134. J. Maynard, *supra* note 124, at 6-7.

135. This fact may help to explain why prosecutors are more reluctant to disclose information in serious, highly publicized cases than in routine matters. John D. Nunes, the Public Defender in Oakland, maintained that because of their "better personal relations with assistant district attorneys," public defenders had a distinct advantage in the discovery process. "Ordinarily," he said, "prosecutors share all the information with us that the law permits. The only exception arises in homicide cases, where the defender, like everyone else, must get an order."

This experience was common among both the public defenders and the private attorneys whom I interviewed, but the opposite policy has apparently been adopted in Philadelphia. There, the District Attorney's files are routinely open in homicide cases but not in other cases. Prosecutors explained this distinction by noting their concern that innocent defendants not be convicted in homicide cases. They failed to explain why they were not equally concerned about the conviction of the innocent in less serious cases. J. Maynard, *supra* note 124, at 9.

fense. A prosecutor whose principal goal is to secure convictions will not usually find it in his interest to share his file with this sort of "adversary" attorney.<sup>136</sup>

At the opposite extreme are attorneys who are more interested in the strengths of the prosecution's case than in its weaknesses. Their primary object is to obtain information that will help to persuade their clients to plead guilty. When a prosecutor senses that a defense attorney is merely looking for a way to rationalize a guilty plea to himself and to his client, it becomes to the prosecutor's advantage to supply the attorney with the ammunition that he seeks. Indeed, a "cop-out lawyer" who can safely be trusted to seize upon the strengths of even the weakest case may find that the prosecutor's files are routinely open to him.<sup>137</sup>

Between these extremes are lawyers who are equally interested in the strengths and the weaknesses of the prosecutor's evidence; their primary goal is to evaluate as objectively as possible the desirability of entering a plea of guilty. Whether the prosecutor's file will be open to these attorneys may depend upon the prosecutor's own assessment of his case. If the case is "airtight," it will usually be to the prosecutor's advantage to permit the defense attorney to examine the file. If, however, a defense attorney's objective assessment of the evidence might lead to a trial, it will often be to the prosecutor's advantage to insist that "official policy" precludes any disclosure.<sup>138</sup>

136. Prosecutors, of course, do not usually describe their policies in exactly these terms, but some do report that they are reluctant to make disclosures to attorneys who "go off half-cocked." *Id.* at 7. See B. GROSSMAN, *THE PROSECUTOR* 75-77 (1969) (similar observations concerning Canadian practice).

137. George Karam, an Assistant District Attorney in Houston, explained, "We [permit defense attorneys to examine our case files] as a matter of courtesy. If they [the defense attorneys] use it to see if their client is lying or what our sentence recommendation is based on, they may look. If they are looking for a loophole, they don't see it." Johnson, *Sentencing in the Criminal District Courts*, 9 HOUS. L. REV. 944, 988-89 (1972). Another Houston prosecutor said that he would not permit a defense attorney to inspect his file if he thought that the case would go to trial. *Id.*

138. See Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth*, 1963 WASH. U.L.Q. 279, 282; Pye, *The Defendant's Case for More Liberal Discovery*, 33 F.R.D. 82, 85 (1963); Note, *Preplea Discovery: Guilty Pleas and the Likelihood of Conviction at Trial*, 119 U. PA. L. REV. 527, 530 (1971).

The impression of experienced public defenders in Denver, according to Jackson B. Battle, was that "prosecutors would not let them have information that would be beneficial to their case but only that which might induce their clients to plead guilty." One of these defenders remarked: "It's all based upon their fear of going to trial. Whether they hate me or not, they'll open up their file if they can avoid trial." *A Comparison of Defense Relationships*, *supra* note 21, at 119-20.

It might be supposed that defense attorneys would quickly "catch on," and that they would view any denial of discovery as the equivalent of a confession that the prosecutor's case was weak. In this respect, however, public defenders have an apparent advantage over private defense attorneys, an advantage that may help to explain their generally favored position in the discovery process. When a prosecutor closes his file to a private attorney, the attorney cannot be entirely certain that a weakness in the prosecutor's case

## The Defense Attorney's Role in Plea Bargaining

This analysis points to the desirability of granting broad discovery to criminal defendants as a matter of right. Although most defense attorneys do seem able to secure relatively broad informal discovery in jurisdictions in which the statutory right to discovery is extremely limited, some defendants suffer because their attorneys are not sufficiently trusted by the prosecutor's office to receive the usual privileges. In addition, the absence of a formal right of discovery seems to impose pressures upon defense attorneys to defend their clients less vigorously than they could. Even when our current system of discovery does not result in a denial of information, it makes defense attorneys beholden to the prosecution and poses an obvious danger to their independence.<sup>139</sup>

### C. *Knowledge of the Criminal Justice System*

Just as public defenders often possess greater knowledge of the facts of their cases than do private attorneys, they often have more com-

has motivated this action; perhaps the prosecutor was annoyed with the attorney for some past conduct; perhaps he was simply a capricious and perverse fellow; or perhaps it really was a "special favor" when the prosecutor permitted him to examine the file in last month's case. If, however, a prosecutor were to deny discovery to a public defender in one of the defender's half-dozen cases for the afternoon, the defender could be reasonably certain that something in the case itself had induced this turnabout in prosecutorial policy.

139. See Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. REV. 228, 237 (1964). The general advantage that public defenders seem to enjoy in the discovery process could, perhaps, be neutralized by more effective bargaining on the part of private attorneys. Most private attorneys seem to accept statements of "official policy" uncritically and are grateful for whatever information the prosecutors give them. At most, these attorneys may attempt to induce additional disclosures by granting reciprocal concessions to the prosecutors. A few attorneys reported, however, that the stick was more powerful than the carrot in securing information. These attorneys simply refused to consider a guilty plea in any case in which they had not been afforded an opportunity to examine the prosecutor's file. They reported that this bargaining tactic was successful once the prosecutors realized that they were not bluffing, and they were thus able to secure reasonably complete discovery in all cases that were not plainly headed for trial.

In addition to their general advantage in discovery, public defenders seem to enjoy an advantage in conducting their own investigation of factual issues. Most major urban defender offices employ investigators as permanent members of their staffs, and contrary to the impression that may have been created by Perry Mason's close association with Paul Drake in numerous television adventures, private attorneys who enjoy the regular services of an investigator are rare. Many defendants who have the means to employ their own attorneys nevertheless lack the resources to pay for investigative services. See Steinberg, *The Responsibility of the Defense Lawyer in Criminal Cases*, 12 SYRACUSE L. REV. 442, 443 (1961); Steinberg & Paulsen, *supra* note 70, at 26, 28. The organization of defender offices thus gives the indigent at least one advantage over the marginally affluent. Quite apart from economic constraints, moreover, private attorneys generally have a low opinion of the ability, diligence, and honesty of private detectives. Some attorneys also reported that they were reluctant to conduct factual investigations for fear that these investigations would give rise to charges of bribery and subornation of perjury. Charges of this sort would, of course, be less credible if leveled against public defenders who lack the private attorneys' economic incentives for corruption. Whether exclusively for these reasons or partly out of laziness, most private attorneys seem to rely almost entirely upon formal and informal discovery and the investigative efforts of defendants themselves (and sometimes the efforts of their friends and families) in preparing for trial and plea bargaining.



plete knowledge of the day-to-day operations of the criminal justice system. This knowledge stems both from the greater volume of cases handled by individual defenders and from the defenders' ability to pool information with other members of their offices.<sup>140</sup> Most private defense attorneys are solo practitioners or members of small firms with little opportunity and sometimes little inclination to share "trade secrets."

Milton Adler, the Assistant Attorney in Charge of the Legal Aid Society of the City of New York, observed:

This month there is a new judge in the criminal courts named Ascioni; and so, this month, our office will "learn Ascioni." We will see dozens or hundreds of his rulings. Two months from now, the average private lawyer still will not know who Ascioni is.

Paul G. Breckenridge, the Chief Deputy Public Defender in Los Angeles, provided an illustration of how this kind of knowledge could affect the guilty plea process:

If a lawyer in our office is unable to work out a satisfactory bargain with a prosecutor, he may nevertheless enter a guilty plea before the judge with almost certain knowledge of what sentence the judge will impose. A private attorney with less knowledge of the judge's sentencing practices might well be afraid to take this action, and his client would therefore receive less effective representation than our office could provide.<sup>141</sup>

#### D. Delay

A defense attorney usually improves his bargaining position by delaying the disposition of his cases as long as possible.<sup>142</sup> With the passage of time, tempers cool, memories fade, and prosecution witnesses

140. See Newman & NeMoyer, *supra* note 54, at 367 n.95; Platt, Schechtner & Tiffany, *supra* note 114, at 629; *A Comparison of Defense Relationships*, *supra* note 21, at 123.

141. Breckenridge also noted that in jurisdictions like Los Angeles, where bargaining focuses on the charge rather than on the prosecutor's sentence recommendation, an attorney's ability to predict what sentence the judge will impose is important in evaluating almost every case.

142. See, e.g., *More Careful Use of Defense Motions Urged at Criminal Practice Institute*, 5 CRIM. L. REP. 2114 (1969) (remarks of Judge Gerhard A. Gesell).

There are, however, important exceptions to this generalization. In some cities, for example, prosecutors' offices regularly offer more favorable plea agreements before the preliminary hearing than they will make available at any later stage of the proceedings. A guilty plea at this early stage may save not only the burden and expense of trial, but the burden and expense of grand jury proceedings, various pretrial hearings that a defense attorney may demand, a significant amount of paperwork, and usually, of course, the preliminary hearing itself. Equally important is the fact that, in most cases, the jurisdictional limitations of preliminary-hearing courts severely confine the penalties that a prosecutor can demand if he is to conclude any plea agreement at this stage.

## The Defense Attorney's Role in Plea Bargaining

are worn down by repeated court appearances<sup>143</sup> or disappear altogether.<sup>144</sup> In an empirical examination of the criminal justice system in Chicago, Laura Banfield and C. David Anderson found that the conviction rate declined from 92 percent in cases that were tried promptly to 48 percent in cases that were substantially delayed. This decline progressed steadily through several intermediate categories, and the authors concluded that it could not be explained by a concentration of "easy, clear-cut cases" among those resolved quickly.<sup>145</sup> As Philadelphia defense attorney Bernard Segal noted with a measure of understatement, "The District Attorney's evidence never grows stronger as a defense attorney procrastinates."<sup>146</sup>

As conviction becomes more difficult, the concessions available in exchange for pleas of guilty almost invariably become greater.<sup>147</sup> Some defendants therefore receive the dividends of their attorneys' procrastination in the form of reduced sentences rather than dismissals or acquittals. Banfield and Anderson noted that convictions on reduced charges, like dismissals and acquittals, increased with the passage of time.<sup>148</sup>

Prosecutors in several cities claimed that as a result of prodding by their offices, trial courts had adopted a "get tough" policy toward requests for delay. "A defense attorney may be able to get one or two continuances," a Philadelphia prosecutor said, "but he cannot get 10." Private defense attorneys commonly reported, however, that they *could* get 10.<sup>149</sup> A Chicago lawyer, for example, recalled the case of a professional burglar:

143. George M. Scott, the County Attorney in Minneapolis, noted that after numerous court appearances a prosecution witness might remark, "Now that you have finished me, when are you going to try the man who robbed my store?" *Conference of Chief Justices*, 3 CRIM. L. REP. 2381, 2382 (1968).

144. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEXAS L. REV. 629, 680 (1972).

145. Banfield & Anderson, *supra* note 89, at 287-90.

146. Some defense attorneys, without giving much thought to strategic considerations, may simply delay their cases on "general principles." As Percy Foreman observed, "I never yet lost a case until I tried it."

147. Alschuler, *supra* note 7, at 58-64.

148. Banfield & Anderson, *supra* note 89, at 287 n.94. Martin Erdmann, Chief of the Supreme Court Branch of the Legal Aid Society of the City of New York, observed, "The last thing [most defendants] want is a trial. They know that if every case could be tried within 60 days, the pleas of one-to-three for armed robbery would be back up to 15-to-25." Mills, *I Have Nothing To Do With Justice*, LIFE, March 12, 1971, at 56, 66.

149. Indeed, more dramatic success in the use of stalling tactics has sometimes been recorded. The *New York Times* noted, for example, the case of Carmine Persico: "In the 30 months following arraignment, defense attorneys were granted 25 adjournments, for the most part because they were busy in other courts." The *Times* also reported that in the case of Matthew Ianniello defense attorneys had "sought and received 39 adjournments from the court over the course of three years." A prosecutor claimed that these cases were not aberrational; some judges regularly gave defense attorneys "adjournments stretching over several years to accommodate their schedules." N. Gage, *Study Shows Courts Lenient With Mafiosi*, N.Y. Times, Sept. 25, 1972, at 1, 31.

This guy's narcotics habit was so bad that he had become thoroughly incompetent at his burglaries. He would be arrested, released on bond, and then rearrested every month or so for a new crime. By the time he came to trial, there were a total of six theft and burglary charges against him. The total bond was enormous. I had already played along for the usual run of continuances when the defendant told me that he really liked summer. Since I had kept him out all winter, couldn't I keep him out for the summer too? I could and did, and after the trial in the fall, I kept him out for 60 days more—30 days to get his teeth fixed and 30 days for the hell of it. Maybe I could have gone on, but I was beginning to get nervous. I was relying on the return of the defendant's bond for \$1,700 of my fee.

No public defender made this kind of boast, and as a group, private attorneys seem to play the waiting game with greater vigor and success than public defenders. Banfield and Anderson found that private attorneys made an average of 7.2 court appearances in each case; the comparable figure for public defenders was only 3.7 court appearances. This difference persisted even when other variables were held constant, including the type of crime, the defendant's race, and the release or detention of the defendant pending trial.<sup>150</sup>

The reluctance of public defenders to seek continuances is, in part, attributable to limitations inherent in the defenders' position. A private attorney with only a few cases in a certain courtroom can usually devise a plausible reason for delaying each one. In one case, for example, the defendant may be too ill to appear; in another, an important witness may be temporarily unavailable; in another, a lengthy psychiatric examination of the defendant may be necessary; and in still another, a scheduling conflict may require the attorney's presence in a different courtroom on the day set for trial. By contrast, a public defender assigned full-time to a single courtroom can never assert a scheduling conflict as a reason for delay, and if he presents other, more elaborate reasons in too many of his cases, his motives will become suspect.

Thus, because of the volume of their caseloads, the tactical objectives of public defenders are relatively transparent, and they lack the opportunities for delay that private attorneys enjoy. Defenders also

150. Banfield & Anderson, *supra* note 89, at 281. Appointed attorneys other than public defenders also seem far less inclined to use delaying tactics than do retained attorneys. See S. BING & S. ROSENFELD, *THE QUALITY OF JUSTICE IN THE LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON: A REPORT BY THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW 33 (1971)* (40 percent of all defendants with assigned attorneys went to trial without securing any continuances, but only 21 percent of the defendants with private attorneys failed to secure at least one continuance).

## The Defense Attorney's Role in Plea Bargaining

lack one reason for delay that commonly influences private defense attorneys: they need not seek postponements to facilitate the collection of fees from their clients. Some courts appear to grant these postponements almost automatically when private defense attorneys report, in appropriately coded language, that they have not been paid. Martin Mayer notes, for example, that a defense attorney in New York can secure a continuance by informing the court that he has been unable to locate his witness, "Mr. Green"; in Washington, D.C., the defense attorneys' practice is to seek a postponement "pursuant to Rule 1 of this court."<sup>151</sup> Sixty-five percent of the 311 defense attorneys surveyed by Ryan L. Petty said that they considered it proper for a lawyer to request postponement of a case in order to collect his fee.<sup>152</sup>

One argument against delay is, moreover, frequently stronger in the cases of public defenders than in cases handled by retained attorneys. A defender's clients are more likely than those of a private attorney to be held in custody during the pretrial period, and the costs of delay to a defendant are obviously greatest when he cannot secure his release on bond.<sup>153</sup> The Banfield-Anderson study reported, however, that retained attorneys sought and obtained significantly more postponements than public defenders even when "jail cases" and "bail cases" were considered separately.<sup>154</sup>

Private attorneys commonly asserted, in fact, that delay was advantageous even for many defendants in custody. If trial today would produce a sure conviction, if trial tomorrow might produce an acquittal, and if the defendant would in any event receive credit on his sentence for the time that he had spent in custody awaiting trial, a balance of tactical interests would usually favor delay.<sup>155</sup> Most public defenders, however, did not seem to employ the same calculus; in explaining their reluctance to seek postponements, they often simply asserted that any delay would increase the period of pretrial detention

151. M. MAYER, *supra* note 13, at 161-62.

152. R. Petty, *supra* note 15, at 15-16.

153. See *Wallace v. Kern*, 15 CRIM. L. REP. 2007 (E.D.N.Y.), *rev'd*, 499 F.2d 1345 (2d Cir. 1974):

[With delay,] inmates are confined under unspeakably degrading conditions, beaten by other inmates, and coerced into homosexual activities, until, in many cases, the pressure to enter some kind of guilty plea becomes unbearable. . . . The suicide rate of untried detainees is very high. Jobs are, of course, lost. Families that attempt to keep up visits for the first three months or so eventually leave the inmate.

154. Banfield & Anderson, *supra* note 89, at 304 (table 15).

155. Nevertheless, it would not be entirely accurate to say that a defendant in this situation has everything to gain and nothing to lose by waiting. The conditions of pretrial detention facilities are often worse than the conditions of state penitentiaries, and many defendants would undoubtedly prefer to serve their sentences in the latter institutions. In addition, even if a defendant receives credit on his sentence for the period of pretrial detention, the state penitentiary's "good-time rules" may be inapplicable to this portion of his confinement. See *McGinnis v. Royster*, 410 U.S. 263 (1973).

for their clients. One public defender of the Legal Aid Society of the City of New York noted that he was reluctant to seek delay for a client in custody even when the client had asked him to do so. He admitted that one factor that entered his calculus was a desire to protect himself. The defender observed that the client might ultimately change his position, point to his lengthy pretrial detention, and blame his appointed attorney for the lack of a speedy trial. By contrast, Richard Haynes, a private defense attorney, reported that he would sometimes seek delay even when a jailed client appeared nervous and anxious to conclude the proceedings as quickly as possible. Private attorneys, selected and retained by their clients, may be somewhat less fearful than public defenders of post-conviction proceedings alleging the ineffective assistance of counsel.<sup>156</sup>

The disadvantage of public defenders in the "continuance game" may not be entirely the product of institutional constraints. In part, this disadvantage seems self-imposed. With a few exceptions, public defenders maintained that it was not their function to "abuse the system" by seeking unnecessary continuances. Most private attorneys, however, denied that their delaying tactics were unethical. "All a defense attorney does is ask," one New York lawyer observed. "The responsibility for wasteful postponements rests elsewhere."<sup>157</sup>

The ethical problem may not of course be quite so simple as this lawyer maintained. A defense attorney is often asked his reasons for delay, and he rarely responds, "I hope that the complaining witness will die, move to New Mexico, or tell the prosecutor that he is tired of waiting and wants to forget the whole thing." When, however, a defense attorney can present a reason for delay that is truthful and persuasive to the court, the position of the New York lawyer has substantial force. It should not matter that the attorney has made less than full disclosure and that the avowed reason for delay is not his only or primary reason (or, indeed, that it does not influence him at all).<sup>158</sup> If a court considers the truthful, stated reason sufficient, the attorney's secret motives are irrelevant.

156. See p. 1284 *infra*.

157. One additional finding of the Banfield-Anderson study seems to confirm that public defenders and private attorneys frequently resolve the ethical issue in different ways. A substantially higher percentage of court appearances were scheduled "with subpoenas" in the cases of retained attorneys than in the cases of public defenders. In light of this fact and the greater number of postponements that retained attorneys secured, witnesses were summoned to court twice as often in retained-attorney cases as in defender cases. Banfield & Anderson, *supra* note 89, at 283.

158. Of course it is rarely difficult for a defense attorney to present *some* truthful reason for delay. He may, for example, seek a continuance because his factual investigation of the case is not yet complete. Presumably, no one's factual investigation of a case is *ever* complete.

## The Defense Attorney's Role in Plea Bargaining

In practice, most private attorneys apparently do use delay for tactical reasons. A defendant is not ordinarily interested in hiring "the noblest lawyer in town," and when a lawyer fails to provide beneficial services that most other lawyers provide, he makes his client a fool for hiring him. Concededly, this argument could be extended too far. The claim that "everybody does it" is a standard rationalization for improper conduct, and a lawyer certainly could not justify such practices as bribery or subornation of perjury by showing that other lawyers engage in these practices and that a client, knowing the situation, would often prefer a lawyer who does.<sup>159</sup> In the absence of any clearly defined obligation imposed by law or by the organized legal profession, however,<sup>160</sup> a lawyer can reasonably be influenced by the principle of equality. His clients should not be denied services that are generally available simply because they have made the mistake of coming to him. Although this consideration need not be determinative, an ethical lawyer should allow it to enter the balance.

Indeed, the principle of equality seems to have special force for public defenders because their clients have *not* selected them. When a defender, free of the economic constraints that influence private attorneys, acts less as an advocate and more as an "officer of the court" than they do, his clients are likely to suffer because of their poverty. That fact should give the defender pause when other considerations do not clearly resolve the ethical issue before him.

### E. Judge-Shopping

Defense attorneys commonly attempt to maneuver their cases before judges whose sentencing policies are lenient, and in most cities, judge-shopping becomes easier when a defendant is willing to plead guilty than when he insists upon a trial. Our criminal justice system thereby supplies an additional reward for the act of self-conviction—a reward that cannot be defended as a measured response to the cir-

159. In addition, I certainly would not give the claim that "everyone does it" any moral weight when a lawyer's actions are taken to benefit himself rather than his clients. It is the moral obligation that a lawyer assumes in agreeing to represent a client that makes the problem complex.

160. The ABA Project on Standards for Criminal Justice has declared that "defense counsel should avoid unnecessary delay in the disposition of cases" and that "defense counsel should not intentionally use procedural devices for delay for which there is no legitimate basis." ABA STANDARDS, *supra* note 55, § 1.2 (Supp. 1971). The ABA Code of Professional Responsibility does not contain any comparable restriction. John F. Sutton, Jr., the reporter to the committee that drafted the ABA Code, told me that this omission was not the result of oversight but of a conscious decision to leave the matter to the courts.

cumstances of the case or to the repentance manifest in the plea.<sup>161</sup> Judge-shopping is apparently so common that one may wonder whether the less lenient judges hear any cases at all.

The answer to this speculation is apparently that the less lenient judges are busy enough, but that they conduct more than their share of trials and consider more than their share of cases in which public defenders appear. In the judge-shopping process, defenders are at a disadvantage and must accept the luck of the draw more often than private defense attorneys.<sup>162</sup>

The basic reason for this disadvantage is similar to one reason for the disadvantage of public defenders in delaying the disposition of their cases. Defenders ordinarily handle a high volume of cases and are frequently assigned to particular courtrooms on a more-or-less permanent basis. If a defender were to employ the shopping techniques of private attorneys in more than a few of his cases, the judge would quickly discern his motives. As Boston Defender Edgar A. Rimbold explained, "We are there all the time. We cannot play games. If we tried dodging judges, everyone would know." In addition, because the public defender himself would remain in the courtroom after his cases were assigned elsewhere, he might find himself with little to do. The defender's position is obviously far different from that of a private attorney who may appear before an unsympathetic judge only once or twice during the judge's tour of duty in the criminal courts.

Indeed, one common judge-shopping device is the continuance itself; when judges rotate assignments on a monthly or weekly basis, it is often desirable for a defense attorney to await a fresh round of musical chairs. The disadvantage of public defenders in securing continuances may thus have a significant cost even when delay would be unlikely to affect the strength of the prosecutor's evidence.

With a few exceptions, public defenders conceded that they were less able than private attorneys to maneuver their cases before favorable judges. When their cases were assigned to "bastard courtrooms," they reported that only one strategy was available. Vincent J. Ziccardi, the First Assistant Defender in Philadelphia, described it:

We simply do our best to make the list break down. When the judge calls the first case on the docket, we request a jury trial.

161. I intend to explore this issue in a separate study of the trial judge's role in plea bargaining and to describe some of the devices that defense attorneys use in the judge-shopping process.

162. Cf. Eckart & Stover, *supra* note 86, at 672-73.

## The Defense Attorney's Role in Plea Bargaining

When the judge then suggests that we pass this case and proceed with the others on the list, we respond, "They are all jury trials, your Honor."

The public defenders' repeated demands for jury trials may cause a disfavored judge to revise his sentencing policies in an effort to "move his share of the load." Even if the judge does not respond to this pressure, the trials tie up the courtroom and cause other cases to be reassigned, thereby insuring that only a small number of defendants come before the insufficiently lenient judge. The relatively few defendants convicted at trial are, of course, likely to receive harsher sentences than they could have secured by pleading guilty. They thereby suffer an attorney-inflicted sacrifice on behalf of their fellow defendants and become especially victimized victims of our system of criminal justice.<sup>163</sup>

### F. *Judicial Pressure and Abuse*

Public defenders almost universally conceded that they suffered another disadvantage in the plea-negotiation process. They noted that although trial judges sometimes "nudge" private defense attorneys to enter pleas of guilty, the judges subject public defenders to more severe forms of pressure. The process may begin with a judge's suggestion that a certain plea agreement would be fair, and if a defender accepts this suggestion, the matter is at an end. Defenders who resist judicial suggestions too often, however, are frequently forced to endure abusive remarks from the bench:

You're a quasi-public agency. You should be interested in *justice*.

Haven't you got any client control?

You spend too much time on hardened criminals.

No private attorney would take this case to trial. You must be awfully eager for experience.

When will you bend to reality?

You guys believe your clients too much.

You're acting like a private lawyer.<sup>164</sup>

163. See p. 1251 *infra*.

164. A judge may also praise cooperative defenders in a way that conveys a message for other defenders as well. See *Defenders Find Thorns in Bouquet*, Denver Post, Sept. 2, 1966:

Judge [Don D.] Bowman praised five members of the defender's staff...because seven defendants, to whom they were assigned, changed their pleas from innocent to guilty, enabling the court to make faster disposition of their cases.... Others of the [defender] staff [were] present when Judge Bowman gave his compliments....



Although they bemoaned the use of this cajolery, most defenders denied that it influenced their representation in any way. New York's Milton Adler declared, "I just say, 'Thank you for the compliment, your Honor,' and then I go about the business of defending my clients." Los Angeles's Paul G. Breckenridge maintained, "We have sufficient resources to ignore this kind of criticism. It simply rolls off our backs." Nevertheless, some defenders conceded that they usually yielded to judicial pressures and suggestions. The reason for this acquiescence was not necessarily that the judges' proposals were in the best interests of their clients, but simply that "going along" tended to encourage an atmosphere of reciprocity. As Oakland's Public Defender, John D. Nunes, explained, "The judges move the prosecutors to our advantage far more often than they move us to the prosecutors' advantage."

When defenders refuse to yield to verbal abuse, judges may turn to stronger mechanisms of control. One of the few public defender systems in Texas provides a striking illustration of the powers that judges sometimes have over public defender operations. This defender system, located in Fort Worth, was created by a special state statute which gave each felony-court judge the power to appoint the public defender for his court, to define the duties and responsibilities of the defender's position, and to remove the defender at will.<sup>165</sup> Judge Byron Matthews once explained to Joe Tom Easley, then a Texas law student, how he had used the power that the statute had given him:

I have a game plan on these things. When I hired my defender, I called him in and set down some little propositions he should follow . . . . For example, I made it clear that I didn't want him arguing with these people if they wanted to plead guilty.<sup>166</sup>

The Fort Worth system is unusual in giving so much power to individual judges, but it is not unusual for courts or groups of judges to control both the funding of public defender offices and the hiring and firing of defenders. In Colorado, for example, the state supreme court selects the public defender and determines his salary and those of his deputies.<sup>167</sup> In Chicago, the Circuit Court's "Committee on

165. TEX. REV. CIV. STAT. ANN. art. 341-1, § 2(a) (1973).

166. J. Easley, *Public Defenders in Texas: Fort Worth and Beyond*, 1970 (unpublished paper on file at the University of Texas Law School Library).

167. COLO. REV. STAT. ANN. § 21-1-101 (1973).

Each of three attorneys who left the Denver office of the Colorado Public Defender in the fall of 1971 complained that judicial control of the office had resulted in significant pressure not to "rock the boat." The defenders preferred the earlier system in which the Denver office was located in the executive branch of the municipal government.

## The Defense Attorney's Role in Plea Bargaining

Help" effectively selects the public defender and his assistants.<sup>168</sup> This sort of judicial supervision may have been designed to minimize direct political control of defender operations. Neither the electorate nor the executive nor the legislature may have seemed sufficiently sympathetic to the need for vigorous representation of indigent defendants,<sup>169</sup> and the judiciary may have been thought a more appropriate and more impartial guardian.

The danger of excessive involvement in politics does seem to be a real one for defender offices.<sup>170</sup> Nevertheless, systems which rely on the judiciary as a buffering agency largely ignore the realities of the guilty-plea process. So long as judges view the guilty plea as the key to effective caseload management, they may have a stronger interest in penalizing aggressive defense efforts than "law and order" politicians. Under a system of plea negotiation, judges may well be the last authorities to whom public defenders should be beholden if they are to perform their functions effectively.<sup>171</sup>

168. Cf. D. OAKS & W. LEHMAN, *supra* note 85, at 120. This judicial control of the defender office has not always kept the office free of scandal. On one occasion, an investigator was listed as a full-time member of the defender staff although he was also drawing another full-time salary from public funds. Incidents of this sort are, of course, unlikely to give indigent defendants much confidence in the quality of the legal services that they receive.

169. See REPORT ON THE SAN FRANCISCO PUBLIC DEFENDER'S OFFICE, *supra* note 84, at 2: "[T]he Public Defender...is likely to become unpopular in exact proportion to his diligence in performing his duties." See generally Steinberg & Paulsen, *supra* note 70, at 38.

170. For example, in San Francisco until 1970, the elected Public Defender required all of his deputies to contribute one percent of their salaries to a "public relations fund." The Defender used this fund as a source of contributions to charities, testimonials, and political campaigns. REPORT ON THE SAN FRANCISCO PUBLIC DEFENDER'S OFFICE, *supra* note 84, at 13.

Inevitably, of course, some authority must determine the budget of the defender office, and some authority must assume responsibility for hiring the defender. Public defenders are thus subject to potential sources of pressure that do not influence the conduct of private defense attorneys. The extent of this danger, however, is often exaggerated, and independent boards of trustees or other buffering agencies can minimize the danger that does exist. Although I have not studied the problem in detail, I am inclined to think that the best governing agency for a public defender office would be a board of trustees with representatives of the public (appointed by the executive branch of government), of the organized bar, of the public defender staff, of community-controlled antipoverty agencies, and of the local jail population.

171. The National Advisory Commission on Criminal Justice Standards and Goals has observed:

Appointment of the defender by a judge may impair the impartiality of the defender, because the defender becomes an employee of the judge. Moreover, such a system will create a potentially dangerous conflict, because the defender will be placed in a position where occasionally he must urge the error of his employer on behalf of his client. Such dual allegiance, to judge and client, will cripple seriously any system providing defender services.

NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON THE COURTS, Standard 13.8, comment (1973). See also THE OTHER FACE OF JUSTICE, *supra* note 83, at 66 ("it is exceedingly difficult for an indigent defendant . . . to have confidence in an advocate who is selected by the same authority who controls the proceedings which may deprive him of his liberty").

Even when judges lack any direct power over the staffing and funding of defender offices, they plainly possess an overwhelming power over the fate of the defenders' clients. A public defender may fear—correctly or incorrectly—that judicial displeasure will result in informal reprisals, and that these reprisals will extend beyond the case at hand to future cases and even to the cases of other defenders.<sup>172</sup> As a member of a large law office with a high volume of cases (and as a lawyer whose professional judgments are subject to review by the head of his office), a public defender may sense that he is in an even more vulnerable position in this respect than most private defense attorneys.

Indeed, power over sentencing and other judicial matters often gives judges an indirect power over the hiring, assignment, and firing of defenders. Vincent J. Ziccardi, the First Assistant Defender in Philadelphia, explained that approximately one-fifth of the lawyers in his office were “married” to particular judges. Ziccardi had found that these defenders achieved unusually favorable results before these judges, and as a result, they followed “their” judges whatever the judges' assignments.<sup>173</sup> A defender who incurs a judge's animosity is, of course, likely to suffer the opposite fate—a “divorce” from the judge and, perhaps, from the defender office as well. An offended judge may simply complain to the chief defender about the attorney's inadequacies, and the chief defender may conclude that the attorney is too abrasive to provide effective representation for his clients. Something like the Fort Worth system of defender selection may thus develop in practice despite the independence of the defender office in theory.<sup>174</sup>

172. See Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 146 (1972); cf. *Davis v. Johnson*, 495 F.2d 335 (3d Cir. 1974).

Michael Ginsburg, a University of Texas law student, studied the work of the Colorado State Public Defender System in rural areas of southern Colorado. He recalled a case in which a judge imposed a 270-year sentence following a trial and then told the public defender who had represented the defendant: “Don't you ever bring a case like this one into my court. You bargain it out first.” Class Presentation, Post-Internship Seminar, University of Texas Criminal Justice Project, November, 1972.

173. See J. Renfro, *Judge Maneuvering in an Urban Court: The Philadelphia System*, Feb. 26, 1971, at 16-17 (unpublished paper on file at the University of Texas Law School Library); *A Comparison of Defense Relationships*, *supra* note 21, at 109 (similar assignment system in Denver).

If the familiarity between judges and public defenders sometimes breeds abuse and contempt, it also sometimes works to the defenders' advantage—as these “marriages” may indicate. Luke C. McKissack, a private defense attorney in Los Angeles, observed, “Public defenders usually have a casual working relationship with the judges. A judge will ordinarily talk out a case with a public defender in a more complete manner than he will with a private attorney.”

174. Judge Abraham L. Freedman of the United States Court of Appeals for the Third Circuit analyzed this problem in a concurring opinion in *United States ex rel. McCoy v. Rundle*, 419 F.2d 118, 120 (3d Cir. 1969). A public defender had antagonized a trial judge, and Judge Freedman reported, “In his anger the judge had handed out what counsel described as ‘really outrageous sentences.’ A more experienced lawyer was sent in ... as the ‘fireman’ to ‘calm the judge down.’” Judge Freedman concluded:

### G. Relationships With Clients

Public defenders are not often heroes to their clients. Professor Jonathan D. Casper recently surveyed a group of convicted defendants in Connecticut and asked, "Do you think your lawyer was on your side?" Although the sample was small, and although the judicially controlled defender system<sup>175</sup> may have been unusually unpopular, the results were unambiguous. All of the 12 defendants who had been represented by private attorneys answered yes, their attorneys had been "on their side." Thirty-nine of the 49 defendants who had been represented by public defenders answered no.<sup>176</sup>

In almost every city, I heard some version of a story that has become part of the folklore of the criminal courts. Some attorneys insisted, however, that they had actually seen it happen. As one of these attorneys told it, a defendant was arraigned, and the trial judge asked whether he had a lawyer. The defendant replied that he did not. The judge then asked the defendant whether he had the money to hire a lawyer. Again the answer was no. Finally the judge asked, "Do you want this court to appoint a lawyer to represent you?," and the defendant replied, "No, that's all right. I'll just take the public defender."

A defendant who lacks confidence in his attorney is likely to resist the attorney's advice, and in today's criminal justice system, this resistance is most likely to take the form of insistence upon a trial despite the attorney's recommendation of a guilty plea. Public defenders are thus at a disadvantage in the process that defense attorneys unblushingly call "client control."

[O]ne whose eye must envisage many other untried cases as he seeks to bank the fires of a judge's indignation is not likely to be able to stand up fully for the rights of a single client, whatever they may be and wherever they may lead him. The desire to appease an indignant trial judge who has already inflicted what seem excessively harsh sentences is magnified where an institutional law office represents many other defendants and is under pressure to subordinate the individual rights of one to the larger good of all.

175. See CONN. GEN. STAT. REV. §§ 3615, 8796, 54-80 to 54-81a (1973).

176. J. CASPER, *supra* note 116, at 105. Compare this statement of a 16-year-old defendant:

I would never take one of those public defenders. . . . They sit down with the judge and they got this piece of paper and they talk it over and decide what this nigger's gonna get.

Platt, Schechtner & Tiffany, *supra* note 114, at 634.

In 1970, inmates of the Tombs City Prison in New York presented a list of grievances to the mayor's office:

[I]n most instances we find that the Legal Aid Society aids and abets the incursions and abuses of our rights in the courtrooms. It is the order of the day for the assigned legal aid, on first meeting his client, to open the conversation by saying, "I suggest that you take a guilty plea," or "I can speak to the District Attorney and get you (this or that) plea." . . . [W]e feel that under the present system of the courts that we cannot receive any justice and can only suffer threat, coercion and intimidation disguised as law and justice.

Quoted in AMERICAN FRIENDS SERVICE COMMITTEE, STRUGGLE FOR JUSTICE 3 (1971).

Some of the reasons for this disadvantage are wholly independent of the quality of representation that public defenders provide. Indigent defendants do not choose their own attorneys, and the relationship of confidence that arises when a defendant selects his own lawyer is undoubtedly slower to develop when an unknown advocate is thrust upon him. In addition, some defendants believe that "one gets what one pays for"; they are suspicious of the fact that the public defender is paid by the state and that "he gets his money either way."<sup>177</sup> Finally, even if indigent defendants were empowered to select and compensate their own representatives through a voucher system,<sup>178</sup> the problem might remain, for the indigent may simply be more bitter and resentful than defendants not so deeply affected by poverty and its associated disadvantages.

The inherent disadvantages of the public defender's position are accentuated by the organization of most urban defender offices. These offices provide a "zone" rather than a "man-to-man" defense. Defenders are not assigned to clients; they are assigned instead to courtrooms. Each defender then provides representation for all indigent defendants who appear at his "station." A defendant may thus find himself interviewed by one attorney, represented at his preliminary hearing by another, and represented at his arraignment by still another. Finally—perhaps only on the day set for trial—he may meet the attorney ultimately responsible for the conduct of his defense.<sup>179</sup> The defendant is likely to spend no more than a half hour or so conferring with any one of his representatives; usually, in fact, the period will be less.<sup>180</sup> The defendant may therefore conclude that his relationship with the defender office resembles the atmosphere of an automatic car wash more than that of a traditional attorney-client relationship.

Apart from its depersonalization of lawyer-client relationships, this balkanization of the defense function sometimes fails to focus responsibility for the performance of out-of-court lawyering tasks. In *United States ex rel. Thomas v. Zelker*,<sup>181</sup> Judge Marvin E. Frankel described the case of a defendant who was represented by at least five public

177. J. CASPER, *supra* note 116, at 110. See also Wilkerson, *supra* note 172, at 163. Joe J. Sawyer, a law student intern in the public defender office in San Jose, heard one jail inmate tell a defender, "It's a game. Some people have it; some people don't. Some people have money; I don't, so I have you. It's like craps." Class Presentation, Post-Internship Seminar, University of Texas Criminal Justice Project, November, 1972.

178. See J. CASPER, *supra* note 116, at 124.

179. See *A Comparison of Defense Relationships*, *supra* note 21, at 109 ("Three months often passed before one charged with a felony met the defender ultimately responsible for his case").

180. See, e.g., N.Y. Times, July 12, 1971, at 25, 46; Note, *supra* note 85, at 448.

181. 332 F. Supp. 595 (S.D.N.Y. 1971).

## The Defense Attorney's Role in Plea Bargaining

defenders during the course of his pretrial confinement. No one told the defendant whom he might contact to discuss developments in his case, and although the defendant supplied two defenders with lists of witnesses who could apparently present valuable evidence on his behalf, most of these witnesses were never contacted. Judge Frankel wrote:

[F]or whatever reasons of calendar pressure and understaffing, Legal Aid counsel left petitioner to the most brutal and horrifying kind of isolation, effectively walled off for months from any genuine assistance by a facade of "representation." Those supposedly aiding him failed even to see him. He did not know who his lawyer, as a live human being, was supposed to be . . . . Twice, he supplied lists of witnesses. He was never told what, if anything, was being done about them. To put the matter more precisely, he was never told that nothing was being done to pursue the elementary and obvious things required for even a rudimentary defense.<sup>182</sup>

In this case, Judge Frankel concluded that the defendant had been denied the effective assistance of counsel, but in a less extreme case, at least one other court has ruled that the "zone defense" is not inherently inadequate to supply effective representation.<sup>183</sup>

Public defenders themselves usually had few kind words for their assembly line methods of representation. They commonly explained that only inadequate financing accounted for their adoption of the "zone defense" and that they, like their clients, regarded it as inconsistent with the development of sound professional relationships.<sup>184</sup>

More significant than the "zone defense" in explaining the lack of rapport between defenders and their clients is the attitude that most public defenders apparently adopt toward their work. Private defense attorneys seem to view themselves both as lawyers and as salesmen. Some, in fact, plainly emphasize the latter role to the detriment of

182. *Id.* at 599.

183. *Moore v. United States*, 432 F.2d 730 (3d Cir. 1970).

184. See, e.g., 37TH ANNUAL REPORT OF THE DIRECTORS OF THE DEFENDER ASSOCIATION OF PHILADELPHIA 4 (1971). Seven of the 11 public defenders surveyed by Donald C. Dahlin in San Bernardino County agreed that "only one Public Defender should handle a felony case from investigation through appeal." Dahlin, *supra* note 87, at 99. Cf. M. Poston, Attorney-Client Relationships in a Public Defender Office, May 1, 1972, at 15 (unpublished paper on file at the University of Texas Law School Library):

It is difficult to muster any real interest or concern for a case for which you, as an attorney, are only partly responsible. Usually, once the client is past your station, he is never seen again nor is his outcome known. As a result, the attorney suffers from the same sort of alienation as any other assembly line worker. He feels no pride in his job.

the former. Public defenders, by contrast, usually seem to think of themselves as lawyers only. Their job, as they see it, is to provide knowledgeable advice and capable representation—not, as some of them put it, to “hold the defendant’s hand.” A public defender, free of the constraints of a competitive marketplace, is less likely than a private defense attorney to conclude that producing satisfied customers is among his highest priorities.<sup>185</sup>

Glen M. Wilkerson interviewed 40 clients of public defenders in Denver and reported that their most common grievance was that the defenders did not visit or contact them often enough.<sup>186</sup> Moreover, as one defendant explained, “With a private attorney, you talk over strategy. With a public defender the client has nothing to say.”<sup>187</sup> Jonathan D. Casper noted the same phenomenon in Connecticut. Most clients of public defenders maintained that their attorneys did not offer advice, provide information, or make suggestions, but instead simply told them what to do.<sup>188</sup> The clients of private attorneys, by contrast, made statements like these:

He made it a point always to see me either before or after court and explain . . . Well, did you understand this, did you understand that; and if I said no, he’d explain it to me, you know, what went on.

He laid things on the line. He told me this can happen, and this can happen; so what we got to do is make up our minds . . . He explained to me how the laws working, and what they doing up there in superior court.<sup>189</sup>

When Wilkerson confronted Denver defenders with their clients’ criticisms, a typical response was, “We get them good deals, probably as good as anyone could get them.”<sup>190</sup> The defenders regarded jail visits as “usually unimportant,” and they added that what a client often

185. Cf. Dahlin, *supra* note 87, at 115: “One defender notes, for example, that he can be more frank with his client because he does not have to worry that his candor will cause the client to leave him and get another lawyer.”

186. Wilkerson, *supra* note 172, at 142. Only eight of the 11 San Bernardino County defenders surveyed by Donald C. Dahlin agreed that “a Public Defender should talk to every defendant assigned to him.” Two even dissented from the truism that “in a felony case, the Public Defender should talk to the defendant as often as the case requires.” Dahlin, *supra* note 87, at 99.

187. Wilkerson, *supra* note 172, at 145. Herbert Sturz, Director of the Vera Institute of Justice, once said, “Generally, legal aid lawyers don’t even bother to introduce themselves to clients—the most elementary civility—but start ordering them around and scoffing at their claims of innocence.” Harris, *supra* note 10, at 82.

188. J. CASPER, *supra* note 116, at 109.

189. *Id.* at 116-17.

190. Wilkerson, *supra* note 172, at 146.

## The Defense Attorney's Role in Plea Bargaining

wants when he sends for a defender is someone to talk to, "someone to hold his hand."<sup>191</sup> These defenders were lawyers, not salesmen or hand-holders, and they apparently viewed the development of a "bed-side manner" as the concern of another profession.<sup>192</sup>

One can often sense a significant difference between public defenders and private defense attorneys simply upon viewing their offices. Here, however, the difference is attributable more to economics than to attitudes. The offices of many private defense attorneys are strikingly opulent—more plush, in fact, than many offices of large, successful corporate law firms. The carpeting, electronic gadgetry, furniture, and fixtures may themselves convey a message to visitors: the occupant of this executive palace has "made it" and knows his way around.<sup>193</sup> There are, of course, other private attorneys who work in dark, low-rent offices with furniture that Goodwill Industries might refuse to sell. Even these offices, however, often have a warm, cluttered "law office" look. They provide a sharp contrast to the sterile atmosphere of most public defenders' cubicles.

That this difference is not entirely the product of economics is written on the office walls. The office of Philadelphia defense attorney Bernard Segal, for example, features a photograph of a junk store window with a sign reading, "Jail Keys Made Here." In the office of Chicago attorney Sam Adam is a painting, done by Adam himself, of a man in a jail cell with sunlight streaming through the bars. Beneath it are these words of Eugene V. Debs: "While there is a lower class, I am in it. While there is a criminal element, I am of it. While there is a soul in prison, I am not free." The most dramatic wall decoration in any public defender office that I visited was a certificate of admission to the bar.

Of course these differences are superficial, yet criminal defendants may form their impressions of their attorneys on a superficial basis. As a group, private defense attorneys are more colorful figures than public defenders, and although a rational consumer might be more suspicious of an attorney's flamboyance than reassured by it, criminal defendants may not be an especially rational group. Indeed, a defense attorney's style and lavish use of money may sometimes affect the outcome of the plea-negotiation process, and the defendants' perceptions may not always be without foundation. Oakland Public Defender John D. Nunes illustrated this possibility when I asked whether the members

191. *Id.*

192. The defenders noted that they also lacked time to visit the jail more frequently.

193. One suspects that the "democratic touch" would be far less popular.



of his office secured "better" or "worse" plea agreements than most private attorneys. Unlike other observers who thought that public defenders did "better," "worse," or "no differently" from private attorneys, Nunes said:

Our office gets better deals than most private attorneys, but there are three private attorneys in Oakland who do better than we do. These attorneys spend a lot of time and money ingratiating themselves with the figures around the criminal courts, and as a result, they are ace high with everyone. The lawyers in my office have neither the time nor the money to take the cops to lunch.

The lack of rapport between public defenders and their clients is, in part, a matter of cosmetics and style, and measures designed to educate the defenders' clientele and to promote better "client relations" might help to alleviate the difficulty. Nevertheless, the Wilkerson and Casper studies indicate that the problem goes beyond cosmetics and education to the substance of the defenders' performance. Many of the grievances voiced by the defenders' clients mirror the problems, dangers and disadvantages that this article has noted in the public defenders' position—particularly the danger of excessive cooperation with the prosecution:

The first thing that comes to the public defender's mind is to cop out.

I think that everything I tell the public defender goes straight to the district attorney.

Judges have no regard for the public defender.

The public defender is not supposed to beat cases, but just go through the motions.

The public defender is a bad thing. They are afraid of the judge.<sup>194</sup>

[H]is name in superior court is known as "cop-out Kujawski." That is what everybody in prison calls him cause that's the first thing as soon as he comes in your cell in superior court, that's the first thing he says—cop out, cop out, cop out.<sup>195</sup>

194. Wilkerson, *supra* note 172, at 143-44.

195. J. CASPER, *supra* note 116, at 107-08. Jail inmates have of course devised other colorful nicknames for public defenders. In San Jose, one defender's reputation for entering speedy pleas of guilty has brought him the nickname "Dumptruck." J. Sawyer, *Social Scientists and the Defense: A Skeptical View*, 1973, at 13 (unpublished paper on file at the University of Texas Law School Library). Another San Jose defender is known as "San Quentin Fats." Eldridge Cleaver has noted that inmates commonly refer to public defenders as "penitentiary deliverers." G. SMITH, *A COMPARATIVE EXAMINATION OF THE PUBLIC DEFENDER AND PRIVATE ATTORNEYS IN A MAJOR CALIFORNIA COUNTY* 157 (1969).

## The Defense Attorney's Role in Plea Bargaining

He seemed like he didn't care one way or the other. He just cop out, you know.

A public defender is just like the prosecutor's assistant. Anything you tell this man, he's not gonna do anything but relay it back to the public defender [*sic*; he means the prosecutor].

He just playing a middle game.<sup>196</sup>

Private defense attorneys have an advantage in the process of "client control" apart from closer personal relationships with their clients. When a client rejects a private attorney's suggestion that he plead guilty, the attorney may threaten to withdraw from the case: "You are paying for my advice, and if you won't accept it, there is no point in continuing our relationship. You've had a damn good lawyer up to now, but I'm not interested in helping you to make a fool of yourself." Although public defenders cannot employ this tactic, they possess a far more terrifying technique of "client control" that is ordinarily unavailable to private attorneys. As this article has noted, many clients of public defenders are unable to secure their release from custody pending trial, and defenders who nobly refuse to employ delay for the sake of wearing down a prosecutor's witnesses may sometimes employ it to wear down their own clients.

The process may not always be quite so coldblooded and cynical as it seems. Although public defenders cannot secure long postponements in many of their cases, they can in a few; and when a defender is persuaded that a trial would be futile, that the defendant may ultimately realize that fact, and that delay may therefore save the defender substantial effort without injuring the client's interests, he may decide to postpone preparation of the client's case in favor of work that he considers more significant. The client, however, may correctly perceive that he is, in effect, the public defender's prisoner, that he will not receive within any foreseeable period the trial that the Constitution guarantees him, and that the only way to secure any resolution of his case is to do the public defender's bidding.

Melvin Goldberg, an attorney in an experimental bureau that provided civil legal aid services in the Cook County Jail, reported the case of a young black woman without any prior criminal record who had been charged with murder. She told an apparently credible story of self-defense: the victim of the shooting was a patron in a cocktail lounge where the defendant worked as a waitress. He had been making

196. J. CASPER, *supra* note 116, at 107-08.

sexual advances throughout the evening and had become more abusive with each rebuff. He had finally threatened to kill the defendant and was apparently reaching for a weapon when she shot him. The defendant had given a public defender a list of witnesses to the entire transaction. Although she had been in custody for a year, the public defender had not contacted anyone on the list. Instead, the defender repeatedly urged the defendant to plead guilty to murder, promising that her sentence would be only 14 years imprisonment, the minimum term permitted by statute. Goldberg telephoned the public defender, who confirmed the defendant's story of their relationship. The defender nevertheless resisted Goldberg's suggestion that it was his duty to secure a trial for the defendant if she wanted one. He maintained that the proposed 14-year sentence was a "good deal," and he argued unrealistically that the defendant might receive the death penalty if she stood trial. Three more months passed before the defendant pleaded guilty to voluntary manslaughter and was sentenced to a term of two-to-ten years. Even then, the defendant had been reluctant to forego her right to trial. She had relented only upon learning that she would be eligible for parole as soon as she arrived at the penitentiary.

#### H. *The Defender's Caseload and Its Effect*

After presenting this example of "client control," Goldberg nevertheless observed that most public defenders were both competent and genuinely concerned about their clients' welfare. In his view, the defenders' failures usually stemmed from the fact that they were seriously overworked. In a federal habeas corpus proceeding, for example, Goldberg induced a Chicago defender to testify that he had handled more than 400 cases in a single month; obviously this defender could have provided only the most cursory representation of his clients.

The caseloads of individual defenders vary substantially from jurisdiction to jurisdiction. In 1970, the average caseload per defender in New York City was 922 cases;<sup>197</sup> in Philadelphia, defenders "were carrying a caseload of from 600 to 800 cases a year and often handled 40 to 50 cases a day";<sup>198</sup> in Oakland, the average caseload per defender was merely 300 cases.<sup>199</sup> Even in cities where the problem is

197. LEGAL AID SOCIETY OF NEW YORK, NINETY-FIFTH ANNUAL REPORT 7 (1970).

198. *United States ex rel. Green v. Rundle*, 434 F.2d 1112, 1115 (3d Cir. 1970).

199. FORTY-FOURTH ANNUAL REPORT OF THE PUBLIC DEFENDER OF THE COUNTY OF ALAMEDA (1970).

A recent national survey concluded that the average annual caseload of defenders assigned to felony cases was 173; the average annual caseload of defenders assigned to misdemeanor cases was 483. Most defenders thought that a single attorney could provide effective representation for no more than 100 felony defendants or 225 misdemeanor defendants each year. THE OTHER FACE OF JUSTICE, *supra* note 83, at 29.

## The Defense Attorney's Role in Plea Bargaining

least severe, public defenders usually have far more burdensome caseloads than most private defense attorneys.<sup>200</sup>

A public defender's caseload is at once his greatest burden and his greatest asset in the plea-negotiation process. Although the caseload may tend to grind some defenders into a perfunctory bureaucratic routine, it also provides defenders with a powerful bargaining lever. In 1937, before the growth of urban defender systems in response to judicial expansion of the right to counsel, Justice Henry T. Lummus wrote, "If all . . . defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of justice in any state in the Union."<sup>201</sup> The organization of urban defender offices has provided a mechanism by which large numbers of defendants can engage in the concerted action that Justice Lummus described; indeed, they may do so at the behest of their attorney without fully realizing that a concerted bargaining strategy is involved. As George H. Ross, the Public Defender in Pittsburgh, noted, "We can tie up the whole system, and the prosecutors and trial judges know it."<sup>202</sup>

The most spectacular form of bargaining leverage that a public defender office can exert is a "general strike," in which all of the defenders' clients insist upon exercising the right to trial.<sup>203</sup> A few prosecutors, however, discounted not only the likelihood that defenders would carry out this threat but the probable effectiveness of the tactic if they did. David S. Worgan, the Executive Assistant District Attorney in Manhattan, maintained, "In a Legal Aid strike, a few defendants might go to trial and hold things up, but the stiff sentences that they received would quickly persuade the Legal Aid Office to reconsider its position." Worgan's view was apparently that his office could "break" any public defender strike, and at least one public defender agreed. Boston's Edgar A. Rimbold observed, "Our volume of cases may be a powerful bargaining weapon, but it is far less powerful than the District Attorney's ability to secure harsh sentences when defendants stand trial. It is to our clients' advantage to see that plea-

200. Bernard Segal, a private attorney in Philadelphia, observed, "In plea negotiation, the public defenders are the wholesalers, and we are the retailers. The defenders have the whole list."

201. H. LUMMUS, *THE TRIAL JUDGE* 46 (1937).

202. See *A Comparison of Defense Relationships*, *supra* note 21, at 123 ("We've got the volume. I could bring my court to a halt if I tried every case").

203. Of course there is another, more obvious form of public defender strike—that in which defenders simply refuse to report for work. In July, 1973, attorneys of the Legal Aid Society of New York successfully participated in a "traditional" strike of this sort. The fruits of their victory included a desk and a telephone for each attorney. See Lobenthal, *supra* note 21, at 1220.

negotiation operates on a level of accommodation and fairness rather than a level of warfare."

Most prosecutors and public defenders, however, believed that the public defenders' caseload was at least a "background factor" in bargaining and that it tended to induce prosecutorial concessions. Indeed, one public defender reported that he had overtly employed the "general strike" as a bargaining tactic. George H. Ross of Pittsburgh declared, "Our office went on strike twice within the past two years, and on both occasions, we got what we wanted within two days. By the time we had 14 or 15 juries lined up, we had secured the respect of the courts and broken down their traditional discrimination against the poor." Other public defenders reported that they had not resorted to a "general strike," but only because it had been unnecessary to do so. One observed, "You bet we are ready to gum up the works. The District Attorney realizes that he has to be moderately plastic or it is just going to happen." Still other defenders apparently believed that they could have it both ways. Said Paul G. Breckenridge, the Chief Deputy Public Defender in Los Angeles, "The 'strike' is not a legitimate tactic, and I would not use it. Nevertheless, the threat is there even when a defender is totally silent."

Although public defenders seem almost never to employ the "general strike," they do employ less dramatic measures that reflect the same concept. For one thing, there is the "strike on the craft union principle." A prosecutor's office may seek sentences for purse-snatchers or for some other group of offenders that the public defenders consider unduly harsh. The defender office may respond by taking every purse-snatching case to trial until the prosecutor's office abandons its policy. Of course this tactic is not always in the best interest of all of the public defenders' clients; even when prosecutors seek harsh sentences for all purse-snatchers, they are likely to seek especially harsh sentences for purse-snatchers who stand trial. Nevertheless, a defender office may decide to seek the greatest good for the greatest number and, in effect, to sacrifice today's client for tomorrow's. It is as though all members of the purse-snatching craft were engaged in collective bargaining.

Most public defenders freely admitted their use of this bargaining leverage. "Some prosecutors in this city once concluded that forgery was a worse crime than robbery," said a New York public defender. "They discovered that forgery defendants would not plead guilty to felony charges, and they quickly came back to their senses. Similarly, I've noticed that there is some provision for enhanced punishment

## The Defense Attorney's Role in Plea Bargaining

for repeated offenders in our new penal code. If the prosecutors ever try to use it, they will find that there are no guilty pleas in repeated offender cases." Several attorneys in Los Angeles recalled that the public defender office in that city had once refused to enter guilty pleas for defendants charged with prostitution. A number of private defense attorneys joined the strike, and for a two-week period, most prostitution cases went to trial. Ultimately, the courts "came around" and revised their sentencing policies. By such mechanisms are resources allocated and sentences determined in the American system of criminal justice.

Use of the "craft union strike" by public defenders caused one New York prosecutor to reject my inquiry whether public defenders secured more or less favorable plea agreements than private defense attorneys. "It is not a matter of doing better," he said. "The Legal Aid Agency simply sets the standard. The Agency may decide that first offenders charged with street robbery should not plead guilty to anything more serious than the highest grade of misdemeanor. The Legal Aid policy ultimately becomes the law, and street-robbers who are represented by private attorneys then receive the same benefits as those who are represented by Legal Aid attorneys."

Public defenders may also employ "strikes on the industrial union principle." All defendants engaged in a particular "craft" do not refuse to plead guilty; instead, all defendants who come before a particular judge insist upon the right to trial. Although they are members of various "trades and crafts," these defendants are united in collective opposition to management policies. They have become members of a union shop by virtue of the assignment of a public defender to represent them. "Back in my day in the public defender office," noted Philadelphia's Bernard Segal, "as soon as a judge reached an unsatisfactory result or imposed an unjustified sentence, we said, 'That's it! Jury trial on the whole list!' If the judge asked us why, we'd bluntly tell him: 'Because you gave the last guy ten years.'" As this article has noted,<sup>204</sup> an "industrial union" strike may persuade an affected trial judge to reconsider his sentencing philosophy; it may induce the court's presiding judge to reassign the judge and replace him with a "more experienced" jurist who knows better how to "move cases"; and if all else fails, the strike insures that a minimum number of defendants will be sentenced by a judge who has dared to offend the public defender office.

204. See p. 1237 *supra*.

All forms of public defender "strikes" pose a serious ethical issue. An individual defendant is usually less interested in promoting the "greater good" of the public defender's clientele than he is in obtaining the most lenient treatment that he can. When a public defender sends a meritless case to trial as part of a "strike," he disregards the probability that his client could have secured more lenient treatment by pleading guilty. This problem is in no way lessened by the fact that the public defender has been unable to secure a satisfactory resolution of his client's case through a plea agreement; in many cases, if not most, an even less satisfactory resolution will probably follow a trial. When a public defender "goes on strike," he is obviously engaged in still another form of trade-out.

I confronted Pittsburgh's George H. Ross with the ethical problem and asked whether he thought that his office had provided effective representation for the defendants who went to trial during his "general strikes."<sup>205</sup> He offered two responses. "First," he said, "throwing a client to a jury is not the same thing as throwing him to the wolves, and second, the only alternative was submission. That course would have perpetuated a system in which judges were building their political reputations on the bodies of the poor while granting special favors to certain private attorneys."

My initial reaction was that Ross's response did not begin to justify the betrayal of an individual client by a public defender who had been assigned to represent him, but on reflection, I became less sure. Perhaps Ross was correct that there is another side to the problem. Prosecutors and trial judges possess an effectively unreviewable power over sentencing, and they can use this power to penalize any action by a defendant or defense attorney that they do not like. A prosecutor or trial judge may, for example, take offense at the exercise of the right to trial, at the invocation of the privilege against self-incrimination, at an attorney's failure to make a political contribution, or even at his refusal to shave a beard or to drink at a club to which the prosecutor and trial judge belong. A lawyer who considers only the best interest of the client whom he represents must yield to almost any abuse that a prosecutor or trial judge is tyrannical enough to impose; the lawyer can rarely hope to prove that a harsh sentence was inflicted on his client as reprisal. In this way, the lawyer's traditional duty to serve his client without reservation may become a device for quieting opposition to injustice and for perpetuating unfairness from one case

205. See pp. 1249-50 *supra*.

## The Defense Attorney's Role in Plea Bargaining

to the next. For a lawyer to combat prosecutorial or judicial abuse, he must refuse to yield to it, and in the short run at least, prosecutors and trial judges can insure that this refusal will not serve the interests of his clients.

The issue, then, is whether a lawyer may properly assert a legal right when he believes that its assertion will be met with reprisal and that no effective remedy for this lawlessness will be available. When the best defense of a client consists of not defending the client, should a lawyer consider other interests, such as the welfare of future clients, in determining his course of action? In other contexts, some moral theorists proclaim an absolute duty of resistance to tyrannical government. In extreme cases, perhaps the individual's responsibility is not to weigh harms and benefits but to refuse to participate even in a small way in perpetuating manifest unfairness. Whatever extremes of injustice a lawyer may encounter in the criminal courts, however, he cannot adopt so simple a view. Unlike the martyrs of history, a lawyer rarely risks prison as the price of his resistance. Only his client runs that risk, and heroism does not seem so heroic when someone else must pay its penalties. Nevertheless, a lawyer may have a long-range obligation to help build a just legal system—a system in which, for example, the exercise of legal rights is taken for granted and is not the subject of informal, unprovable reprisals. This obligation may conflict with the lawyer's duty to serve the immediate interests of his client, and terrifying though it is to betray these interests, perhaps extreme abuses of governmental power sometimes require this action—through such mechanisms as the public defender strike.<sup>206</sup>

206. At a minimum, of course, a lawyer must inform his client of the long range objectives that he seeks and of the risks that the client runs. Public defenders seem to neglect this duty in assuming the power to proclaim, "That's it! Jury trial on the whole list!" Disclosure alone, however, cannot fully resolve the problem. In ordinary circumstances, it would be presumptuous and unfair for a lawyer to suggest to a client a course of action that the lawyer himself does not consider in the client's interest. Moreover, when a lawyer informs a client that he wants to "fight" the judge or prosecutor, the client is likely to acquiesce despite the disclosure of risks which indicate that he is unlikely to gain from this action. Effective representation in ordinary circumstances may require that a lawyer persuade a client to disregard his own instincts and inclinations and think more clearly about what is at stake. Even the omission of this persuasion can be regarded as an act of betrayal and as an abandonment of the lawyer's traditional obligation to serve the interests of each client unreservedly. I would not, in short, regard the "consent" of a public defender's clients as automatic justification for a strike that the public defender himself had initiated; instead, a defender should consider the quality of this consent, the severity of the abuses to which he is responding, and the extent of the probable penalty, in deciding whether so extreme a measure on behalf of future clients is warranted. Still, I am no longer prepared, as I once was, to view the public defender strike as inherently unethical. Perhaps I should add, however, that simple disagreement with a judge's sentencing philosophy seems inadequate as justification for a "public defender strike."



The ability of a public defender's caseload to induce prosecutorial concessions seems far less significant in practice than its effect on the defender himself. A public defender who strives to "keep current" must inevitably enter guilty pleas for most of his clients, and as a public defender becomes attuned to his work, the guilty plea may tend to become his almost instinctive response to all but the most serious or exceptional cases.<sup>207</sup>

It is easy to understand why prosecutors and trial judges respond

207. Joe J. Sawyer, a law student who worked as an intern with the Public Defender Office in San Jose, offered an illustration. As part of his duties, Sawyer interviewed a jailed 18-year-old defendant, who was small, black, slow-witted, and frightened. The defendant lived in a high-crime neighborhood, and his story emerged only gradually after some coaxing.

As the defendant told it, he was walking home at 3:00 A.M. and was within two blocks of his apartment when a voice called out, "Hey, you!" The defendant started to run, climbed over a neighbor's fence, and was then overtaken by a large dog. The dog attacked, and the defendant fell to the ground and covered his head with his arms. As the dog bit him repeatedly, the defendant heard voices in the background. One of the voices finally called the dog to heel. It developed that both the dog and the author of the anonymous shout worked for the San Jose Police Department. The defendant was charged with resisting arrest, trespass, and failure to identify himself properly, a non-existent crime.

The defendant's statement might, of course, have been untrue. The "unidentified voice" and the "flight to safety" do seem to be recurring themes in the stories of defendants charged with resisting arrest. Nevertheless, the defendant was apparently convinced that, even as he had described the situation, he had done something criminal; he had, in fact, begun the interview by offering to plead guilty. In addition, the defendant did not seem intelligent enough to create so coherent an exculpatory story. Finally, the story had apparently not been planned in advance; the defendant had, for example, failed even to mention the dog bites until Sawyer noticed that he was scratching himself and asked why. When, however, the defendant removed his shirt at Sawyer's request, the evidence of the dog's attack was compelling.

Sawyer concluded that the defendant was innocent of any wrongdoing. His only "resistance" was flight from an unidentified voice; his only "trespass," an entry that was plainly noncriminal. CAL. PENAL CODE § 602(k) (West 1972). Sawyer filed his interview report along with a request, in duplicate, for photographs of the defendant's wounds. He assumed that the lawyers and investigators of the defender office would take responsibility for further action in the case.

Several weeks later, Sawyer noticed the defendant in jail, dressed in "kitchen whites." He asked whether the defendant had been to court, and the defendant answered that he had. "Did you have a lawyer?" Sawyer asked. "Yes, but I thought it was gonna be you," the defendant answered. The defendant could not remember the name of his attorney, but he asked shyly when the photographer that Sawyer had mentioned would come to the jail.

Sawyer investigated and found that the defendant, represented by a public defender, had pleaded guilty to the most serious charge against him, resisting arrest. He had been sentenced to a six-month term in the county jail. At the bottom of the defender's files were Sawyer's interview report and his requests, marked urgent, for photographic evidence. Sawyer also uncovered the police arrest record, which was consistent with the defendant's story. The public defender who had appeared in the case admitted that he had not read Sawyer's initial report and seemed appalled by his error.

When Sawyer wrote to me about this incident, I suggested that it might not be too late to secure a partial remedy. If the public defender would seek a new trial, reveal the circumstances, and confess that he had failed to provide adequate representation for the defendant, it seemed almost unthinkable that his motion would be denied. Most trial judges are undoubtedly willing to stop the criminal justice machine once they are persuaded that it has run someone over. Sawyer conveyed this suggestion to the public defender, but the defender, fearful of losing his job, refused to file a motion for a new trial. "You'll make some mistakes yourself when you become a lawyer," he told Sawyer.

## The Defense Attorney's Role in Plea Bargaining

to caseload pressures, but it is not entirely clear why public defenders share their concern. It is true that many of the defenders' clients are held in custody pending trial, and as one defender observed, "The longer we take with each case, the longer the other guys must sit it out." Although this consideration is obviously relevant and important, it probably does not offer a full explanation for the haste that many defenders exhibit.

Of the various legal rights that public defenders are sworn to uphold, the right to counsel is among the most basic. The protection of this right is, of course, the very reason for the public defenders' existence. The use of delay for tactical reasons and the public defender strike may seem improper, but it is obviously a defense attorney's obligation to seek the time necessary to provide an effective defense. Fulfillment of this obligation may cause a defender to fall behind and may increase the court's backlog. Those concerns are not properly the defender's.

A public defender should therefore respond to an unmanageable caseload by complaining about it, and he should complain, not only in administrative and budgetary forums, but in the courts. Specifically, a defender should object to proceeding in any case in which he is unable to provide effective representation, and if ordered to proceed despite his objection, he should note for the record every point in the proceedings at which he might have done a more capable job if granted additional time.<sup>208</sup> Far from adopting this approach, however, most public defenders apparently consider it their duty to "do the best they can with what they've got" and to fight hard for an adequate budget "next year."<sup>209</sup> The reason for this attitude may be that the defenders fear reprisal if they seek too vigorously to vindicate their clients' rights,<sup>210</sup> or it may be that the defenders are simply coopted by the bureaucratic ethic that pervades the criminal courts. In either event, the public defender's caseload is a mainstay of the guilty-plea system.

208. A federal district court once ordered the Legal Aid Society of the City of New York to refuse appointments in felony cases until its lawyers had average caseloads of no more than 40 cases each. The court was quickly reversed on appeal on the ground that public defenders do not act under color of state law. See *Wallace v. Kern*, 481 F.2d 621 (2d Cir. 1973), *rev'g* 371 F. Supp. 1384 (E.D.N.Y.), *cert. denied*, 414 U.S. 1135 (1974). For a more defensible path to the same unfortunate result, see *Brown v. Joseph*, 463 F.2d 1046 (3d Cir. 1972), *cert. denied*, 412 U.S. 950 (1973); *John v. Hurst*, 489 F.2d 786 (7th Cir. 1973) (immunity of public defenders in federal civil rights actions).

209. See *Eckart & Stover*, *supra* note 86, at 670: "[T]he notion of providing an adequate defense . . . becomes defined in terms of what is possible given limited time and resources for investigation."

210. See *A Comparison of Defense Relationships*, *supra* note 21, at 110.

### III. Other Appointed Attorneys

Appointed attorneys other than public defenders may be divided into two main categories, draftees and volunteers. The draftees are, of course, those who serve because they must; judges have simply ordered them to represent indigent defendants as a matter of professional duty. The volunteers, by contrast, are those who choose to serve—usually for reasons of social concern, a desire for trial experience, or a desire to obtain the statutory fees available to appointed attorneys. The factors that induce attorneys to accept their appointments are, I believe, very likely to affect the substantive outcome of the criminal process under a regime of plea negotiation. This section will develop this thesis and then consider one disadvantage shared by many appointed attorneys—the nonspecialist's lack of knowledge of our secret system of justice.

Only one of the jurisdictions that I studied—Houston, Texas—lacked a public defender system. At the time of my visit in 1968, it operated instead under a “coordinated assigned-counsel system”—a system in which every member of the bar was expected to take his turn at representing indigent defendants. (The grant that supported this system expired in 1969, and Houston has now returned to its older system of ad hoc appointments under which a relatively small number of lawyers are repeatedly assigned to represent the indigent.)<sup>211</sup>

The design of Houston's assignment system received the praise of the President's Commission on Law Enforcement and Administration of Justice,<sup>212</sup> but almost all local observers agreed that in operation the system was a failure. As the program was conceived, staff members of the Houston Legal Foundation would interview all defendants shortly after arrest to determine which were indigent. In practice, as staff members themselves conceded, the Foundation “missed” many indigent defendants. These “forgotten men” commonly remained in jail for a year or longer without any form of defense representation.<sup>213</sup> Even

211. Jack D. Bodiford, a Houston Legal Foundation staff attorney, reported that before the establishment of the coordinated assigned-counsel system in 1966, fewer than 20 attorneys secured most appointments. “Each judge had his handful of favorites,” he explained. In a recent telephone conversation, Bodiford added a postscript on the current situation: “The number of appointed attorneys is larger than 20 today because so many young lawyers are haunting the courthouse looking for business.”

212. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 60 (1967).

213. If, for example, a defendant told a Foundation interviewer that a friend or relative was attempting to hire a lawyer for him, no attorney would be appointed (unless the defendant later, on his own initiative, wrote the Legal Foundation to request assistance). Similarly, defendants who were indicted by the grand jury prior to arrest were commonly not interviewed. Although many “forgotten defendants” were scheduled

## The Defense Attorney's Role in Plea Bargaining

when the Foundation considered the indigency of particular defendants, moreover, it applied an unrealistic test of financial need and failed to provide counsel for many defendants who were in fact unable to hire their own attorneys.<sup>214</sup> Trial judges usually did not apply the same narrow standards of indigency when these defendants came before them, and hasty last-minute appointments were the result.

In theory, the Foundation would select two attorneys to represent each indigent defendant—one with significant trial experience and one without. The experienced trial lawyer would be responsible for the conduct of the litigation, and the other lawyer would assist him with bookwork and legwork. In practice, however, the two appointed attorneys could divide the labor as they chose, and it was common for the more experienced lawyer to thrust full practical responsibility for the case upon his less experienced subordinate. Moreover, lawyers with political connections seemed to have little difficulty escaping their assignments,<sup>215</sup> and several judges refused to participate in the program in certain sorts of cases, preferring to appoint attorneys whom they had personally selected.

It was also contemplated that the Legal Foundation would maintain a comprehensive "motion bank" and a file of briefs and memoranda on issues likely to arise in criminal cases. Its staff attorneys would, moreover, be available for consultation with appointed attorneys. In practice, few appointed attorneys ever called upon the staff attorneys or examined the Foundation's files. Most of those who did reported that they had not found the process worth the effort.

for examining trials (preliminary hearings) during their lengthy periods of pretrial detention, the problem was not remedied at that stage. Instead, lawyers were appointed to represent these defendants for their examining trials only; at the conclusion of these hearings, the defendants returned to jail and were once again forgotten.

214. An unmarried defendant was ineligible for Foundation assistance if he earned as much as \$1,800 per year. Although a defendant's permissible annual earnings increased with the number of dependents he supported, no defendant, however large his family, could obtain free defense services if he earned more than \$4,000 per year. Incredibly, one common complaint of private defense attorneys was that even these standards were not stringent enough. "I could get a fee out of those people," one lawyer remarked.

The Foundation also refused assistance to any defendant who had secured his release on bond, however small the bond amount. Its position (and the position of every Texas trial court with which I am familiar) was that "anyone who can make bond is not indigent." This test of indigency seems unrealistic and unfair. Even a penniless defendant may be released on bond if someone else supplies the money, yet the disqualification imposed by the Texas trial courts still applies. As one judge explained, "If a defendant can come up with funds from any source, these funds should go to a lawyer rather than to a bondsman." This policy probably does not reflect an objective assessment of the defendant's interests, but it does reflect the interests of the private defense bar. See ABA STANDARDS, *supra* note 55, § 6.1 (1967) ("Counsel should not be denied to any person . . . because he has posted or is capable of posting bond").

215. In Galveston County, Texas, one attorney successfully evaded appointment in a different way. He joined the Sheriff's Reserve as a deputy, thereby creating a conflict of interest. W. Verkin, *Plea Bargaining in Galveston County*, May 12, 1971, at 14 (unpublished paper on file at the University of Texas Law School Library).

More careful and competent administration could probably have alleviated many of these problems, but in my view, the primary defect of Houston's assigned-counsel system was its reliance on "draftees." The quality of representation provided by these attorneys and the degree of their involvement or commitment varied greatly. Some prosecutors and Legal Foundation staff members reported that, in terms of hours of service and quality of research and legal analysis, the members of large corporate law firms probably did the most capable job.<sup>216</sup> These firms could fit assigned cases into their workloads with no significant economic hardship, and they could treat each assignment as "just another case."<sup>217</sup> Prosecutors also reported that most of the attorneys who regularly appeared in the criminal courts in private practice treated their assignments no differently from other cases. Only a few private defense attorneys sought to conserve their energies for paying clients by "getting rid of" the assigned cases as quickly and easily as possible. In addition, some of Houston's draftees might have become volunteers if given the opportunity. These attorneys valued their assignments as an opportunity for service, as a chance to gain trial experience, and even, perhaps, as a source of variety and amusing cocktail party conversation.

Most appointed attorneys in Houston, however, apparently resented their assignments.<sup>218</sup> Some were not practicing lawyers—simply trust officers in banks, stock brokers, business executives, and insurance salesmen who had once been admitted to the bar and who continued to pay their dues. Many of those who were practicing lawyers, moreover, had chosen to draft bond indentures, examine real estate titles, file patent applications, or register securities partly because they did not *like* criminal work. The thought of representing the guilty was often particularly discomfoting to these attorneys, and they could

216. These lawyers were, however, often hampered by their lack of knowledge of the guilty-plea system. See pp. 1268-70 *infra*.

217. The younger associates of large firms often found that they had greater responsibility and authority in assigned cases than they did in other matters handled by their firms. With their salaries unaffected, they might therefore respond to their assignments with enthusiasm.

218. The Houston Legal Foundation supplied appointed attorneys with forms to submit upon the completion of their assignments, and the forms provided an opportunity for comment upon the attorneys' experiences. Many attorneys, of course, chose not to comment, and the responses of those who did have not been published or subjected to statistical analysis. Nevertheless, as Sam H. Robertson, a former Chief of the Legal Foundation's Criminal Division, summarized the attorneys' comments, only a minority expressed enthusiasm for their assignments. The attitudes of the others ranged from resignation ("O.K., I was drafted, so I did the job") to hostility ("Go to hell; this criminal stuff stinks").

## The Defense Attorney's Role in Plea Bargaining

easily conclude that the "honorable thing" to do for a client who admitted his guilt was to negotiate a speedy plea of guilty.<sup>219</sup>

The economic burden of poorly compensated assignments was another manifest source of resentment. As members of small firms, many draftees felt busy enough just juggling the cases of their paying clients. When confronted with a case that was outside their area of expertise, that might require extensive re-education in a subject considered only briefly in law school, that involved strange people and led to unfamiliar places, and that paid next to nothing, these lawyers commonly concluded that they would fit it in as best they could—and that it would fit in best at the bottom of their files.

Fortunately for many of these lawyers, the guilty-plea system offered an easy way out. With little effort and minimal contact with the grime and confusion of the criminal courts, an unhappy recruit could quickly put his unpleasant duties behind him. The only work involved was that of persuading the defendant to plead guilty, a task that might, in fact, be eased by the defendant's vision of the kind of trial that his resentful lawyer would be likely to provide. Moreover, the lawyer's conscience would be clear, for under the guilty-plea system, a lawyer can always persuade himself that the course that serves his own interests is probably in the best interest of the defendant and society as well.<sup>220</sup>

An assigned-counsel system relying on draftees might conceivably be successful if all or most cases were resolved by trial. The adequacy of each attorney's performance would then be a matter of record, and the attorney would be encouraged to take his responsibilities seriously. Today, however, draftees may evade their responsibility in a way that is not subject to any effective form of review, that can usually be rationalized as no evasion at all, and that may, in fact, win the plaudits of court officials. Under a regime of plea negotiation, an assignment system like Houston's will inevitably deny loyal and effective representation to a substantial proportion of indigent defendants.

219. Arthur Wood reported the following conversation with a lawyer who handled a significant number of criminal cases but who would have preferred to do nothing but probate work:

Q. Have you ever refused a client's request to take his criminal case because you knew the defendant was guilty?

A. No. Everyone has a right to a lawyer.

Q. Have you ever defended such a person in court?

A. Never have that I know of. I usually convince them to plead guilty.

A. WOOD, *CRIMINAL LAWYER* 72-73 (1967).

220. See A. TREBACH, *THE RATIONING OF JUSTICE* 148 (1964) ("the guilty plea is used as a quick way out by certain assigned counsel harassed by the pressure of private business and embarrassed by the procedure of an unfamiliar court").

A different sort of assignment system exists in Chicago. In that city, the Chicago Bar Association Committee on the Defense of Prisoners provides representation for indigent defendants when the Public Defender cannot appear because of a conflict of interest or when, for some other reason, a trial judge chooses to appoint counsel other than the Public Defender. In 1965, this Committee directed its members to decline the statutory compensation to which they were entitled as appointed attorneys,<sup>221</sup> and although this policy was short-lived, most Committee members refused to accept compensation for their services even when the choice was left to them.<sup>222</sup> Many of these volunteer lawyers were young men and women anxious for trial experience. Partly because their own law firms would not entrust them with full responsibility for a \$5000 civil case, they gained experience in cases in which the stakes were merely a few decades of the lives of indigent defendants.

The danger posed by the service of this sort of volunteer is, of course, the opposite of the usual danger posed by the service of a reluctant draftee. For the sake of trial experience, a volunteer may be too ready to take a case to trial.<sup>223</sup> A Chicago prosecutor recalled a narcotics case in which he had offered to permit the defendant to plead guilty to a reduced charge and to recommend a minimum sentence of five years. According to the prosecutor, the defendant sought initially to accept this offer, but his appointed attorney persuaded him that the case could be won at trial. As the prosecutor expected, this

221. D. OAKS & W. LEHMAN, *supra* note 85, at 129-30. The Committee's policy of refusing compensation did not extend to capital cases, however.

222. *Id.* at 128.

223. Chicago's situation is unusual. In other cities, appointed attorneys, like public defenders, are usually more likely to enter guilty pleas for their clients than are retained attorneys. Cf. L. SILVERSTEIN, *supra* note 85, at 69-70. Thus, in the federal district courts outside the District of Columbia in fiscal year 1971, more than 66 percent of all cases in which appointed attorneys appeared ended in guilty pleas. Fewer than 56 percent of the cases of retained attorneys ended in guilty pleas. With dismissals and acquittals excluded, 86 percent of all convictions in appointed-attorney cases were by guilty plea, and 81 percent of all convictions in retained-attorney cases were by guilty plea. See FEDERAL OFFENDERS IN U.S. DISTRICT COURTS, *supra* note 82, at 46-47, 122 (although not reported directly, the percentages can be calculated on the basis of figures presented on these pages). The greater willingness of appointed attorneys to enter pleas of guilty was not reflected in lighter sentences for their clients. On the contrary, retained attorneys secured lighter sentences overall, *id.* at 45; this difference was especially pronounced in guilty plea cases, *id.* at 46-47; and the difference remained when separate offense categories were examined separately, *id.* A Minnesota study found that counties with appointed-counsel systems experienced about the same guilty-plea rate as counties with public defender systems. It also found that the introduction of public defender systems did not significantly change the guilty-plea rate in individual counties. Benjamin & Pedeski, *The Minnesota Public Defender System and the Criminal Law Process: A Comparative Study of Behavior at the Judicial District Level*, 4 LAW & SOC'Y REV. 279, 292 (1969).

In Chicago, however, with its uncompensated volunteers, the story is different. Oaks and

## The Defense Attorney's Role in Plea Bargaining

prediction proved too optimistic and the defendant was sentenced to a minimum term of 35 years. The defendant's conviction was, however, reversed on appeal because of the appointed attorney's incompetence (as manifested in his trial errors, not in his rejection of the proposed plea agreement).

Some observers maintain that appointed attorneys have only themselves to blame for this sort of failure. A Texas prosecutor spoke, for example, of a case in which a defendant who had been offered a 12-year sentence on a plea of guilty was instead convicted at trial, adjudged a habitual offender, and sentenced to a life term. The prosecutor conceded that it was unfortunate for a defendant to receive a life sentence for his attorney's miscalculation, but he argued that the situation was no different from that in which a young doctor lost a cancer patient whom a more experienced doctor might have saved. The prosecutor plainly overlooked the fact that he himself could have dismissed the habitual offender charge and thus acted as "Christ among the lepers." Whatever the fault of an appointed attorney, moreover, a far more serious fault seems to lie with a legal system that exacts so severe a penalty for miscalculation. This fault is compounded when the system gives power to attorneys who lack the wisdom and experience to avoid serious misjudgments and who, indeed, are subject to personal temptations to make them.<sup>224</sup>

Some volunteers are, of course, less interested in public service or trial experience than in money. In one common form of appointment system, judges merely select their personal or political favorites or lawyers who are sitting idle in their courtrooms. In Austin, Texas, for example, lawyers regularly file into a misdemeanor courtroom and place their business cards on the judge's bench before court convenes. As the judge runs through the docket call, asking each defendant whether he is able to hire his own attorney, he also runs through the business cards and makes his appointments on that basis.

Under a system of ad hoc appointments, there is some tendency for

Lehman reported that members of the Chicago Bar Association Committee on the Defense of Prisoners took their cases to trial as frequently as retained counsel and far more frequently than public defenders. When they demanded a trial, moreover, these volunteers insisted on trial by jury far more frequently than either public defenders or private attorneys. D. OAKS & W. LEHMAN, *supra* note 85, at 157 (table 27).

224. Of course it is difficult to imagine any legal system in which a defendant would not suffer for his attorney's miscalculations. The problem obviously arises whenever a system assigns significant responsibility to a defense attorney. Nevertheless, one mark of a good legal system is that, to the greatest extent possible, it makes the consequences of criminal litigation turn upon what the defendant did and what treatment he requires. A good legal system minimizes rather than maximizes the effects of strategic judgments upon the outcome of its processes.



judges not to appoint lawyers who are likely to consume the court's time with "unnecessary" trials.<sup>225</sup> Beyond that, attorneys who seek appointments are often those who cannot attract enough paying clients to keep busy.<sup>226</sup> Their primary goal may be to secure small fees from public funds, and some of them may provide no greater service than is necessary to obtain this compensation.

Appointments are commonly compensated as "piecework"; a standard fee is awarded for each case regardless of the method by which the case is resolved.<sup>227</sup> Twenty-five or 50 dollars may seem seriously inadequate as compensation for defending a person at trial, but some lawyers view it as a generous enough reward for conferring with a client for 10 minutes and then standing with him in the courtroom to enter a plea of guilty. Many assigned cases are resolved just this quickly even in felony courts, and many appointed attorneys are undoubtedly unable to remember the names of their clients a few hours after their representation has been concluded.<sup>228</sup>

The most satisfactory technique for compensating an appointed attorney is probably to pay an established hourly rate.<sup>229</sup> This method

225. Cf. Harris, *supra* note 10, at 46:

Judge Adlow chose to call on about half a dozen regular lawyers. "He parcels out the assignments—one here, one there—so that each lawyer picks up a hundred and fifty to two hundred dollars a week from the state," my informant explained. "That's not bad money for a couple of hours' work a week. They get the assignments as long as they do things the way Adlow wants—with dispatch."

226. I do not mean to suggest, however, that these lawyers are always pathetic "hangers-on" whose failure to attract clients is attributable to incompetence, alcoholism, laziness, or the like. Many are young lawyers just beginning their practices who are capable and energetic.

227. See *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 1, 152 (1970); Tigar, *supra* note 14.

Methods of compensating appointed attorneys do, however, vary greatly. Most state statutes provide for "reasonable compensation" or compensation at the discretion of the trial court. *E.g.*, IDAHO CODE ANN. § 19-860(2)(b) (Supp. 1973); IOWA CODE ANN. § 775.5 (Supp. 1974). Under these statutes, the common policy of awarding a "flat fee" in each case is apparently the judiciary's rather than the state legislature's. Other statutes grant some discretion to trial judges but impose limitations on the maximum fee in each case. *E.g.*, N.H. REV. STAT. ANN. §§ 604-A:4, 604-A:5 (Supp. 1973); VA. CODE ANN. §§ 14.1-184, 19.1-241.5 (Supp. 1974). When the statutory limits are small, the maximum fee probably tends to become the standard fee as well. Some states leave the matter to local county governments. *E.g.*, GA. CODE ANN. § 27-3204 (1972). Two states compensate appointed attorneys differently when their cases are resolved by guilty plea than when they are resolved by trial. In misdemeanor courts in Oregon, the minimum fee is 50 dollars per day for a case resolved by trial but only 25 dollars for a case that ends in a plea of guilty. ORE. REV. STAT. § 135.055(1) (1974). In New Mexico, a judge may award as much as 400 dollars to an appointed attorney who represents an indigent defendant at trial; the maximum fee is 300 dollars when the case is terminated without trial. N.M. STAT., ANN. § 41-22-8 (1972); see also GA. CODE ANN. § 27-3001 (1972) (capital cases). Even under these statutes, some economic incentive in favor of pleas of guilty seems to remain. Despite a recognition of the problem, the statutes probably do not reflect the saving in time and energy that a guilty plea is likely to provide.

228. See D. NEWMAN, *supra* note 3, at 204.

229. Accord, Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1120 (1973).

of compensation is the usual one in the federal courts under the Criminal Justice Act of 1964,<sup>230</sup> and a few state courts also pay appointed attorneys on an hourly basis.<sup>231</sup> Practical constraints prevent most private attorneys from submitting itemized bills to their clients after their services have been concluded, but there is no apparent reason why payments from government funds cannot reflect the effort that each appointed attorney has made. More significantly, this method of payment may reduce or eliminate the financial inducement to enter pleas of guilty that is inherent in the more common schemes of compensation.

Hourly payments may, indeed, encourage some attorneys to demand trials that are not really in their clients' interests. Any rate that provides reasonable or even minimal compensation for most attorneys will be attractive to a few, and these few may "milk" their assignments for all they are worth. Although it is hard to know the cause, the trial rate in the federal courts has increased somewhat since the enactment of the Criminal Justice Act.<sup>232</sup> Nevertheless, compensation based on the number of hours that an attorney has expended seems far less likely to influence his evaluation of a client's interests than any other realistic compensatory scheme. Some effect may simply be inevitable under the guilty-plea system with its emphasis on one basic yes-or-no decision, and if so, it seems better that an attorney be encouraged to give too much time to his clients rather than too little. Our current system of justice supplies ample incentives to enter guilty pleas without also imposing unnecessary financial pressures upon appointed attorneys.<sup>233</sup>

When appointed attorneys yield to the temptation to secure their

230. 18 U.S.C. § 3006A(d) (1970). The payments of \$30 per hour for time expended in court and \$20 per hour for time reasonably expended out-of-court are, however, ordinarily subject to a maximum limit of \$1,000 in a felony case.

231. *E.g.*, PA. STAT. ANN. tit. 19, § 791 (Supp. 1974) (applicable only in Philadelphia); S.C. CODE ANN. § 17-284 (Supp. 1974).

232. FEDERAL OFFENDERS IN U.S. DISTRICT COURTS, *supra* note 82, at 3; D. OAKS, *supra* note 85, at 236.

Although attorneys appointed under the Criminal Justice Act, 18 U.S.C. § 3006A(b) (1970), enter guilty pleas more frequently than retained attorneys, *see* note 223 *supra*, they may enter guilty pleas less frequently than did the uncompensated appointed attorneys who represented indigent defendants prior to implementation of the Criminal Justice Act.

233. An appointed attorney may, of course, feel financial pressure to recommend pleas of guilty even when he is compensated on an hourly basis. The rate of compensation may be so low that an assignment remains financially burdensome. Some observers believe, in fact, that this situation persists in the federal courts even under the Criminal Justice Act. *See* D. OAKS, *supra* note 85, at 245 (one-third of the Criminal Justice Act counsel surveyed believed that appointed attorneys were encouraging defendants to plead guilty for reasons unrelated to the merits of the case). The fact that attorneys appointed under the Criminal Justice Act enter guilty pleas more frequently than private attorneys lends inferential support to the view that these lawyers sense a financial impetus toward guilty pleas; nevertheless, this evidence is far from conclusive. *See* note 223 *supra*.

fees as quickly and easily as possible, their actions may give rise to claims that their clients have been denied the effective assistance of counsel. No court has ruled that 10 or 15 minutes of effort is inherently inadequate to provide effective representation in a felony case, but the Fourth Circuit has said that when a defendant is able to show that his attorney entered a guilty plea within a few minutes of his appointment a *prima facie* case of ineffective representation is established.<sup>234</sup> The burden then shifts to the state to demonstrate that, under the circumstances, the attorney could indeed have considered the case effectively in so brief a period, or, in the alternative, that the defendant suffered no prejudice from his attorney's inadequate representation.<sup>235</sup>

Most courts, however, have rejected this approach.<sup>236</sup> For example, in a felony case in which the defendant had conferred with his attorney for only 15 minutes before entering a plea of guilty, the United States Court of Appeals for the Fifth Circuit observed, "[T]he totality of

234. *Fields v. Peyton*, 375 F.2d 624 (4th Cir. 1967).

235. Other courts, without talking in terms of presumptions, have relied primarily on a lack of time for preparation to support a finding of ineffective assistance. *E.g.*, *United States ex rel. Dennis v. Rundlc*, 301 F. Supp. 1291, 1295 (E.D. Pa. 1969) (five-minute conference—time element such that counsel "was simply in no position to evaluate his case"); *Pedicord v. Swenson*, 304 F. Supp. 393 (W.D. Mo. 1969), *aff'd on other grounds*, 431 F.2d 92 (8th Cir. 1970); *Bentley v. Florida*, 285 F. Supp. 494 (S.D. Fla. 1968) (appointment only five minutes before guilty plea entered).

236. *E.g.*, *Rastrom v. Robbins*, 440 F.2d 1251 (1st Cir.), *cert. denied*, 404 U.S. 883 (1971); *Callahan v. Russell*, 423 F.2d 450 (6th Cir. 1970); *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970); *Cote v. State*, 286 A.2d 868 (Me. 1972); *Wynn v. Peyton*, 211 Va. 515, 178 S.E.2d 676 (1971).

In *Chambers v. Maroney*, 399 U.S. 42, 54 (1970), the Court said:

[W]e are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel.

This statement, although not encouraging, does not preclude the position adopted by the Fourth Circuit in *Fields v. Payton*, 375 F.2d 624 (4th Cir. 1967). Shifting the burden to the state to show an absence of prejudice when an appointed attorney has devoted only a few minutes to a case is plainly not a *per se* rule of reversal, nor does it automatically require an evidentiary hearing. Indeed, *Chambers* itself had been decided by the United States Court of Appeals for the Third Circuit before it adopted its current position, at a time when it did presume ineffectiveness once it was shown that an attorney had devoted inadequate time to a case. Despite the last-minute assignment of counsel in *Chambers*, the court of appeals had denied an evidentiary hearing on the ground that "the 'record' contain[ed] 'adequate affirmative evidence to overcome the presumption of harm from lack of time for preparation' by appointed counsel." *United States ex rel. Chambers v. Maroney*, 408 F.2d 1186, 1190 (3d Cir. 1969), *aff'd*, 399 U.S. 42 (1970). It was this result—in a case that had gone to trial—that the Supreme Court affirmed.

The Fourth Circuit has adhered to its "presumption of ineffectiveness" in the period since *Chambers* was decided, concluding after careful analysis that its position is consistent with that of the Supreme Court. *Garland v. Cox*, 472 F.2d 875 (4th Cir.), *cert. denied*, 414 U.S. 908 (1973); *accord*, *Miller v. Quatsoe*, 332 F. Supp. 1269, 1274-75 (E.D. Wis. 1971).

## The Defense Attorney's Role in Plea Bargaining

the facts may not be overridden by a judicial stop-watch.”<sup>237</sup> Similarly, in upholding a guilty plea that followed the appointment of counsel by 15 minutes, the United States Court of Appeals for the Second Circuit concluded:

[T]ime consumed in oral discussion and legal research is not the crucial test of the effectiveness of the assistance of counsel. The proof of the efficiency of such assistance lies in the character of the resultant proceedings, and unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice, mere allegations of incompetency or inefficiency of counsel will not ordinarily suffice.<sup>238</sup>

The dispute about what conclusions to draw from an attorney's failure to spend more than a few minutes on a case tends to obscure a more fundamental issue—whether it is a defense attorney's duty to explore possible defenses before advising a client concerning his choice of plea. At first glance, it seems to belabor the obvious to assert, as the California supreme court has, that “counsel by advising his client

237. *Doughty v. Beto*, 396 F.2d 128, 130 (5th Cir. 1968).

238. *United States v. Wright*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 378 U.S. 950 (1950).

In *Turley v. State*, 439 S.W.2d 521 (Mo. 1969), the defendant claimed that his attorney had been appointed only a few minutes prior to the entry of a plea of guilty, and the attorney himself testified that he had conferred with the defendant for only about 30 minutes. The attorney conceded that he had not inquired into the circumstances of either the defendant's interrogation or the warrantless search of his hotel room, but the Missouri supreme court concluded that the defendant's guilty plea should stand:

Hasty appointment of counsel may result in prejudice, particularly in a *trial*... but the difficulty with the appellant's position here is that the matters to which he points to prove his point, illegal search and seizure and involuntary confession, play but little part upon a voluntary plea of guilty.

*Id.* at 525. On habeas corpus, the United States District Court for the Western District of Missouri rejected this analysis and concluded that investigation and preparation were as vital in the guilty-plea process as in the trial process. *Turley v. Swenson*, 314 F. Supp. 1304 (W.D. Mo. 1970). The court quoted Mr. Justice Sutherland's classic opinion in *Powell v. Alabama*:

It is not enough to assume that counsel...thought there was no defense, and exercised their best judgment in proceeding to trial...without preparation. Neither they nor the court could say what a prompt and thoroughgoing investigation might disclose as to the facts. No attempt was made to investigate.

*Id.* at 1312 (quoting 287 U.S. 45, 58 (1932)). The state then appealed and secured a reversal in the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit's analysis closely paralleled that of the Missouri supreme court:

Adequacy of representation cannot be determined solely upon the basis of the amount of time appointed counsel spent interviewing a particular defendant and, in any event, such a determination is immaterial to the issue of whether a guilty plea was properly accepted, except to the extent counsel's incompetence bears on the issues of voluntariness and understanding.

...  
[W]e do not believe that defense counsel's failure to conduct a collateral investigation of the facts of Turley's pending criminal case in Jasper County was such a dereliction of duty as to make the proceedings a farce and a mockery of justice, shocking to the conscience of the court.

*Missouri v. Turley*, 443 F.2d 1313, 1316-17 (8th Cir.), *cert. denied*, 404 U.S. 965 (1971).

to plead guilty cannot be permitted to evade his responsibility to adequately research the facts and the law.”<sup>239</sup> As early as 1948, moreover, a plurality opinion of the United States Supreme Court declared, “An accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered.”<sup>240</sup> Nevertheless, many courts have disputed the proposition that an effective defense attorney must examine possible defenses before entering a plea of guilty.

In 1958, an opinion by Judge Warren E. Burger for the District of Columbia Circuit concluded that ineffective legal assistance was ordinarily “immaterial” in a guilty-plea case. The effectiveness of counsel was merely a factor that might bear on the voluntariness or understanding quality of the defendant’s plea. Moreover, an attorney’s failure to evaluate the legality of the means by which the government had obtained its evidence (however egregious this failure might have been) could not establish that a defendant’s guilty plea was “not understandingly made.” Judge Burger wrote, “We think ‘understandingly’ refers merely to the *meaning* of the charge, and what acts amount to being *guilty* of the charge, and the *consequences* of pleading guilty thereto, rather than to dilatory or evidentiary defenses.”<sup>241</sup>

The Fifth Circuit adopted a similar position in a 1970 opinion by Judge Elbert P. Tuttle. A former prosecutor had testified about appointment practices at the time of the defendant’s conviction, and it seemed unlikely that the defendant had conferred with his appointed attorney for more than 10 or 15 minutes prior to the entry of his plea of guilty. Indeed, it seemed entirely possible that, as the defendant claimed, he had never met his attorney at all. Judge Tuttle nevertheless observed:

Obviously, more would be required of counsel if the plea had not been guilty for some duty might have arisen to support this plea. However, it appears that the only required duty of counsel

239. *In re Hawley*, 67 Cal. 2d 824, 828, 433 P.2d 919, 921, 63 Cal. Rptr. 831, 833 (1967). See *McLaughlin v. Royster*, 346 F. Supp. 297 (E.D. Va. 1972); *In re Williams*, 1 Cal. 3d 168, 460 P.2d 984, 81 Cal. Rptr. 784 (1969); *People v. White*, 514 P.2d 69 (Colo. 1973); *Alires v. Turner*, 22 Utah 2d 118, 449 P.2d 241 (1969). Cf. ABA STANDARDS, *supra* note 55, § 4.1 (1970): “The duty to investigate exists regardless of the accused’s . . . stated desire to plead guilty.”

240. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948).

241. *Edwards v. United States*, 256 F.2d 707, 710 (D.C. Cir.), cert. denied, 358 U.S. 847 (1958); see *Kress v. United States*, 411 F.2d 16, 22 (8th Cir. 1969); *Alaway v. United States*, 280 F. Supp. 326, 333-34 (C.D. Cal. 1968); *Wilson v. State*, 291 N.E.2d 570, 570-74 (Ind. Ct. App. 1973).

## The Defense Attorney's Role in Plea Bargaining

under the most liberal construction when a plea of guilty is entered is that counsel . . . should ascertain if the plea is entered voluntarily, and knowingly.<sup>242</sup>

The Fifth Circuit has relied on Judge Tuttle's language to uphold guilty pleas in numerous cases in which appointed attorneys manifested a total lack of preparation,<sup>243</sup> although there have been recent indications that the court may be modifying its position.<sup>244</sup>

In decisions like these, the distinction between an attorney's obligation in guilty-plea cases and his obligation in trial cases is asserted without any attempt at justification. In fact, a lawyer's evaluation of possible defenses is every bit as important to a defendant who pleads guilty as to one who stands trial. Most defendants do not, of course, regard a plea of guilty as the best of all possible worlds; a decision to plead guilty does not suggest that the defendant would not have preferred a dismissal or acquittal if his lawyer had made the possibility known. A colorable defense, moreover, even when it does not lead to a dismissal or acquittal, commonly becomes a "pry pole" in bargaining.<sup>245</sup> Few defendants would deliberately forego the opportunity to secure reductions in their sentences through whatever leverage might be available.

242. *Lamb v. Beto*, 423 F.2d 85, 87 (5th Cir.), *cert. denied*, 400 U.S. 846 (1970). See note 258 *infra*. The Fifth Circuit's opinion has been approved in several other jurisdictions. *Goad v. Anderson*, 364 F. Supp. 128 (E.D. Okla. 1973); *Hulett v. State*, 473 S.W.2d 410 (Mo. 1971); *Butler v. State*, 499 S.W.2d 136 (Tex. Crim. App. 1973).

243. *E.g.*, *Woodard v. Beto*, 447 F.2d 103 (5th Cir.), *cert. denied*, 404 U.S. 957 (1971); *Gotcher v. Beto*, 444 F.2d 696 (5th Cir. 1971); *O'Neal v. Smith*, 431 F.2d 646 (5th Cir. 1970).

244. In *Walker v. Caldwell*, 476 F.2d 213, 215 (5th Cir. 1973), the court noted that the defendant's attorney had an office adjacent to a Georgia courtroom. Presumably because of his proximity, the attorney was appointed to represent approximately 90 percent of the indigent defendants who appeared in this court. On Fridays, which were "plea days," the attorney ordinarily appeared in about 10 cases. He represented approximately 500 defendants each year. The attorney admitted that in the case before the court, he had not sought to investigate the facts, to talk to any witnesses, to explore the possibility of suppressing the government's evidence, or to engage in plea negotiations. He conceded that he followed "a substantially different practice when representing fee clients rather than appointed clients." The attorney testified, however, that he had fully complied with the governing Fifth Circuit standard: he had determined to his satisfaction that the defendant's guilty pleas were "voluntarily and understandingly made."

The Fifth Circuit ruled that the attorney's pro forma representation did not satisfy the Constitution, and it quoted the United States Supreme Court for the proposition that a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts." 476 F.2d at 218, *quoting* *McCarthy v. United States*, 394 U.S. 459, 466 (1969). The court nevertheless felt constrained to say:

We do not hold that every appointed counsel representing an accused who desires to plead guilty, or whom he advises to plead guilty, must investigate all of the facts of the case, explore all possible avenues of defense, etc., to the extent required of appointed counsel representing an accused who pleads not guilty and goes to trial. 476 F.2d at 224. See also *Herring v. Estelle*, 491 F.2d 125 (5th Cir. 1974); *Colson v. Smith*, 438 F.2d 1075, 1079-81 (5th Cir. 1971). But see *Lee v. Hopper*, 449 F.2d 456 (5th Cir. 1974).

245. See *Alschuler*, *supra* note 7, at 56-83.

The right to counsel exists partly because defendants with valid defenses may not recognize them, and the vindication of these defenses serves not only the interests of defendants but those of the public. In short, a lawyer should not be excused from exploring possible defenses merely because his client ultimately pleads guilty.

Appointed attorneys are often lawyers whose principal experience lies outside the criminal courts and lawyers who are just beginning their practices.<sup>246</sup> Even when these attorneys devote long hours to their assignments and perform with unquestionable dedication, they are commonly hampered by a lack of knowledge of the secret rules of plea negotiation. For this reason, private defense attorneys and prosecutors frequently regarded their efforts with contempt:

The one-shot amateur can't negotiate a plea because he doesn't know and doesn't care.

Those civil lawyers don't know bullshit from wild honey.

A civil lawyer always manages to throw out the baby, the bath, and the tub.

Criminal law is a speciality, and a nonspecialist cannot possibly do as much for his client as a professional defense attorney.

The only qualification the downtown lawyers have for the job is fear.

A few private defense attorneys conceded that some "civil lawyers" had a partially offsetting advantage—their spontaneity and enthusiasm. Particularly striking was the statement of one Houston lawyer: "They work and investigate where I evaluate. Where I try to anticipate the police officer's testimony, they actually listen to the defendant."<sup>247</sup>

246. One-third of the trial judges in assigned-counsel jurisdictions who participated in a recent national survey said that less than half of the lawyers whom they appointed to represent indigent defendants were experienced in handling criminal cases. Only one in seven judges said that all appointed counsel were experienced defense attorneys, and some judges reported that none of the appointed attorneys in their jurisdictions were experienced in defending criminal cases. Eighty percent of the lawyers surveyed at random in appointed-counsel jurisdictions had been appointed to represent indigent defendants; more than two-thirds of these lawyers reported that they handled few if any criminal cases in private practice. *THE OTHER FACE OF JUSTICE*, *supra* note 83, at 43-44. See *Stinnett v. Commonwealth*, 468 S.W.2d 784 (Ky. Ct. App.), *cert. denied*, 404 U.S. 994 (1971) (standard procedure of appointing counsel from a list of the 15 most recently admitted members of the bar does not violate right to effective assistance of counsel).

247. An often-convicted offender described this same sort of lawyer:

If I'm going to trial, actually going in to have one, you know what I like to have?

I like to have me a little bitty young lawyer, a fire burner. You know, one that will go up there and really argue the case. This offender did not want to be represented by a "little bitty young lawyer" in the plea-negotiation process, however; for that he wanted a "fixer." B. JACKSON, *supra* note 10, at 130.

## The Defense Attorney's Role in Plea Bargaining

The appointed attorney's unfamiliarity with the mechanics of the plea-negotiation process is a common source of annoyance to prosecutors. "We are handling more than 6,000 indictments a year in this office," a Houston prosecutor observed. "We should be able to deal with a fellow on the other side who knows what he's doing." This prosecutor had just explained to a corporate lawyer that he should wait until his client was indicted before attempting to negotiate a plea agreement. The lawyer had seemed reluctant to accept this advice, and it took the prosecutor several minutes to convince him.<sup>248</sup>

More significant than the appointed attorney's uncertainty concerning the mechanical aspects of plea negotiation is his uncertainty concerning the substance of the process. Neil McKay, the First Assistant District Attorney in Houston, explained, "Anyone who can try a civil case can try a criminal case, but a civil lawyer is not qualified to *evaluate* a criminal case. He has no way of knowing what a criminal case is worth." McKay illustrated this remark by describing the experience of John Hill, a distinguished personal injury lawyer who is now Texas's Attorney General:

John did a beautiful job in a rape case that he tried. Then he was appointed in a bad, bad murder case. He came to the courthouse looking for a plea for five or 10 years. He was given a complete copy of the state's file. Realizing that his client was in danger of a long sentence, he consulted an experienced criminal lawyer, who told him to take 60 years and be grateful for it. Fortunately for his client, John did.

The story does not always have such a happy ending. McKay recalled another murder case in which the prosecutor had offered to reduce the charge to murder without malice, thereby ensuring that the maximum sentence could not exceed five years. An appointed attorney, convinced that he could win the case at trial, persuaded his client to reject this offer. The client was convicted and sentenced to a 99-year term, and the attorney returned to his civil practice a somewhat shattered man.

In any legal system, of course, an experienced lawyer is likely to provide more effective representation than a novice. The problems

248. Occasionally, an appointed attorney's ignorance is more a source of amusement than of resentment. A lawyer whose background is in civil litigation may write a letter to the prosecutor to note his appointment in a criminal case. He may propose a preliminary conference "at an early date" and suggest that the prosecutor call his secretary to arrange a luncheon meeting. The prosecutor, who ordinarily would not devote a full lunch hour to negotiating a plea agreement in a routine case, might accept the lawyer's suggestion—just for a chance to see the inside of his country club.



of inexperience are, however, multiplied in a system of plea negotiation in which such vital consequences depend upon a defense attorney's judgment. Under the guilty-plea system, moreover, inexperienced attorneys usually have nowhere to turn for enlightenment. They sense, quite correctly, that they are as likely to err by trusting the prosecutors as by refusing to trust them,<sup>249</sup> and even when an unbiased teacher is available, the kind of information that can make an attorney effective in plea bargaining is difficult to convey. Unlike trial—an open system that can be studied, observed, and eventually mastered—plea negotiation is a closed-door process not governed by even a rudimentary set of rules.

When participants in the criminal justice system complained to me that certain lawyers did not "know what a case is worth," I asked them to tell me what various cases *were* worth. Although I tried to make my hypothetical cases as precise as possible, I received very few answers. The usual response was a shrug and a statement that "it all depends on what the defendant looks like, who the judge is, and what mood the prosecutor is in." It seems possible that no one really understands the plea-negotiation process, and if anyone does, it is only because of his own long and largely subjective experience. Plea negotiation apparently depends more on a well developed intuition than on knowledge subject to verbalization. The novice in the criminal courts therefore cannot "know what a case is worth," and numerous defendants may suffer while he finds out.<sup>250</sup>

#### IV. Unrepresented Defendants

Bargaining with unrepresented defendants is largely a thing of the past,<sup>251</sup> but the practice persisted in two Texas cities—Houston and

249. Prosecutors did report that they tried to assist appointed attorneys, and some even said that they offered more generous plea agreements to appointed attorneys than to retained counsel. "We hate to see those fellows do so much work for nothing," one Houston prosecutor declared. Nevertheless, as Houston defense attorney Richard Haynes observed, "Prosecutors can't turn backflips for an appointed attorney. They still want to put his client in jail."

250. See Dowd, Book Review, 12 VILL. L. REV. 408, 410 (1967):

The most careful, but unknowledgeable lawyer, may be quite unaware of the unwritten law in this area. Most lawyers are aware that such practices are carried on but cannot easily discover what in fact they can do. The negotiated plea can breed a type of "pseudo expertise" which is not based on any knowledge of the law, analytical skills or forensic power—just "knowing one's way around." Too often those who possess this kind of knowhow are noticeably deficient in other professional skills.

251. For descriptions of this sort of bargaining in the 1950's, see M. MAYER, *supra* note 13, at 183; Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956).

## The Defense Attorney's Role in Plea Bargaining

Dallas.<sup>252</sup> Despite the establishment of Houston's coordinated assigned-counsel system two years prior to my investigation, large numbers of indigent misdemeanor defendants still bargained with prosecutors in the absence of counsel. Although the extent of the practice in felony cases was disputed,<sup>253</sup> everyone agreed that some felony defendants also represented themselves in the bargaining process.<sup>254</sup>

First Assistant District Attorney Neil McKay explained that, in the past, plea negotiation had usually begun in the jail:

Two assistant district attorneys would go shaking the jail, looking for pleas. They would approach each defendant arrested since their last visit and ask whether he considered himself guilty and whether he wanted to talk. Friday was cop-out day, and all defendants who seemed interested would be brought to the courthouse. Trial assistants would firm-up the deals in a holdover jail in back of the courtroom.

252. Bargaining with unrepresented defendants, although far from commonplace, is not unique to these two cities. Twenty-seven percent of the prosecutors surveyed by the University of Pennsylvania Law Review in late 1963 reported that they negotiated with defendants prior to the appointment or retention of counsel. Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 904 (1964). The Law Review's survey was conducted only about six months after the Supreme Court's decision in *Gideon v. Wainwright*, and the percentage of affirmative responses would probably be smaller today. Donald J. Newman indicated the situation prior to *Gideon* when he reported, "Most defendants who are guilty of criminal conduct and willing to plead guilty waive counsel." D. NEWMAN, *supra* note 3, at 46.

More recently, Stephen R. Bing and S. Stephen Rosenfeld described the situation in six misdemeanor courts in the Boston area:

We observed several incidents where judges implied that a lenient sentence was available if the defendant would waive his right to counsel.... [In one case,] a young narcotics defendant was told that he would be "satisfied" with the results of the trial if he would proceed without a lawyer.

Our statistics suggest that defendants who proceed without attorneys do indeed receive more lenient treatment than those who insist on the assignment of counsel. [35 percent of all convicted defendants with assigned attorneys were ultimately sentenced to jail, but only 12 percent of the convicted defendants without attorneys were sentenced to jail.]

S. BING & S. ROSENFELD, *supra* note 150, at 53-54 (statistical data based on survey of 2,192 district court cases, excluding drunkenness and minor traffic cases).

See FEDERAL OFFENDERS IN U.S. DISTRICT COURTS, *supra* note 82, at 45-48 (tables 9(a)-9(d)). These tables indicate that federal defendants who waived the right to counsel received significantly lighter sentences than defendants represented by either retained or appointed attorneys. This difference in sentencing outcomes persisted when guilty-plea cases were separated from trial cases and when, within each category of cases, separate offenses were examined separately. But see Note, *supra* at 889 ("[I]n the guilty plea context... there is nothing for a defendant to gain by being unrepresented").

253. Some prosecutors reported that bargaining with unrepresented defendants was quite exceptional in felony cases, but virtually all defense attorneys disagreed.

254. Although the Houston Legal Foundation designated attorneys for many indigent defendants shortly after arrest, it failed to do so for others. See pp. 1255-57 *supra*. Moreover, even when the Foundation did provide counsel, the formal appointment of counsel commonly did not occur until arraignment, by which time a defendant might have entered a plea agreement on his own.

At the time of my visit in 1968, the initial contact between prosecutors and unrepresented defendants usually occurred in the holdover room itself. A dozen or more defendants were assembled in this lock-up, and a single prosecutor then entered the room. He spoke to each defendant individually and commonly asked, "Do you want a lawyer, or do you want to talk to me today?" In most misdemeanor cases, the prosecutor's offers seemed irresistible. He frequently explained that the defendant "could be home by Saturday night" or—even more often—that he "could go home today" if he wanted to. "Of course," the prosecutor sometimes added, "if you want a lawyer, that is your right, but we will have to reset your case. I don't know when your trial might be. You will have to take your turn."<sup>255</sup>

Once this bullpen bargaining had ended, misdemeanor defendants usually signed forms waiving their right to counsel, and after the trial judge mumbled something ("waive your right to a lawyer and I accept your plea"), their cases were concluded. In felony guilty-plea cases, however, no waivers of the right to counsel appeared on court records. Instead, after the prosecutors and defendants had struck their bargains, defense attorneys were appointed to represent the defendants at the entry of their guilty pleas. A Texas statute required the appointment of counsel in all felony cases in which indigent defendants waived the right to jury trial,<sup>256</sup> and the right to counsel created by this statute could not itself be waived.<sup>257</sup>

When the felony prosecutors concluded their negotiations in the lock-up, they therefore approached the bench and reported, "The cases of defendants A, B, C, D, and X can be disposed of today if your Honor will appoint counsel." The trial judge then surveyed the courtroom, selected some defense attorneys, and asked them to "help

255. In fact, the "second setting" of a misdemeanor case usually occurred 30 or 60 days after the "first setting." Thus, whenever a prosecutor offered less than a 30-day sentence in exchange for a plea of guilty, it would always be to the apparent advantage of an incarcerated defendant to accept this offer. Even if the defendant were acquitted at his trial, he would have served a longer term than he would have been required to serve under the proposed plea agreement.

256. TEX. REV. STAT. ANN. art. 1.13 (1966).

257. *Hernandez v. State*, 138 Tex. Crim. 4, 133 S.W.2d 584 (1939). This statute had, in fact, been in effect even in the period before the Supreme Court's decision in *Gideon v. Wainwright*, 372 U.S. 335 (1963)—at a time when the state refused, absent unusual circumstances, to provide counsel for felony defendants who insisted upon the right to trial before a jury. Ch. 43 [1931] General Laws of Texas 65. For a description of pre-*Gideon* Texas practice, under which an appointed attorney was permitted to withdraw from a case if his client decided to stand trial, see *Haney v. Beto*, 308 F. Supp. 262 (E.D. Tex. 1970). The state legislature had apparently concluded that the right to counsel was of greater importance in the guilty-plea process than in the trial process—so much so that it made the right non-waivable in the first situation and almost nonexistent in the second.

## The Defense Attorney's Role in Plea Bargaining

out with these fellows who want to plead.”<sup>258</sup> In an effort to distribute the burdens and benefits of appointment equitably, the judge appointed a single attorney to no more than two or three cases. Attorneys appointed in this manner usually found that the prosecutors’ files were open to them. As defense attorney Sam J. Alfano explained, “The D.A.’s know the problems of client control that are likely to arise when an appointed attorney is huddled with his client.”<sup>259</sup>

After examining the prosecutors’ files, the defense attorneys conferred with their clients for a few minutes to “go over the deals.” Despite the clients’ lack of legal knowledge and experience (and despite the problems of “client control” that Alfano mentioned), the attorneys almost never found occasion to upset the bargains that the defendants had entered without professional assistance.

There were several reasons for the passive role that these lawyers usually assumed. Clyde W. Woody explained, “The defendants are professionals at this sort of thing, and they are the ones who have to do the time.” Defense attorney Richard Haynes noted, “Judges do not want a lawyer who will shake the defendant off his plea. A lawyer who does not understand this fact is unlikely to be reappointed.” Moreover, when an appointed attorney induced a client to reconsider the bargain that he had entered, the attorney himself became responsible for defending the client at trial. Most attorneys apparently considered their 50-dollar fees in these quick guilty-plea cases a pleasant bonus; the task of persuading the prosecutor and the defendant to accept a plea agreement had been eliminated, and usually the limited time that an attorney devoted to his cases would otherwise have been spent in idle waiting. Nevertheless, the bonus plainly became a burden

258. In *Lamb v. Beto*, 423 F.2d 85, 86-87 (5th Cir.), *cert. denied*, 400 U.S. 846 (1970), the court reported the testimony of a lawyer who had prosecuted the defendant in Austin, Texas in 1944:

[A]t that time, in taking a plea of guilty where a defendant did not have an attorney and when he agreed to plead guilty we simply went out into the hall of the courtroom or the district clerk’s office or anywhere we could, we found an attorney and told him we had a plea of guilty and wanted him to come in and sign the jury waiver.... [O]rdinarily the attorney was not in the presence of the defendant for more than ten or fifteen minutes.... Signing the jury waiver was about all... and in many cases if the attorney were in a hurry... he could come in and sign the jury waiver and go on about his business.

The defendant testified that he had never met his attorney, but the Fifth Circuit nonetheless concluded that he had not been denied the effective assistance of counsel. It said that an attorney’s only duty in a guilty-plea case, “under the most liberal construction,” was to ascertain whether the plea was entered voluntarily and knowingly. *See* pp. 1266-67 *supra*. How the court concluded that the defendant’s attorney had done even this much is something of a mystery. Apart from the testimony of the former prosecutor, the only evidence that the defendant had received any representation at all was a court record showing that an attorney had entered a *pro forma* appearance.

259. Alfano reported that defendants frequently asserted their innocence once their attorneys had been appointed. On these occasions, the attorneys sometimes found it helpful to confront the defendants with the evidence contained in the prosecutors’ files.

when the attorney could not make the plea agreement "stick," and this fact may have induced some attorneys to provide only the pro forma representation that everyone apparently expected.

The most significant reason for the attorneys' regular ratification of their clients' plea agreements was probably not, however, the attorneys' selfish interests. Attorneys who carefully considered their clients' welfare rarely found any reason to reject the prearranged bargains. "I have been appointed on a great many occasions," said Clyde W. Woody, "and I have yet to encounter a harsh bargain. Usually, the defendant has been offered the bare minimum." Most defense attorneys conceded that, as a group, unrepresented defendants secured more favorable plea agreements than the attorneys were able to obtain for their own clients. Richard Haynes explained, "The D.A.s' policy is to keep the case from a lawyer. The sentences that the prosecutors offer to unrepresented defendants are kept low simply to demonstrate that a person hurts himself by demanding an attorney."<sup>260</sup>

In Haynes's view, the practice of bargaining with unrepresented defendants did lend itself to abuse, but the usual abuse was not the imposition of harsh sentences. "The real danger," Haynes said, "is that a person is likely to plead guilty when he is innocent."<sup>261</sup>

Defense attorney Donald H. Flintoft described an incident that demonstrated the lengths to which Houston prosecutors sometimes went in their efforts to discourage exercise of the right to counsel. In a bargaining session in a lock-up, a prosecutor had offered an unrepresented defendant a lenient sentence in exchange for his plea of guilty. When the defendant was brought into the courtroom, however, he began a conversation with Flintoft, who had represented him in other cases. The prosecutor apparently concluded that he might have been mistaken in thinking that the defendant lacked counsel. He rushed up, interrupted the conversation, and said to the defendant, "Is this guy your lawyer? If he's your lawyer, that deal we made is off!"<sup>262</sup>

260. Haynes added that in their efforts to discourage exercise of the right to counsel, prosecutors sometimes told bondsmen that their clients could be granted probation in exchange for pleas of guilty. Once the bondsmen had relayed this message, the clients usually saw little reason to retain attorneys.

261. Haynes recalled an illustrative case in which several unrepresented defendants had agreed to plead guilty to aggravated assault. It developed that these defendants had merely engaged in a voluntary fistfight with their supposed victims, so that they were guilty of nothing more serious than disorderly conduct. "The prosecutor had offered a rockbottom sentence on the assault charge," Haynes reported, "but the case was one that should never have been filed."

262. A charitable interpretation of this incident would be that the prosecutor merely recognized the impropriety of bargaining with a defendant who had already retained an attorney. In fact, however, the prosecutor emphasized that the same favorable bargain would not be available if Flintoft represented the defendant. He was not simply offering to renegotiate the agreement.

## The Defense Attorney's Role in Plea Bargaining

In Dallas, Texas, bargaining with unrepresented defendants has apparently been even more common than in Houston. Dallas's system of bargaining differed from Houston's, however, in one important respect. The prosecution, like the defense, was often not represented by a lawyer in the bargaining process. The task of striking bargains with jailed defendants was entrusted to investigators (often retired policemen) hired by the District Attorney's office. At least until recently,<sup>263</sup> these investigators, known as "cop-out men," had free access to the Dallas County Jail, where they initiated guilty-plea negotiations with virtually all incarcerated defendants except those who had already hired their own attorneys.<sup>264</sup>

John Brumbelow, a student intern assigned to the Dallas District Attorney's office in 1971, studied the practices of these investigators and reported that bargaining sessions in the jail were usually brief. An investigator usually began the interview by saying, "I'm the cop-out man," and he quickly informed the defendant of the sentence that the District Attorney's office would recommend in exchange for a plea of guilty. In an effort to stress the generosity of his proposal, the investigator also sometimes offered an estimate of the sentence that would follow

263. In 1972, a federal district court ordered the Sheriff of Dallas County not to admit the "cop-out men" to the jail unless an inmate had affirmatively requested an interview. This order was part of a broad injunction designed to correct a number of unconstitutional jail conditions, and the court's opinion did not specify the legal grounds on which its restriction of jailhouse bargaining rested. *Taylor v. Sterrett*, 344 F. Supp. 411, 423 (N.D. Tex. 1972), *aff'd as modified*, 499 F.2d 367 (5th Cir. 1974), *cert. denied*, 95 S. Ct. 1414 (1975). The district court's order was stayed for two years pending review by the Fifth Circuit, but Dallas officials nevertheless observed the court's prohibition of unsolicited visits by the cop-out men.

For a time, the court's decision apparently did not substantially reduce the amount of bargaining with unrepresented defendants in Dallas. Douglas Mulder, Dallas's First Assistant District Attorney, reported that his office responded to the court's order by supplying jailers with printed forms for prisoners to use in requesting meetings with the "cop-out men." Large numbers of prisoners availed themselves of the opportunity. Now, however, according to Mulder, the prevailing practice in felony cases is to appoint counsel within 24 hours of incarceration and for prosecutors to bargain only with defense attorneys.

264. In *Gotcher v. Beto*, 444 F.2d 696 (5th Cir. 1971), a Dallas "cop-out man" had (apparently through inadvertence) negotiated a plea agreement with a jailed defendant who had previously retained counsel. Another lawyer was then appointed to represent the defendant at the entry of his plea. The court said, "While this court does not approve of the practice of a member of the District Attorney's office visiting the petitioner without the petitioner's counsel being present (unless he waives having counsel present), it does not appear that this fact made the petitioner's plea involuntary." *Id.* at 698. *Cf.* *State v. Britton*, 203 S.E.2d 462 (W. Va. 1974) (improper for prosecutor to engage in plea discussions with defendant who he knew had retained counsel—error could not be considered harmless although defendant ultimately stood trial); ABA STANDARDS, *supra* note 55, § 4.1(b) ("It is unprofessional conduct for a prosecutor to engage in plea discussions directly with an accused who is represented by counsel, except with counsel's approval"); ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-104(A)(7) ("[A] lawyer shall not communicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other party or is authorized by law to do so").

a trial. Bargaining between a "cop-out man" and an unrepresented defendant differed, however, from bargaining between two lawyers in at least one respect: there was rarely any discussion of the legal merits of a case. On one occasion, for example, a defendant protested that his automobile had been illegally searched. The cop-out man replied, "I don't know anything about that, but if you don't want to plead guilty, you can always get yourself a lawyer."<sup>265</sup> Brumbelow reported that defendants regarded the investigators as "easier to bargain with" than assistant district attorneys, and he also noted that the investigators' sentence recommendations were almost invariably accepted by the courts. As in Houston, defense attorneys were appointed to represent Dallas's indigent defendants once their "do-it-yourself" negotiations were concluded, and as in Houston, the attorneys usually regarded their assignments as "plums."<sup>266</sup>

Several courts have ruled that bargaining with defendants prior to the appointment, retention, or formal waiver of counsel violates the constitutional right to the effective assistance of counsel. The courts have held that this sort of bargaining renders a guilty plea invalid even if counsel is later appointed to represent the defendant at the entry of his plea. In *Lorraine v. Gladden*,<sup>267</sup> for example, a United States District Court concluded, "The appointment of counsel after the successful negotiation of the guilty plea and minutes before its entry was ineffective, and did not give petitioner the representation required by the constitution . . . . For all practical purposes, the petitioner entered his plea of guilty without advice of counsel."<sup>268</sup> In *Anderson v. North Carolina*,<sup>269</sup> an appointed attorney had agreed to permit a prosecutor to confer with the defendant in the attorney's absence, but a federal district court nevertheless invalidated the resulting guilty plea. Judge J. Braxton Craven, Jr., wrote:

265. J. Brumbelow, *The Cop-Out Man*, 1972 (unpublished paper on file at the University of Texas Law School Library).

A knowledgeable defendant could sometimes improve his position by rejecting the cop-out man's first offer. An inmate of the Texas Department of Corrections reported that the cop-out man had initially approached him with an offer of a 20-year sentence in exchange for his plea of guilty. Although the cop-out man stressed that Dallas juries had imposed 1000-year sentences in recent cases, the inmate decided to "hang in there and see what I could get." Soon an assistant district attorney visited the inmate and offered to recommend a five-year sentence. The prosecutor warned that Dallas's District Attorney, Henry Wade, was a "mean D.A.," but the inmate still resisted an agreement. He ultimately pleaded guilty in exchange for the prosecutor's recommendation of a three-year sentence, a recommendation that was accepted by the court. W. Verkin & M. Bender, *Perspectives on Plea Bargaining: The Prisoner's Viewpoint*, May 12, 1971, at 12 (unpublished paper on file at the University of Texas Law School Library).

266. Nevertheless, appointed attorneys in Dallas received a smaller compensation than their counterparts in Houston—\$25 per case in most courts, and only \$12.50 per case in one court with an especially heavy caseload. J. Brumbelow, *supra* note 265.

267. 261 F. Supp. 909 (D. Ore. 1966).

268. *Id.* at 911.

269. 221 F. Supp. 930 (W.D.N.C. 1963).

## The Defense Attorney's Role in Plea Bargaining

It is . . . irrelevant that counsel may have consented for the Solicitor to conduct—in counsel's absence—what amounted to a pre-trial conference with the prisoner in jail. Unquestionably, the most important part of the proceedings against Anderson occurred in jail—when his counsel was not present to advise him . . . . What happened in the courtroom was to merely make a formal record of a decision arrived at upstairs in jail . . . . The most [that counsel] could have done was to ratify a decision previously made. More than this is implicit in the right to counsel: petitioner was entitled to have counsel aid and help him *in making the decision*.

\*\*\*\*  
It is idle to speculate whether petitioner's counsel could have, if present, worked out a better deal with the Solicitor. The point is Anderson was entitled to have him *try*. For lack of effective counsel at a "critical" stage of the proceedings against him, those proceedings are constitutionally defective.<sup>270</sup>

These decisions and others like them<sup>271</sup> find some support in opinions of the United States Supreme Court.<sup>272</sup> I am aware of only two rulings to the contrary. One, a decision by the Supreme Court of Illinois, upheld bargaining between an unrepresented defendant and a sheriff. This decision provoked a dissent by Justice Walter V. Schaefer, who said, "In my opinion the stage of the proceeding at which a representative of the prosecution induces a defendant to plead guilty is a crit-

270. *Id.* at 934-35. Cf. Hallworth, *The Myth of the Jury Trial*, COMMONWEAL, Apr. 25, 1969, at 161, 163:

[An individual charged with crime] lacks the general education, the technical education, and the verbal abilities of the man who tells him that "it would be better" if he plead[ed] guilty. . . . [Moreover,] the suspect is in no position, regardless of his knowledge, to weigh with any degree of objectivity his chances in a trial by jury procedure. . . . In plea-bargaining the suspect is unable to enter into the agreement with any understanding of what is at stake or what the alternatives to a given or prescribed course of action might entail.

See also Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1391 n.21 (1970):

To guarantee a defendant counsel when he pleads, but not when he makes the bargain that impels the plea and establishes his conviction and sentence, is to deny him legal assistance when he most needs it.

271. *Gallarelli v. United States*, 441 F.2d 1402, 1404 (3d Cir. 1971) (Hastie, C.J.) ("[I]n an adversary system, it is not the role of counsel merely to acquiesce in . . . a decision made independently by his client; it is the role of counsel to counsel"); *Grades v. Boles*, 398 F.2d 409, 413 (4th Cir. 1968) (absence of counsel at plea bargaining session "wholly unacceptable"); *Shupe v. Sigler*, 230 F. Supp. 601, 606 (D. Neb. 1964); *State v. Johnson*, 279 Minn. 209, 156 N.W.2d 218 (1968); *Rogers v. State*, 243 Miss. 219, 136 So. 2d 331 (1962); *Garnick v. Miller*, 81 Nev. 372, 403 P.2d 850 (1965). See *Myers v. State*, 115 Ind. 554 (1888); ALI, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 350.3 (Tent. Draft No. 5, 1972) (nonwaivable right to counsel during plea negotiations); cf. *Pontow v. State*, 58 Wis. 2d 135, 205 N.W.2d 775 (1973) (bargaining with unrepresented defendant permissible following warnings and intelligent waiver).

272. See *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (requirement that counsel be appointed "is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid"); *Avery v. Alabama*, 308 U.S. 444, 446 (1940) ("Constitution's guarantee of assistance of counsel cannot be satisfied by mere formal appointment"); *Waley v. Johnson*, 316 U.S. 101 (1942); *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (plurality opinion).



ical stage at which a defendant requires the assistance of counsel.”<sup>273</sup> The other case in which bargaining with unrepresented defendants was apparently approved arose when an appointed attorney ratified a bargain that a defendant had entered with a Dallas “cop-out man.”<sup>274</sup>

The practice of providing lenient sentences to unrepresented defendants for the purpose of keeping them unrepresented seems offensive to constitutional ideals, but in our current system of criminal justice, every legal right tends to become a counter to be traded for a discount in sentence. Indeed, bargaining for waiver of the right to counsel can be distinguished from plea negotiation itself on only the most tenuous grounds. Like plea bargaining, this practice saves money, simplifies the administration of justice, and provides a “break” that defendants might not otherwise secure. The defenders of plea bargaining might therefore pause to consider the implications of their arguments for a different bargaining process that most of them would unhesitatingly condemn.<sup>275</sup>

## V. Two Additional Ethical Problems: The Entry of a Guilty Plea by a Defendant Who Claims to be Innocent and the Division of Responsibility Between an Attorney and His Client in Making the Choice of Plea

### A. *The “Innocent” Defendant*

The guilty-plea system confronts defense attorneys with a number of ethical issues that cannot be resolved by reference to established standards of professional conduct. One of these issues arises when a

273. *People v. Bowman*, 40 Ill. 2d 116, 129, 239 N.E.2d 433, 441 (1968).

274. *Gotcher v. Beto*, 444 F.2d 696 (5th Cir. 1971). On habeas corpus, a federal district court rejected the defendant's claim that he had been denied the effective assistance of counsel “during plea bargaining and at trial.” Although the court reached this result without considering whether plea negotiation was a “critical stage of the proceedings” at which a defendant should be offered legal assistance, its opinion was approved by the United States Court of Appeals for the Fifth Circuit. The district court had merely relied on the testimony of the defendant's lawyer that, although he “could not specifically recall having represented the petitioner,” he “never allowed anyone to plead guilty if the accused intimated that he was not in any way guilty of the offense.” Somehow the court concluded that this testimony established the attorney's compliance with the Fifth Circuit standard; by determining that the defendant had not affirmatively protested his innocence, the attorney had apparently also determined that the defendant's guilty plea was knowingly and voluntarily made. The court's ruling seems especially outrageous in view of the fact that the defendant had previously retained his own attorney, who was hospitalized at the time that the defendant struck his bargain and accepted the last-minute appointment of another attorney to enter his plea. *See* note 264 *supra*.

Another Fifth Circuit case can also be read as approving plea bargaining with unrepresented defendants, so long as a defense attorney is later appointed to ratify the agreement. *Lamb v. Beto*, 423 F.2d 85 (5th Cir.), *cert. denied*, 400 U.S. 846 (1970), *discussed in* note 258 *supra*.

275. *Cf. People v. Byrd*, 12 Mich. App. 186, 195 n.4, 162 N.W.2d 777, 781 n.4 (1968) (Levin, J., concurring).

## The Defense Attorney's Role in Plea Bargaining

guilty plea would apparently be to a client's advantage, when the client recognizes that fact and is willing to plead guilty, and when, indeed, only one consideration may lead the defense attorney to hesitate: the client insists that, despite the evidence against him, he is innocent of any crime. Several legal writers have proclaimed that an attorney may not permit his client to plead guilty in these circumstances<sup>276</sup> or, at least, that ethical defense attorneys regularly act on that principle.<sup>277</sup> Most of these pronouncements were made before the Supreme Court's 1970 ruling in *North Carolina v. Alford*: in certain circumstances, a trial court may constitutionally accept the guilty plea of a defendant who claims to be innocent.<sup>278</sup>

Despite the unqualified character of these pronouncements, my pre-*Alford* study revealed that defense attorneys had adopted widely differing attitudes toward the propriety of entering guilty pleas on behalf of defendants who asserted their innocence. Recent telephone interviews with some of the same attorneys made it apparent that *Alford* has not settled the issue for them or for the trial courts in which they practice.

At the time of my pre-*Alford* interviews, Houston defense attorney Percy Foreman maintained, "A lawyer ought to be disbarred if he permits a client to plead guilty when the client says that he is innocent." Chicago's Sherman Magidson, however, expressed the opposite position:

A lawyer's function is simply to minimize the painful consequences of criminal proceedings for his client. If, for example, I get an offer of probation in a felony case, I jump at it. It doesn't matter whether the client tells me that he is innocent, whether I believe him, or even whether I'm 90 percent sure of an acquittal. So long as there is a 10 percent chance of a prison sentence, the client is better off to plead.<sup>279</sup>

The attitudes of most defense attorneys correspond roughly to one or the other of these viewpoints,<sup>280</sup> but some sought intermediate po-

276. E.g., *United States v. Rogers*, 289 F. Supp. 726 (D. Conn. 1968); Polstein, *How to "Settle" a Criminal Case*, PRACT. LAW., Jan. 1962, at 35, 36; Doherty, *Bullpen Ethics of a Plea of Guilty*, 24 LEGAL AID BRIEFCASE 123, 131 (1966).

277. E.g., *People v. Byrd*, 12 Mich. App. 186, 162 N.W.2d 777, 796 (1968) (Levin, J., concurring); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1473 (1966) (see also pp. 1480-81 & n.23, where the author criticizes what he regards as the conventional viewpoint).

278. 400 U.S. 25 (1970). See pp. 1289-1306 *infra*.

279. Cf. J. EHRLICH, *A LIFE IN MY HANDS* 135 (1965) ("I wasn't happy at the prospect of having [drummer Gene] Krupa expediently admit guilt for an offense of which I was convinced he was innocent, but I felt that it was the lesser of two evils"); White, *supra* note 24, at 451-52 (statement of Martin Erdman of the Legal Aid Society of the City of New York).

280. Among the private defense attorneys who considered it improper to permit a guilty plea by a defendant who claimed to be innocent were Sam Adam, Irene Bennett,

sitions. They announced a general rule against entering guilty pleas on behalf of defendants who asserted their innocence, then qualified this rule in various ways. For example, a public defender in Chicago, who reported that his office refused to permit defendants to plead guilty if they claimed to be innocent, added that he distinguished between "pro forma" and "bona fide" protestations of innocence. In his view, only the latter precluded the entry of pleas of guilty.

A few lawyers said that although they ordinarily insisted on a client's confession before entering a guilty plea, they made exceptions for clients charged with certain sorts of crime. "I won't demand a confession in a sex case," Oakland's Stanley P. Golde declared, "because the psychological obstacles to confession in this sort of case are so often overpowering." Golde maintained, however, that sex cases were the only ones that presented the ethical problem vividly and recurrently; in his experience they were the only cases in which clients refused to admit their guilt when the evidence against them was abundant and when favorable bargains had been made available.

Other attorneys reported that although they usually refused to permit "innocent" defendants to plead guilty, they sometimes made exceptions when prosecutorial offers were unusually generous or unusually coercive.<sup>281</sup> For example, Herman W. Mintz, an Oakland defense attorney, recalled a case in which a school teacher had been accused of sexually abusing an eight-year-old girl. In Mintz's view, the complaining witness was "an adorable brat who would have charmed the courtroom and left the jury in tears." Mintz also believed that she was a "psychopathic liar," and the attorney was convinced of the truth of his client's claim of innocence. When, however, the prosecutor offered to permit a guilty plea to disorderly conduct (a bargain that would have permitted the defendant to retain his teaching certificate), Mintz urged the defendant to accept. He was gratified that his client followed this advice.

Houston's Donald H. Flintoft was one of several other attorneys who had persuaded defendants whom they believed to be innocent to enter pleas of guilty, and Flintoft illustrated the kind of pressure that

Thomas E. Dwyer, William Ferdon, Richard H. Kuh, Irving Mendelson, Richard Haynes, Monroe L. Inker, Joseph S. Oteri, John A. Pettis, Jr., J. Eugene Pincham, Henry Rothblatt, and Clyde W. Woody. Among those who maintained that "guilt or innocence is irrelevant" were Johnnie L. Cochran, Jr., Francis J. DiMento, J.W. Ehrlich, Donald H. Flintoft, Donald J. Goldberg, Whitman Knapp, Lloyd M. Lunsford, James Martin MacInnis, Luke C. McKissack, Burton Marks, Gregory S. Stout, and Bernard Segal. For a description of the position of public defenders on this issue, see pp. 1284-85 *infra*.

281. See Alschuler, *supra* note 7, at 61 (statement of San Francisco defense attorney Benjamin M. Davis).

## The Defense Attorney's Role in Plea Bargaining

could produce this response. One of Flintoft's clients was charged as a second offender with burglary and with assault with intent to commit murder. After 11 months of incarceration, he was brought to trial; the result was a hung jury with the vote ten-to-two in favor of acquittal. The prosecutor was apparently persuaded that he could not win the case at trial, but he attempted to secure a conviction through plea negotiation. He offered to permit the defendant to plead guilty to aggravated assault, a misdemeanor. He further offered to recommend a six-month sentence and to ask that the defendant be given credit on this sentence for the time that he had already spent in custody. Acceptance of the bargain would thus have made the defendant a free man; its rejection would have resulted in the defendant's return to jail to await a retrial.<sup>282</sup> At Flintoft's urging, the defendant accepted the prosecutor's offer. Flintoft then attempted to enter a plea of *nolo contendere* on behalf of his client. The trial judge, who ultimately rejected this request, asked Flintoft why he had chosen so unusual a plea. "The defendant just give up, your Honor," Flintoft replied. "Ain't that what *nolo contendere* means?"

One qualification of the supposed rule against allowing defendants to plead guilty when they claim to be innocent was voiced more frequently than any other. Many lawyers said that although they would not countenance a guilty plea when a client maintained that he was entirely uninvolved in an alleged criminal incident, they did not apply the same principle when the client asserted a claim of self-defense, entrapment, lack of criminal intent, or the like. Oakland Public Defender John D. Nunes explained, "When a person says that he acted in self-defense, he means that he thinks he was morally justified."<sup>283</sup> Lawyers who excluded cases involving "legal" defenses from their rule against permitting "innocent" defendants to plead guilty apparently did not distinguish between defenses that turned upon the application of vague legal standards to undisputed facts and those that turned upon clear-cut factual disputes. So long as there was no claim that the state had charged the wrong person, these attorneys saw no ethical bar to the entry of a plea of guilty.

282. The prosecutor's threat to bring the defendant to trial a second time may have been a bluff, but his threat to return the defendant to jail to await a second trial was not. Although the prosecutor might ultimately have decided to dismiss the charges against the defendant, he was not in any hurry to make that decision.

283. Sam W. Davis, a Houston trial judge, offered an anecdotal illustration of this contention. As a defense attorney, Davis had represented an elderly woman charged with murdering two other elderly women with whom she lived. "It was a clear case of self-defense," the defendant had announced to her attorney at their first interview. "They was a-killin' me by degrees."

The problem of the "innocent" defendant was one that, in some measure, divided public defenders and private defense attorneys. With only a few exceptions, public defenders refused to enter guilty pleas when their clients claimed to be innocent. Private defense attorneys, by contrast, were almost evenly divided between those who followed the same rule and those who maintained that "guilt or innocence has nothing to do with it."

The different conclusions of public defenders and private defense attorneys on this issue was not entirely the product of different ethical viewpoints. To some extent, it reflected the different tactical positions occupied by the two sorts of lawyers. Indeed, even to refer to the problem of the "innocent" defendant as a problem of ethics is somewhat misleading, for both public defenders and private defense attorneys asserted a variety of reasons for refusing to permit the "innocent" to plead guilty. Some, to be sure, did justify their refusal primarily on moral grounds. Said Houston's Clyde W. Woody, "My conscience would not let go of me if I permitted a client to plead guilty when he maintained that he was innocent. I just could not do it." James J. Doherty, a Chicago public defender, said, "My position may not be the logical one when the state's evidence is strong and when the defendant has been offered a good deal, but logic has its limits." Thomas E. Dwyer, a Boston defense attorney, declared, "From my perspective, there is something deeply wrong with a guilty plea by a defendant who says that he is not guilty."

Other lawyers did not rely entirely upon personal ethical sentiments but, in addition, asserted an almost mystic faith in the fairness and accuracy of the trial process. These lawyers denied that their refusal to permit assertedly innocent clients to plead guilty could ever be harmful. "An attorney never knows that he doesn't have a prayer," said San Francisco defense attorney William Ferdon. "I've seen it happen too many times. The jury says, 'There is a lot of evidence against this defendant, but we don't believe it.' Somehow the jurors sense the truth." Added Boston's Irene Bennett, "There may be no objective ground for optimism at the beginning, but I've won many apparently hopeless cases. The evidence only *looks* open and shut."<sup>284</sup>

The attitude of these attorneys was apparently unusual, however, and a more typical viewpoint was that of Houston's Richard H. Haynes.

284. Ms. Bennett was unique among the attorneys whom I interviewed in one respect; she claimed that in 38 years of a mixed civil and criminal practice, she had never entered a guilty plea for any defendant. Cf. *Lefcourt v. Legal Aid Soc'y*, 445 F.2d 1150 (2d Cir. 1971).

## The Defense Attorney's Role in Plea Bargaining

When I asked whether Haynes's policy of refusing to permit a guilty plea by a defendant who asserted his innocence reflected Haynes's faith in the trial process, he answered, with a hard look in my direction, "Buddy, don't hand me that schmalz." The usual reason for refusing to enter a guilty plea on behalf of a defendant who claimed to be innocent was expressed by Boston attorney Joseph S. Oteri: "It is a matter of self-protection, not of ethics. If I entered guilty pleas for clients who said that they were innocent, sooner or later a writ would come out of the penitentiary alleging that I had coerced an innocent person to plead." Sam Adam, a Chicago defense attorney, said simply, "I don't want to be caught in the middle when a defendant claims that his guilty plea was invalid."<sup>285</sup>

Several attorneys reported that when they persuaded clients to plead guilty, they attempted to protect themselves against possible post-conviction proceedings by preparing letters for the clients to sign. In such a letter, a client would express an awareness of his legal rights, describe the circumstances of his plea, and report his satisfaction with the representation that he had received.<sup>286</sup> Other lawyers did not de-

285. Although courts are not notably receptive to claims that guilty pleas have been coerced or to claims that defendants have been denied the effective assistance of counsel, these claims are often asserted. In a recent five-year period, the Supreme Court of Missouri heard appeals in 325 post-conviction proceedings. The most common ground of complaint was that a guilty plea was involuntary—a complaint that was asserted in 143 cases, though the court granted relief in only seven. The second most frequent complaint was that of ineffective assistance. Although this complaint was asserted in 130 cases, the court granted relief (a remand for an evidentiary hearing) in only two. Anderson, *Post-Conviction Relief in Missouri—Five Years Under Amended Rule 27.26*, 38 Mo. L. Rev. 1, 6, 14-15 (1973).

Despite the manifest reluctance of the courts to find ineffective assistance, defense attorneys often expressed intense concern about the prospect. When, for example, I asked a lawyer in Manhattan whether changes in criminal procedure had influenced the guilty-plea process, I anticipated a discussion of the effects of recent constitutional decisions upon the defense attorney's bargaining position. The lawyer answered, however, "Oh yes, criminal law has changed greatly in the last several years—and for the worse. The criminal has moved higher and higher on the ladder, and his lawyer has been denigrated. Today, defense attorneys are open game in every court."

286. In the United States District Court for Oregon, defendants who plead guilty are required to complete a printed form supplied by the court. This form, headed "Petition to Enter Plea of Guilty," contains the following provision:

I believe that my lawyer has done all that anyone could do to counsel and assist me, AND I AM SATISFIED WITH THE ADVICE AND HELP HE HAS GIVEN ME. Quoted in Erickson, *The Finality of a Plea of Guilty*, 48 NOTRE DAME LAW. 835, 846-47 n.80 (1973). Requiring defendants to praise their lawyers as having done "all that anyone could do" illustrates a common response of some courts to the problems of the guilty-plea system; adding new boilerplate to an adhesion contract can, in the view of these courts, make any problem disappear.

The practice of plea negotiation may lead lawyers to take self-protective measures not only in guilty-plea cases but also in cases that are resolved through trial. In one recent case, two lawyers, concerned about possible charges of ineffective assistance, advised the judge at trial that they had urged their clients to plead guilty. Although the tendency of this statement was plainly to prejudice the judge against the clients' claims of innocence, the Illinois supreme court concluded that the defendants had not been denied effective legal assistance. *People v. McCalvin*, 55 Ill. 2d 161, 302 N.E.2d 342 (1973).

mand that their clients sign testimonials to the lawyers' energy and ability, but they did prepare their own statements "for the files." The members of one Boston firm regularly sent copies of these statements to the court and to the prosecutor, and they also delivered a copy "in hand" to each defendant and required him to sign it in the presence of a witness.<sup>287</sup>

Public defenders are probably more vulnerable than private attorneys to post-conviction proceedings alleging the ineffective assistance of counsel,<sup>288</sup> and many defenders conceded that their reluctance to enter guilty pleas on behalf of assertedly innocent defendants stemmed largely from this fact. "I cannot defend our rule on grounds of principle," said Philadelphia's Vincent J. Ziccardi. "It is, frankly, a self-serving rule. Public defenders do not have the same freedom as private lawyers and cannot always employ the same procedures." Many defenders, in fact, echoed the sentiments of Boston's Edgar A. Rimbold: "We have no 'rule' against permitting defendants to plead guilty when they claim to be innocent. Our only 'rule' is that they may not do so when they are represented by our office." These defenders reported that when a client wished to plead guilty while asserting his innocence, their usual practice was to seek the court's permission to withdraw from the case. They instructed the client to request the appointment of a lawyer from outside the public defender office, and, in effect, they passed their ethical problem to this outside lawyer. (The defenders apparently assumed that most defense attorneys would resolve the problem in accordance with their clients' desires.)

Only a few public defenders unabashedly permitted their clients to make the choice of plea whether or not they admitted their guilt.<sup>289</sup> Among them was Paul G. Breckenridge, Jr., the Chief Deputy Public Defender in Los Angeles. Breckenridge agreed that his office's failure

287. Cf. A. AMSTERDAM, B. SEGAL & M. MILLER, TRIAL MANUAL FOR THE DEFENSE OF CRIMINAL CASES ¶ 214 (1967) [hereinafter cited as TRIAL MANUAL].

288. As this article has noted, public defenders are appointed attorneys who have not been selected by their clients; they represent a group of relatively distrusting and hostile defendants; and they sometimes do provide a mechanical and impersonal sort of representation. In addition, some courts have suggested that the effectiveness of privately retained attorneys should be judged by a more lenient standard than that applied in judging the effectiveness of court-appointed attorneys. *E.g.*, *People v. Morris*, 3 Ill. 2d 437, 447, 121 N.E.2d 810, 816 (1954); *Hall v. State*, 492 S.W.2d 950, 951 (Tex. Crim. App. 1973); *contra*, *West v. Louisiana*, 478 F.2d 1026 (5th Cir. 1973). See generally Polur, *Retained Counsel, Assigned Counsel: Why the Dichotomy?*, 55 A.B.A.J. 254 (1969).

289. At least in Pittsburgh, Denver, and Los Angeles, defender offices follow this policy. But see M. MAYER, *supra* note 13, at 162: "[Defender] offices, despite rumors to the contrary, all maintain a policy of never urging a man to plead guilty unless he admits his guilt."

## The Defense Attorney's Role in Plea Bargaining

to promulgate a rule on the subject of the "innocent" defendant was unusual, and he observed:

Most defender offices are afraid of their shadows. They are paranoid about the possibility that a client may accuse them of misconduct. But I'm a lawyer. My job is to protect my clients, not myself. I have to have a thick skin.

The rule of most defender offices against permitting "innocent" defendants to plead guilty may have been intended partly as a public relations measure rather than as a serious guide to conduct. At least the rule was often broken by individual defenders in an effort to manage their overwhelming caseloads. In Manhattan, for example, Milton Adler, the Assistant Attorney in Charge of the Legal Aid Society of the City of New York, told me that his office followed "an ironclad rule that a defendant may not plead guilty unless he admits his guilt." Later, on the same day, I saw a Legal Aid attorney strike a bargain with a prosecutor and then confer with a defendant who insisted that he was innocent. The attorney informed the defendant that it would be necessary for him to tell the court that he was guilty to insure the acceptance of his plea. When, despite the attorney's obvious anger, the defendant reported that he would not do so, the attorney agreed to confer with the trial judge to determine whether he would accept a guilty plea despite the defendant's protestations of innocence.

Oakland's Public Defender, John D. Nunes, conceded that it was difficult to enforce his office's rule against permitting defendants to plead guilty when they claimed to be innocent: "Eager young lawyers are so sure that they know best what is in their clients' interests. When they decide that they are going to save themselves and the state a trial, they often put intolerable pressure on a defendant." In Cleveland I accompanied a public defender to a bargaining session that resulted in more than a dozen pleas of guilty. On two occasions during this lengthy session, the defender told the prosecutor that his client claimed to be innocent. This disclosure, which was made in an entirely deprecatory way, did not cause either attorney a moment's hesitation. Later, however, in the defender's office, I mentioned the problem of the "innocent" defendant and found that the defender had apparently forgotten what I had seen. "I never advise a client to plead guilty if he tells me that he is innocent," the defender reported.<sup>290</sup>

<sup>290</sup> Similar hypocrisy apparently characterized the approach of some prosecutors to this problem. A few prosecutors reported that they automatically terminated plea negotia-



Defense attorneys apparently do not confront the problem of the "innocent" defendant with great frequency. Many defendants do, of course, deny their guilt during early interviews with their attorneys,<sup>291</sup> but not even the most dedicated proponent of the "rule" against permitting innocent defendants to plead guilty would suggest that these initial denials should forever preclude the entry of guilty pleas. After investigating the facts, an attorney may conclude that a case is hopeless, and after talking with the prosecutor, he may decide that a plea agreement would serve his client's interests. The attorney certainly has an obligation to report this judgment to his client, and when he does, the client may agree with his lawyer's assessment and offer to plead guilty. At this point, however, a defense attorney who follows the "rule" against permitting an "innocent" defendant to plead guilty may declare, "Yes, but if you are innocent, there must be a trial. I cannot ethically permit you to plead guilty when you tell me that you are not guilty." A defendant who has been persuaded that a trial would probably result in a substantial penalty is likely to tell the lawyer, "All right. I'll say that I did it." Despite the fact that a confession in these circumstances is not entirely reassuring, there is little more that a defense attorney can do to satisfy his conscience.<sup>292</sup> Under the

tions if a defense attorney suggested that his client might be innocent. See White, *supra* note 24, at 460 n.103. Sometimes, however, there was a reason to doubt the sincerity of these assertions.

For example, in a suburban preliminary hearing court in Cook County, Illinois, I saw a prosecutor offer to permit a repeated offender charged with attempted murder to plead guilty to a misdemeanor. The defense attorney conferred with his client and later told the court, "The defendant wants to take the deal, but he says that he is innocent." The prosecutor immediately objected that he would have no part of this arrangement. "A defendant can plead guilty only if he is guilty," he told the court.

Earlier, however, in the trial judge's chambers, I had seen the same prosecutor exact a "stipulation" of guilt from a defendant who vigorously asserted his innocence. In this case, the defendant was accused of molesting a child, and the prosecutor had offered to permit "supervision" (a continuance without a finding of guilt) if the defendant would secure psychiatric help and report to the court at regular intervals. As part of the agreement, the defendant was required to "stipulate" in writing to the truth of the charge against him. (The prosecutor and the trial judge believed that the court could enter a "judgment on the stipulation" without further proceedings if the defendant violated the conditions of his "supervision." So far as I can tell, this proposition finds no support in Illinois law.) The defense attorney reported that his client claimed to be innocent and would not sign the stipulation. He added that the defendant's denials seemed credible in light of his unblemished record and the failure of the supposed victim to complain until more than a month after the alleged occurrence. The prosecutor, however, opposed the defense attorney's request for a "straight continuance" and demanded that the defendant sign the stipulation. The defendant signed while still protesting his innocence to the prosecutor and the trial judge.

291. See M. MAYER, *supra* note 13, at 196.

292. A few lawyers did suggest that a mere admission of guilt was not enough. They said that they cross-examined their clients and refused to enter a guilty plea until they were "more satisfied than the judge" of a defendant's guilt. When a guilty plea would apparently serve a client's interests, however, and when the client has confessed and done everything else that he can to enter the plea, it seems almost inconceivable that a lawyer

guilty-plea system, a defense attorney can either permit the "innocent" to plead guilty and adopt the view that, as one attorney put it, "the truth has nothing to do with a guilty plea," or he can satisfy his sense of ethics with a coerced confession. In practice, there is no other choice.

Defense attorneys confirmed that the problem of the "innocent" defendant usually "washed out" once a defendant had been convinced that a plea agreement was truly in his interest.<sup>293</sup> "You'd be surprised how few defendants remain innocent once they understand the situation," said Oakland Public Defender James C. Hooley. The attorneys added, however, that the problem did not always evaporate in this manner. John D. Nunes observed, "Some clients beg to plead guilty while still asserting their innocence. Their egos are so involved in their initial denials of guilt that it is psychologically impossible for them to change." Added Philadelphia's Bernard Segal, "There are many things people do that they can never bring themselves to admit. Some defendants are literally insane on this point."

When confronted with clients who refused to admit their guilt despite clear evidence against them, many defense attorneys made strenuous efforts to secure their confessions.<sup>294</sup> A Los Angeles defense attorney said that he went "almost to the point of coercion" in his efforts to secure confessions, and other defense attorneys reported that they sometimes required defendants who claimed to be innocent to submit to polygraph examinations or sodium pentothal examinations in an effort either to test the veracity of their stories or to induce damaging admissions. Still other attorneys insisted that their clients consult psychiatrists—apparently in the belief that the psychiatrists would encourage the clients' recognition of their guilt.<sup>295</sup>

would stand in the way of the client's intelligent choice. I suspect that few lawyers have encountered cases in which, despite a client's confession and his desire to enter an advantageous plea agreement, the lawyers have had serious reservations about the client's guilt.

293. See TRIAL MANUAL, *supra* note 287, § 215:

Views differ on whether a lawyer may advise (or even permit) a client to plead guilty who protests his innocence. Fortunately, the moral question seldom needs arise.... If counsel discusses the evidence critically with the client, and subjects him to the sort of cross-examination which in every case will be necessary to prepare him for trial, the client frequently will admit guilt.

294. Thus, when a Chicago defense attorney reported that he would not permit a client to plead guilty if the client claimed to be innocent, I asked how he would treat a case in which there was virtually no chance of success at trial—a case, for example, in which a repeated offender claimed that arresting police officers had "planted" the narcotics he was accused of possessing and in which the officers would certainly contradict his testimony. The attorney replied, "I would simply question the defendant until he told me the truth."

295. Nevertheless the use of these techniques was not confined to situations in which defendants wished to plead guilty while asserting their innocence. Defense attorneys used similar tactics when assertedly innocent defendants sought trials that the attorneys thought would only harm their interests. See pp. 1191-92 *supra*.

An Oakland defense attorney described an incident that had all the flavor of a backroom stationhouse interrogation. The attorney's client was charged with murder, and during several meetings, the attorney did not question her plainly contrived denials of guilt. Then, as the attorney described it, he began an interview "in the most profane manner that I could devise." He called the defendant a "lousy, lying bitch," told her that she would go to the gas chamber, and threatened to withdraw from the case. With tears in her eyes, the defendant insisted that she had told the truth. The attorney said that although his "heart was breaking," he pressed on: "They found the gun this morning with your fingerprints all over it." The statement was a lie; the gun was still in the sewer where the defendant had thrown it. Nevertheless, the statement had the desired effect, and the defendant confessed.

A lawyer in Houston recalled an even more extreme case in which a "headstrong" defendant refused to admit his guilt despite strong evidence to the contrary. The case went to trial, and, as the lawyer described it,

The prosecutor presented only a skeletal case, hoping to nail the defendant in rebuttal after he had lied on the stand. But I called the witnesses whom the prosecutor had failed to call, and their testimony broke the defendant down. He admitted his guilt and changed his plea to guilty.

Defense attorneys reported that they often resolved the problem of the "innocent" defendant through a "slow plea of guilty"—a perfunctory trial without a jury whose result is always a foregone conclusion. The result of this trial may, in fact, become the subject of explicit bargaining. A Philadelphia defense attorney explained that he might approach a trial judge in chambers and say,

Your Honor, my client is crazy. They've got him dead-to-rights, but he still says that he didn't do it. Let's give him a half hour trial just to make him happy, but when you find him guilty, give him no more than two years, O.K.?

Amazingly, judges do not usually respond to this act of betrayal by ejecting the defense attorney from their chambers or by instituting disciplinary proceedings against him. Instead, they are likely to haggle with the attorney, arrange the terms of a mock trial, and feign impartiality as the defendant is led to the slaughter.

## The Defense Attorney's Role in Plea Bargaining

If these techniques seem inconsistent with the relationship of trust and confidence that should exist between attorneys and their clients, they become simply ludicrous when they are coupled with certain other devices and stratagems that defense attorneys employ. Many attorneys reported that some clients were "too ready to level" with them. Because of the "ethical rule" that an attorney may not knowingly permit his clients to present perjured testimony,<sup>296</sup> these attorneys sought initially to discourage their clients from confessing. Some, in fact, employed the technique that Robert Traver illustrated in *Anatomy of a Murder*:<sup>297</sup> they advised their clients of various legal defenses before asking for their statements, so that the clients could devise plausible exculpatory stories if they desired to do so.<sup>298</sup>

One lawyer in Manhattan reported that many of the homosexual defendants whom he represented were "highly emotional individuals who want to treat their lawyer as a father-confessor." Before asking for their stories, this attorney advised his clients that they should think carefully about their replies: "You may confess if you want to, but if you do, I cannot permit you to take the stand to present a different story. If you tell me that you did it, you are pretty much pleading guilty here and now." This same lawyer, however, insisted that he would not permit a client to plead guilty unless the client admitted his guilt. The attorney's "ethical rules" might therefore pull a client in opposite directions. Initially, the attorney would seem to invite the client to "make up a good story"; apparently the attorney could not "ethically" present an effective defense if the client confessed. If, however, the attorney later learned that a guilty plea would be to his client's advantage, he would insist that the client retract his exculpatory story before entering his plea; it would, in the attorney's view, be "unethical" to permit a guilty plea by a defendant who said that he was not guilty. A defendant put through this emotional wringer and back again—all in the privacy of the lawyer's office—would surely emerge with a very strange sense of legal ethics.

In light of the manipulation, evasion, and hypocrisy produced by

296. ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A)(4). This rule is discussed and criticized in Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966).

297. R. TRAVER, *ANATOMY OF A MURDER* 35-49 (1958).

298. Cf. ABA STANDARDS, *supra* note 55, § 3.2:

(a) [T]he lawyer should probe for all legally relevant information without seeking to influence the direction of the client's responses.

(b) It is unprofessional conduct for the lawyer to instruct the client or to intimate to him in any way that he should not be candid in revealing facts so as to afford the lawyer free rein to take action which would be precluded by the lawyer's knowing of such facts.

a "rule" against permitting a guilty plea by a defendant who claims to be innocent, the Supreme Court's decision in *North Carolina v. Alford*<sup>299</sup> may seem a step in the right direction. The defendant in *Alford*, charged with first-degree murder, feared that he would be sentenced to death if he stood trial. He was, however, permitted to plead guilty to second-degree murder and was sentenced to a 30-year term of imprisonment. At the time that he offered his guilty plea, the defendant told the court:

I pleaded guilty on second-degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all.

The trial court heard a summary of the prosecution's evidence presented by a police officer and, in addition, the testimony of two other witnesses who incriminated the defendant. Then the court accepted the defendant's plea.<sup>300</sup>

299. 400 U.S. 25 (1970).

300. Doris R. Bray, the defendant's attorney in the Supreme Court, reported in a telephone interview that the trial court had not considered the evidence that it heard for the purpose of establishing either the defendant's guilt or a "factual basis" for his guilty plea. According to Ms. Bray, the function of the evidence under North Carolina practice was merely to aid the court in sentencing. (The record of the case does not reveal why the evidence was received, and North Carolina statutes shed little light on the subject.)

Ms. Bray supplied a transcript of the proceedings in which the defendant's guilty plea was accepted. (This transcript does not appear in the Supreme Court appendix, apparently because, as the case was initially submitted to the Court, the significant issue was not the propriety of accepting a guilty plea offered by a defendant who claimed to be innocent.)

The transcript provided by Ms. Bray reveals two circumstances, not reported by the Supreme Court, that are of interest:

(1) All of the testimony of the police officer was hearsay that could not have been received at a trial, and the two witnesses who testified to damaging admissions by the defendant were called by the defense attorney rather than the prosecutor. Why the defense attorney called these witnesses is entirely unclear.

(2) The proceedings had noticeable overtones of racism. The police officer indicated that before the crime occurred, the defendant had been in the company of "a white girl." According to the witnesses whom the officer interviewed, they drank whiskey together and "hugged and kissed," and the defendant paid his last dollar to a friend for permission for the two to "use the bedroom." (The "white girl," however, was overheard to tell the defendant that he would have to find more money; they were not in the bedroom long.)

The prosecutor permitted the police officer to present his testimony virtually without interruption. Of the six questions that he asked, however, one concerned the crime, and the other five concerned the defendant's relationship with his companion earlier in the evening. These questions were apparently intended primarily for emphasis: "She was a white girl?" "Well then, [the defendant] admitted what had taken place with reference to Georgia Lee Holder, is that right?" "He paid \$1 for the room to Nathaniel?"

The events to which the police officer and the prosecutor referred occurred shortly before the killing, and the victim of the crime was the friend from whom the defendant had rented the bedroom. The victim had apparently given the "white girl" permission

## The Defense Attorney's Role in Plea Bargaining

The Supreme Court recognized that an admission of guilt is normally "central to the plea of guilty and the foundation for entering judgment against the defendant,"<sup>301</sup> but it held that such an admission "is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."<sup>302</sup> In support of this ruling, the Court cited the following statements of various lower courts, although it recognized that many other lower courts had disagreed:

[A court should not] force any defense on a defendant in a criminal case, [particularly when advancement of the defense] might end in disaster.<sup>303</sup>

An accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty. . . .<sup>304</sup>

Reasons other than the fact that he is guilty may induce a defendant to so plead . . . and he must be permitted to judge for himself in this respect.<sup>305</sup>

The Supreme Court qualified its basic holding in *Alford* in two important ways. First, it noted that "the State had a strong case of first-degree murder against Alford"<sup>306</sup> and stated, "[V]arious state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea."<sup>307</sup> Second, the Court said that its holding "does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plea. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court."<sup>308</sup>

to remain at his home after the defendant had asked her to leave, and when the defendant took the woman's coat, the victim was one of the people who chased him. These facts offered the only hint of any motive that the defendant might have had for the killing. The events were therefore relevant, but the emphasis that they received and the manner in which they were treated suggest that racism was not a thing of the past in Forsyth County, North Carolina, in 1963. In a case in which the defendant's fear of the death penalty apparently motivated his guilty plea, this background of racism seems noteworthy.

301. 400 U.S. at 32 (*quoting* *Brady v. United States*, 397 U.S. 742, 748 (1970)).

302. 400 U.S. at 37.

303. *Tremblay v. Overholser*, 199 F. Supp. 569, 570 (D.D.C. 1961).

304. *McCoy v. United States*, 363 F.2d 306, 308 (D.C. Cir. 1966).

305. *State v. Kaufman*, 51 Iowa 578, 580, 2 N.W. 275, 276 (1879) (dictum).

306. 400 U.S. at 37.

307. *Id.* at 38 n.10.

308. *Id.* at 38 n.11.

Within the context of the guilty-plea system, I believe that the *Alford* decision makes sense,<sup>309</sup> but the case illustrates some incongruities that this system has produced. For one thing, *Alford* effectively obliterates the historical distinction between pleas of guilty and pleas of *nolo contendere*. Since the 15th century, courts have carefully distinguished between these pleas on the ground that a guilty plea constitutes a factual confession while a plea of *nolo contendere* does not.<sup>310</sup> Although both pleas result automatically in conviction, the distinction between them has not usually been just one of nomenclature. Instead, in most jurisdictions, the plea of *nolo contendere* has been unavailable in cases involving serious offenses, and defendants in these cases have been able to convict themselves only by confessing their guilt.<sup>311</sup> The Supreme Court in *Alford* thus resolved the problem of the "innocent" defendant in a different manner than most Anglo-American courts had resolved it, in serious cases, for the preceding 500 years.

Another problem is that Mr. Justice White's opinion for the Court did not specify what kind of hearing a trial court must conduct before accepting a guilty plea offered by an assertedly innocent defendant. The Court plainly indicated, however, that some independent evidence of guilt was necessary to justify the acceptance of an *Alford* plea. The significance of this requirement depends, of course, upon the quality of the evidence that trial and appellate courts in fact demand, and it may be productive to consider a few alternatives.

The basic standard suggested by the Court was that there must be a "factual basis for the plea"—just as there must, under the Federal Rules of Criminal Procedure, be a "factual basis" for any guilty plea

309. See pp. 1296-98 *infra*.

310. The Supreme Court observed in *Alford*, "Throughout its history, . . . the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency." The Court cited a 15th-century case in which the defendant had not admitted his guilt but "put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (*petit se admittit per finem*)."<sup>400 U.S. at 35-36 n.8, citing Anon., Y.B. Hil. 9 Hen. 6, f. 59, pl. 8 (1431).</sup>

311. See *State ex rel. Clark v. Adams*, 144 W. Va. 771, 779, 111 S.E.2d 336, 341 (1959), *cert. denied*, 363 U.S. 807 (1960): "The courts . . . are unanimous in holding that in the absence of a statute to the contrary the plea of *nolo contendere* can not be accepted to an indictment for an offense for which capital punishment is prescribed. There is a division of authority upon the question whether the plea may be accepted where the penalty is or may be imprisonment."

A 1926 Supreme Court decision held that federal courts could impose sentences of imprisonment following pleas of *nolo contendere*. *Hudson v. United States*, 272 U.S. 451 (1926). This case clearly supported the Court's conclusion in *Alford* that the Constitution did not forbid a defendant's imprisonment when he had neither been tried nor admitted his guilt. For the view that the plea of *nolo contendere* is available only in misdemeanor cases in which the defendant "desires to submit to a small fine," see J. ARCHBOLD, PLEADING AND EVIDENCE IN CRIMINAL CASES 73 (1st Am. ed. 1824).

## The Defense Attorney's Role in Plea Bargaining

accepted in a federal court.<sup>312</sup> To say that a guilty plea must have a factual basis is apparently to say—in a high-sounding way—that a court must have reason to think that the defendant before it might be guilty.<sup>313</sup> However, few defendants are arrested by the police, charged by prosecutors, and indicted by grand juries in the absence of some significant incriminating evidence. Virtually every defendant in the criminal courts therefore “might be guilty,” and in that sense, there may be a “factual basis” for virtually every *Alford* plea.<sup>314</sup> The requirement that an *Alford* plea be supported by independent evidence could thus become more a salve to troubled consciences than a meaningful safeguard of the fairness of guilty-plea convictions.<sup>315</sup> If the presence of any significant incriminating evidence is enough to establish a “factual basis for the plea,” the requirement of a factual basis seems relatively unimportant.

Of course no civilized legal system sends people to prison because

312. FED. R. CRIM. P. 11.

313. The term “factual basis,” because it says so little, can be interpreted in a variety of ways. The United States Court of Appeals for the District of Columbia has said that “this language is consistent with a probability-of-guilt standard.” *Bruce v. United States*, 379 F.2d 113, 119 n.19 (D.C. Cir. 1967). *But see McCoy v. United States*, 363 F.2d 306, 308 (D.C. Cir. 1966) (requiring only “significant evidence that the accused was involved or implicated in the offense”). In *United States v. Webb*, 433 F.2d 400, 403 (1st Cir. 1970), *cert. denied*, 401 U.S. 958 (1970), the First Circuit concluded, “The court need not be convinced beyond a reasonable doubt that defendant is in fact guilty.... It should be enough if there is sufficient evidence for a jury to conclude that he is guilty.” These three cases thus suggest three different standards for determining the existence of a factual basis—a preponderance of the evidence, any “significant” evidence, and sufficient evidence to avoid a directed verdict.

314. The authors of the factual basis requirement of Rule 11 may, however, have been less concerned with confirming the factual accuracy of a plea of guilty than with insuring that the plea was not the result of a mistake of law. The Advisory Committee Note to the 1966 amendment that established the factual basis requirement explained:

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself... that the conduct which the defendant admits constitutes the offense charged.... Such inquiry should, *e.g.*, protect a defendant who is in the position of pleading voluntarily... but without realizing that his conduct does not actually fall within the charge.

18 U.S.C.A. FED. R. CRIM. P. 11, Advisory Committee Note. This Note probably should not be read as an exhaustive statement of the objectives of the factual basis requirement. The history of the 1966 amendment indicates that one of its purposes was indeed to insure the factual accuracy of a defendant's plea and not simply to protect against mistakes of law. Nevertheless, the authors of Rule 11 plainly assumed that any guilty-plea case would involve “conduct which the defendant admits”; the apparent objective of their requirement of a factual basis was to confirm both the factual accuracy and the legal sufficiency of this admission; and the Rule's authors might therefore have been surprised to find the concept of a factual basis pressed into service in a case in which the defendant admitted no “conduct” at all. *Cf. McCarthy v. United States*, 394 U.S. 459, 467 (1969).

315. *Cf. People v. Coates*, 32 Mich. App. 52, 62, 188 N.W.2d 265, 269 (1971) (Levin, J., dissenting) (“It will be an unusual prosecution that does not have some tenable factual basis”); Note, *supra* note 265, at 1394 (“A court can provide little protection against inaccurate pleas by requiring the prosecutor to present a *prima facie* case, for he will almost surely be able to offer a substantial amount of proof”).



they "might be guilty" or because there is a "factual basis" for their convictions. A civilized legal system sends people to prison because they are guilty (or, more accurately, because their guilt has been established beyond a reasonable doubt either by uncoerced guilty pleas or by independent evidence).<sup>316</sup> An *Alford* plea obviously does not itself establish a defendant's guilt, and the Supreme Court may have contemplated more than a perfunctory review of the evidence before the acceptance of such a plea.<sup>317</sup>

The mechanism that our legal system has created and refined over several centuries to determine whether a criminal defendant is guilty, however, is the criminal trial. If, under *Alford*, a court must truly determine whether the defendant before it is guilty, the court will, in effect, try every defendant who submits an *Alford* plea. The defendant's plea will therefore become inconsequential, and the court might as well reject it as accept it.

The Supreme Court obviously did not contemplate this result, and the most reasonable conclusion may simply be that an *Alford* plea is a piece of fudge. Just as a defendant seeks to "have it both ways" by submitting a plea of "guilty-but-not-guilty," so the Supreme Court may have sought to "have it both ways" by authorizing the acceptance of these pleas. The Court did not contend that the defendant's guilty plea itself justified his conviction; it conceded that the plea lacked the admission of guilt that is normally "the foundation for entering judgment against the defendant." Nor did the Court contend that the defendant had been tried. Instead, the defects of the plea were answered by the evidence, and the defects of the evidence were answered by the plea.

The Court's theory may thus have been that half-a-guilty plea plus

316. The language of Rule 11 of the Federal Rules of Criminal Procedure was deliberately chosen to obscure this elementary principle. An early draft-amendment would have required a federal trial judge to satisfy himself in a guilty-plea case "that the defendant in fact committed the crime charged." PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO RULES OF CRIMINAL PROCEDURE 3 (1962). This amendment would not have required the judge to follow any specified procedure; it would merely have told him to determine to his own satisfaction that he was not subjecting an innocent person to criminal condemnation. Nevertheless, this proposal was too strong for the committee that drafted the Rule, and the amorphous requirement of a "factual basis for the plea" was substituted. See 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 174, at 377 n.75 (1969); 8 J. MOORE, FEDERAL PRACTICE ¶ 11.03[4] (2d ed. R. Cipes 1965).

The American Law Institute's *Model Code of Pre-Arrest Procedure* requires a finding of "reasonable cause" when a guilty plea is accepted. As with the federal rules, the draftsmen rejected a stronger proposal that had been presented to them. ALI MODEL CODE, *supra* note 101, at 72, Note on § 350.4.

317. The Court indicated not only that there should be a "factual basis" for the plea, but that a trial judge should "inquire...into and [seek] to resolve the conflict between the waiver of trial and the claim of innocence." 400 U.S. at 38 n.10.

## The Defense Attorney's Role in Plea Bargaining

half-a-trial equals a whole conviction. Either procedure by itself would be shockingly inadequate, but when a halfhearted guilty plea is coupled with a halfhearted trial, they provide reasonable assurance of a defendant's guilt. Surely, however, an *Alford* plea offers little or no assurance of guilt, and the quality of the evidence that most courts are likely to demand to support the plea will fall short of that required by traditional rules of evidence and due process. Implicit in the *Alford* decision may be an assumption that these traditional rules are unnecessary and that guilt can be adequately determined in a brief, informal hearing in which both the prosecutor and the defendant desire the same result. The issue is slippery because the Court did not indicate whether factual guilt or consent provides the basic foundation for an *Alford* conviction.

Mr. Justice White often indicated that a defendant should be the master of his destiny:

Whether [Alford] realized or disbelieved his guilt he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term.<sup>318</sup>

The concept of "consent" is so strained in the context of a guilty plea induced by a threat of capital punishment and accompanied by protestations of innocence, however, that in the final analysis the Supreme Court apparently did not rely on this concept. Ultimately the Court merely agreed to uphold a conviction that, in its view, was supported by the evidence.

The ambiguity of the *Alford* rationale becomes especially apparent if one supposes that the requirement of a "factual basis for the plea" is more than sugar-coating, that courts might reject *Alford* pleas on the ground that their "factual bases" were not adequately established, and that these courts might insist upon hearing the evidence in full trials. At this point, the assertion that "a court should not force any defense on a defendant in a criminal case, particularly where advancement of the defense might end in disaster" would apparently become inap-

318. 400 U.S. at 37.

plicable, as would the assertion that a defendant "must be permitted to judge for himself in this respect." A case in which a court believes that the defendant might be innocent poses the dilemma in its starkest terms: should a defendant be allowed to judge for himself what course will serve his interests even when he could be innocent of the offense to which he has offered to plead guilty?

This problem may be viewed initially from the perspective of an individual defense attorney who, far from being concerned with whether his client's plea has a "factual basis," may be entirely convinced of his client's innocence.<sup>319</sup> Philadelphia's Donald J. Goldberg reported:

I have entered guilty pleas for defendants whom I *knew* to be innocent. Most of these defendants were professional gamblers whom I had represented in prior cases. Year after year, these clients would come to me and "level" without hesitation. Then they would come into my office and say, "It's a bum rap this time." There would be no reason for the clients to lie; the case would be like all the others. Yet a swearing match with the police department would not have produced an acquittal; it would merely have angered the judge. I would therefore advise these clients to plead guilty when I was satisfied that the sentence to be imposed upon the plea was satisfactory to them.

When our criminal justice system fails to provide trials for defendants who deny their guilt and who may in fact be innocent, the result is, of course, distressing. One may reasonably be offended by the cheapness, the hypocrisy, and the injustice of a system that cares too little about the truth to test a denial of guilt through the time-honored mechanism designed for that purpose. For this reason, one may strongly sympathize with a "rule" against permitting defendants to plead guilty when they claim to be innocent (or, at least, with a rule forbidding a guilty plea when a defendant's denials of guilt may be credible).

Nevertheless, I believe that such a rule is unconscionable within the context of the guilty-plea system. The implications of our regime of plea bargaining should be recognized, and cynical though this position may seem, both courts and defense attorneys should recognize a "right" of the innocent to plead guilty. So long as a defendant has something to gain by entering a plea agreement, it is unfair to deny him the choice. Whether the defendant denies his guilt, whether his attorney

319. A court can never confront this problem in terms quite so stark, for a court may dismiss the case or acquit when it is convinced of a defendant's innocence.

## The Defense Attorney's Role in Plea Bargaining

considers him innocent, and whether the trial court might feel more comfortable after a trial should not be determinative. Indeed, because the extreme pressures of the guilty-plea system can make it unwise to run even a slight risk of conviction,<sup>320</sup> not even the probability of acquittal should stand in the way of a plea of guilty. This position may be terrifying, but I believe that attempts to hedge and equivocate merely aggravate the injustice of our inherently unjust system. The *Alford* decision reached the correct result if the continued existence of the guilty-plea system is assumed, and indeed, the only defect of the court's opinion lies in its effort to qualify a defendant's power to choose his own plea.

In practice, a "rule" against permitting defendants to plead guilty when they claim to be innocent usually fails to achieve its goal. It merely leads assertedly innocent defendants to make coerced confessions to their attorneys and to the courts.<sup>321</sup> When the pressures of the guilty-plea system are themselves inadequate for this purpose, moreover, the rule encourages defense attorneys to employ interrogation techniques that often seem destructive of the attorney-client relationship.<sup>322</sup> My opposition to a rule against permitting the "innocent" to plead guilty is not, however, based primarily on its ineffectiveness, its destructive influence upon the attorney-client relationship, or the apparently greater honesty of the opposite position. In my view, the rule does its greatest damage on the infrequent occasions when it works.

One statement of a defense attorney who refused to permit innocent defendants to plead guilty effectively illustrated the incongruity of his position. Said Clyde W. Woody of Houston, "I would not 'plead' a client who told me that he was innocent even if it cost him 10 years." Chicago's Sam Adam recalled a case in which his own "ethical rule" had, in fact, resulted in approximately this penalty. Adam's client was charged with attempted rape, and the evidence against him was overwhelming. For one thing, the victim of the crime had bitten off part of her assailant's finger, and the piece of nail and flesh from her mouth matched the piece that was missing from the defendant's hand. Although a prosecutor had offered to permit the defendant to plead guilty to a misdemeanor, thereby insuring that his sentence would not exceed one year, Adam declined the offer because the defendant in-

320. See Alschuler, *supra* note 7, at 58-62.

321. See pp. 1286-87 *supra*.

322. See pp. 1287-89 *supra*.

sisted that he was innocent. After his conviction at trial, the defendant was sentenced to a penitentiary term of one-to-ten years.

Los Angeles's Paul G. Breckenridge posed a difficult question for the proponents of a rule against permitting the innocent to plead guilty. He said, "Suppose that a trial could result in the death penalty. Could a lawyer possibly tell a client that his sense of ethics required a course that might result in the client's death?" There is, of course, only one reasonable answer to Breckenridge's question: even if a defendant denies his guilt and even if he would apparently stand a better than even chance of acquittal, the choice must be his to make. It would be unfair to force the client to run even a small risk of death for the sake of his lawyer's peace of mind. Moreover, the problem is not essentially different when penalties other than death are at issue. In every case, it is the defendant who "must do the time," and for a defense attorney or a trial court to insist on a course that could, through no fault of the defendant's, add to his term of imprisonment approaches the height of arrogance.<sup>323</sup>

Ultimately, of course, the civilized solution to the problem would be to eliminate the dilemma that confronts assertedly innocent defendants under the guilty-plea system, to abolish the penalty that our system exacts for exercise of the right to trial, and simply to give every defendant who desires a trial his day in court. If we are unwilling or unable to adopt this solution, we should at least permit defendants to choose between the branches of the dilemma that we have thrust upon them. When our consciences cause us to deny the coercive character of the system that we have created, we magnify its injustice as we delude ourselves.

Although the *Alford* decision seems to represent a step toward honesty, it has had surprisingly little effect. One might not, however, sense its limited impact upon reading the decisions of state appellate courts. The Supreme Court emphasized that "the States in their wisdom" might prohibit *Alford* pleas,<sup>324</sup> but even states that had forbidden these pleas prior to *Alford* have commonly reconsidered their position. The Maryland Court of Appeals, for example, abandoned its requirement that a defendant admit his guilt before entering a guilty plea, and made the remarkable statement, "[T]he assertion of innocence does not

323. See Y. KAMISAR, W. LAFAVE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 1161 (4th ed. 1974) (letter from unnamed lawyer to Advisory Committee on Criminal Trial of A.B.A. Project on Minimum Standards for Criminal Justice).

324. 400 U.S. at 39.

## The Defense Attorney's Role in Plea Bargaining

necessarily negative any admission of guilt.”<sup>325</sup> Without discussing the merits of the issue, courts in Texas and Washington cited *Alford* for the proposition that defendants might plead guilty despite their denials of guilt; these courts did not advert to their earlier rulings to the contrary, rulings which the Supreme Court had described in the *Alford* opinion itself.<sup>326</sup> My research indicates that appellate courts in only three states—Michigan, New Jersey, and New York—have expressly adhered to their refusal to allow assertedly innocent defendants to plead guilty in the period since *Alford* was decided.<sup>327</sup>

Among defense attorneys and trial judges, however, the story has been different. Two and one-half years after the *Alford* ruling, I telephoned many of the attorneys who had told me that they would not permit guilty pleas by defendants who claimed to be innocent, and almost uniformly their policy remained the same. Public defender offices in Philadelphia, New York, Boston, San Francisco, and Oakland still refused to permit defendants to plead guilty if they claimed to be innocent, and Oakland Public Defender James C. Hooley indicated the intensity of his office's commitment to this policy when he said, “That is still our number one rule.” In Hooley's view, the

325. *Williams v. State*, 10 Md. App. 570, 574, 271 A.2d 777, 779 (1970). See *People v. Canino*, 508 P.2d 1273 (Colo. 1973); *Robinson v. State*, 291 A.2d 279 (Del. 1972); *Cote v. State*, 286 A.2d 868 (Me. 1972).

326. *Johnson v. State*, 478 S.W.2d 954, 955 (Tex. Crim. App. 1972); *State v. Brown*, 3 Wash. App. 797, 477 P.2d 930 (1970). For the Supreme Court's discussion of prior rulings in these states, see 400 U.S. at 33.

327. *People v. Butler*, 43 Mich. App. 270, 279 n.2, 280 n.4, 204 N.W.2d 325, 330 nn.2 & 4 (1972); *McConnell, Memorandum to Assignment Judges and County Prosecutors, set forth in State v. Korzenowski*, 123 N.J. Super. 454, 456 n.1, 303 A.2d 596, 597 n.1 (App. Div. 1973); *People v. Hill*, 39 App. Div. 2d 949, 333 N.Y.S.2d 238 (1972); *People v. Meadows*, 35 App. Div. 2d 1003, 317 N.Y.S.2d 826 (1970).

The most bizarre response to the *Alford* decision has come from the Supreme Court of Pennsylvania. In *Commonwealth v. Sampson*, 445 Pa. 558, 285 A.2d 480 (1971), the court upheld the propriety of accepting a guilty plea offered by a defendant who denied any involvement in the alleged crime. At the same time, the court said that a guilty plea must be rejected if the defendant asserted “facts establishing an affirmative defense” to the charge. Despite a strong protest by Justice Samuel J. Roberts, the court offered no justification for its distinction between a complete denial and the assertion of an affirmative defense. The court claimed instead that this distinction was required by a pre-*Alford* opinion, which read:

[I]f a defendant pleads guilty to a criminal charge, and in the next breath contravenes the plea by asserting facts which, if true, would establish that he is not guilty, then his guilty plea is of no effect and should be rejected.... In other words, a defendant should not be allowed to plead “guilty” from one side of his mouth and “not guilty” from the other.

*Commonwealth v. Roundtree*, 440 Pa. 199, 202, 269 A.2d 709, 711 (1970). The Supreme Court of Pennsylvania has applied its unusual distinction to reject a guilty plea coupled with a claim of self-defense, *Commonwealth v. Blackman*, 446 Pa. 61, 285 A.2d 521 (1971), and a lower court has effectively deprived the distinction of any meaning by ruling that a defendant's denial that he had sold any drugs “clearly indicated that he was making an affirmative defense to the charges against him.” *Commonwealth v. Thomas*, 221 Pa. Super. 418, 422, 293 A.2d 615, 617 (1972), *rev'd on other grounds*, 450 Pa. 548, 301 A.2d 359 (1973).

*Alford* decision was not directed to the ethical problem of the individual defense attorney: "The conscience of the court is one thing; my conscience is another."<sup>328</sup> Similarly, lawyers who based their refusal to permit "innocent" defendants to plead guilty upon purely pragmatic grounds reported that *Alford* had not affected their calculations. "I still know that if I entered guilty pleas for defendants who asserted that they were innocent, those letters from the penitentiary would claim that I had coerced the pleas," observed Boston's Joseph S. Oteri.

The *Alford* decision has apparently had a more noticeable impact in Cleveland—a city where the adherence of the public defender office to a rule against permitting "innocent" defendants to plead guilty had seemed problematic before the *Alford* ruling.<sup>329</sup> Defender William T. Wuliger reported that his office now permits each attorney to resolve the issue for himself, and that his own policy is "to use plea bargaining to minimize a defendant's exposure to punishment even when he claims to be innocent." Wuliger added that the *Alford* decision had been "very useful in overcoming the squeamishness of certain judges."

Virtually everywhere else, however, lawyers reported that state and federal trial judges, with only a few exceptions, refuse to accept *Alford* pleas. Many lawyers noted that this judicial refusal was one important reason for their own continued adherence to the traditional "ethical rule." Lawrence Linzer, a public defender in Manhattan, explained:

The impact of the *Alford* decision in this city has been close to zero. I do not know a single prosecutor or a single judge who will touch an *Alford* plea. Indeed, I recently had a client who conceded that he was probably guilty. He was an alcoholic, however,

328. Although Hooley's position may have an initial appeal, a lawyer might reasonably conclude that the ethics of the situation do depend upon "the conscience of the court." Indeed, when a court is willing to accept an *Alford* plea, it may seem unethical for a lawyer to deny his client the power to enter it (whatever the lawyer's own opinion of the *Alford* principle). Similarly, when a court is unwilling to permit a defendant to enter an *Alford* plea, an attorney might reasonably regard the court's decision as conclusive (even when the lawyer personally believes that "innocent" defendants should be allowed to plead guilty).

Why the problem of the "innocent" defendant has been viewed primarily as an ethical problem for defense attorneys rather than as a legal problem for the courts is somewhat mystifying. Apparently guilty pleas were once viewed unquestioningly as factual confessions to the court, and it was considered unethical for an attorney to permit a client to make a false confession. Under the guilty-plea system, however, as facts gradually became less important than strategies, lawyers began to reconsider whether it might be proper to employ the "guilty-plea strategy" on behalf of a defendant who denied his guilt. Once courts themselves have ruled upon the issue, however, my own view is that the defense attorney's "ethical problem" largely disappears.

329. See pp. 1285-86 *supra*.

## The Defense Attorney's Role in Plea Bargaining

and he said that he could not remember the events in question. Because he could not make an unequivocal confession to the court, he was ultimately forced to stand trial.<sup>330</sup>

Refusal to accept an *Alford* plea even when the plea has a "factual basis," even when it is "voluntary," and even when it is surrounded by any other safeguards that a court might desire, is apparently consistent with the terms of the *Alford* opinion:

Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court . . . .<sup>331</sup>

In this statement, the Supreme Court once again abandoned its suggestion that a court should not "force any defense on a defendant in a criminal case" and its suggestion that a defendant "must be permitted to judge for himself in this respect." Under *Alford*, the choice is not the defendant's but the court's, and a court's discretion to refuse an *Alford* plea is apparently subject to no restrictions and no standards. This result is, of course, consistent with the Supreme Court's reluctance to view the problem of the "innocent" defendant as a problem of constitutional law and with the Court's willingness to tolerate a variety of approaches among the various states. The practical effect, however, is to create a system in which defendants have no rights and trial courts can do no wrong. Despite the Supreme Court's suggestion that upholding a defendant's choice of plea serves important "human values," this choice can apparently be denied on the basis of judicial whim.

Considerations of federalism do not, of course, explain the failure of the federal courts to adopt for themselves a uniform policy toward *Alford* pleas, and indeed, the Supreme Court indicated that it might in the future "delineate the scope" of a federal judge's discretion to refuse to accept these pleas.<sup>332</sup> The United States Courts of Appeals, however, have not yet begun any effort to confine the discretion of federal trial judges; they have instead insisted that this discretion is virtually unlimited.

330. Cf. the New York appellate decisions cited in note 323 *supra*. These decisions by the Appellate Division's Second Department are not controlling in Manhattan, but they may have influenced the attitude of Manhattan trial courts.

331. 400 U.S. at 38 n.11.

332. *Id.*



In *United States v. Bednarski*,<sup>333</sup> for example, the defendant offered to plead guilty to one count of a six-count tax-fraud indictment. In return, the United States Attorney agreed to dismiss the remaining charges and to recommend a sentence of one month's imprisonment and a fine of \$1,000.<sup>334</sup> When the defendant told the court that he had been unaware of the falsity of his tax returns, however, the court refused to accept his plea. The court later convicted the defendant on all six counts, fined him \$9,000,<sup>335</sup> and sentenced him to four months' imprisonment.

The United States Court of Appeals for the First Circuit found no error in the trial judge's refusal of the *Alford* plea or in the penalty that the judge apparently imposed as a result of this refusal. The court's opinion emphasized that *Alford* had merely authorized the acceptance of a guilty plea in the circumstances of the case, suggested that it would be inappropriate to require a court "to fine and jail a person who has not been tried and who protests his innocence," and expressed concern that a contrary ruling would invite defendants who were dissatisfied with their sentences to "freely litigate" the propriety of the courts' rejection of their guilty pleas.<sup>336</sup>

333. 445 F.2d 364 (1st Cir. 1971) (Aldrich, C.J.).

334. Although the promise of the United States Attorney was not a matter of record, the court accepted the defendant's description of this promise in his brief for purposes of decision.

335. This fine was larger than the court could have imposed following a conviction on one count of the indictment. 445 F.2d at 365.

336. 445 F.2d at 366.

The United States Court of Appeals for the District of Columbia made a similar ruling in *United States v. Price*, 436 F.2d 303 (D.C. Cir. 1970), a case in which the trial judge's refusal to consider an *Alford* plea may have reflected his ignorance of the law rather than a conscious exercise of discretion. The following dialogue had occurred between the defendant's appointed attorney and the judge:

DEFENSE COUNSEL: [The defendant] has asked me to try to get a plea to a lesser offense. He tells me he didn't do it. I told him that under those circumstances, I can't proffer the plea to the Court.

THE COURT: That is right. If he pleads, it means he is willing to admit his guilt.

DEFENSE COUNSEL: ... [H]e says he didn't do it but wants to plead to a lesser offense.

THE COURT: You would be highly criticized if you did have him plead to a lesser offense.

Although this exchange apparently occurred before the *Alford* ruling, the District of Columbia had been among the few jurisdictions to authorize *Alford* pleas prior to *Alford*. As early as 1966, the United States Court of Appeals for the District of Columbia Circuit had said that "a willingness to concede the commission of facts constituting the elements of the crime, and a personal admission of guilt, should not be essential to the acceptance of a plea of guilty . . ." *McCoy v. United States*, 363 F.2d 306, 308 (D.C. Cir. 1966); see *Griffin v. United States*, 405 F.2d 1378 (D.C. Cir. 1969); *Bruce v. United States*, 379 F.2d 113 (D.C. Cir. 1967).

After the trial judge had apparently misstated the District of Columbia law, however, and after he had discouraged the entry of a guilty plea, he may have penalized the defendant's exercise of his right to trial. At least the court sentenced the defendant more severely than it did an accomplice whose guilty plea it had accepted. In these circumstances, Chief Judge Bazelon argued in dissent that the defendant should have been

## The Defense Attorney's Role in Plea Bargaining

Cases of this sort seem to suggest two distinct issues: first, what discretion a trial court should have to refuse an *Alford* plea, and second, what sentence a court should impose when an *Alford* plea has been rejected. To impose a penalty for standing trial may always be objectionable, but this practice seems especially objectionable when the decision to stand trial was not the defendant's but the court's. In this situation, the defendant has offered to save the state the burden and expense of a trial, and the court, for its own reasons, has decided to reject the offer. To deny a defendant who has submitted an *Alford* plea the benefits that usually follow a decision to plead guilty is therefore to deny him equal treatment.<sup>337</sup>

A recent decision of the Vermont supreme court indicated the irony of the situation. In adult criminal proceedings, a juvenile defendant had sought to plead guilty to second-degree murder, an arrangement that was acceptable to the prosecution. The defendant had refused to make an unequivocal admission of his guilt, however, and his guardian ad litem successfully urged rejection of the plea. The guardian remarked that she had known the defendant since he was two years old and that "she knew he would never do such a thing." The defendant was then convicted at trial of first-degree murder, and the Vermont supreme court found no error in the trial court's refusal to permit him to plead guilty to the lesser offense. The court explained that the purpose of the trial had been "to protect the rights of the respondent."<sup>338</sup>

permitted to seek a guilty plea to a lesser offense. The majority, however, did not discuss or even describe the facts of the case. Its per curiam opinion read in its entirety, "The judgment is affirmed." The court's ruling seems especially disappointing in view of the fact that *Griffin v. United States*, *supra*, had indicated the court's willingness to review a trial court's rejection of an *Alford* plea. Other Court of Appeals' decisions upholding the apparently unlimited discretion of federal judges to reject *Alford* pleas are *United States v. Melendrez-Salas*, 466 F.2d 861 (9th Cir. 1972); *United States v. Pineda-Espinoza*, 455 F.2d 498 (9th Cir. 1972). State courts have similarly indicated that trial judges may reject *Alford* pleas whenever they choose. *State v. Brumfield*, 14 Ore. 273, 511 P.2d 1256 (1973); *State v. Reuschel*, 131 Vt. 554, 312 A.2d 739 (1973).

337. This argument proceeds from the assumption that the benefits which usually flow from a guilty plea are a reward for saving the state the burden of a trial. One might respond, however, that by submitting an *Alford* plea, a defendant who is later found guilty exhibits a lack of remorse and an unwillingness to face the truth. He is, in these respects, indistinguishable from a guilty defendant who asserts his innocence at trial, and it is therefore appropriate to impose the sort of sentence associated with a trial following his conviction. One obvious difficulty with this answer is that all defendants who submit *Alford* pleas exhibit the same lack of remorse. If "remorse" provides the rationale for leniency to guilty-plea defendants, defendants whose *Alford* pleas are accepted should presumably be sentenced as severely as defendants who stand trial. No coherent theory of punishment could make the trial judge's decision to accept or reject a guilty plea a critical determinant of the sentence that a defendant should receive, and the problem of inequality is therefore inherent.

338. *State v. Reuschel*, 131 Vt. 554, 312 A.2d 739 (1973).

One possible view is that a trial court should retain its discretion to refuse an *Alford* plea, but that a court which exercises this option should not sentence the defendant more severely than it would have if his guilty plea had been accepted. Adoption of this view might, however, lead to intricate maneuvering by defendants to secure the rejection of the guilty pleas that they had offered. The defendants might hope to secure the benefits associated with a trial as well as those associated with a plea of guilty. Our cost-minded courts have seemed alert to this danger,<sup>339</sup> and in practice, courts which reject *Alford* pleas must choose between allowing defendants to "have it both ways," thereby undercutting the effectiveness of the guilty-plea system, and penalizing defendants for decisions that were not of their making.

The refusal of most trial judges to accept *Alford* pleas is probably attributable in part to their personal conviction that these pleas are improper, in part to the inertia of their pre-*Alford* practices, and in part to their perception of the effects that *Alford* pleas might ultimately have upon our concepts of criminal justice. Trial judges seem to sense that once they began to allow *Alford* pleas, more and more defendants might seek to enter them. Whether or not these defendants recognized their guilt, they would probably see no reason not to accompany their pleas with face-saving denials of culpability—"grace notes" that could enable the defendants to pretend to their families, to their friends, or perhaps even to themselves that they were the hapless victims of circumstance. Ultimately most defendants might be convicted of crime without trials and without admissions of guilt, and this situation might force us to blink hard.

To put the matter another way, the utility of the *Alford* plea may seem apparent if one thinks only of a small group of obviously guilty defendants who are psychologically incapable of admitting their guilt. Nevertheless, no mechanism can effectively confine use of the *Alford* plea to this situation. Once the plea is allowed, the compulsion upon a defendant to admit his guilt disappears, and when a defendant insists that he considers himself innocent at the time that he submits a guilty plea, it becomes impossible to tell whether he truly needs the crutch that an in-between plea provides. Thus, even if *Alford* pleas seem tolerable in small numbers, that conclusion may not settle the issue. The *Alford* plea could gradually become the usual plea in

339. See *United States ex rel. Williams v. McMann*, 436 F.2d 103, 106-07 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971) (elimination of penalty for standing trial merely because defendant had tried to plead guilty would "encourage gamesmanship of a most offensive nature"); *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971).

## The Defense Attorney's Role in Plea Bargaining

criminal cases, and we might be forced to pay even that unsettling price for the maintenance of our guilty-plea system.

Whether or not this kind of speculation accounts in part for the continued rejection of most *Alford* pleas, most courts apparently do ask defendants before accepting their pleas, "Are you pleading guilty because you are guilty and for no other reason?" A negative answer almost invariably leads to a rejection of the plea—or at least to a hurried conference in which the defense attorney encourages the defendant to "get his lines right."<sup>340</sup> Indeed, one federal court currently requires defendants to sign a printed form when they plead guilty, and this form contains the following provision:

I know that the Court will not permit anyone to plead "GUILTY" who maintains that he is innocent and, with that in mind and because I am "GUILTY" and do not believe I am innocent, I wish to plead "GUILTY" and respectfully request the Court to accept my plea of "GUILTY" and to have the Clerk enter my plea of "GUILTY" as follows: . . . <sup>341</sup>

This guilty-plea ritual obviously poses a difficult problem for lawyers who are willing to permit assertedly innocent defendants to plead guilty. Although professional codes do not speak directly to the ethics of permitting guilty pleas by clients who claim to be innocent, the codes plainly condemn the practice of permitting clients to lie to the court.<sup>342</sup> It was with some trepidation, therefore, that I asked defense attorneys how they secured the courts' acceptance of the pleas of their "innocent" clients.

Some attorneys had an easy answer, which San Francisco's James

340. Cf. *Peete v. Rose*, 381 F. Supp. 1167 (W.D. Tenn. 1974); *Young v. State*, 438 S.W.2d 280, 283 (Mo. 1969).

341. This "Petition to Enter Plea of Guilty" is used by the United States District Court for Oregon. It is quoted in Erickson, *supra* note 286, at 846 n.80.

342. E.g., ABA CODE OF PROFESSIONAL RESPONSIBILITY, Disciplinary Rule 7-102(A)(7). Of course an attorney never knows in any absolute sense that his client's confession to the court is a lie, but in ordinary usage, an attorney "knows" that a client is lying when the client has given the attorney a different version of the facts than he presents to the court. Cf. *Bruce v. United States*, 379 F.2d 113, 119 n.17 (D.C. Cir. 1967):

It has been raised as a problem of ethics whether an attorney may advise the defendant first that the evidence implicating him is so overwhelming that a guilty plea is his best salvation, and second that this plea will not be accepted unless the defendant, departing from truth if need be, states facts that show he is guilty....

We have no hesitation in saying that an attorney, an officer of the court, may not counsel or practice such a deliberate deception.

Section 5.3 of the ABA STANDARDS, *supra* note 97, provides:

If the accused discloses to the lawyer facts which negate guilt and the lawyer's investigation does not reveal a conflict with the facts disclosed but the accused persists in entering a plea of guilty, the lawyer may not properly participate in presenting a guilty plea, without disclosure to the court.

Martin MacInnis expressed: "I simply tell the judge in chambers that if he asks whether the defendant is guilty, the defendant will say no. The judge never asks." There could be no clearer indication, of course, that the procedures surrounding the acceptance of guilty pleas are usually not intended as serious safeguards of the plea bargaining process; the function of these formalities is simply to package a guilty plea in the way most likely to make post-conviction proceedings disappear.<sup>343</sup>

Other attorneys freely admitted that they advised their clients to lie, explaining to the clients that the courts would not accept their pleas unless they did so. Some lawyers seemed to justify this practice as a form of civil disobedience. Said a Boston lawyer, "My view is that a client has a right to lie for probation—at least so long as the courts surround the acceptance of a guilty plea with such outrageous bullshit." Other lawyers viewed a defendant's admission of guilt as "a joke," "a game," or "a fiction, like Nevada domicile in a divorce action." These lawyers supported their position by pointing to other fictions in the courts' guilty-plea rituals, particularly the requirement of a negative answer to the question, "Have any threats or promises been made to induce you to plead guilty?" Since at least part of the procedure is hypocritical and contrived, these lawyers apparently assumed that all of it was. The problem of the "innocent" defendant obviously remains unresolved in the American legal system, and from my perspective, no solution short of the abolition of all forms of plea bargaining can satisfactorily settle the issue.

B. *The Division of Responsibility Between a Defense Attorney and His Client in Making the Choice of Plea*

Professor Jerome H. Skolnick has observed that, in the attorney-client relationship, the attorney usually regards himself as the "player."<sup>344</sup> The material in this article has, of course, tended to support this conclusion. Most defense attorneys agree that a client must finally decide for himself whether to enter a plea of guilty, but they often adhere to this proposition in only a narrow and technical sense. Their view is not that a client may direct his lawyer to defend him at trial;

343. See TRIAL MANUAL, *supra* note 287, ¶ 215:

Since counsel cannot... countenance his client lying to the court, it then becomes his job to bring the case on for pleading before that judge who will take the plea notwithstanding the circumstances, or who will think the circumstances insufficiently important for inquiry. The prosecutor will usually know whether there is such a judge and who.

344. Skolnick, *supra* note 27, at 65.

## The Defense Attorney's Role in Plea Bargaining

it is merely that the client is free to seek a new lawyer when he is dissatisfied with the choice of plea that his attorney has advised.

Many defense attorneys made statements like these:

An attorney should not take a case unless he can be master of the ship. A client cannot insist on anything.

It does not lie in a defendant's mouth to say that he is innocent. The defense attorney must make that decision because it is his reputation that goes on the line.

A client hires his lawyer's judgment, and the lawyer should leave the case when a client refuses to accept that judgment.

I tell my clients right at the beginning that I am the boss in the attorney-client relationship.

If a defendant has paid me a fee adequate to indulge his whims, he can go to trial. Otherwise he had better respect my opinion.

A client comes to me to take my advice, and I cannot permit him to commit suicide.<sup>345</sup>

Of course defendants have far more at stake than their attorneys in the all-or-nothing decision that the guilty-plea system demands. An attorney may reasonably fear that an unsuccessful trial will harm his reputation and waste his time, talent, and energy, but these considerations pale beside the obvious fact that the defendant "must serve the time." The constitutional right to trial should remain the defendant's right, however foolish it may be for him to exercise it, and

345. Several courts apparently share this attitude. In *Williams v. Beto*, 354 F.2d 698, 705-06 (5th Cir. 1965), the court declared:

When one seeks the assistance of counsel, he thereby confesses his own inadequacy in the field and stipulates his willingness... to be bound by the presumably superior knowledge of the professional man on whose assistance he proposes to depend.

....

If the indigent client, conferred upon and trusted to the lawyer, knows more about what ought to be done in handling the case, then he needs no counsel and it is folly for him to ask for it.

See *Williams v. United States*, 345 F.2d 733, 737 (D.C. Cir. 1965) (Burger, J., concurring), *cert. denied*, 382 U.S. 942 (1965) ("As I see it [the] lawyer must be free to follow his own professional judgment and conscience no matter what his client thinks or be entirely free to withdraw"); *Steward v. People*, 498 P.2d 933, 934 (Colo. 1972) ("Defense counsel stands as captain of the ship in ascertaining what evidence should be offered and what strategy should be employed in the defense of the case"); *Schnautz v. Beto*, 416 F.2d 214, 215 (5th Cir. 1969) ("This is a good time to make it plain that when a defendant has counsel, as he did here, that counsel is the manager of the law suit"); *Nelson v. California*, 346 F.2d 73, 81 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965) (counsel as "manager of the lawsuit"). *But cf.* *Henry v. Mississippi*, 379 U.S. 443 (1965); *Fay v. Noia*, 372 U.S. 391 (1963); P. BATOR, P. MISHKIN, D. SHAPIRO & H. WECHSLER, *HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 558 (2d ed. 1973); Y. KAMISAR, W. LAFAYE & J. ISRAEL, *MODERN CRIMINAL PROCEDURE* 1539-43 (4th ed. 1974).

the basic function of the defense attorney should be to serve his client in exercising his legal rights as he chooses. The traditional role of the attorney is to advise and counsel, not to control.

The general principle that an attorney is the agent of his client could be extended too far. If a litigant were to insist that his lawyer quote Bob Dylan in his closing argument, the lawyer could properly respond that he did not practice law that way, just as a doctor could reasonably deny a patient's request that he treat the patient's fever by applying leeches.<sup>346</sup> The fact that the defendant's liberty is at stake and that the course which he suggests is within the options allowed by law need not be determinative; the lawyer's interest in the effective conduct of his profession and in the integrity of his own personality should sometimes prevail. Nevertheless, the choice of plea is not a mere question of tactics; it involves the most basic of the defendant's rights. For this reason, courts insist that a guilty plea must be entered by a defendant personally after full advice concerning its consequences. Although the letter of this requirement is almost invariably observed in the courtroom (after the decision to plead guilty has been made), its spirit is often forgotten in the place where it counts—the defense attorney's office.

The ideal attorney-client relationship should rest upon a natural, informal give-and-take. When an attorney recognizes the importance of the client's interests and respects his right to make important choices for himself—and when the client trusts his attorney, his knowledge, and his judgment—there is little need for a blueprint to allocate responsibility for the decisions that both parties are required to make. When a blueprint does become necessary, however, a productive starting point is the American Bar Association's *Standards Relating to the Defense Function*. These standards suggest that although a defense attorney should be allowed to decide such questions as what witnesses to call, how to conduct a cross-examination, and what jurors to accept or strike, at least three decisions should ultimately be made by the client—what plea to enter, whether to waive a jury trial, and whether to testify in his own behalf.<sup>347</sup>

346. The imagery was suggested by Bart Wulff, a University of Texas law student.

There are undoubtedly exceptions to the principle that an attorney should follow the instructions of his client regarding choice of plea. All of these exceptions, however, would rest on a lawyer's perception that his client had asked him to do something improper, not on simple disagreement with the wisdom of the client's choice.

347. ABA STANDARDS, *supra* note 55, § 5.2 (1970). See Comment, *Criminal Waiver: The Requirements of Personal Participation, Competence and Legitimate State Interest*, 54 CALIF. L. REV. 1262, 1267-68 (1966).

## The Defense Attorney's Role in Plea Bargaining

To say that a defendant should be allowed to choose his own plea is not, of course, to establish a very clear guide for the conduct of a defense attorney. An attorney has an obligation to give his client the benefit of his experience, to offer his advice on the most important question that the client faces, and to insure that the client understands as fully as possible the likely consequences of his choice. A scholarly and dispassionate analysis of alternatives may fail to achieve these objectives, and some rather forceful language may be necessary. A leading manual on the defense of criminal cases concludes, "The limits of this kind of persuasion are fixed by the lawyer's conscience,"<sup>348</sup> and although this statement may not offer much help, the variety of problems and circumstances with which defense attorneys are confronted defies precise analysis. It may often be a lawyer's duty to emphasize in harsh terms the force of the prosecution's evidence: "What about this fact? Is it going to go away? How the hell would you vote if you were a juror in your case?" It may sometimes be a lawyer's duty to say bluntly, "I cannot possibly beat this case. You are going to spend a long time in jail, and the only question is how long." It may even be a lawyer's duty to use the kind of language illustrated by a recent Massachusetts case: "The jury will fry your ass." "You're going to die if you take the stand." "You will burn if you do not change your plea." "The jury wants your blood."<sup>349</sup>

Because the line between advice and coercion seems virtually nonexistent in the guilty-plea system (a system in which accurate advice is almost always coercive), the principle that a defendant should be allowed to choose his own plea does not indicate to a defense attorney how forceful he may properly be in urging a particular plea

348. TRIAL MANUAL, *supra* note 287, ¶ 201.

349. *Huot v. Commonwealth*, 292 N.E.2d 700 (Mass. 1973). *But see* *Peete v. Rose*, 381 F. Supp. 1167 (W.D. Tenn. 1974).

Similarly, it may be appropriate for a defense attorney to permit a client to make the right decision for the wrong reason—provided that the consideration the client finds persuasive is factually accurate. Henry B. Rothblatt of New York recalled a favorite client who had taught him Spanish when he was just beginning his practice. This client had expressed little interest in a plea agreement despite the fact that he was obviously guilty of a brutal murder. Ultimately, the client agreed that if Rothblatt could negotiate a guilty plea "*sin mucho tiempo*," the client would consider this alternative. Rothblatt persuaded a prosecutor to reduce the charge against the defendant to manslaughter, but when he explained the probable advantage in sentencing that the defendant could expect, the defendant seemed uninterested. The defendant did, however, ask Rothblatt what manslaughter was, and when Rothblatt replied that it was a killing "*en el ardor de la pasión*," a light came into the defendant's eyes. He repeated the phrase and agreed to accept the prosecutor's offer.

Of course, guilty pleas become palatable to defendants in various ways. For example, an attorney may say to a defendant accused of rape, "Are you sure that you didn't even brush against this woman? If you did, that's a battery, and that's all the prosecutor is asking you to admit."



upon his client. This principle can, however, be given concrete meaning in at least one situation. A defense attorney should neither withdraw nor threaten to withdraw from a case because his client has refused to enter the plea that the attorney has recommended.<sup>350</sup> Professional codes should, in my view, be revised to make this action grounds for professional discipline. If, after all the badgering, the cajolery, and the verbal abuse is concluded, a defendant still insists that he wishes to stand trial, the attorney's ethical obligation is simply to carry out his client's decision. Having undertaken the defense of a person accused of crime, the attorney must respect his client's desire to exercise the most basic of his rights.

This article has focused primarily on the unfairness of the guilty-plea system to criminal defendants, but in many ways, the system is unfair to defense attorneys as well. Although practices that seem abusive are sometimes undertaken for the most objectionable and selfish of reasons, they are often undertaken out of genuine concern for the clients whom a lawyer is sworn to represent.

Most defendants do not understand our system of criminal justice and cannot be made to understand. They are, in the main, too optimistic: they believe that if their attorneys were willing to fight vigorously on their behalf, they might be acquitted. They suspect, however, that the "legal establishment" (including perhaps their own attorney) is conspiring to deprive them of the right to trial, and even when defense attorneys have the time for patient explanations (as they often do not), defendants may not fully realize the extent of the penalty that our system exacts for an erroneous tactical decision. For these reasons, a Chicago public defender observed, "A lawyer shirks his duty when he does not coerce his client," and this statement suggests a fundamental dilemma for any defense attorney working under the constraints of the guilty-plea system. When a lawyer refuses to "coerce his client," he insures his own failure; the foreseeable result is usually a serious and unnecessary penalty that, somehow, it should have been the lawyer's duty to prevent. When a lawyer does "coerce his client," however, he also insures his failure; he damages the attorney-client relationship, confirms the cynical suspicions of the client, undercuts a constitutional right, and incurs the resentment of the person whom he seeks to serve. The defense attorney's lot is therefore not a happy one—until he gets used to it.

350. Cf. *Commonwealth v. Forbes*, 450 Pa. 185, 299 A.2d 268 (1973) (counsel's threat to withdraw held coercive under circumstances of the case).

## The Defense Attorney's Role in Plea Bargaining

Sheila Finneran, a student intern assigned to the public defender office in San Jose, reported a case in which a defendant was charged with forcible rape, kidnapping, and assault with intent to inflict great bodily harm. The defendant's alibi witnesses were strong; he protested his innocence during extensive police interrogation and conferences with his attorney; and his attorney was convinced of his innocence and told him so. In light of the strong possibility of acquittal, however, the prosecutor offered to permit the defendant to plead guilty to simple battery—an offer which would have reduced the possible penalty from a life term to six month's imprisonment. This offer strongly tempted the public defender but not the defendant. Finneran observed, "By leaning on his client to take the offer, the defender has now apparently lost his client's confidence. Pressures like this are what drive the lawyers crazy."

The guilty-plea system perverts the attorney-client relationship in other ways as well. Even in a system in which all or most cases were tried, a defense attorney certainly could not take his clients' stories at face value. It would be necessary for the attorney to test each client's account to learn how it would fare on cross-examination and what additional problems it might raise at trial.<sup>351</sup> Nevertheless, the pressures upon an attorney to "break" a client's story might be reduced in such a system, and more importantly, there would be little or no pressure upon the attorney to make an ultimate judgment concerning the probable outcome of his client's trial. The attorney would be able to think of himself as an advocate and to leave the task of judging to others. When an attorney could not avoid forming a personal conclusion concerning his client's guilt, moreover, he could at least keep this judgment to himself.<sup>352</sup>

351. At least this statement represents the conventional wisdom. See ABA STANDARDS, *supra* note 55, § 3.2, comment at 204-06. For a different view, see Steinberg & Paulsen, *supra* note 70, at 33. Sheila Finneran asked 14 public defenders and private defense attorneys in San Jose, California, whether they considered it important to learn the truth from their clients. Only half of the lawyers said that they did. S. Finneran, Interviewing the Client Accused of Crime, Fall 1973, at 27 (unpublished paper on file at the University of Texas Law School Library).

352. After a long and unsuccessful trial, Milton Adler of the Legal Aid Society of the City of New York talked with some of the jurors about their verdict (an action permitted by New York law). One juror said to him, "Mr. Adler, you're a marvelous lawyer, but how on earth could you believe that awful man was innocent?" Adler did not, in fact, believe that the "awful man" was innocent, but he was too tired to deliver a lecture on the adversary system and did not wish to "spoil" the jurors for future cases. He therefore gave the jurors a one-sentence description of the lawyer's role in an adversary system: "I believe my clients."

Although Adler's statement was not strictly accurate, it expresses an ideal toward which lawyers can often strive in adversary proceedings. The question that prompted Adler's remark shows how close they can come; a lawyer can usually act as though he believes his clients whatever his secret reservations.

Under the guilty-plea system, by contrast, an essential part of the defense attorney's task is to predict the likely outcome of each case at trial and to communicate this judgment to his client—sometimes, of course, in extremely forceful terms. This prediction certainly colors the attorney-client relationship from the time that it is made. An attorney's honest prediction does not often give his client much encouragement, and the client's initial reaction may be that the attorney "does not believe in his case." In addition, a client may decide to stand trial despite his attorney's advice that this course is hopeless, and in these circumstances, the attorney's prediction may tend to become a self-fulfilling prophecy. A defeat at trial would only prove that the attorney had been right, and a client aware of this fact might sense a certain schizophrenia in his attorney's efforts whether it was present or not. When a legal system can encourage defense attorneys to view themselves as advocates rather than judges, it promotes a relationship of confidence between attorneys and their clients—a relationship that is essential to a sense of fair treatment on the part of the clients and that gives the attorneys greater dignity and purpose than they have today as the badgering taskmasters of apparently uncomprehending defendants.

Defense attorneys commonly reported that the clients whom they most enjoyed representing were not white-collar criminals from the attorneys' own social station, not first offenders whose lives might still be changed for the better, and certainly not defendants who were in fact innocent. The defendants with whom the attorneys established the most satisfactory relationships were usually "professional criminals who know the score." In describing their relationships with these defendants, attorneys often seemed to depart from the assertion that a lawyer must be "master of the ship." When an experienced defendant wished to stand trial, the attorneys ordinarily respected his decision. A typical statement was that of Milton Adler:

My favorite client is the old con who says, "Look, I know that the odds are against me and that I may go away for a long time, but if you think that we have any chance of beating this case, I want to take a run at it."

The situation that Adler described permits a defense attorney to perform the advocate's role—the role that our legal system has, in theory, assigned to him. Although most defense attorneys recognize that an adversary posture is usually irresponsible in the context of today's

## The Defense Attorney's Role in Plea Bargaining

guilty-plea system, many of them seem to welcome this opportunity. The principal vice of the guilty-plea system is that it turns major consequences upon a single tactical decision, and few defendants seem truly capable of making the decision for themselves. A defendant who can make the decision intelligently and without equivocation lifts a heavy burden from the defense attorney's shoulders—a burden that is unfair to assign to the attorney and that, in the eyes of his less experienced clients, often converts him from a friend and confidant into an agent of the state's criminal justice machinery.

### Conclusion

The problem of providing effective representation within the framework of the guilty-plea system is a problem that cannot be resolved satisfactorily. Contrary to the assumption of the Supreme Court and other observers that plea negotiation ordinarily occurs in an atmosphere of informed choice, private defense attorneys, public defenders, and appointed attorneys are all subject to bureaucratic pressures and conflicts of interest that seem unavoidable in any regime grounded on the guilty plea. Far from safeguarding the fairness of the plea-negotiation process, the defense attorney is himself a frequent source of abuse, and no mechanism of reform seems adequate to control the dangers.

As dilemmas multiply, it may be desirable to step back and re-examine the assumptions that an apparent "practical necessity" has thrust upon us. The difficulty of providing effective representation within the guilty-plea system may reflect the intolerable nature of the system itself. The assumption that some form of procedural tinkering or some appeal to professional ideals can resolve every difficulty obscures the nature of the system that we have created—a system in which vital consequences turn on a judgment that is irrelevant to any rational goal of the criminal process and in which the defense attorney invariably has personal interests that depart from those of his client.

The burden should rest with the advocates of plea bargaining to propose some mechanism that can achieve the asserted advantages of the guilty-plea process without, at the same time, yielding the abuses that this article has described. If, as I believe, the task is impossible, we must either endure these abuses or else restructure our criminal justice system to eliminate the overwhelming importance of the de-

fendant's choice of plea, a choice that is usually bent to the purposes of defense attorneys and other participants in the criminal justice system rather than to the interests of the defendant or society.

The problem of providing adequate resources for criminal courts, for prosecutor and defender offices, and for other criminal justice agencies is undeniably difficult. Nevertheless, even the poorest and most primitive societies manage to guarantee a right to trial, and it is hard to believe that our nation cannot find the resources to guarantee this right as well. Rather than rationalize the familiar, the cheap, and the easy, it may be time to reassert the judgment of the framers of the Sixth Amendment: the cost of jury trials is worth paying.

# The Yale Law Journal

Volume 84, Number 6, May 1975

DAVID A. MARTIN  
*Editor-in-Chief*

W. DUANE BENTON  
*Managing Editor*

R. HALE ANDREWS, JR.  
PHILIP C. BOBBITT  
LAURA J. CORWIN  
ALAN B. LOUGHNAN  
*Article & Book Review  
Editors*

MARK I. LEVY  
*Executive Editor*

ANDREW H. COHN  
*Note & Project Editor*

HOLLY E. KENDIG  
CHARLES H. MONTANGE  
STEPHEN R. MYSLIWIEC  
LEWIS T. STEVENS  
JOHN P. WHEELER III  
*Note Editors*

PAUL G. ABRAMS	STEVEN J. GOODE	JUDITH A. MILLER
SAMUEL A. ALITO	KRIS F. HEINZELMAN	EDWARD R. MULLER
NED T. ASHBY	CARL W. HERSTEIN	CHARLES A. PATRIZIA
LON S. BABBY	MARK D. HOFFER	JAN-ANDERS PAULSSON
DONALD N. BERSOFF	JOSEPH ISENBERGH	GEORGE K. RAHDERT
JOSEPH J. BIANCO	THOMAS H. JACKSON	GLEN A. REED
DANIEL H. BOOKIN	VICKI C. JACKSON	GLENN M. REITER
ROY L. BROOKS	PETER R. JARVIS	MICHAEL E. ROBINSON
MARC L. BROWN	RICHARD A. JOHNSON	STEPHEN E. ROTH
CHARLES G. BUSCHMAN	ELLEN A. KANDOIAN	JEFFREY L. SCHULTE
GEORGE F. CARPINELLO	DIANE S. KAPLAN	MARY A. SIEGEL
FRANKLIN D. CHU	EDWARD D. KLEINBARD	ROBERT M. SMITH
BENJAMIN I. COHEN	MADELEINE A. KLEINER	JOHN W. SPIEGEL
N. GEORGE DAINES III	TERRY S. KOGAN	JAMES S. STARZYNSKI
BRETT DEHAVEN	ANTHONY T. KRONMAN	JONATHAN W. STILL
KEITH P. ELLISON	PAUL C. LEMBESIS	MICHAEL L. TABAK
SANFORD B. FERGUSON	RICHARD B. LEVIN	CAROL N. THEODORE
PETER FEUERLE	WALTER P. LOUGHLIN	BATE C. TOMS III
WILLIAM A. FLETCHER	OWEN E. MACBRIDE	HARLEY J. WILLIAMS
WILLIAM J. GENEGO	ELIOTT E. MAXWELL	ROBERT G. WOODWARD
RUTH N. GLUSHIEN	CARLOS E. MÉNDEZ-PENATE	EDWARD A. ZELINSKY
PETER D. GOLDBERGER	THOMAS H. MILCH	RICHARD M. ZUCKERMAN
	JAMES D. MILLER	

*Secretaries to the Editors* M. OLIVE BUTTERFIELD, PAMELA WILLMOTT

## *Student Contributors to This Issue*

Joseph Isenbergh, *The Scope of the Power to Impeach*

Diane S. Kaplan and Richard M. Zuckerman, *The Wyatt Case:*

*Implementation of a Judicial Decree Ordering Institutional Change*

Edward R. Muller, *Due Process and Employee Safety:*

*Conflict in OSHA Enforcement Procedures*