

# MEANINGFUL REFORM OF PLEA BARGAINING: THE CONTROL OF PROSECUTORIAL DISCRETION

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## I. INTRODUCTION

Plea bargaining is now widely acknowledged to be the most prevalent form of resolving criminal cases,<sup>1</sup> yet courts and commentators alike fundamentally misunderstand the plea bargaining process. They view plea bargaining as one variety of adversarial negotiation similar to settlement talks in civil disputes.<sup>2</sup> The Supreme Court has attributed the frequency of plea bargaining to "the mutuality of advantage" for defendants and prosecutors, each with his own reasons for avoiding trial.<sup>3</sup> According to the Court, the negotiating process is characterized

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1. Some surveys show a guilty plea rate as high as 90%. See PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 3 (1966). In 1979, 82.9% of the convictions in the federal district courts resulted from guilty pleas. 1979 ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 108, table 55 (1979). Comparative statistics from twenty-two states show guilty plea rates of as high as 97.7% (South Dakota) and as low as 66.5% (Pennsylvania). See D. JONES, CRIME WITHOUT PUNISHMENT 44 (1979).

2. A recently published text on legal negotiation states flatly, "Most of what we learn about negotiation in civil contexts applies equally well to the criminal setting." See G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 4 (1983). See, also, e.g., Brady v. United States, 397 U.S. 742, 750-53 (1970); United States v. Swinehart, 614 F.2d 853, 858 (3d Cir.), cert. denied, 449 U.S. 827 (1980); C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 280-83 (1978); Church, *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509, 519-20 (1979); Uviller, *Pleading Guilty: A Critique of Four Models,* 41 LAW & CONTEMP. PROBS. 102, 102-03 (1977).

In Scott v. United States, 419 F.2d 264 (D.C. Cir. 1969), Judge Bazelon characterized plea bargaining as follows:

When there is substantial uncertainty concerning the likely outcome of a trial, each side is interested in limiting these inherent litigation risks. The prosecutor may be willing to accept a plea of guilty on a lesser charge rather than chance an acquittal on the more serious. The accused may be similarly willing to acknowledge his guilt of the lesser charge rather than risk conviction on the more serious charge, or to accept the promise of a lighter sentence to escape the possibility of conviction after trial and a heavier sentence.

*Id.* at 276 (footnotes omitted).

3. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978). See also United States v. Goodwin,

by "give-and-take;"<sup>4</sup> a defendant who is represented by counsel and protected by procedural safeguards is presumed capable of "intelligent choice in response to prosecutorial persuasion"<sup>5</sup> as if he were a party entering into any other contract. Plea agreements resulting from this process are mistakenly analogized to contracts entered into by defendants and by prosecutors representing the public interest.<sup>6</sup> The legitimacy afforded plea bargaining thus seems to rest largely on the consent of the participants.<sup>7</sup>

Section II of this article argues that plea bargains are not consensual agreements entered into by defendants after adversarial negotiation. Rather, the prosecutor substantially dictates the terms of plea agreements in most cases.<sup>8</sup> "Plea bargaining" is in reality the prosecutor's unilateral administrative determination of the level of the defendant's criminal culpability and the appropriate punishment for him.<sup>9</sup> Support for this interpretation of plea bargaining, while nonexistent in appellate court opinions, is widespread among those who study plea bargaining as it actually takes place and among those who routinely participate in plea bargaining.<sup>10</sup> Empirical studies suggest that there is

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102 S. Ct. 2485, 2491-92 (1982); *Corbitt v. New Jersey*, 439 U.S. 212, 222-25 (1978); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977); *Santobello v. New York*, 404 U.S. 257, 260-62 (1971); *Brady v. United States*, 397 U.S. 742, 752 (1970). According to the Court, the defendant precludes or reduces the risk of the maximum penalty provided by law, eliminates the burdens of trial, and can begin the correctional processes immediately. *Brady v. United States*, 397 U.S. at 752. The government avoids the expense of trial. *Id.*

4. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

5. *Id.* Charging defendants with more serious crimes after they refuse to enter a plea is viewed as a legitimate bargaining tactic. *See United States v. Goodwin*, 102 S. Ct. 2485, 2491-92 (1982); *Bordenkircher v. Hayes*, 434 U.S. 357, 360-65 (1978).

6. For example, in *United States v. Krasn*, 614 F.2d 1229 (9th Cir. 1980), the Ninth Circuit Court of Appeals expressly stated, "a plea bargain itself is contractual in nature and 'subject to contract-law standards.'" *Id.* at 1233. *See also, e.g.*, *Blackledge v. Allison*, 431 U.S. 63, 75 n.6 (1977); *United States v. Bernard*, 670 F.2d 625, 627 (5th Cir. 1982); *United States v. Mooney*, 654 F.2d 482, 486 (7th Cir. 1981); *United States v. Calabrese*, 645 F.2d 1379, 1390 (10th Cir. 1981); *Louisiana v. Nall*, 379 So. 2d 731, 733 (La. 1980); *Kisamore v. State*, 286 Md. 654, 656-58, 409 A.2d 719, 720-21 (1980); *Mann v. Nevada*, 96 Nev. 62, 64, 605 P.2d 209, 210 (1980); *North Dakota v. Thurstad*, 261 N.W.2d 899, 902 (1978). When a defendant has bargained or negotiated for a specific sentence recommendation, he is entitled to the contract law remedy of specific performance if the prosecutor fails to carry out the government's bargain. *See Santobello v. New York*, 404 U.S. 257, 262 (1971).

7. *See, e.g.*, *United States v. Krasn*, 614 F.2d 1229, 1233 (9th Cir. 1980); *United States v. Swinehart*, 614 F.2d 853, 858 (3d Cir.), *cert. denied*, 449 U.S. 827 (1980); Church, *In Defense of "Bargain Justice,"* 13 LAW & SOC'Y REV. 509, 511-13 (1979); Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93, 104 (1976); Ostrow, *Comment: The Case for Preplea Disclosure*, 90 YALE L. J. 1581, 1602-06 (1981).

8. *See infra* notes 51-83 and accompanying text.

9. The term "plea bargaining" is therefore a misnomer when used to describe the prosecutor's determination of what concessions the defendant will receive in exchange for his guilty plea. In most criminal cases there is an absence of "bargaining" as that word is used to describe negotiations in civil cases. *See infra* notes 31-89 and accompanying text. Nonetheless, in accordance with popular usage, the term "plea bargaining" will be used in this article to describe the prosecutor's determination of guilty plea concessions.

10. The argument that plea bargaining is essentially the prosecutor's administrative determination of the level of culpability of the defendant and his appropriate punishment rests upon two distinct conclusions which are shared by attorneys who participate in plea bargaining and by

little negotiable about pleading guilty; defendants simply choose between pleading guilty and getting mercy, or proceeding to trial and getting justice.<sup>11</sup> Defendants are coerced into pleading guilty because they face the risk of far more severe penalties if tried and convicted than if sentenced after a guilty plea.<sup>12</sup> For example, in the Illinois case of *People v. Dennis*,<sup>13</sup> the defendant rejected a plea bargain which would have resulted in a prison term of two to six years, and instead was sentenced after his jury conviction to a term of forty to eighty years. In reality, there is little of the "give-and-take" which is axiomatic to the Supreme Court's treatment of plea bargaining.

Because the legitimacy of plea bargaining supposedly rests on its consensual nature, under the traditional view the only required regulation of plea bargaining is procedural safeguards designed to assure that the defendant's consent to his guilty plea is legally effective.<sup>14</sup> Supreme Court decisions and, where applicable, the Federal Rules of Criminal Procedure require the trial court judge to ask the defendant a brief and routine series of questions to establish that pleas of guilty are voluntarily and intelligently made<sup>15</sup> and that there is nothing to question the accuracy of the defendant's admissions.<sup>16</sup> Except in extreme cases, courts review neither the types of pressures that the prosecutor brings

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social scientists who have studied plea bargaining. First, the prosecutor possesses overwhelming leverage in bargaining with defendants and, accordingly, he controls the substance of the plea agreement in most cases. *See infra* notes 51-83 and accompanying text. *See also* M. HEUMANN, PLEA BARGAINING: THE EXPERIENCE OF PROSECUTORS, JUDGES AND DEFENSE ATTORNEYS, 63, 100-02 (1978); Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 663-69 (1981); McDonald, *From Plea Negotiation to Coercive Justice: Notes on the Respecification of a Concept*, 13 LAW & SOC'Y REV. 385, 390-91 (1979). Second, in most cases, the equitable circumstances surrounding the offense and the offender are the most important factors in deciding what concessions should be offered to the defendant, not the possibility of acquittal if the case is tried. *See infra* notes 46-50 and accompanying text. *See also* M. HEUMANN, *supra*, at 103-10; D. NEWMAN, *supra* note 1 at 112-30; L. MATHER, PLEA BARGAINING ON TRIAL? 140-41 (1979).

11. *See* McDonald, *supra* note 10, at 385-86. Another commentator states, "The right to reject the proposed plea bargain is largely chimerical. Fear of heavier sentence after trial and deference to advice of defense counsel might lead defendants to accept virtually all plea agreements, thereby impairing, at least in a pragmatic sense, the voluntariness of the guilty plea." Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 579 (1977).

12. *See infra* notes 55-58 and accompanying text.

13. 28 Ill. App. 3d 74, 328 N.E.2d 135 (1st Dist. 1975). Other factors contributing to the prosecutor's dominance in plea bargaining include the small risk of acquittal in most cases and the inclination of many defense attorneys to accept the prosecutor's plea offer rather than proceed to trial. *See infra* notes 37, 71-83 and accompanying text.

14. *See, e.g.*, *Brady v. United States*, 397 U.S. 742, 758 (1970); FED. R. OF CRIM. P. 11(c).

15. *See* *Brady v. United States*, 397 U.S. 742, 758 (1970); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969). These constitutional requirements are now essentially codified in Federal Rule of Criminal Procedure 11. To ensure that the defendant enters his plea intelligently, rule 11(c) directs the trial court to personally address the defendant and to determine that the defendant understands the charges against him, any mandatory minimum sentence, and the possible maximum sentence. Rule 11(c) also requires the court to address the defendant concerning the waiver of his constitutional rights. Rule 11(d) provides that the trial court must personally address the defendant to ensure that his plea is voluntary and is not the result of force, threats, or promises other than the plea agreement entered on the record.

16. *See* *North Carolina v. Alford*, 400 U.S. 25, 37 (1970). FED. R. CRIM. P. 11(f) now provides that the trial court must determine that a factual basis exists to support the guilty plea.

upon the defendant to encourage him to plead guilty<sup>17</sup> nor the substance of the plea bargain.<sup>18</sup>

Section III of this article suggests that the image of plea bargaining as adversarial negotiation leading to contract-like agreements obscures the significant costs current methods of plea bargaining impose on the criminal justice system. The attitude of courts and commentators has been that defendants cannot object to what they have consented to,<sup>19</sup> yet the guilty plea process does not protect the interests of defendants. Defendants view their answers to the judge's questions about their pleas as ritualistic incantations necessary to gain the benefits of the prosecutor's bargaining concessions.<sup>20</sup> As long as the plea bargain relieves the defendant from the possibility of facing the draconian consequences of being sentenced on all crimes with which he is charged and receiving the maximum sentences, the defendant's understanding of the consequences of his plea only increases the prosecutor's overwhelming bargaining power. When pleading guilty, defendants waive important constitutional rights associated with the trial process under conditions which would not be deemed efficacious elsewhere in criminal or civil law.<sup>21</sup> In a significant number of cases, defendants may plead guilty even when there is a significant possibility of being acquitted at trial.<sup>22</sup>

Procedural requirements at the guilty plea hearing do not address a variety of other problems attendant upon plea bargaining. Plea bargaining generates unequal treatment of defendants.<sup>23</sup> Thousands of individual plea bargains are approved by prosecutors who have differing philosophies, attitudes and capabilities. At best, their decisions are inconsistent and haphazard. At worst, the hidden and informal nature of plea bargaining invites prosecutors to be influenced by corruption, ra-

17. As Justice Brennan stated, "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." *McMann v. Richardson*, 397 U.S. 759, 784 (1970) (Brennan, J., dissenting). Among the pressures the government may not use to encourage pleas are "actual or threatened physical harm . . . , mental coercion overbearing the will of the defendant . . . , and threatening prosecution on a charge not justified by the evidence." *Brady v. United States*, 397 U.S. 742, 750, 751 n.8 (1970). See also *Waley v. Johnston*, 316 U.S. 101, 103 (1942). Further, the government may not establish a sentencing scheme which provides the death penalty for every defendant convicted at trial, but which allows defendants who plead guilty to receive more lenient sentences. See *United States v. Jackson*, 390 U.S. 570, 581-82 (1968).

18. In a few instances, courts refuse to accept a plea agreement when they find the agreement is not in the public interest. See, e.g., *People v. Ferguson*, 46 Ill. App. 3d 732, 361 N.E.2d 333 (1977); *Akron v. Ragsdale*, 61 Ohio App. 2d 107, 109, 399 N.E.2d 119, 120-21 (1978). See also *infra* notes 174-76 and accompanying text. Courts universally have rejected challenges to the exercise of the prosecutor's plea bargaining discretion which are based upon an equal protection challenge or which assert an entitlement to plea bargain when the prosecutor has refused to offer bargaining concessions. See, e.g., *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977); *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967). See also *infra* notes 163-66 and accompanying text.

19. See *Kipnis, supra* note 7, at 194.

20. See A. BLUMBERG, *CRIMINAL JUSTICE* 89 (1967). See also *infra* notes 114-15 and accompanying text.

21. See *infra* notes 104-27 and accompanying text.

22. See *infra* notes 128-42 and accompanying text.

23. See *infra* notes 143-66 and accompanying text.

cism or personality conflicts between themselves and defendants or their attorneys. Further, plea bargaining undermines legislative intent on the correct punishment for defendants convicted of specified crimes.<sup>24</sup> The public image of plea bargaining as a process of "letting off" guilty defendants is not entirely a myth.<sup>25</sup> Defendants who plead guilty suffer significantly less severe consequences than those sentenced after conviction.<sup>26</sup> Most egregiously, plea bargains are used to circumvent mandatory sentencing statutes.<sup>27</sup> Finally, criminal trials themselves have value to the public, the victim and the defendant, aside from their function of determining guilt.<sup>28</sup> The criminal trial has been analogized to a "morality play," and described as "a drama deliberately staged in furtherance of the great general end of the criminal process, that citizens should so conduct themselves as to avoid the types of behaviour [*sic*] which society has legally condemned."<sup>29</sup> These ends are lost when guilt is established through hurried conferences between two harried professionals behind closed doors.

Regulation of plea bargaining fashioned on a contract model cannot solve these problems. Instead, meaningful plea bargaining reform must begin with a fundamental doctrinal change which recognizes the essentially administrative role of the prosecutor in the guilty plea process and the dominant influence of his discretionary decisions. Building upon this interpretation, section IV of this article proposes an administrative model for regulating the exercise of prosecutorial discretion in plea bargaining.<sup>30</sup> This section suggests that because the prosecutor acts as an administrator when he grants concessions in plea bargaining, controls and procedural safeguards similar to those typically applied to other administrators should be imposed upon prosecutors. The comprehensive and radical proposal outlined in section IV combines increased judicial review of the prosecutor's decisions with other administrative law techniques, such as the adoption of written guidelines and a requirement that the prosecutor justify his guilty plea concessions with statements of reasons. It also outlines a method for

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24. See *infra* notes 167-90 and accompanying text. Commentators have suggested that legislatures may set sentencing ranges with extremely heinous crimes and political reaction in mind, without consideration of what a realistic and appropriate sentence is. See TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 31-34 (1976). However, if sentences imposed after trial are too long, the legislature and courts should rectify the situation and not depend upon plea bargaining with its inequities to set appropriate sentences. The judgement of prosecutors and defense attorneys that plea bargaining results in more appropriate sentences is suspect because of the self-interest which the participants have in plea bargaining. See Kipnis, *supra* note 7, at 104. See also *infra* notes 41, 71-83, and accompanying text.

25. See D. JONES, *supra* note 1, at 61-62, 109, 114-19 (1979).

26. See *infra* notes 55-57 and accompanying text.

27. See *infra* notes 178-90 and accompanying text.

28. See *infra* notes 190-209 and accompanying text.

29. J. MORTON, THE FUNCTION OF CRIMINAL LAW 30 (1962).

30. See *infra* notes 210-96 and accompanying text.

granting victims of crimes an opportunity for input into the plea bargaining and sentencing processes.

## II. PLEA BARGAINING AS AN EXERCISE OF PROSECUTORIAL DISCRETION

When courts and commentators classify plea bargaining as one variety of negotiation, they ignore critical differences between plea bargaining and settlement discussions in civil cases. This section will discuss these differences and conclude that plea bargaining more closely resembles an administrative determination of the defendant's culpability and his appropriate punishment than it does a bipolar negotiation.

### A. *The Preeminence of Equitable Factors in Plea Bargaining*

In civil cases, litigants settle because the compromise agreed upon is more attractive to them than their respective perceptions of the likely trial outcome.<sup>31</sup> The most important factor in these negotiations is the parties' predictions of what would happen at trial, and the traditional interpretation of plea bargaining asserts that prosecutors and defendants enter into plea bargains for similar reasons.<sup>32</sup> Professor H. Richard Uviller, a spokesman for those defending plea bargaining in this manner, describes the plea bargain as occurring at "that point at which the parties, taking all their common and opposing interests into account, find a mutually acceptable meeting of surrender and gain."<sup>33</sup> Under this view of plea bargaining, the prosecutor and the defense attorney negotiate a mutually acceptable plea which approximates their views of the charges of which the defendant would be convicted at trial.<sup>34</sup> If this interpretation of plea bargaining is correct, then the defendant's guilt is questionable in most cases, because most defendants receive concessions in exchange for their guilty pleas. A slightly more sophisticated version of this view of plea bargaining acknowledges that in most criminal cases facts are not in dispute, but the legal significance of such facts are not clear until after the jury has delivered its verdict.<sup>35</sup> The uncertainty of conviction supposedly contributes to the "relatively

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31. One commentator described negotiated settlements in civil cases in this manner: Litigants settle out of court for only one reason: each thinks he obtains through the settlement agreement an outcome at least as good as his estimated outcome in court. Therefore, all settlement negotiation proceeds within the confines of the parties' anticipations of the result of the contemplated lawsuit. Each party's bargaining limit is determined by his evaluation of the probable dollar outcome in court, adjusted for the probable dollar costs of litigation and settlement.

Note, *An Analysis of Settlement*, 22 STAN. L. REV. 67, 70-71 (1969).

32. See, e.g., C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 280-83 (1978); Church, *supra* note 7, at 519-20; Uviller, *supra* note 2, at 102-03.

33. Uviller, *supra* note 2, at 102-03.

34. See C. SILBERMAN, *supra* note 32, at 282-83; Church, *supra* note 7, at 519-20.

35. See C. SILBERMAN, *supra* note 32, at 281-83.

equal bargaining power" that the Supreme Court believes exists between the defendant and the prosecutor.<sup>36</sup>

The observations of participants in the criminal justice system directly challenge the premise that the probable trial outcome is the primary factor in most plea bargains. According to Professor Heumann, "most of the defendants are factually guilty and have no legal grounds to challenge the state's evidence."<sup>37</sup> Where there is doubt as to whether the defendant can be convicted on the original charge, it is often because the prosecutor has "overcharged" to gain additional leverage to induce the defendant to plead to the "real offense."<sup>38</sup> Obviously, the prosecutor's recognition that he cannot convict the defendant of the original charge will be an important factor inducing him to plea bargain.<sup>39</sup> This may result either because the prosecutor overcharged initially or because the defense attorney reveals new facts to the prosecutor during plea bargaining which make conviction unlikely.<sup>40</sup> Nonetheless, plea bargains do not appear to depend nearly as much upon prediction of what will happen at trial as do settlements in civil cases.

If the terms of the plea bargain do not directly reflect counsel's prediction of trial outcomes, other factors must determine the substance of the agreement between the prosecutor and the defense attorney.<sup>41</sup> Certainly caseload pressures affecting prosecutors and public

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36. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

37. M. HEUMANN, *supra* note 10, at 61. Heumann found that "experienced defense attorneys agree that of the approximately 90% of the defendants who are factually guilty, most have cases devoid of any legally disputable issue." *Id.* at 60. See also P. UTZ, *SETTLING THE FACTS: DISCRETION AND NEGOTIATION IN CRIMINAL COURT* 34-35 (1978); Mather, *Some Determinants of the Method of Case Disposition: Decision-Making By Public Defenders in Los Angeles*, 8 *LAW & SOC'Y REV.* 187, 187-88 (1973).

38. See L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES* 57-58 (1977). See also *infra* notes 59-70 and accompanying text.

39. Prosecutors tend to be risk averse and want to avoid the possibility of an embarrassing loss at trial. See White, *A Proposal for Reform of Plea Bargaining*, 119 *U. PA. L. REV.* 439, 445-48 (1971). Assistant prosecutors often perceive that their superiors evaluate them by their "won-lost" records at trial, and they therefore will offer major concessions rather than trying a case when there is a substantial risk of acquittal. Similarly, elected prosecutors may find a loss at trial politically embarrassing.

40. See D. NEWMAN, *supra* note 1, at 67-75; Lagoy, Senna, & Siegel, *An Empirical Study on Information Usage For Prosecutorial Decision Making In Plea Negotiations*, 13 *AM. CRIM. L. REV.* 435, 438 (1978); White, *supra* note 39, at 445.

41. Professor Albert Alschuler, a leading scholar of plea bargaining, has identified four overlapping roles the prosecutor may play in plea bargaining: administrator, advocate, judge, and legislator. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 *U. CHI. L. REV.* 50, 52-53 (1968). According to Alschuler, the prosecutor, as an administrator, uses plea bargaining as a fast, efficient way to dispose of cases. In the role of advocate, the prosecutor views plea bargaining as a tool to maximize the number of convictions and the severity of sentences. In the third role of judge, according to Alschuler, the prosecutor considers on equitable grounds such factors as the circumstances of the offense or the characteristics of the offender. It is argued here that this is by far the most important role played by the prosecutor. See *infra* notes 46-50 and accompanying text. The last prosecutorial role identified by Alschuler is that of legislator. Prosecutors may offer reductions in charges not only because the application of a statute to a particular defendant is too harsh, but because the statute itself is too harsh. In such cases, prosecutors offer wholesale reduc-

defenders provide a strong incentive, or even the necessity, for plea bargaining. Plea bargaining is a fast, efficient alternative to trial. Recent empirical studies suggest, however, that caseload considerations may not be as important as commonly believed;<sup>42</sup> these studies do not show a direct correlation between increasing caseloads and more plea bargaining.<sup>43</sup> Further, even if heavy caseloads do encourage prosecutors to plea bargain generally, they do not determine a prosecutor's attitude toward plea bargaining in any particular case.<sup>44</sup> Prosecutors also use plea bargaining as a tool to encourage defendants to inform on other criminals, cooperate in investigations, and testify on behalf of the government;<sup>45</sup> but bargaining concessions for these purposes occur in comparatively few cases.

The available empirical studies of plea bargaining suggest that the primary factor in most cases is the prosecutor's attempt to individualize justice by taking into account the circumstances of the offense and the characteristics of the offender.<sup>46</sup> Charge reductions or sentence recommendations decided upon by the prosecutor focus on the level of the defendant's culpability and what his sentence should be. Mitigating factors warrant charge concessions, while aggravating factors suggest that the defendant should not be granted the benefits of charge reductions or sentence recommendations. Mitigating factors may relate either to the offense or the offender. Those relating to the characteristics of the offender include the youth of the defendant or the lack of a prior record;<sup>47</sup> those relating to the circumstances of the offense include factors such as provocation by the victim.<sup>48</sup> In making plea bargaining concessions, the prosecutor is primarily interested in what the defendant's sentence will be.<sup>49</sup>

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tions. Plea bargaining in this instance is not an attempt to individualize justice; rather, it is the exceptional case where the charge is not reduced. See also D. NEWMAN, *supra* note 1, at 177-84.

42. See Heumann, *A Note on Plea Bargaining and Case Pressure*, 9 LAW & SOC'Y REV. 515, 527 (1975); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 901 (1964).

43. See Heumann, *supra* note 42, at 527.

44. Only 36.7% of the prosecutors surveyed by the *University of Pennsylvania Law Review* indicated that their workloads influenced them to plea bargain with a particular defendant. Other factors, such as the defendant's prior criminal record, were considered by a far higher percentage of those surveyed. Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 901 (1964).

45. See D. NEWMAN, *supra* note 1, at 186-87.

46. See M. HEUMANN, *supra* note 10, at 103-10; D. NEWMAN, *supra* note 1, at 114-30; P. UTZ, *supra* note 37, at 134-36; Mather, *supra* note 10, at 187-88.

47. See D. NEWMAN, *supra* note 1, at 114-25.

48. See *id.* at 125-30. Mitigating circumstances which customarily justify bargaining concessions are virtually identical to those factors listed in presumptive sentencing statutes and which allow the court to sentence the defendant to less than the presumptive term of imprisonment stated in the statute. See, e.g., ALASKA STAT. § 12.55.155(d) (1980); ARIZ. REV. STAT. ANN. § 13-702(E) (1978). This correspondence of factors obviously substantiates the argument that prosecutors and defense attorneys focus on the defendant's sentence during plea bargaining and not on the historical facts of the crime or on what facts can be proved at trial.

49. See M. HEUMANN, *supra* note 10, at 102-10; P. UTZ, *supra* note 37, at 135-36; Mather, *supra* note 37, at 187-88.



Recognition that the primary determinants of plea bargains are the characteristics of the defendant and the circumstances of the offense forces a re-evaluation of the traditional view of plea bargaining as being one form of negotiation. If the prosecutor is seen as an adversarial advocate in the criminal process, none of the prosecutor's interests are directly served in most cases by parcelling out charge reductions or sentence recommendations based upon equitable factors. The key to understanding the so-called "plea bargaining" process is to understand the prosecutor's unique role in the criminal justice system. The American Bar Association's Standards for Criminal Justice explicitly provide that the prosecutor is to be more than an advocate; he is also to be "an administrator of justice whose duty is to seek justice, not merely to convict."<sup>50</sup> This dual role distinguishes the function of the prosecutor in plea bargaining from that of the defense attorney, or from attorneys in civil negotiations, who attempt to achieve through negotiation all that the client could possibly have obtained at trial. This responsibility of the prosecutor explains why it is appropriate for him to make guilty plea concessions based upon equitable factors even when there is little possibility of acquittal.

### *B. The Prosecutor's Dominance of Plea Bargaining*

The process of individualizing justice by taking into account the characteristics of the offense and the offender occurs not through an actual adversarial negotiation, but largely through a unilateral administrative determination by the prosecutor. The prosecutor in the typical case possesses such a gross disparity of bargaining power that the process of determining what charges the defendant will plead to is more an administrative determination than a true negotiation. In plea bargaining there is little of the "give-and-take" which typically occurs in settlement talks in civil cases, where either side possesses the ability to break off negotiations and proceed to trial if the opposing attorney's negotiating behavior does not realistically reflect probable trial outcomes. The prosecutor, who resembles a powerful, unregulated monopoly, establishes "the going rate" for any particular category of crime and can change "the going rate" or deviate from previous policy at will. Not even the comparable defense counterpart to the prosecutor, the public defender's office, possesses comparable power or can prevent a determined prosecutor from changing bargaining policies.

Four factors largely explain the dominance of the prosecutor's decision-making in plea bargaining. First, as previously discussed, in most cases prosecutors face relatively little risk of acquittal if they proceed to trial.<sup>51</sup> Second, in most cases, including those few cases in which the defendant possesses an arguable defense, the defendant faces

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50. ABA STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(b) (2d ed. 1980).

51. See *supra* notes 37-38 and accompanying text.

the risk of much more severe penalties if tried and convicted than if sentenced after a guilty plea.<sup>52</sup> The risks to a defendant who challenges a prosecutor's determination of the "worth" of a case are clearly intimidating. Third, prosecutors can "overcharge" defendants with multiple offenses or more serious charges than those warranted by the offense.<sup>53</sup> Defendants who fear conviction on these charges will plead guilty to the "real offense." Fourth, the personal and organizational interests of defense attorneys are inherently, and regrettably, usually better served by acquiescing in the prosecutor's administrative determination of the appropriate level of guilt and punishment for the defendant than in challenging it.<sup>54</sup>

### 1. *The Trial Penalty*

The sentencing differential between defendants who are convicted at trial and those who accept the prosecutor's offer to plead guilty is so pervasive and so substantial that few defendants are foolhardy enough to risk testing the prosecutor's determination of the "value" of their case. Professor Albert Alschuler describes the impact of sentencing differentials in one defendant's case:

San Francisco defense attorney Benjamin M. Davis recently represented a man charged with kidnapping and forcible rape. The defendant was innocent, Davis says, and after investigating the case Davis was confident of an acquittal. The prosecutor, who seems to have shared the defense attorney's opinion on this point, offered to permit a guilty plea to simple battery. Conviction on this charge would not have led to a greater sentence than thirty days' imprisonment, and there was every likelihood that the defendant would be granted probation. When Davis informed his client of this offer, he emphasized that conviction at trial seemed highly improbable. The defendant's reply was simple: "I can't take the chance."<sup>55</sup>

An analysis of plea bargaining practices in New York City revealed that the average sentences for defendants electing to go to trial was twice that of similar defendants who pleaded guilty.<sup>56</sup> In some cases,

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52. See *infra* notes 55-57 and accompanying text.

53. See *infra* notes 59-70 and accompanying text.

54. See *infra* notes 71-83 and accompanying text.

55. Alschuler, *supra* note 41, at 61.

56. See Zeisel, *The Offer That Cannot be Refused*, in F. ZIMRING & R. FRASE, *THE CRIMINAL JUSTICE SYSTEM: MATERIALS ON THE ADMINISTRATION AND REFORM OF THE CRIMINAL LAW* 558, 561 (1980). Professor Zeisel believes that his figure for the average increase in sentence, 136%, is probably low because some of the defendants who went to trial probably did so because they perceived the sentence discount to be too low. *Id.* A survey conducted eighteen years earlier by the *Yale Law Review* among federal district court judges revealed that prison terms for defendants who pled guilty were discounted by 10 to 95 percent of the length of incarceration that would have been imposed after trial and conviction. Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 *YALE L. J.* 204, 207 (1956).

In *People v. Snow*, 386 Mich. 586, 194 N.W.2d 314 (1972), the defendant showed on appeal

the defendant's choice is between a plea to an offense which would result in a maximum sentence of two to six years, and the possibility of a forty to eighty-year sentence after a conviction at jury trial.<sup>57</sup> The disparity of bargaining power which the prosecutor possesses in plea bargaining led Professor Langbein to compare plea bargaining with torture as a means of extracting admissions of guilt.<sup>58</sup> Without going this far, one can conclude that in most cases the prosecutor unilaterally determines what concessions the defendant will receive for his guilty plea because of the state's ability to punish those defendants who do not plead. The prosecutor's decision to offer concessions in most cases is an offer which cannot be intelligently refused.

## 2. *Overcharging by Prosecutors*

The prosecutor's leverage in bargaining is augmented in many jurisdictions by the process of "overcharging."<sup>59</sup> "Overcharging" is an ambiguous term. In its strongest sense, it means filing charges for which the prosecutor does not even have sufficient evidence to support a finding of "probable cause." If the term is used in this sense, overcharging clearly violates the prosecutor's ethical norms.<sup>60</sup> More

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that 202 of 207 defendants who had been charged with prison escape and pleaded guilty had received minimum sentences of 1-1/2 years or less. The thirteen defendants who were tried by a jury and convicted received sentences of two years or more. Other studies corroborate the finding that there exists a significant "trial penalty" in the form of longer sentences for defendants who contest their guilt at trial. See Brereton & Casper, *Does it Pay to Plead Guilty? Differential Sentencing and the Functioning of Criminal Courts*, 16 LAW & SOC'Y REV. 45 (1982); Shin, *Do Lesser Pleas Pay? Accommodations in the Sentencing and Parole Processes*, 1 J. CRIM. JUST. 27, 31 (1973). See Alschuler, *supra* note 10, at 652-56 for a concise but comprehensive analysis of empirical studies of sentencing differentials.

An analysis of "average sentence differential" understates the risk to many defendants who elect to contest their guilt. See *id.* at 656 n.8. The average sentence differential is reduced because in many cases the defendant would receive probation regardless of whether he pleaded guilty or was convicted at trial. This means that in many other cases the "trial penalty" for a defendant electing to contest guilt is incredibly large. *Id.*

57. See *People v. Dennis*, 28 Ill. App. 3d 74, 328 N.E.2d 135 (1st Dist. 1975). See also *supra* note 13 and accompanying text.

58. Langbein, *Torture and Plea Bargaining*, 46 U. CHI. L. REV. 3, 12-13 (1978). Professor Langbein makes his comparison colorfully:

We coerce the accused against whom we find probable cause to confess his guilt. To be sure, our means are much politer; we use no rack, no thumbscrew, no Spanish boot to mash his legs. But like the Europeans of distant centuries who did employ these machines, we make it terribly costly for an accused to claim his right to the constitutional safeguard of trial. We threaten him with a materially increased sanction if he avails himself of his right and is thereafter convicted. The sentencing differential is what makes plea bargaining coercive. There is, of course, a difference between having your limbs crushed if you refuse to confess, or suffering some extra years of imprisonment if you refuse to confess, but the difference is of degree, not kind. Plea bargaining, like torture, is coercive.

*Id.* (footnote omitted).

59. See L. WEINREB, *supra* note 38, at 57-59; Aranella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 500-07 (1980); Kaplan, *The Prosecutorial Discretion—A Comment*, 60 NW. U. L. REV. 174, 178-80 (1965).

60. See MODEL RULES OF PROFESSIONAL CONDUCT § 3.8 (1981). See also CODE OF PROFESSIONAL RESPONSIBILITY DR 7-103(A)(1) (1976).

typically, overcharging merely refers to the prosecutor filing the most serious crimes that the evidence will support, even when conviction on the charged offense is questionable.<sup>61</sup> This version of overcharging serves the prosecutor's interests regardless of whether the case is tried to a jury or resolved through a negotiated plea. At trial, a jury may convict of a lesser included offense, but obviously may not convict the defendant of a more serious charge than the one filed by the prosecutor. In negotiating pleas, overcharging allows the prosecutor to offer the defendant consideration in the form of a reduced charge in exchange for a guilty plea to the "real offense."<sup>62</sup>

Overcharging could be prevented by an early judicial review of the strength of the government's case.<sup>63</sup> Presently, most jurisdictions require the government to present at a preliminary hearing or grand jury some evidence that the defendant committed the crimes with which he is charged. However, preliminary examinations and grand juries generally do not serve as effective screening mechanisms to protect a suspect.<sup>64</sup> In theory, the prosecutor must demonstrate at the preliminary hearing that there is probable cause to bind the case over to the grand jury and to retain the defendant in custody,<sup>65</sup> but preliminary examinations are often waived by the defendant or circumvented by the prosecutor's proceeding directly to the grand jury stage. In addition, the probable cause requirement is so minimal that it screens out only the weakest cases.<sup>66</sup> The grand jury is similarly ineffective in controlling the charging decision.<sup>67</sup> Indeed, it usually rubberstamps whatever decision is made by the prosecutor.

Overcharging is one more tool the prosecutor has to induce defendants to plead guilty. A prosecutor may "stack" multiple charges or charge more serious offenses than those warranted by his case evaluation. Even if conviction on all charges is unlikely, the defendant who perceives some risk of conviction on all charges, and a virtual certainty of conviction on at least some charges, is unlikely to contest guilt.

Initially, it appears inconsistent to contend both that most cases

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61. See L. WEINREB, *supra* note 38, at 57-59.

62. The benefit to the defendant may be illusory because sentencing judges often sentence on the basis of the "real offense" as opposed to the nominal offense to which the defendant pleads. See *infra* note 103 and accompanying text.

63. See *infra* notes 102 and accompanying text.

64. For a complete description of the preliminary hearing role in several jurisdictions and the limitations which prevent it from being an effective check on the prosecutor's charging decision, see F. MILLER, PROSECUTION: THE DECISION TO CHARGE A SUSPECT WITH A CRIME 64-136 (1969).

65. See Aranella, *supra* note 59, at 481.

66. Surveys indicate that only about two percent of all cases are dismissed at the preliminary hearing stage. F. MILLER, *supra* note 64, at 83-94. See also Neubauer, *After the Arrest: The Charging Decision in Prairie City*, 8 LAW & SOC'Y REV. 495, 512 (1974) (survey showing that in Prairie City, Illinois, only 1.3% of cases are dismissed at the preliminary hearing stage).

67. See Aranella, *supra* note 59, at 496-97; Neubauer, *supra* note 66, at 512-13; Noll, *Controlling a Prosecutor's Screening Discretion Through Fuller Enforcement*, 29 SYRACUSE L. REV. 697, 703 (1978).

against defendants are “dead-bang” cases so that probable trial outcome usually is not a factor in negotiations<sup>68</sup> and also to assert that overcharging is a common occurrence. Four factors refute this apparent inconsistency. First, defense attorneys may not apprise defendants that they have been overcharged and that conviction and sentencing on all charges are extremely unlikely;<sup>69</sup> accordingly, defendants often believe the cases against them are “dead-bang” and are induced to plead by the overcharging. Second, most cases are “dead-bang” cases in the sense that there is little risk of acquittal on all charges, even if the defendant is acquitted on some charges. The defendant accepts the prosecutor’s offer because he sees no hope of being acquitted on all charges. Third, arguably it may be overcharging on equitable grounds to charge the defendant with all the overlapping crimes possible, even if there is sufficient evidence to make conviction likely on all charges. Equitable factors often suggest that prosecutors should not charge all provable offenses.<sup>70</sup> Finally, the prosecutor can choose between overcharging and charging only those offenses where convictions and appropriate sentences are likely. This choice often is influenced by the prosecutor’s judgment as to which mode of charging is most likely to convince defendants to plead guilty. Allowing prosecutors that choice in their uncontrolled discretion is itself troublesome.

### 3. *Defense Attorneys’ Acquiescence in the Prosecutor’s Determinations of Guilty Plea Concessions*

The reality of sentencing differentials is generally enough to deprive defendants of any real choice in plea bargaining. In many instances, however, the defendant’s perception of what will happen if he is sentenced after trial is worse than reality. Defense attorneys often inform defendants of the maximum possible sentence after conviction, without explaining that with parole and good time the convicted defendant will serve only a portion of the sentence. Regrettably, counsel will not even always explain to their clients that actual sentences are customarily considerably less severe than maximum sentences.

The defense attorney’s personal and institutional interests generally are served by encouraging the defendant to plead guilty.<sup>71</sup> In a survey of defendants in a major metropolitan area, over half of the defendants interviewed pointed to the defense attorney as the individual who most influenced them to plead guilty.<sup>72</sup> Professor Alschuler

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68. See *supra* notes 37-38 and accompanying text.

69. See *infra* notes 71-83 and accompanying text.

70. STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(b) (2d ed. 1980).

71. See generally Alschuler, *The Defense Attorney’s Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975). See also A. BLUMBERG, *supra* note 20, at 92; A. ROSETT & D. CRESSEY, *JUSTICE BY CONSENT* 108-09 (1976); L. WEINREB, *supra* note 38, at 74; Hyman, *Bargaining and Criminal Justice*, 33 RUTGERS L. REV. 3, 13-16 (1980).

72. See A. BLUMBERG, *supra* note 20, at 93. Approximately 77% of the defense attorneys raised the possibility of a plea with their clients during either the first or second interview. *Id.*

uses the situation in *United States ex rel. Brown v. LaVallee*<sup>73</sup> to demonstrate the extreme pressures defense attorneys bring upon their clients to plead.<sup>74</sup> After failing to convince the defendant to plead after ten months of personal persuasion, the defense attorney arranged for the defendant's mother to visit with him and talk about how hard it would be for the "family to come here and have to claim a body that had been electrocuted . . . ."<sup>75</sup> Unfortunately, the defense attorney's arranging to have a parent or spouse talk a defendant into pleading guilty does not appear to be an isolated incident.

The heavy caseload of most public defenders makes it just as impossible for them to try every case as it is for the prosecutor.<sup>76</sup> The attorney who routinely handles criminal cases becomes a part of a courthouse "sub-culture" along with prosecutors and judges. The prevailing ethos of that culture, and indeed perhaps the reason for its very existence, is to dispose of cases quickly and efficiently by avoiding both trials and adversarial negotiations.<sup>77</sup> At least some defense attorneys lack the ability or the courage to take their cases to trial.<sup>78</sup> A larger number of defense attorneys experience psychological relief when the client pleads guilty and avoids the prospect of a trial; they fear that a less-than-perfectly-tried case may have sent their client to prison.

When counsel is appointed at public expense or privately retained, strong financial incentives exist to encourage defense attorneys to accept the prosecutor's evaluations of cases. Most attorneys appointed to handle criminal cases are poorly compensated.<sup>79</sup> The result, according to one Nebraska prosecutor, is that "[m]any appointed attorneys expe-

73. 424 F.2d 457 (2d Cir.), *cert. denied*, 401 U.S. 942 (1972).

74. *See* Alschuler, *supra* note 71, at 1192-94.

75. 424 F.2d at 459.

76. *See* A. ROSETT & D. CRESSY, *supra* note 71, at 108.

77. *See* Hyman, *supra* note 71, at 13-14.

The suspicion that the prosecutor's relationship with a public defender is more "accommodative" and less "adversarial" than the relationship with a private attorney was confirmed by a survey of prosecutors in Nebraska. *See* Kray & Berman, *Plea Bargaining in Nebraska: The Prosecutor's Perspective*, 11 CREIGHTON L. REV. 118, 128-29 (1977). Two-thirds of the prosecutors surveyed indicated no differences in bargaining behavior between public defender and private attorneys. One-third of the prosecutors, however, stated that "the public defender was better able to evaluate a case and make a reasonable bargaining proposal." *Id.* In view of the thesis of this article, these results could be re-interpreted by saying public defenders were more aware of the "going rate" determined by the prosecutor for typical cases and their "bargaining" proposals more closely corresponded with the prosecutor's evaluations of their cases.

78. *See* L. WEINREB, *supra* note 38, at 74. Professor Weinreb views this as a pervasive influence in plea bargaining:

Although they perform ably for their clients by ordinary professional standards, many defense counsel lack the capacity to try a case and would admit the lack. While such an admission would be startling in the context of criminal practice because of the theoretical emphasis on trial, in this also defense counsel resemble other lawyers. Most of the lawyers in large law firms are unable to try a case; they do not regard themselves as unprepared to serve their clients.

*See also* Alschuler, *supra* note 71, at 1181-98 (discussion of retained "cop out" lawyers who plead large number of criminal cases and rarely, if ever, try a case).

79. *See* Alschuler, *supra* note 71, at 1256-70; Kray & Berman, *supra* note 77, at 128.

dite the case as fast as possible and tend to enter pleas with reckless abandon."<sup>80</sup> With such enthusiasm for quick dispositions, appointed counsel do not bargain adversarially. Rather they acquiesce in the prosecutor's determination of appropriate guilty plea concessions. Similarly, in larger urban areas some privately retained attorneys generate attractive income by disposing of a large volume of cases, at inexpensive rates, by pleading them quickly.<sup>81</sup> Like appointed attorneys, such "pleaders" are unlikely to bargain "hard" or aggressively for the best possible deal.

The net result of the prosecutor's overwhelming bargaining advantage and the institutional pressures on defense counsel to plead their clients is a process which is not an adversarial negotiation. Professors Rossett and Cressey describe what would happen to the criminal justice system if "the guilty plea system were as adversary as the plea-bargaining and concessions language implies"<sup>82</sup> in the following manner: "With both sides using poker tactics to gain advantages, the workday of the courthouse would be so crammed with bluffs, counterbluffs and counter-counter bluffs, that there would be no time for dispositions."<sup>83</sup> Defense attorneys generally do not contest a prosecutor's administrative determinations of what crimes the defendant should plead to. They seldom have viable defenses to argue, and it is not in their own best interests to take an adversarial posture in bargaining or to contest the prosecutor's position in court.

### C. *The Different Nature of Compromise in Criminal Cases*

Plea bargaining also differs from negotiations in civil cases because the methods of achieving compromises in civil negotiations are inherently inapplicable to criminal cases. Negotiation in civil cases involves satisfying both parties' needs to the extent that an agreed to settlement is preferable to risks of litigation or other consequences of not settling.<sup>84</sup> Most often the parties are compromising a claim for monetary compensation.<sup>85</sup> In this context, the choice between a guaranteed

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80. See Kray & Berman, *supra* note 77, at 128.

81. See Alschuler, *supra* note 71, at 1181-1206.

82. A. ROSSET & D. CRESSEY, *supra* note 71, at 108.

83. *Id.*

84. See C. KARRASS, *THE NEGOTIATING GAME* 144-46 (1970).

85. Karrass regards this type of negotiation as an example of "share bargaining" which is "the process by which opponents share or ration the settlement range between themselves. If one gets more, the other gets less." *Id.*, at 66. He contrasts "share bargaining" with "*Problem-solving*—The process by which both parties work together to solve each other's problems. In this process both gain at the same time." *Id.* To a limited extent, both types of bargaining occur in plea bargaining. To the extent that prosecutors are motivated by a desire to have the defendant "do time" or to have a label attached to the crime which accurately reflects the seriousness of the crime, the prosecutor and defense attorney are engaged in "share bargaining." To the extent that all parties are interested in avoiding costly and time consuming litigation, they are engaged in "problem-solving bargaining." The prosecutor's primary role in plea bargaining, making an accurate determination of the defendant's level of culpability and punishment, does not fit neatly into

smaller amount of compensation and the gamble to achieve greater compensation at trial is a clearly understood choice which poses no great moral dilemmas.

When determining the settlement value of a civil case, an attorney often begins by estimating the amount of damages a jury likely would award his client if the jury found liability, and then discounting this amount by a factor representing the possibility of a no liability verdict.<sup>86</sup> Attorneys engaged in settlement talks need not agree on liability before engaging in negotiations. Liability and damage issues are both independent variables which can be compromised at any point during negotiations.

Compromise in plea bargaining is not analogous to compromise in settlement talks. In most cases, attorneys in plea bargaining do not compromise issues of guilt. To do so would be illogical. Crimes are different from torts precisely because they involve society's moral condemnation which cannot be so easily compromised and bargained away.<sup>87</sup> In slightly oversimplified terms, either the historical facts reflect that the crime charged has been committed, or they do not.<sup>88</sup> This

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the concepts of either "share bargaining" or "problem-solving" bargaining, unless the meaning of those terms is expanded beyond reasonable parameters.

86. See, e.g., Werchick, *Settling the Case—Plaintiff*, in 4 AM. JUR. TRIALS 319-22 (1966).

87. See generally, Drane & Neal, *On Moral Justifications for the Tort/Crime Distinction*, 68 CALIF. L. REV. 398 (1980). See also Alschuler, *supra* note 56, at 703-17.

88. Proponents of plea bargaining offer two justifications for the necessity of viewing plea bargaining as a compromise of guilt. First, they argue that many crimes require the government to prove elements which are more ambiguous than objectively verifiable historical facts, such as the defendant's intent, recklessness, or insanity, or apprehension of an attacker. See Enker, *Perspectives on Plea Bargaining*, in U.S. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, 108 app., 113-14 app. (1967) [hereinafter cited as *Enker*]. Determination of these elements involves the passing of moral judgment on the defendant's actions, not mere fact-finding. Professor Enker argues that experienced counsel will agree to a plea bargain which is both rational and reflects a likely jury verdict. Indeed, Enker finds an advantage in plea bargaining because negotiations can lead to an "intermediate" value judgment on the culpability of the accused somewhere between the stark choices often posed to the jury.

Professor Enker's argument is persuasive in a limited number of cases but cannot justify routine plea bargaining. Most bargained cases are "dead-bang" cases, not ones involving subtle and debatable issues of moral responsibility. See *supra* notes 37-38. Further, the assumption that the likely jury verdict is a primary consideration in the plea bargaining in most cases is unsound. Of course there will be a number of serious offenses, and highly publicized ones, where Enker's analysis applies. Even here though, one must ask whether it is desirable to have two professional lawyers make those value judgments on issues of moral responsibility in a low-visibility setting. In any case, Enker's arguments do not justify the compromise of moral guilt in the overwhelming majority of cases.

A more sophisticated extension of the "partial guilt" argument is that there is a distinction between "factual guilt" and "legal guilt." See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 166-67 (1968); Alschuler, *supra* note 10, at 707-13; White, *supra* note 39, at 458-62. In order to establish legal guilt it is not sufficient to show that the defendant, in all probability and based upon reliable evidence, committed the crime. See H. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 166-67 (1968). Legal guilt is established only after factual determinations are made "in a procedurally regular fashion and by authorities acting within competences duly allocated to them." *Id.* at 166. Between the prosecutor's perception of factual guilt and the proof of legal guilt lie the obstacles of the exclusionary rule and other evidentiary restrictions based upon policies other than fact-finding, the prosecutor's obligation to prove the case beyond a reasonable doubt,



is inherently a different issue from whether a personal injury is worth \$20,000 or \$40,000, or even whether the civil trial defendant acted "unreasonably" so as to be required to compensate the victim. If there is risk for the parties to a civil claim, they can meaningfully compromise by taking into account the degree of risk at trial and the anticipated recovery. In criminal cases, it makes less sense to have the defendant compromise by pleading to a crime carrying a label which does not fit the facts of his case or a punishment which is not appropriate.

Attorneys engaged in plea bargaining reflect these differences from civil negotiations in the way in which they negotiate. The prosecutor and defense attorney begin by assuming the defendant's guilt.<sup>89</sup> The most important issue decided by the prosecutor, and the one obviously of greatest concern to the defendant, is sentencing. In many instances, the prosecutor largely determines the defendant's sentence either through explicit sentencing recommendations or through charge reductions or dismissals. Unlike in civil negotiations, the prosecutor and defense attorney generally do not begin with the likely disposition and then discount the sentence by the likelihood of acquittal.

#### *D. The Prosecutor's Autonomy in Defining the Public Interest*

The prosecutor's role as an administrator of justice, who determines what guilty plea concessions are in the public interest,<sup>90</sup> differentiates plea bargaining from traditional negotiation in yet another way. Defendants in criminal cases, as well as both parties in civil cases, must agree to any settlement themselves.<sup>91</sup> Despite the pressures which an

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the possible unavailability of important evidence, the possibility of jury nullification and the other risks inherent in litigation. The argument is that it is appropriate to compromise criminal cases because what is being negotiated is this very fragile and risky concept of "legal guilt," not "factual guilt." See White, *supra* note 39, at 458-67. For an excellent analysis of "legal guilt" and a decisive refutation of the idea that the concept of "legal guilt" can be used to justify compromise in criminal cases, see Alschuler, *supra* note 56, at 707-13. The argument based on "legal guilt" assumes the prosecutor is in a better position to determine "factual guilt" than are the regularly established fact-finding processes. *Id.* at 707-08. Allowing prosecutors to plea bargain cases where they regard the defendant as "factually guilty," but cannot prove the guilt in court because of the exclusionary rule or other evidentiary limitations based upon social policies also undermines these policies. *Id.* at 711-13.

89. See Polstein, *How to 'Settle' a Criminal Case*, 8 THE PRACTICAL LAW. 35, 37 (1962).

90. See STANDARDS FOR CRIMINAL JUSTICE § 3-3.9(b) (2d ed. 1980). See also *supra* note 50 and accompanying text.

91. The Model Rules of Professional Conduct, provide:

A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer for the defendant shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, . . . .

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (Proposed Final Draft, 1981). See also CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7 & 7-8 (1976). For an excellent analysis of why clients should make these decisions, see D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE 7-23, 27-28 (1974). For a contrasting view which suggests that lawyers ought to have authority to make these decisions, see J. SINDELL & D. SINDELL, LET'S TALK SETTLEMENT 382-83 (1963).

attorney may bring to convince a client to settle,<sup>92</sup> the ultimate decision to settle lies with the client. This is not the case with the prosecutor. The prosecutor makes his own judgment whether the guilty plea concessions are in the public interest. Accordingly, there is no "party" to ratify the prosecutor's decision to enter into a plea agreement or to check the prosecutor's determination of what is in the public interest.<sup>93</sup> The absence of a check on the prosecutor's negotiating behavior makes it more likely that the prosecutor's judgments in plea bargaining will be affected by his own institutional or personal interests.<sup>94</sup> It also means that regulation of plea bargaining which proceeds from a contract model can never assure that the interests of the public are adequately protected in plea bargaining.<sup>95</sup> Other forms of regulation of plea bargaining are required to protect the public's interest.

The differences between negotiations in civil cases and plea bargaining outlined in this section suggest that plea bargaining is something other than another form of negotiation. The level of guilt determined through plea "bargaining" is in most cases a unilateral administrative determination by the prosecutor of the appropriate degree of the defendant's culpability, not the result of effective bargaining between adversaries. The primary focus in plea bargaining is the prosecutor's effort to individualize substantive justice by taking into account the characteristics of the offender and the circumstances of the offense, not the prosecutor's cost-benefit analysis of the chances of conviction at trial weighed against the certainty of a conviction resulting from the defendant's willingness to plead to a lesser offense. Understanding the prosecutor's function in plea bargaining primarily as that of an administrator of justice and not as an adversarial negotiator is the first step toward meaningful reform of plea bargaining.

### III. THE COSTS OF UNREGULATED PROSECUTORIAL DISCRETION IN PLEA BARGAINING

Even though plea bargaining is a financially inexpensive alternative to the trial process, it imposes significant other costs on the crimi-

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92. See *supra* notes 71-81 and accompanying text.

93. The public and the police certainly affect the prosecutor's decision in plea bargaining. Most state and local prosecutors are popularly elected and can, in theory, be defeated if the public disapproves of plea bargaining policies. In reality, however, most plea bargaining decisions are not highly publicized and elections of prosecutors are not referenda on bargaining policies. For a description of the inefficiency of these informal controls on the prosecutor's decisions to charge suspects with crimes, see Gifford, *Equal Protection and the Prosecutor's Charging Decision: Enforcing an Ideal*, 49 GEO. WASH. L. REV. 659, 670-71 (1981).

94. Like the defense attorney, the prosecutor is pushed toward making routine bargaining concessions by caseload pressures and the desire to maintain an accommodative working relationship with defense attorneys and judges. See A. ROSETT & D. CRESSEY, *supra* note 71, at 104-13; White, *supra* note 38, at 445. See also *supra* notes 71-83 and accompanying text.

95. See *infra* notes 167-205 and accompanying text for a more complete description of how the rights of the public and victims of crimes may be jeopardized during current plea bargaining practices.

nal justice system. These negative consequences can best be seen as resulting from the uncontrolled exercise of prosecutorial discretion. The prosecutor's decision as to the charges to which the defendant should plead, or the sentence recommendations to make, is often made on a case-by-case basis, without reference to standards, guidelines, or precedents. The decision-making and bargaining processes occur outside the public view, and prosecutors need not explain or justify the concessions offered defendants. This section will review the problems resulting from unregulated plea bargaining. It will further argue that current regulation of plea bargaining, which focuses on assuring that the defendant's plea is voluntary, does little to mitigate these problems.<sup>96</sup>

### A. *The Unconscionability of Plea Bargaining*

Defendants acquiesce in plea bargains under many of the same conditions which would make civil contracts unenforceable under the doctrine of unconscionability.<sup>97</sup> As a result of these pressures, defendants routinely waive important constitutional rights under circumstances that cannot meaningfully be regarded as voluntary,<sup>98</sup> and at least some defendants enter guilty pleas even though they have a reasonable chance of acquittal at trial.<sup>99</sup>

In assessing whether a contract is unconscionable and therefore unenforceable, courts review the totality of the circumstances surrounding the negotiation and execution of the contract.<sup>100</sup> Two of the most important considerations are whether there was a gross disparity of bargaining power and whether the parties understood the provisions of the contract.<sup>101</sup> The application to plea bargaining of the first factor, the gross disparity of bargaining power, was discussed in the previous section. The second factor is also frequently present in plea bargaining because defendants often do not understand the provisions of their "contracts," particularly those relating to sentencing. Defendants are primarily interested in their sentences, and they enter guilty pleas only after given assurances or predictions regarding their sentences. Even if told there are not any absolute guarantees about sentences and that sentencing remains the court's prerogative, most defendants understand only that "the court almost always grants probation in this type of case" or "the prosecutor has agreed to recommend probation."<sup>102</sup>

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96. See *infra* notes 114-27 and accompanying text.

97. See U.C.C. § 2-302; J. CALAMARI & J. PERILLO, *THE LAW OF CONTRACTS* 325-26 (2d ed. 1977).

98. See *infra* notes 104-27 and accompanying text.

99. See *infra* notes 128-42 and accompanying text.

100. See *Gildermen & Co. v. Lane Processing, Inc.*, 527 F.2d 571, 575 (8th Cir. 1975).

101. *Id.* See also *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965); *Weaver v. American Oil Co.*, 257 Ind. 458, 464, 276 N.E.2d 144, 147-48 (1971).

102. In fact, courts almost always go along with the prosecutor's sentencing recommendation when made as part of a plea agreement. See Comment, *Restructuring Plea Bargaining*, 82 *YALE*

In reality, plea bargaining is even more one-sided than defendants believe. Defendants assume they are receiving substantial sentence reductions in exchange for their guilty pleas. This benefit is often more illusory than real. Judges and parole boards frequently make sentencing and parole decisions based upon the "real" offense committed by the defendant and not upon the charge to which the defendant pleads.<sup>103</sup> The prosecutor's recommendations, which appear attractive compared to maximum possible sentences, may in fact only correspond with the court's typical sentencing practices. Defendants often receive less in plea bargaining than they perceive; like parties victimized by unconscionable contracts, they do not understand the terms of the bargain.

Other less subtle factors suggest that plea bargains are "unconscionable" when judged against contract standards. When deciding whether to plead guilty, defendants are often incarcerated, isolated from family and friends, scared, confused, and embarrassed. The concept of consent in plea bargaining is a very attenuated one.

### 1. *The Relinquishment of Constitutional Rights*

One of the consequences of the defendant's guilty plea is the waiver of important constitutional rights including the sixth amendment rights to trial by jury,<sup>104</sup> to have one's guilt proved beyond a reasonable doubt,<sup>105</sup> to have compulsory process for obtaining witnesses<sup>106</sup> and to confront hostile witnesses,<sup>107</sup> and the fifth amendment right against self-incrimination.<sup>108</sup> To be sure, the United States Constitution<sup>109</sup> and the Federal Rules of Criminal Procedure<sup>110</sup> both require

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L.J. 286, 296-99 (1972). If the prosecutor's recommendations were ignored frequently, defendants would not be inclined to plead guilty because prosecutors could not deliver what had been promised. Accordingly, in those jurisdictions where bargaining is a common practice, prosecutors perform the actual sentencing functions within the boundaries set by the judge.

103. See D. NEWMAN, *supra* note 1, at 98-99.

104. See *Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). In *McCarthy v. United States*, 394 U.S. 459, 466 (1969), Chief Justice Warren stated that "[a] defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." See also *Santobello v. New York*, 404 U.S. 257, 264 (1971) (Douglas, J., concurring); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969).

105. See *In re Winship*, 397 U.S. 358, 364 (1970).

106. See *Washington v. Texas*, 388 U.S. 14, 18-19 (1967).

107. See *Pointer v. Texas*, 380 U.S. 400, 406 (1965).

108. See *Mallory v. Hogan*, 378 U.S. 1, 8 (1964).

109. The constitutional requirements are grounded in the due process clause of the fourteenth amendment. See, e.g., *Brady v. United States*, 397 U.S. 742 (1970); *Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969).

110. See FED. R. CRIM. P. 11. Rule 11 provides the procedural and substantive requirements that a federal district court must comply with in order to accept defendant's plea of guilty. In *McCarthy v. United States*, 394 U.S. 459 (1969), the Supreme Court, in its supervisory role over the lower federal courts, held that noncompliance with Rule 11 required that the plea be set aside and the case remanded to the trial court. *Id.* at 472. Subsequently, the rule was amended and in *United States v. Timmreck*, 441 U.S. 780 (1979), the Supreme Court held that a guilty plea is not subject to collateral attack when all that can be shown is a formal violation of Rule 11.

the trial court to personally address the defendant with a number of questions designed to assure that the plea is made voluntarily,<sup>111</sup> knowingly and intelligently,<sup>112</sup> and accurately.<sup>113</sup> However, Professor Blumberg describes the guilty plea hearing as seen by the defendant:

The "cop-out" is in fact a charade, during which an accused must project an appropriate and acceptable degree of guilt, penitence, and remorse. If he adequately feigns the role of the "guilty person," his hearers will engage in the fantasy that is contrite and [that he] thereby merits a lesser plea. One of the essential functions of the criminal lawyer is that he coach his accused-client in this performance. What is actually involved, therefore, is . . . a highly structured system of exchange cloaked in the rituals of legalism and public professions of guilt and repentance. Everyone present is aware of the staging, including the defendant.<sup>114</sup>

The defendant perceives his answers to the judge's questions as incantations necessary to realize the sentencing concessions resulting from plea bargaining. His participation in the guilty plea process is not a meaningful acknowledgment of guilt; a majority of the defendants surveyed by Professor Blumberg continued to assert their innocence following their guilty pleas.<sup>115</sup>

The defendant's explicit and implicit waivers of constitutional rights as a result of a guilty plea do not satisfy the criteria for effective waiver of rights elsewhere in the criminal process. In *Johnson v. Zerbst*,<sup>116</sup> the Supreme Court held that a waiver of constitutional rights requires "an intentional relinquishment or abandonment of a *known* right or privilege."<sup>117</sup> Determination of whether there is an effective waiver turns upon "the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."<sup>118</sup> The constitutional requirements for a guilty plea fall far short of these standards. The guilty plea defendant often is not aware of those procedural rights which are not specifically mentioned in the Rule 11 litany and does not fully understand his rights and how they apply to his case.<sup>119</sup> Indeed, in *McMann v. Richardson*,<sup>120</sup> the Supreme

111. See FED. R. CRIM. P. 11(d). Rule 11(d) provides that the trial court must personally address the defendant in open court to determine that the plea is voluntary. The plea must not be the result of force, threats or promises other than the plea agreement. Similar requirements for state courts are grounded in the due process clause of the fourteenth amendment. See *Boykin v. Alabama*, 395 U.S. 238 (1969).

112. See FED. R. CRIM. P. 11(c). See also *supra* note 15 and accompanying text.

113. See FED. R. CRIM. P. 11(f); *North Carolina v. Alford*, 400 U.S. 25, 37 (1970); see also *infra* note 137.

114. A. BLUMBERG, *CRIMINAL JUSTICE* 89 (1967). See also J. CASPER, *AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE* 81-86 (1972); L. WEINREB, *supra* note 38, at 77-79.

115. A. BLUMBERG, *supra* note 20, at 89.

116. 304 U.S. 458 (1938).

117. *Id.* at 464 (emphasis added).

118. *Id.*

119. See Tigar, *Foreward: Waiver of Constitutional Rights: Disquiet in the Citadel*, 84 HARV. L. REV. 1, 22-23 (1970).

Court necessarily applied a different standard for waiver of rights in the guilty plea process than elsewhere in the criminal process.<sup>121</sup> Similarly, conditions of incarceration and police treatment which render a confession involuntary do not necessarily void a subsequent guilty plea, according to the Supreme Court.<sup>122</sup> Apparently the Court believes the effect of such psychologically coercive conditions terminates prior to the time when the defendant appears in the courtroom.<sup>123</sup>

The waiver of rights as part of the guilty plea process is ineffective not only under criteria applied elsewhere in criminal law, but also under contract principles. As previously discussed, courts would quickly strike down most plea bargains under the doctrine of unconscionability.<sup>124</sup> In addition, courts void civil contracts under the doctrine of duress when the wrongful acts of one contracting party overcome the free will of the other party.<sup>125</sup> Threats of imprisonment or criminal prosecution are among the acts that courts find sufficient to constitute duress.<sup>126</sup> The different standards courts employ to determine the efficacy of consent in criminal and civil cases has led Professor Tigar to remark, "Judges who would not hesitate to condemn a furniture dealer who preyed on the ignorance of his customer and exploited a superior bargaining position will routinely approve the plea bargains that result from negotiations between the state and an uninformed, powerless defendant."<sup>127</sup>

## 2. *The Risk of Unjustified Guilty Pleas*

In some cases, the unconscionable nature of the plea bargaining process induces defendants who would otherwise be acquitted at trial to plead guilty.<sup>128</sup> Some defendants who continue to assert their inno-

120. 397 U.S. 759 (1970).

121. *Id.* at 769-70. The defendant had been informed by his counsel that his confession was legally admissible. Following his guilty plea, defendant asserted that counsel's advice was mistaken and that his plea was therefore "an unintelligent and voidable act." *Id.* at 769. The Court rejected defendant's claim. *Id.* See also *Parker v. North Carolina*, 397 U.S. 790, 796 (1970).

122. See *Parker v. North Carolina*, 397 U.S. 790, 796 (1970).

123. *Id.*

124. See *supra* notes 97-103.

125. For example, in *Plechner v. Widener College, Inc.*, 418 F. Supp. 1282 (E.D. Pa. 1976), *aff'd*, 569 F.2d 1250 (3d Cir. 1977), the court held that the party seeking to invalidate a transaction on the ground of duress must establish a wrongful act or threat by the opposite party to the transaction or an action by a third party of which the opposite party is aware and uses, and a state of mind in which the complaining party was overwhelmed by fear and consequently was precluded from exercising free will or judgment. See also, *e.g.*, *Levin v. Garfinkle*, 492 F. Supp. 781 (E.D. Pa. 1980); *Higgins v. Brunswick Corp.*, 76 Ill. App. 3d 273, 395 N.E.2d 81 (1979); *Stewart M. Muller Construction Co. v. New York Telephone Co.*, 40 N.Y.2d 955, 390 N.Y.S.2d 817, 359 N.E.2d 328 (1976).

126. See, *e.g.*, *Balling v. Finch*, 203 Cal. App. 2d 413, 21 Cal. Rptr. 490 (1962); *Willig v. Rapaport*, 81 A.D.2d 862, 438 N.Y.S.2d 872 (1982).

127. Tigar, *supra* note 119, at 20. See also *Alschuler, supra* note 10, at 695-703.

128. See generally, *Alschuler, supra* note 71, at 1278-1306; *Finkelstein, A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 309-11 (1975). The issue is really one of whether a plea is "unjustified" because the defendant would likely be acquitted at

cence will reasonably conclude that their interests are better served by entering a plea and accepting the certainty of a lesser punishment than facing the risk of a long incarceration or the death penalty. Consider the choice facing the defendant in the leading case of *North Carolina v. Alford*:<sup>129</sup>

Here the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by trial and much to gain by pleading . . . . 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>130</sup>

Obviously, many defendants unwilling to admit in public that they committed the crimes may nonetheless acknowledge to themselves that they are guilty. However on many occasions experienced defense attorneys believe their clients' protestations of innocence even as the defendants plead guilty.<sup>131</sup>

It is extremely difficult to quantify the number of cases in which defendants who would otherwise be acquitted at trial plead guilty. However, Professor Finkelstein concludes from a study of conviction rates in two federal district courts that at least one-third of the defendants who plead in some jurisdictions would have been acquitted at trial.<sup>132</sup> Other evidence substantiates the existence of unjustified or inaccurate guilty pleas. Defense attorneys freely debate and discuss the circumstances under which they "allow" a defendant who asserts innocence to plead guilty.<sup>133</sup> Further, a majority of defendants continue to assert their innocence following the entry of guilty pleas.<sup>134</sup>

The Supreme Court's prescription of procedures to be followed in accepting a guilty plea when the defendant continues to assert factual innocence suggests such pleas are not an uncommon occurrence. Un-

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trial, not whether the objective historical facts establish that the defendant did not commit the crime and his plea is therefore "false" or "inaccurate."

129. 400 U.S. 25 (1970).

130. *Id.* at 37.

131. See Alschuler, *supra* note 71, at 1278-1306. Professor Alschuler quotes Philadelphia defense attorney Donald G. Goldberg as an example:

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.

*Id.* at 1296.

132. See Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293, 309-11 (1975).

133. See Alschuler, *supra* note 71, at 1278-1306 (1975).

134. A. BLUMBERG, *supra* note 20, at 90-91.

der *North Carolina v. Alford*,<sup>135</sup> the government is required to present a "strong factual basis" before the court can accept a guilty plea from a defendant who professes belief in his own innocence.<sup>136</sup> Professor Alschuler argues that in fact the *Alford* plea process affords little assurance of guilt and that most courts do not require an adequate evidentiary showing to substantiate the plea.<sup>137</sup> The *Alford* procedures, of course, do not even apply in those cases where the defendant acknowledges his guilt in the courtroom although he believes himself to be innocent. Because defendants frequently regard the plea process as a charade,<sup>138</sup> many will plead guilty and acknowledge guilt regardless of their own perceptions of their culpability.

There are several reasons why defendants likely to be acquitted would plead guilty. Professor Barkai identifies two groups of innocent defendants who plead:

- (1) defendants who because of a misunderstanding of the law erroneously conclude they have committed the crime charged even though they have not; and
- (2) defendants who believe they are innocent but nevertheless conclude it is in their best interests to plead guilty.<sup>139</sup>

The most important reason motivating a defendant who considers himself innocent to plead guilty are the sentencing differentials between defendants who plead and defendants who contest their guilt,<sup>140</sup> and the defendant's perception that his defense attorney is incompetent or uncaring.<sup>141</sup> Ironically, the sentencing differential between guilty plea defendants and trial defendants is greatest in those cases in which there is a substantial likelihood of acquittal.<sup>142</sup> Prosecutors who desire convictions in cases where the evidence is weak will offer substantial bargaining concessions, making such offers difficult for defendants to refuse. The defendant's decision to plead is most coercive when his guilt is most in doubt.

The existing regulation of the guilty plea process seeks to assure the voluntariness and accuracy of the defendant's plea through procedural reforms. These procedures do not protect defendants against the kinds of pressure which prosecutors can bring through sentencing differentials to "encourage" pleas. Only substantive regulation of the bar-

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135. 400 U.S. 25 (1970).

136. *Id.* at 32-33, 38.

137. Alschuler, *supra* note 71, at 1294-95. Alschuler criticizes the Supreme Court for holding "that half-a-guilty plea plus half-a-trial equals a whole conviction." *Id.*

138. *See supra* notes 114-15 and accompanying text and *infra* notes 206-09 and accompanying text.

139. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas But Innocent Defendants?*, 126 U. PA. L. REV. 88, 96 (1977).

140. *See supra* notes 55-58 and accompanying text.

141. *See* J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE, 81-86 (1972).

142. *See* Alschuler, *supra* note 41, at 60-61.



gaining concessions offered by prosecutors to defendants can restore voluntariness in any meaningful sense to the guilty plea process.

### B. *Unequal Treatment of Defendants*

Ideally, the criminal justice system should treat similarly situated defendants in an equal manner. Defendants who have committed similar crimes, and who have similar backgrounds and prospects for rehabilitation, should be offered plea bargaining opportunities resulting in equivalent criminal labels and sentences. Obviously, uniform results will not emerge from scores or thousands of separate and discrete prosecutorial decisions regarding what concessions should be offered to defendants. Existing plea bargaining practices seem designed to exacerbate differences in treatment among individual defendants. Generally, the prosecutor's decisions in plea bargaining are made without reference to any guidelines or regulations,<sup>143</sup> without any checks from other prosecutors or judges,<sup>144</sup> without any requirement for reasons or explanations,<sup>145</sup> without any input from the victim of the crime,<sup>146</sup> and without exposure to the public's view.<sup>147</sup>

Even if some inconsistent treatment of defendants in the plea bargaining process is regarded as tolerable, and in fact inevitable, some forms of unequal treatment by prosecutors must be regarded as invidious. For example, unequal treatment of defendants motivated by racial or ethnic prejudices, political considerations, the desire to retaliate for the exercise of constitutional rights or the prosecutor's personal likes or dislikes should not be tolerated.<sup>148</sup> A system which allocates criminal labels and sentences without standards or guidelines, and virtually without checks, invites discrimination against disfavored classes and individuals.<sup>149</sup>

In most prosecutors' offices, each individual prosecutor is free to develop his own standards to determine when to reduce charges or make sentence recommendations as part of a plea bargain.<sup>150</sup> Prosecutors obviously possess varying temperaments, viewpoints toward cer-

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143. See *infra* notes 228-53 and accompanying text.

144. See *infra* notes 264-96 and accompanying text.

145. See *infra* notes 254-63 and accompanying text.

146. See *infra* notes 200-05 and 279-87 and accompanying text.

147. See *infra* notes 191-99 and accompanying text.

148. A similar standard has been widely adopted to govern the comparable situation of whether a prosecutor's charging decision violates the equal protection rights of defendants and establishes the defense of discriminatory prosecution. See, e.g., *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974); *State v. Flynt*, 63 Ohio St. 2d 132, 134, 407 N.E.2d 15, 17, *cert. granted*, 449 U.S. 1033 (1980), *cert. dismissed*, 451 U.S. 619 (1981).

149. See J. ELY, *DEMOCRACY AND DISTRUST* 177 (1980); Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521, 1555-56 (1981).

150. See White, *supra* note 39, at 449. Despite this, offices probably develop a "common law" of when common offenses with recurring fact patterns will be reduced. This "common law" provides little assurance of uniform treatment of defendants because it is unenforceable and usually not very specific.

tain kinds of crimes, and levels of enthusiasm for going to trial. Empirical studies of prosecutors' plea bargaining practices confirm that similar cases are handled in inconsistent ways by individual prosecutors.<sup>151</sup> Typically, the concessions offered by a prosecutor will be affected by a wide variety of factors unrelated to the nature of the offense, the culpability of the offender, or other legitimate law enforcement criteria. From one day to the next, an individual prosecutor's decisions about what concessions to offer may vary. If a prosecutor is busier than usual, he may offer a concession that he would not otherwise make so that his workload is reduced and he may devote his time and energy to other cases.<sup>152</sup> A prosecutor's guilty plea concessions also may be affected by his perception of how the case disposition will affect his career or by his level of enthusiasm to try a particular case. As an assistant prosecutor in Philadelphia commented: "When I get a case that looks interesting and I think I can win it, I don't want to encourage a guilty plea. I joined the district attorney's office so that I could try that kind of case to a jury."<sup>153</sup> Aberrant plea reductions also result from prosecutors' negligence or inexperience.<sup>154</sup>

The personal relationship between the prosecutor and the defense attorney is probably the most important variable in plea bargaining unrelated to the merits of the case.<sup>155</sup> Judge J. Skelley Wright's characterization of the defense attorney as the "equalizer"<sup>156</sup> in the bargaining process is ironic, because the identity of the defense attorney and the nature of his relationship with the prosecutor contribute to substan-

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151. See *id.* at 448; see also, Lagoy, Senna, & Siegal, *An Empirical Study of Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 AM. CRIM. L. REV. 435, 462 (1976) (study of simulated plea bargains); Comment, *Factors Affecting the Plea-Bargaining Process in Erie County: Some Tentative Findings*, 26 BUFFALO L. REV. 693, 702 (1977). In surveys of bargaining practices among New York and Philadelphia prosecutors, defense attorneys reported marked disparities in concessions offered by individual prosecutors. See White, *supra* note 39, at 448. Similarly, a study of plea bargains in the Erie County (New York) District Attorney's office found that the prosecutors studied handled similar cases differently. However, the differences may not be statistically significant given the size of the sample. Comment, *Factors Affecting the Plea-Bargaining Process in Erie County: Some Tentative Findings*, 26 BUFFALO L. REV. 693, 702 (1977). Finally, Professors Lagoy, Senna, and Siegal, after their study of plea bargaining which employed actual prosecutors and defense attorneys, but simulated case histories, concluded:

As a result of this project, the major impression with which one is left is that of prosecutor individuality. This is certainly consistent with traditional prediction of wide prosecutorial discretion. But the degree to which information selection, sorting, and weighing vary even within the same office tends to confirm the worst fears of critics—that equal defendants will receive unequal treatment from prosecutors seated at opposite sides of the same desk.

Lagoy, Senna, & Siegal, *supra*, at 435, 462.

152. See White, *supra* note 39, at 445-46.

153. *Id.* at 446.

154. For example, Richard Kuh, former New York district attorney, reported that an inexperienced assistant district attorney, apparently overcome by the persuasiveness of the defense attorney, reduced an armed robbery charge to a misdemeanor even though the defendant had held a knife to the victim. See Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621, 622 (1976).

155. See generally, Alschuler, *supra* note 71; Kray & Berman, *supra* note 77.

156. See Wright, *The New Role of Defense Counsel Under Escobedo and Miranda*, 52 A.B.A.J. 1117, 1120 (1966).

tial inconsistencies in plea bargaining. Sixty percent of the prosecutors questioned in a Nebraska survey of plea bargaining practices indicated that a defense attorney's style, personality, or past or present relationship with the prosecutor influenced their willingness to grant concessions.<sup>157</sup> Defense attorneys who establish good rapport with a prosecutor will receive greater concessions in some cases; conversely, prosecutors are more reluctant to grant bargaining concessions to defense attorneys whom they find personally distasteful.<sup>158</sup>

Other more invidious forms of discrimination by prosecutors in granting guilty plea concessions undoubtedly occur, but are difficult to verify or quantify. The uncontrolled and unchecked nature of the prosecutor's decision-making process, hidden from public view, makes it a fertile field for corruption, racism, political antagonism, personal hostility, or other invidious factors.<sup>159</sup> Professor Norval Morris, on the

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157. Kray & Berman, *supra* note 77, at 130. More troublesome than idiosyncratic variations in plea bargainings are concession patterns dependent upon whether the defendant is represented by a public defender, a retained private attorney, or an attorney appointed to represent the defendant at public expense. If, for example, it could be shown that indigent defendants represented by public defenders did not receive as favorable concessions as similarly situated defendants who were wealthy enough to retain private attorneys, such a result should be a matter of substantial concern. Existing data comparing plea bargains negotiated by public defenders with those negotiated by private counsel are ambiguous. A survey of participants in the criminal justice system in Buffalo, New York, indicated that clients of private attorneys did receive more favorable plea bargains than defendants represented by the public defender. See Comment, *Factors Affecting the Plea-Bargaining Process in Erie County: Some Tentative Findings*, 26 BUFFALO L. REV. 693, 706 (1977). This study did not take into account in any way that the "class" of defendants represented by the public defender's office might consist of more frequent defendants who might be "presumed" guilty by the prosecutor and thus receive less favorable concessions. *Id.* at 707.

It does not appear realistic to assume from the Buffalo study that defendants represented by the public defender received less favorable concessions because prosecutors perceived public defenders to be less capable trial attorneys or less willing to go to trial than private counsel. Indeed, in the sample surveyed, the public defender took more cases to trial than did private attorneys. *Id.* at 706. Further, in a survey of Nebraska prosecutors, only a minority of the prosecutors surveyed indicated that a defense attorney's trial reputation influenced their bargaining concessions. See Kray & Berman, *supra* note 77, at 130. The relative unimportance of the defense attorney's trial reputation to prosecutors when making bargaining concessions further suggests that plea bargaining is something other than a prediction of trial outcome. See *supra* notes 31-40 and accompanying text. For a description of variations in plea bargaining resulting from representation of defendants by different types of attorneys, see Alschuler, *supra* note 71, at 1206-55.

158. See Alschuler, *supra* note 71, at 1220-25; Comment, *In Search of the Adversary System—The Cooperative Practices of the Private Criminal Defense Attorneys*, 50 TEX. L. REV. 60, 111-12 (1971).

159. In his seminal work, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY*, Professor Davis comments on the exercise of prosecutorial discretion in a similar situation, the prosecutor's charging decision:

Theoretically possible is a system of enforcement in only a fraction of the cases in which enforcement would be appropriate, with discretionary selections made in such a way that all the cases prosecuted are more deserving of prosecution than any of the cases not prosecuted.

The degree of probability of such an achievement is, I think, the same as the degree of probability that all public administrators will act with 100 percent integrity, will never be influenced by political considerations, will never tend to favor their friends, will never take into account their own advantage or disadvantage in exercising discretionary power, will always eschew ethically doubtful positions, will always subordinate their own social values to those adopted by the legislative body, and will make every decision on a strictly rational basis.

basis of a limited sample of defendants in Chicago, concluded that black defendants represented by public defenders fared considerably poorer in plea bargaining than white defendants represented by private counsel.<sup>160</sup> Similarly, Professor John Kaplan admits that the political prominence of defendants sometimes played a role in the exercise of prosecutorial discretion in the U.S. Attorney's Office where he once practiced.<sup>161</sup> Finally, Arizona prosecutor Moise Berger acknowledges that plea bargaining facilitates corruption and even infiltration of prosecutors' offices by organized crime.<sup>162</sup> These anecdotal references to guilty plea concessions affected by invidious factors are probably only the tip of the iceberg. Participants in plea bargaining are understandably disinclined to admit to others that race, politics or personal relationships play a role in the guilty plea process.

Courts are reluctant to restrain the exercise of prosecutorial discretion in plea bargaining. In *Newman v. United States*,<sup>163</sup> for example, the defendant challenged the prosecutor's failure to allow him to enter a plea to a reduced offense on due process and equal protection grounds. A co-defendant had pleaded guilty to a lesser offense and received "relatively minor punishment," while Newman was convicted on the original charge and sentenced to a prison term of two to six years. In rejecting this constitutional challenge to the prosecutor's exercise of discretion, then Circuit Court Judge Burger stated:

Few subjects are less adapted to judicial review than the exercise by the Executive of his discretion in deciding when and whether to institute criminal proceedings, or what precise charge shall be made, or whether to dismiss a proceeding once brought

. . .

To say that the United States Attorney must literally treat every offense and every offender alike is to delegate him an impossible task . . . Myriad factors can enter into the prosecutor's decision . . . No court has any jurisdiction to inquire into or review his decision.<sup>164</sup>

Attempts to upset a defendant's conviction on equal protection grounds because he was not offered the same opportunity to bargain as other defendants have been uniformly unsuccessful.<sup>165</sup> Further, the United

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K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 167 (1969).

160. Morris, *Are Courts Too Soft on Criminals?: Probation and Plea Bargaining in Metropolitan Jurisdictions*, 53 JUDICATURE 231, 233 (1970).

161. Kaplan, *supra* note 59, at 181.

162. Berger, *supra* note 154, at 622.

163. 382 F.2d 479 (D.C. Cir. 1967).

164. *Id.* at 480-82 (D.C. Cir. 1967) (Burger, J., concurring).

165. *E.g.*, *Newman v. United States*, 382 F.2d 479 (D.C. Cir. 1967); *People v. Ruiz*, 78 Ill. App. 3d 326, 396 N.E.2d 1314 (1st Dist. 1979) (neither equal protection nor due process prevented state from prosecuting a juvenile defendant as an adult for murder when co-defendant was permitted to plead guilty as juvenile to involuntary manslaughter); *State v. Jackson*, 50 Ohio St.2d 253, 364 N.E.2d 236 (1977) (state not constitutionally required to accept defendant's plea in exchange for lighter sentence even when state had already plea bargained with co-defendant). How-

States Supreme Court has held that the due process clause does not grant defendants a right to plea bargain.<sup>166</sup>

Procedural safeguards premised upon judicial interpretation of plea bargains as contract-like transactions do nothing to guarantee or even encourage equal treatment for defendants. The defendant will consent to the plea bargain as long as the consequences of being convicted at trial are sufficiently more severe than those following a plea, even if the prosecutor discriminates in making bargaining concessions. The defendant's choice is not between what the prosecutor offers him and what the prosecutor offers similarly situated defendants; rather, the choice is between what the prosecutor offers and the potentially severe consequences after trial. Equal treatment of defendants in the plea bargaining process requires substantive regulation of the concessions offered by the prosecutor.

### C. *Undermining Sentencing Legislation*

#### 1. *The Defense Bias In Plea Bargaining*

Initially, the assertion that there exists a defense bias in plea bar-

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ever, in *In re Rook*, 276 Or. 695, 556 P.2d 1351 (1976), the Oregon Supreme Court upheld a disciplinary reprimand against a prosecutor who had refused to plea bargain with defendants represented by a certain attorney on the same basis as similarly situated defendants represented by other attorneys. *Id.* at 1354, 1356. The court found this practice to be "prejudicial to the administration of criminal justice." *Id.* at 1356. The court's decision was made easier by an unusual Oregon statute which provided, *inter alia*, that "[s]imilarly situated defendants should be afforded equal plea agreement opportunities." OR. REV. STAT. § 135.405(4) (1977).

The court's total refusal to scrutinize the prosecutor's discretionary decisions in plea bargaining on equal protection grounds compares with an only slightly greater willingness to review prosecutors' charging decisions on equal protection grounds. See Gifford, *supra* note 93, at 674-85, 709-16. The charging decision violates a defendant's equal protection rights only when the government has not proceeded against others who are similarly situated and, "the government's discriminatory selection of him for prosecution has been invidious or in bad faith, *i.e.*, based upon such impermissible considerations as race, religion, or the desire to prevent his exercise [of his] constitutional rights." *United States v. Berrios*, 501 F.2d 1207, 1211 (2d Cir. 1974). Even when discrimination meeting one of these criteria is alleged, the courts appear to be reluctant to conclude that the defendant has established the facts necessary for the defense. See Gifford, *supra* note 93, at 662, 678. Finally, courts refuse to consider suits brought by citizens to compel the filing of criminal charges, even when it is alleged that unconstitutional motives influenced the charging decision. See, *e.g.*, *Linda R. S. v. Richard D.*, 410 U.S. 614, 619 (1973); *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 382 (2d Cir. 1973). See also Gifford, *supra* note 93, at 709-16.

166. In *Weatherford v. Bursey*, 429 U.S. 545 (1977), Justice White, speaking for the Court, stated, "but there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." *Id.* at 561.

The defendants in *McMillan v. United States*, 583 F.2d 1061 (8th Cir. 1978) and in *People v. Barnett*, 113 Cal. App. 3d 563, 170 Cal. Rptr. 255 (1980), also both based their challenges to the prosecutor's plea bargaining practices on due process grounds. In *McMillan*, the Court of Appeals found that the defendant's due process rights were not violated when the co-defendant received a better plea bargaining offer than did the defendant. 583 F.2d at 1062-63. In *Barnett*, a California Court of Appeals found no due process violation when the prosecutor's offer to allow the defendant to plead to a lesser offense was conditional upon the acceptance of a similar offer to a co-defendant. 113 Cal. App. 3d at 574; 170 Cal. Rptr. at 261.

gaining seems to contradict the argument that prosecutors possess an "unconscionable" advantage in bargaining power. Ironically, the best evidence of a "tilt" in plea bargaining is precisely what gives prosecutors their bargaining leverage. Defendants who plead guilty suffer significantly less severe consequences than those who are sentenced after conviction.<sup>167</sup> The 1970 report of the Administrative Office of the United States Courts showed that defendants who plead guilty receive an average sentence of either probation or less than one year's imprisonment, while those convicted after trial received a typical sentence of three or four years.<sup>168</sup> Because it is the sentencing differential which induces defendants to plead, plea bargaining results in sentences more lenient than those intended by the legislature.<sup>169</sup>

The necessity of offering defendants less severe sentences in order to maintain a steady flow of guilty pleas only partially explains sentencing differentials between defendants who plead and those who are tried. There is also a defense bias in plea bargaining which results from the nature of the plea bargaining process itself and the respective roles played by the prosecutor and the defense attorney. The defense attorney represents an identifiable person, and his role is to represent his client "zealously within the bounds of the law."<sup>170</sup> This responsibility effectively translates, as it should, into attempting to encourage the prosecutor to allow the defendant to plead to the least onerous crime possible with the lightest sentence. The prosecutor, on the other hand, has a responsibility in plea bargaining to act in the public interest, and this role is often more ambiguous. The prosecutor's goal is not necessarily to gain a plea to the highest possible offense with the longest sentence.<sup>171</sup> Nor does the prosecutor represent one specific individual. Most often, the prosecutor's constituency, unlike the defense attorney's, is unaware of what is transpiring in plea negotiations. The press only infrequently reports the prosecutor's plea bargaining decisions. Victims of crime, who might encourage the prosecutor to be more adversarial in plea bargaining, in a manner analogous to the pressure defendants exert on their attorneys, are frequently not privy to the

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167. See *supra* notes 56-58 and accompanying text.

168. ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT OF THE DIRECTOR 59 (1970). In addition to the sentencing differentials between defendants who plead and defendants convicted at trial on the same charge, defendants receive other benefits in sentencing from their willingness to plead. A survey of forty jurisdictions throughout the United States revealed a number of bargaining trends. See D. JONES, CRIME WITHOUT PUNISHMENT 117-19 (1979). According to the report, defendants charged with a single felony or single misdemeanor will almost invariably have the charge reduced to a lesser included offense which avoids the label of the more onerous original charge. Further, defendants charged with multiple offenses will plead to only one or two offenses.

169. See Kipnis, *supra* note 7, at 104.

170. CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1976).

171. Cf. STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE § 3.9(b) (1980) (prosecutor may "for good cause consistent with the public interest decline to prosecute, notwithstanding that sufficient evidence may exist which would support a conviction").

negotiations.<sup>172</sup>

Further, plea negotiations often become "future-oriented" to the defendant's advantage. The crime is in the past, and the resulting injury to society cannot be prevented. To the extent that defense counsel is able to focus the prosecutor's attention on the defendant and his future, the prosecutor probably will grant additional concessions in bargaining. The prosecutor constantly confronts the impact of imprisonment on the defendant and his family. In contrast, the criminal justice system's goals of retribution and deterrence for other potential offenders often become secondary to the object of making the defendant himself a law-abiding and productive member of society. The interests of victims and the public, except in the highly publicized case, are easily overlooked. When the defense attorney represents a real live human being and has a strictly adversarial responsibility, and the prosecutor represents the highly amorphous concept of "the public interest," the plea process tends to yield favorable results for the more adversarial participant.<sup>173</sup>

In an egregious case, courts may intervene and refuse to accept a plea agreement which the trial court does not believe is in the public interest.<sup>174</sup> The willingness of courts to review the prosecutor's determination that a plea bargain is in the public interest varies from juris-

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172. See DuBow & Becker, *Patterns of Victim Advocacy*, in *CRIMINAL JUSTICE AND THE VICTIM* 147-49 (W. McDonald ed. 1976). See also *infra* notes 199-204 and accompanying text.

173. Dr. Chester Karass' seminal study of negotiating behavior found that negotiators with higher aspiration levels and who otherwise engaged in using adversarial tactics in negotiation typically gained more in negotiations than negotiators with a more "accommodative" approach. C. KARASS, *supra* note 84, at 17-24.

The bias in favor of the "adversarial negotiator" is even more pronounced in plea bargaining. The prosecutor views his role as an administrator of justice and makes bargaining concessions in excess of those warranted by the risk of acquittal. See *supra* note 50 and accompanying text. The defense attorney is placed in a role resembling one who makes arguments to an administrator rather than one who engages in adversarial negotiations.

174. For example, the defendant in *Akron v. Ragsdale*, 61 Ohio App.2d 107, 399 N.E.2d 119 (1978), was originally charged with felonious assault after he had pointed a shotgun at a police officer. 61 Ohio App.2d at 108, 399 N.E.2d at 120. The prosecutor agreed to allow the defendant to plead to disorderly conduct, a minor misdemeanor carrying a maximum penalty of \$100 fine with no imprisonment. The trial court refused to accept the plea agreement, and the appellate court upheld this rejection and stated, "No cogent reason exists why such a serious act should be dealt with so lightly." 61 Ohio App.2d at 110, 399 N.E.2d at 121. See also *United States v. Bean*, 564 F.2d 700 (5th Cir. 1977); *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973); *People v. Ferguson*, 46 Ill. App.3d 632, 361 N.E.2d 33 (1977); *State v. Haner*, 95 Wash. 2d 358, 631 P.2d 381 (1981).

Judicial authority for this substantive regulation of plea bargaining, depending upon the jurisdiction, may be grounded in rule 11 of the Federal Rules of Criminal Procedure or a similar state provision governing the entry of guilty pleas, see, e.g., *United States v. Bean*, 564 F.2d 700 (5th Cir. 1977); *State v. Haner*, 95 Wash.2d 858, 631 P.2d 381 (1981); or in rule 48 or an analogous rule governing the dismissal of charges, see, e.g., *United States v. Ammidown*, 497 F.2d 615 (D.C. Cir. 1973); *Akron v. Ragsdale*, 61 Ohio App.2d 107, 399 N.E.2d 119 (1978); or in a state statute, see, e.g., *State v. LeMatty*, 263 N.W.2d 559, 561-62 (Iowa Ct. App. 1977); or in inherent judicial powers, see, e.g., *People v. Ferguson*, 46 Ill. App.3d 732, 361 N.E.2d 333 (1977); *State v. Stewart*, 197 Neb. 497, 250 N.W.2d 849 (1977).

diction to jurisdiction,<sup>175</sup> and indeed from one trial court to another within a jurisdiction.<sup>176</sup> However, regardless of the articulated standard, courts rarely intervene in plea agreements. Justice Levin (then Judge Levin) of the Michigan Court of Appeals described judicial oversight of plea agreements when he stated, "by and large prosecutors deal and judges accept deals . . . ."<sup>177</sup> Judicial oversight of plea bargains, at least as currently practiced, does not protect the public interest by adequately guarding against excessively lenient bargaining concessions by the prosecutor.

## 2. *The Special Case of Determinate Sentencing*

The consequences of the prosecutor's exercise of discretion in plea bargaining increase enormously when the legislature curtails judicial discretion in sentencing.<sup>178</sup> Under the so-called indeterminate sentencing systems common in the 1960's and 1970's, judges possessed wide latitude in sentencing.<sup>179</sup> Regardless of the charge reductions granted by the prosecutor pursuant to a plea bargain, judges retained discretion to impose sentences from a wide range which reflected their own conclusions as to the severity of offenses, the need for punishment and the likelihood of rehabilitation.<sup>180</sup> When the plea bargains included a sentence recommendation by the prosecutor, judges were free to disregard the recommendation. Although the prosecutor's sentencing recommendations were probably not rejected in many cases, a few judicial vetoes

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175. For example, compare the broad discretion granted trial courts to review prosecutorial concessions in plea bargaining in *People v. Ferguson*, 46 Ill. App.3d 732, 361 N.E.2d 333 (1977) with the much narrower standard of review outlined in *United States v. Ammidown*, 497 F.2d 615, 617-22 (D.C. Cir. 1973). Some courts hold that the trial court may, in its discretion, reject a plea bargain whenever it does not believe the plea bargain serves the public interest. *See, e.g.*, *United States v. Bean*, 564 F.2d 700, 703 (5th Cir. 1977); *Akron v. Ragsdale*, 61 Ohio App.2d 107, 395 N.E.2d 119 (1978); *State v. Haner*, 95 Wash. 2d 858, 631 P.2d 381 (1981). In contrast, other courts have held that the plea bargain entered into by the prosecutor may be rejected by the court only on more narrow grounds. *See, e.g.*, *United States v. Ammidown*, 497 F.2d 615, 622-23 (D.C. Cir. 1973); *State v. Pruett*, 213 Kan. 41, 515 P.2d 1051 (1973). In *Ammidown*, the Court of Appeals for the District of Columbia held that the trial court could reject the prosecutor's decision to allow the defendant to plead guilty to a lesser offense only when the prosecutor has abused his discretion in determining whether a plea bargain is in the public interest or when the plea bargain "in a blatant and extreme case" intrudes on the sentencing functions of the trial judge. 497 F.2d at 622-23.

176. *See People v. Byrd*, 12 Mich. App. 186, 196, 162 N.W.2d 777, 781 (1968) (Levin, J., concurring).

177. *Id.*

178. *See* Alschuler, *Sentencing Reform and Prosecutorial Power: A Critique of Recent Proposals For 'Fixed' and 'Presumptive' Sentencing*, 126 U. PA. L. REV. 550, 550-51, 568-74 (1978); Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems For the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROBS. 495, 505-07 (1958); Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733, 742-43 (1980).

179. *See, e.g.*, Ill. Unified Code of Corrections, ILL. REV. STAT. ch. 38, § 1005-8-1 (1981); OHIO REV. CODE ANN. §§ 2929.11, 5145.01 (Page 1982). *See generally* ABA COMMISSION ON CORRECTIONAL FACILITIES AND SERVICES, SENTENCING COMPUTATION LAWS AND PRACTICE: A PRELIMINARY SURVEY (1974).

180. Schulhofer, *supra* note 178, at 745.



were probably sufficient to establish the court's view of appropriate sentencing ranges and to bring the prosecutor's recommendations into accord.<sup>181</sup>

During the past decade, cynicism about the rehabilitative model of sentencing led many states to reduce sharply judicial discretion in punishment and to adopt "determinate" sentencing structures which provide that judges sentence offenders within a narrow range established by the legislature.<sup>182</sup> For example, the California statute establishes a "presumptive" sentence for each class of crimes;<sup>183</sup> the trial court sentences an offender to the presumptive sentence unless it finds aggravating or mitigating circumstances.<sup>184</sup> In these cases, a longer or shorter sentence may be imposed.<sup>185</sup>

The net result of a determinate sentencing structure is to transfer the discretion over the sentence once held by the sentencing judge and the parole board to the prosecutor. The defendant's sentence is now effectively determined by the prosecutor's bargaining concessions. Both the prosecutor's leverage over defendants and his impact on the administration of criminal justice increase enormously. The prosecutor's increased coercive power over the defendant is illustrated by the situation in *Bordenkircher v. Hayes*.<sup>186</sup> Hayes, the defendant, was originally charged with uttering a forged instrument in the amount of \$88.30, an offense punishable by a term of two to ten years in prison.<sup>187</sup> During plea negotiations, the prosecutor threatened to re-indict Hayes under the Kentucky Habitual Criminal Act which, because of the defendant's prior convictions, carried a mandatory life sentence without the possibility of parole. Hayes rejected the offer and proceeded to trial. His conviction, with a sentence of life imprisonment, was subsequently affirmed by the United States Supreme Court.<sup>188</sup>

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181. *Id.* The impact of the prosecutor's plea bargaining concessions was vitiated even further by parole boards which frequently ignored the charge to which the defendant pleaded and instead considered the "real offense" committed by the defendant. See generally Alschuler, *supra* note 178, at 566-67; Schulhofer, *supra* note 178, at 745-47.

182. See, e.g., CAL. PENAL CODE §§ 1170, 3000, 3040 (West Supp. 1981); IND. CODE ANN. §§ 35-50-1-1 to 35-50-6-6 (Burns Supp. 1979); Extended Term, ILL. REV. STAT. ch. 38, § 1005-8-2 (1981). See R. SINGER, JUST DESERT: SENTENCING BASED ON EQUALITY AND TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT (1976) for discussion of the reasons for adoption of determinate sentencing structure and for specific proposals.

183. CAL. PENAL CODE § 1170 (West Supp. 1982).

184. For example, sentences are automatically lengthened if the offense involved use of a firearm, see CAL. PENAL CODE §§ 12022, 12022.5 (West 1982) or great pecuniary loss, *id.* at § 12022.6, if the offender has a prior record, *id.* at § 1170.1, or if there were multiple offenses, *id.* at § 1170.1.

185. The California statute also removes from the parole authority most of the discretion as to when an offender should be released from incarceration. *Id.* at §§ 3000, 5077 (West 1982).

186. 434 U.S. 357 (1978).

187. *Id.* at 358-59.

188. The Supreme Court acknowledged that plea bargaining had become an essential component of the criminal justice system and displayed a reticence to oversee the prosecutor's exercise of discretion on constitutional grounds. The Court held that the prosecutor had not violated the

The combination of a determination sentencing structure and unregulated plea bargaining makes it more likely that a defendant will be psychologically coerced into an inaccurate or involuntary plea.<sup>189</sup> The prosecutor possesses greater leverage than under an indeterminate sentencing structure; if the prosecutor pursues all applicable charges and obtains convictions, the court must sentence the defendant to a lengthy term of incarceration. Restricted by a narrow sentencing range, the sentencing judge is less able to correct a prosecutorial abuse of discretion.

Unregulated plea bargaining also undermines the intent of determinate sentencing statutes. The legislative purpose is to reduce sharply the discretion of criminal justice officials in dealing with offenders who commit similar crimes. Instead, much of the discretion formerly possessed by judges and parole boards is, in effect, transferred to prosecutors in the charging and plea bargaining decisions.<sup>190</sup> Attainment of the goals of proportionality between the sentences for various offenses, and equality of treatment for similar offenses, depends upon the unlikely assumption that sentences determined by the prosecutor's *ad hoc* bargaining concessions will be consistent and rational.

#### D. *Avoiding the Inherent Values of the Trial Process*

##### 1. *The Public's Interest in the Trial Process*

Plea bargaining circumvents the trial process. The trial process itself has value to the community aside from determining which members of society should be labelled as criminals and punished. Trial and conviction, as well as the subsequent punishment, help to restore the sense of equilibrium to the community defaced by the criminal act, to reaffirm the temporarily lost feeling of security and perhaps to satisfy the latent public desires to condemn and to punish.<sup>191</sup> Through criminal prosecution, the state redirects the victim's and the public's aggressive feelings toward the defendant.<sup>192</sup> The trial becomes a battle between protagonist and antagonist competing with differing versions

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defendant's due process rights when the prosecutor carried out a threat made during plea negotiations to have the accused reindicted on more serious charges if he did not plead guilty to the offense originally charged. 434 U.S. at 365.

Similarly, the California sentencing statutes reveal the extent of the prosecutor's control over sentencing in a determinate sentencing structure. *See* CAL. PENAL CODE § 1170-70.7 (West Supp. 1982). Initially, the prosecutor determines the narrow range of punishments available when he decides with which crimes to charge the defendant and whether he will accept a plea to a lesser charge calling for a lower presumptive sentence. The prosecutor can further elect whether to charge sentence enhancing factors such as the use of a firearm.

189. *See supra* notes 97-103 and accompanying text.

190. *See* Alschuler, *supra* note 178, at 571.

191. *See* Mueller, *Problems Posed By Publicity to Crime and Criminal Proceedings*, 110 U. PA. L. REV. 1, 6 (1961).

192. *See* Ball, *The Play's the Thing: An Unscientific Reflection on Courts Under the Rubric of Theater*, 28 STAN. L. REV. 81, 107-09 (1975); DuBow & Becker, *Patterns of Victim Advocacy*, in CRIMINAL JUSTICE AND THE VICTIM 147-49 (W. McDonald ed., 1976).

of what has transpired and what the consequences should be;<sup>193</sup> the defendant's acts are judged in public and may be condemned.<sup>194</sup>

The visibility of the trial process increases public confidence in the criminal justice system. Trial by jury also allows for direct public input into the trial by citizen participation, which traditionally has been viewed as a check on potential government oppression or misconduct.<sup>195</sup> No corresponding citizen participation or oversight occurs in plea bargaining; instead, issues of guilt are resolved by professional participants in the criminal justice system.<sup>196</sup> Finally, the trial process serves as a lesson for the public in legal procedure, and as a model of dignity, fairness and justice.<sup>197</sup> In the courtroom, even the defendant accused of the most heinous crime is given the benefit of important constitutional rights and is treated with dignity.<sup>198</sup> The trial ideally serves as an example for public officers in how to treat citizens.<sup>199</sup>

Plea bargaining sacrifices all of these public benefits of the trial process. The hidden nature of plea bargaining eliminates any public lessons regarding either conduct that is to be condemned or the way that citizens are to be treated. The *sub rosa* nature of plea bargaining and the lack of citizen participation reduce public confidence that justice has been done. These intangible costs of current plea bargaining practices too often are overlooked when the costs and benefits of plea bargaining are considered.

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193. See Ball, *supra* note 192, at 88-89. See also Arnold, *The Criminal Trial as a Symbol of Public Morality*, in Y. KAMISAR, F. INBAU, & T. ARNOLD, *CRIMINAL JUSTICE IN OUR TIME* 137, 143-44 (1965). According to Arnold, "[t]rials are like the miracle or morality plays of ancient times. They dramatically present the conflicting moral values of a community in a way that could not be done by logical formulation." *Id.* at 143.

194. Professor Mueller describes the importance historically attached to the public nature of the trial: "In early Frontier America . . . trial day in the country was like fair day, and from near and far citizens young and old converged on the county seat. . . . It was felt to be the business of everyone in the country to be present when in their name justice was dispensed." Mueller, *supra* note 191, at 6.

195. See, e.g., *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *McKeiver v. Pennsylvania*, 403 U.S. 528, 554-56 (1971) (Brennan, J., concurring in part, dissenting in part).

196. Professor Langbein illustrates public dissatisfaction with plea bargaining in the case of James Earl Ray and its failure to establish the facts of the case and the guilt of the defendant. See Langbein, *supra* note 58, at 17. Langbein notes that public concern of this sort motivated the government in the plea bargained case of Vice President Agnew to take extraordinary steps to ensure the full disclosure of the government's evidence against Agnew. *Id.* at 17, 36.

197. See Griffiths, *Ideology in Criminal Procedure or a Third "Model" of the Criminal Process*, 79 *YALE L.J.* 359, 398 (1970).

198. See Ball, *supra* note 192, at 109-13.

199. Professor Ball notes that the Supreme Court adopted this analogy in *Ashcraft v. Tennessee*, 322 U.S. 143 (1944). See Ball, *supra* note 192, at 110. The Supreme Court compared the treatment of suspects by police officials with the treatment of defendants in the courtroom:

It is inconceivable that any court of justice in the land, conducted as our courts are, open to the public, would permit prosecutors serving in relays to keep a defendant witness under continuous cross-examination for thirty-six hours without rest or sleep in an effort to extract a "voluntary" confession. Nor can we, consistently with Constitutional due process of law, hold voluntary a confession where prosecutors do the same thing away from the restraining influences of a public trial in an open court room.

322 U.S. at 154 (footnote omitted).

## 2. *The Victim's Interest in the Trial Process*

The general public's interest in seeing that just results are achieved at trial, and that the guilty are convicted and sentenced, is magnified in the victim. The trial provides an outlet for the victim's feelings of retribution and his psychological need to personally assist in the societal condemnation of the defendant's actions.<sup>200</sup> Originally, prosecution by the state evolved when the government assumed responsibility for the enforcement and prosecution of wrongs which were formerly regarded as disputes between private parties.<sup>201</sup> When this occurred the victim lost control over the proceedings against the criminal, and his ability to receive restitution from the defendant diminished.

In most criminal trials the victim participates as a witness. In contrast, victims are usually not involved in plea bargaining,<sup>202</sup> and prosecutors often make guilty plea concessions without regard to the preferences or needs of the victim.<sup>203</sup> Any influence the victim may have on the prosecutor's decisions in plea bargaining is strictly informal and varies greatly from one jurisdiction to another.<sup>204</sup>

The plea bargaining process is a frustrating one for victims.<sup>205</sup> They observe defendants pleading to offenses carrying labels which do

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200. See Ball, *supra* note 192, at 107-09.

201. DuBow & Becker, *supra* note 192, at 148-49. Initially, the role of the public prosecutor developed at common law to supplement prosecutions initiated and conducted by private citizens. See Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443-46 (1974). The decision to prosecute remained in the hands of the victim or other complaining witnesses. In 1704, Connecticut passed the first statute designating the duties of the prosecutor. See Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 476 (1976). Gradually the public prosecutor acquired a monopoly over the initiation and conduct of prosecutions. By transforming the prosecutor into an elected official, American populism buttressed the prosecutor's discretionary authority. Langbein, *supra*, at 445. As an elected official, the prosecutor acquired the authority to conduct the affairs of the office in a manner designed to win electoral approval.

202. See DuBow & Becker, *supra* note 192, at 150. But see Hall, *The Role of the Victim in the Prosecution and Disposition of a Criminal Case*, 28 VAND. L. REV. 931, 953-56 (1975). Professor Hall's survey of victim participation in the criminal justice system in Davidson County (Nashville), Tennessee, revealed a much higher degree of victim participation in the plea bargaining process than reported elsewhere. Prosecutors and judges surveyed indicated that prosecutors encourage the direct and personal involvement of victims in plea bargaining. The prosecutor explains to the victim his or her position as to whether the tendered plea is desirable. If the prosecutor fails to convince the victim, the victim's opposition to the proposed plea bargaining may influence the prosecutor to reject the offer, at least in serious felony cases.

203. See Heinz & Kerstetter, *Victim Participation in Plea-Bargaining: A Field Experiment in PLEA BARGAINING* 167 (W. McDonald & J. Cramer eds. 1980).

204. Victims have more leverage to encourage the prosecutor to reduce or dismiss charges, by expressing reluctance about testifying, than they do in encouraging vigorous prosecution. See F. MILLER, *supra* note 64, at 104-05. In his study for the American Bar Foundation, Professor Miller found the complainant-victim's reluctance to testify to be one of the two major causes of dismissals at the preliminary examination stage. *Id.* at 105. Professor Newman also found that prosecutors made major concessions in plea bargaining when the victim was reluctant to testify. D. NEWMAN, *supra* note 1, at 68-70. Victims were most reluctant to testify in cases involving assault, organized crime, certain sex offenses, accosting or soliciting, and larceny involving "respectable" victims fleeced by prostitutes or procurers. *Id.*

205. DuBow & Becker, *supra* note 192, at 150.

not reflect the seriousness of a crime, or pleading to one offense when the defendant has committed a series of crimes. They watch as defendants receive lenient sentences in exchange for their guilty pleas to crimes which do not reflect the seriousness of the defendant's transgressions. All of this is accomplished outside the public view and without explanation by the prosecutor. They speculate that it was because the defendant hired a "good" attorney or one who was friendly with the prosecutor. To add insult to injury, victims may be deprived of their opportunity to have the cathartic experience of testifying against the defendant or otherwise participating in the societal process of condemning the defendant's criminal acts.

### 3. *The Defendant's Perception of Plea Bargaining*

Defendants also dislike the plea bargaining process despite the comparatively more lenient sentences which they receive.<sup>206</sup> According to interviews conducted by Professor Casper, defendants perceive plea bargaining as a "game" where the most important factors are money and luck.<sup>207</sup> Defendants who were surveyed claimed that they were aware of pay-offs in plea bargaining, and the defendants assumed that all prosecutors had a price. More sophisticated defendants noted that defendants with financial resources could hire a good attorney, and because these more affluent defendants were free on bail they could wait for more bargaining concessions from the prosecutor. The defendants surveyed pointed to a variety of ways that the results of plea bargaining depended upon factors unrelated to their culpability, including how crowded the courts were, whether individual prosecutors were concerned about a particular kind of crime, and the vagaries of fate, such as whether the prosecutor had misspelled a defendant's name and therefore was unable to obtain a defendant's arrest records. Professor Blumberg found that a majority of the defendants continued to assert their innocence after entering guilty pleas. These defendants attributed their pleas to being "conned" by their lawyers, judges, or police, or being "framed."<sup>208</sup> The rituals enacted by trial courts when they accept guilty pleas exacerbate the cynicism of defendants towards plea bargaining.<sup>209</sup> Defendants' cynical attitudes about plea bargaining sometimes nullify whatever rehabilitative or deterrent impact their admissions of guilt might otherwise have.

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206. See generally, A. BLUMBERG, *supra* note 20, at 88-94; J. CASPER, *supra* note 141, at 77-92.

207. J. CASPER, *supra* note 141, at 77-92.

208. See A. BLUMBERG, *supra* note 20, at 90-92.

209. See *id.* at 89; J. CASPER, *supra* note 141, at 81-86. See also *supra* notes 114-15 and accompanying text.

#### IV. AN ADMINISTRATIVE MODEL FOR REGULATING PROSECUTORIAL DISCRETION IN PLEA BARGAINING

Procedural safeguards for defendants, premised upon viewing plea bargains as contracts, are inadequate to protect either the interests of defendants or the interests of the public.<sup>210</sup> Effective reform of plea bargaining must proceed from a recognition that the prosecutor's plea bargaining decisions are the actions of an administrator. This section outlines a radical new proposal for applying to prosecutors the same kind of controls and procedural requirements typically imposed upon other administrators.<sup>211</sup>

The proposal combines increased judicial review of the prosecutor's decisions<sup>212</sup> with other administrative law techniques, such as the adoption of written guidelines<sup>213</sup> and a requirement that the prosecutor justify his guilty plea concessions with statements of reasons.<sup>214</sup> Part A<sup>215</sup> proposes strengthening the preliminary hearing, so that the strength of the government's case is tested before plea bargaining and the impact of overcharging on plea bargaining is eliminated. Part B<sup>216</sup> then outlines a system for regulating the concessions that the prosecutor can offer a defendant to encourage his guilty plea. Beginning with a

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210. Many commentators, reacting to the problems associated with plea bargaining, have urged its abolition. *See, e.g.*, Alschuler, *supra* note 71, at 1313-14; Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970). A few prosecutor's offices have attempted to ban plea bargaining, either in all cases or in the handling of certain crimes. *See generally* M. RUBINSTEIN, S. CLARKE & T. WHITE, ALASKA BANS PLEA BARGAINING (1980) (all crimes); Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC'Y REV. 393 (1979) (firearm offenses).

These attempted bans on plea bargaining have not accomplished their purposes. Instead, prosecutors, defense attorneys, and judges have used a variety of legal maneuvers to circumvent the bans on plea bargaining. *See generally* M. RUBINSTEIN, S. CLARKE, & T. WHITE, *supra*, at 17-28, 237-38 (1980); Church, *Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC'Y REV. 377, 384-400 (1976); Heumann & Loftin, *supra*, at 416-24; Mathey, *Some Determinants of the Methods of Case Disposition: Decision-Making by Public Defenders in Los Angeles*, 8 LAW & SOC'Y REV. 187, 190 (1973). These failures suggest that plea bargaining prohibitions are doomed because the interests of participants in the criminal justice system are served by plea bargaining as a quick, efficient alternative to trial. *See, e.g.*, A. ROSSETT & D. CRESSEY, *supra* note 71, at 165-67; Alschuler, *supra* note 10, at 717.

211. The application of an administrative law model to the prosecutor's decisions is a central theme of the work of Professor Kenneth Culp Davis who argued "that both police and prosecutors, federal as well as state and local, should be governed by many principles that have been created by and for our best administrative agencies." K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 222 (1969). *See also id.* at 188-214; K. DAVIS, ADMINISTRATIVE LAW TREATISE 216-82 (2d ed. 1979). Professor Davis' work covered the control of prosecutorial discretion generally, but concentrated on discretion in the charging decision. *See, e.g., id.* at 216-27. Although Davis discussed discretion in plea bargaining as an example of prosecutorial discretion generally, *id.* at 240-41, he apparently never addressed either the interplay of administrative and contract principles in plea bargaining or how administrative law principles should be specifically applied to the prosecutor's plea bargaining decisions.

212. *See infra* notes 218-27 and 264-96 and accompanying text.

213. *See infra* notes 228-53 and accompanying text.

214. *See infra* notes 254-63 and accompanying text.

215. *See infra* notes 218-27 and accompanying text.

216. *See infra* notes 228-63 and accompanying text.

presumptive sentence for each offense, the prosecutor determines a defendant's sentence recommendation by adjusting the presumptive sentence to take into account four factors designated in written guidelines. These factors are: whether the defendant pleaded guilty, the circumstances of the offense and the characteristics of the offender, the probability of acquittal on the charges, and the defendant's cooperation with law enforcement authorities. The prosecutor would be required to give a reasoned explanation in open court of how the guidelines were applied to determine the defendant's sentence recommendation. Finally, Part C<sup>217</sup> suggests that the prosecutor's guilty plea concessions be subject to judicial review, and indicates how victims of crimes can be given an opportunity for input into the review process.

#### A. *Early Judicial Review of the Government's Case*

Effective regulation of plea bargaining must include an early judicial review of the strength of the government's case against the defendant. The prosecutor can control plea bargaining, whether regulated or unregulated, if he is allowed to overcharge. By "stacking" multiple charges or charging more serious offenses than those warranted by the evidence, he induces the defendant to plead and thus the prosecutor can dictate the terms of the "bargain."<sup>218</sup> For most defendants whose cases are resolved through pleas, the preliminary hearing will be their only encounter with the adversarial system and the only opportunity for a neutral fact-finder to evaluate the strength of the evidence against them;<sup>219</sup> yet preliminary hearings do not screen out cases where there is not sufficient evidence of guilt.<sup>220</sup> Because of this inadequacy and the impact of the original charges on the subsequent plea bargaining, Professor Aranella has argued convincingly that "we can no longer pretend that the pretrial process does not adjudicate the defendant's guilt."<sup>221</sup>

The written guidelines governing the bargaining concessions which prosecutors can grant, suggested in Part B, cannot work unless there are controls on the original charging decision. The bargaining concessions allowed under the guidelines are measured from the original charges. If the original charges are not required to be provable offenses, then the prosecutor can manipulate at will the application of the guidelines through overcharging and defeat the purposes of regulation. By preventing overcharging, an early judicial review of the government's case will also reduce the prosecutor's overwhelming leverage in bargaining and allow the defendant to more adequately protect his own interests.<sup>222</sup>

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217. See *infra* notes 264-96 and accompanying text.

218. See *supra* notes 59-70 and accompanying text.

219. See Aranella, *supra* note 59, at 468-69.

220. See *supra* notes 64-67 and accompanying text.

221. See Aranella, *supra* note 59, at 469.

222. The combination of early judicial review of the government's case and restrictions on the

Professor Aranella has proposed a series of reforms to the preliminary hearing which would prevent prosecutors from using overcharging to dictate the terms of plea bargains.<sup>223</sup> Aranella advocates replacing the current minimal standard of guilt at the preliminary hearing, "probable cause," with a more demanding level of review designated "reasonable cause" which he defines as "sufficient evidence to support a guilty verdict and find it credible."<sup>224</sup> Aranella also urges the adoption of more stringent evidentiary requirements for preliminary hearings.<sup>225</sup> Those jurisdictions, such as the federal system, which presently rely on grand juries to screen prosecutions rather than on preliminary hearings could, according to Aranella, either switch to a system using preliminary hearings<sup>226</sup> or substantially reform grand jury

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guilty plea concessions which the prosecutor offers the defendant therefore serves two roles. First, they are portions of an administrative model for regulating guilty plea concessions. Second, the combination of review and restrictions increases the defendant's ability meaningfully to decide whether to accept or reject the prosecutor's guilty plea concessions so that plea bargaining more realistically resembles contract formation. This attempt to combine administrative regulation of prosecutorial discretion in plea bargaining with an effort to make the contract process a truly consensual one for the defendant is not unique. Government response to business enterprises often includes substantive regulation of price and services, along with antitrust enforcement which has as one of its goals the preservation of the competitive marketplace and avoidance of disparities of bargaining power. *See generally* 1 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶¶ 107, 222-24 (1978). Examples of industries in which comprehensive regulation of prices or services exists alongside antitrust regulation include the electric industry, *see* *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), banking, *see* *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 352 (1963), and broadcasting, *see* *United States v. RCA*, 358 U.S. 334, 348-51 (1959). The analogy between reducing the prosecutor's bargaining leverage in plea bargaining and antitrust regulation is not a perfect one, but both efforts seek to prevent the prosecutor or seller from having an unconscionable advantage in the marketplace.

The other requirement for enabling the defendant to more adequately protect his interests in plea bargaining is more vigorous oversight of the quality of representation offered by defense attorneys in plea bargaining. *See generally* D. NEWMAN, *supra* note 1, at 197-230; Fines, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077, 1081 (1973); Comment, *Effective Assistance of Counsel in Plea Bargaining: What is the Standard?*, 12 DUQ. L. REV. 321 (1973); Note, *Criminal Procedure—Effective Assistance of Counsel—Appointed Counsel Must Actually and Substantially Assist His Client in Determining Whether or Not to Plead Guilty*, 51 J. URB. L. 564 (1976); *see also* Annot., 10 A.L.R. 4th 8 (1981); Annot., 8 A.L.R. 4th 660 (1981); Annot., 26 A.L.R. FED. 218, 265 (1976).

223. *See* Aranella, *supra* note 59, at 530-32.

224. *Id.* at 530 n.342. *See also* MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE § 330.6(3) (1978). In determining reasonable cause, the magistrate or court would not, as is the current practice in most jurisdictions, view the evidence in the light most favorable to the government.

225. Aranella suggests the following changes in preliminary hearing procedures in order to make the preliminary hearing an effective mechanism for screening weak cases:

- (1) Apply the rules of evidence, with certain limited exceptions, to the hearing;
- (2) Permit the defense to raise suppression motions before or during the hearing so the magistrate's screening decision is not influenced by illegally seized evidence;
- (3) Require the prosecutor to present credible evidence on every element of the crime (the reasonable-cause standard);
- (4) Permit defendants to cross-examine the government's witnesses, subpoena witnesses, and present testimony in their own behalf, including evidence of an affirmative defense;
- (5) Permit dismissal of the charges if the magistrate disbelieves the prosecution's essential witnesses.

Aranella, *supra* note 59, at 531-32.

226. In the federal system, grand juries cannot be eliminated without amending the United States Constitution to do away with the fifth amendment's requirement of indictment by a grand



procedures to allow that process to effectively screen out weak cases.<sup>227</sup>

A strengthened preliminary hearing means that guilty plea concessions will begin with a provable offense as a starting point, instead of with charges determined solely by the prosecutor without effective judicial screening. This starting point will in most cases reflect the strength of the government's case and the level of the defendant's culpability. The defendant's eventual sentence, after being adjusted for the variables in Part B, will be based initially upon an early judicial evaluation of the probability of the defendant's guilt and not merely upon the prosecutor's independent charging decision supported only by the minimal standard of probable cause.

### *B. Regulation of Guilty Plea Concessions*

#### *1. Adoption of Written Guidelines: A Presumptive Sentence and Four Variables*

To guide the exercise of discretion, prosecutors' offices should adopt written guidelines to govern the granting of concessions as part of the plea process.<sup>228</sup> When dealing with agencies other than the pros-

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jury for all "infamous crimes." To impose an additional requirement of a preliminary hearing would add yet another costly step in the already protracted federal criminal litigation process. *See id.* at 535-39.

227. Aranella proposes changing both the evidentiary requirements for grand jury proceedings and the standard by which the grand jury evaluates the prosecutor's evidence. *See id.* at 558-60. The prosecutor would not be allowed to present hearsay evidence, absent special circumstances, or evidence obtained in violation of the defendant's constitutional rights. Conversely, the prosecutor should be compelled to present any evidence he is aware of that negates elements of the crime, undermines the credibility of one of the government's critical trial witnesses, or suggests a viable affirmative defense.

Aranella would require clear and convincing evidence of the defendant's guilt in order to return an indictment. The grand jury would be required to find sufficient legally admissible evidence both to get the case past a directed verdict and to justify a conviction.

Finally, the prosecutor and grand jury's roles would be policed by permitting limited judicial review of the grand jury's indictment. The defendant could file a motion to dismiss an indictment that was not supported by legally sufficient evidence. Such review would be accomplished by inspection of the grand jury transcript to assess whether the prosecutor had presented sufficient legally admissible evidence to get the case past a directed verdict.

228. Several prosecutors' offices have adopted guidelines governing plea bargaining as well as other aspects of prosecutorial discretion, but in most cases the guidelines are so general as to be meaningless. *See* UNITED STATES DEP'T OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION (July 1980), in 27 CRIM. L. REP. (BNA) 3277-92 (1980); J. Holmes, Jr., *The Prosecutor, The Decision Making Process, and Supervisory Controls* (Harris County, Tex. 1980)) (available from author); Washington Association of Prosecuting Attorneys, *Charges and Disposition Policies* (1980) (available from author). A notable exception is the specific and realistic guidelines adopted by Richard Kuh, former Manhattan District Attorney. *See* Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975); *Sentencing: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1975).

A number of commentators have suggested that prosecutors adopt written guidelines governing the exercise of prosecutorial discretion. *See, e.g.*, K. DAVIS, 2 ADMINISTRATIVE LAW TREATISE, 256-63 (2d ed. 1978); Bubany & Skillern, *Taming the Dragon: An Administrative Law for Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 473, 496-99 (1969); Schulhoffer, *supra* note 178, at 755-57; Vorenberg, *supra* note 149, at 1562-65.

The Washington Supreme Court recently suggested that adoption of guidelines which mandate that the prosecutor exercise his discretion in a certain way under a specified set of circum-

ecutor, the Supreme Court has acknowledged the value of adopting guidelines to ensure uniformity of official conduct and to prevent arbitrary deviation from accepted practice.<sup>229</sup> Indeed, some courts have held that the due process clause requires administrative agencies to adopt written guidelines.<sup>230</sup> The adoption of rules and guidelines by administrators minimizes the influence of non-objective or illegitimate factors, informs the public of the policies of the administrator, and aids judicial review.<sup>231</sup>

Under this proposal for regulating prosecutorial discretion, guidelines would specify how the prosecutor is to determine a sentence recommendation for each crime. So long as the prosecutor properly applies the guidelines, the sentencing judge would follow the prosecutor's recommendation in sentencing.<sup>232</sup> Prosecutors would be prohib-

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stances constitutes an illegal abuse of discretion on the prosecutor's part. *See* *State v. Pettitt*, 93 Wash. 2d 288, 296-97, 609 P.2d 1364, 1368 (1980). *Pettitt* involved guidelines governing the exercise of prosecutorial discretion in the charging decision. The defendant was charged with being an habitual criminal, and the prosecutor had a mandatory policy of filing habitual criminal complaints against all defendants with three or more prior felonies. *Id.*, at 290, 609 P.2d at 1365. The defendant argued that such a policy constituted an abuse of discretion because the prosecutor was precluded from considering mitigating factors which were not listed in the guidelines, and because the policy did not afford minimum procedural due process to the defendant. *Id.* at 294, 609 P.2d at 1367. The court agreed that the prosecutor's policy of considering the guidelines mandatory constituted an abuse of discretion. *Id.* at 296-97, 609 P.2d at 1368. *Pettitt* appears unique in holding that guidelines restraining the exercise of prosecutorial discretion constitute an abuse of prosecutorial discretion, and might cynically be explained by the Washington Supreme Court majority's distaste for the habitual criminal statute in question. *See* *State v. Pettitt*, 93 Wash. 2d 288, 301, 609 P.2d 1364, 1370 (1980) (Rosellini, J., dissenting). In any event, the *Pettitt* holding would not apply to the kinds of sentencing guidelines described in this article, both because this proposal is open-ended enough to allow the prosecutor to consider factors other than ones listed and because the guidelines do not mandate a specific result in any instance.

229. *See, e.g.*, *Morton v. Ruiz*, 415 U.S. 199, 236 (1974).

230. *See, e.g.*, *Franklin v. Shields*, 569 F.2d 784, 792-93 (4th Cir. 1977), *cert. denied*, 435 U.S. 1003 (1978) (parole board); *White v. Roughton*, 530 F.2d 750, 753-54 (7th Cir. 1976) (administrative agency); *Holmes v. New York City Hous. Auth.*, 398 F.2d 262, 265 (2d Cir. 1968); *Baker-Chaput v. Cammett*, 406 F. Supp. 1134, 1140 (D.N.H. 1976).

231. *See infra* notes 264-95 and accompanying text.

232. In effect, this proposal provides that the prosecutor is making the actual sentencing decision, and the court is only reviewing the recommendation to ensure that the prosecutor has not abused his discretion. *See infra* notes 264-78 and accompanying text. In reality, this conforms with existing practice in many jurisdictions. *See* Comment, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 297 (1972). However, a substantial argument can be made that judges are better suited by experience and temperament to perform the sentencing function than are prosecutors, and therefore judges ought to be given more control over sentences resulting from plea bargains, not less. *See generally* Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1122-54 (1976); Pugh & Rademaker, *A Plea for Greater Judicial Control Over Sentencing and Abolition of the Present Plea Bargaining System*, 42 LA. L. REV. 79, 118-21 (1981); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 587-91 (1977); Comment, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 299-312 (1972).

More important than determining who should perform the sentencing function is the recognition that the discretion exercised by both prosecutors and judges must be controlled simultaneously. Discretion in the sentencing process is hydraulic in nature; if the prosecutor's discretion in plea bargaining is eliminated, judges will grant sentencing discounts to defendants who plead guilty. *See* Church, *Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC'Y. REV. 377, 384-87 (1976); Heumann & Loftin, *Mandatory Sentencing and the Abolition of Plea Bargaining: The Michigan Felony Firearm Statute*, 13 LAW & SOC'Y REV. 393, 416-17

ited from using dismissals or reductions of charges as bargaining concessions; such concessions would be permitted only when the prosecutor could not prove the original charges.<sup>233</sup> Sentencing concessions

(1979); Mather, *supra* note 37, at 190. Conversely, attempts to limit excessive sentencing discretion by judges may be undermined by prosecutors' discretion in plea bargaining. *See generally* Alschuler, *supra* note 178, at 550. In short, discretion at either end of the criminal process cannot be controlled while ignoring discretion at the other end.

The regulation of guilty plea concessions must vary greatly from one jurisdiction to another depending upon the jurisdiction's sentencing structure and practices. If the prosecutor's bargaining concessions are regulated, but the judge retains discretion in sentencing, then the sentencing judge can either nullify the effect of the prosecutor's charging concessions or consider the same factors as the prosecutor a second time, thus enlarging the sentence discount beyond that provided for in the regulations. Equal treatment of defendants and rational sentencing patterns, which plea bargaining regulations are designed to achieve, would be obliterated. In addition, judges with a high degree of discretion in sentencing could implicitly grant substantial sentencing discounts to defendants who plead and restore the unconscionable sentencing differentials which exist. The proposal in the text assumes one set of circumstances; jurisdictions where the judges routinely follow the prosecutor's sentencing recommendations. If a jurisdiction is not willing to grant the prosecutor primary responsibility in sentencing and to bind the judge to follow the prosecutor's sentence recommendations except where the prosecutor has abused his discretion, then one of three other variations of regulation for guilty plea concessions will be required to accommodate local sentencing practices:

- (1) *Jurisdictions where judges have wide discretion in sentencing and do not routinely follow the prosecutor's sentencing recommendations.*

Sentencing judges would be subject to guidelines similar to those outlined in the text. The guidelines would establish presumptive sentences, allow a 15 or 20% discount for guilty plea defendants, and provide adjustments for offender and offense factors, evidentiary variables and the defendant's cooperation with law enforcement authorities. *See infra* notes 234-53 and accompanying text. Bargaining concessions by the prosecutor would be prohibited.

This proposal is closest to that proposed in Schulhoffer, *supra* note 178, at 823-27. Professor Schulhoffer proposes "Sentencing Guidelines" to be used by the judge, which essentially constitute a presumptive sentencing structure, together with a discount for pleading guilty. *Id.* at 826-27. Under Schulhoffer's proposal, the prosecutor may reduce or dismiss charges when the government will have difficulties proving its case or when the defendant cooperates with law enforcement authorities, but such reductions must be approved by the trial court. *Id.* at 823-24.

- (2) *Jurisdictions with presumptive sentencing structures.*

In presumptive sentencing jurisdictions, sentencing judges make the same adjustments for the circumstances of the offense and characteristics of the offender that the prosecutor often makes in plea bargaining. *See supra* notes 182-85 and accompanying text. To avoid duplication, the prosecutor should be prohibited from making charge reductions or otherwise granting concessions to defendants on the basis of factors relating to the offense or the offender. The presumptive sentencing statute should be amended, however, to provide a regulated sentencing discount for defendants who plead guilty, and an additional discount to be made upon the recommendation of the prosecutor in cases in which there is a strong possibility of acquittal, or when the defendant is cooperating with law enforcement authorities. *See infra* notes 239-43, 251-53 and accompanying text.

- (3) *Jurisdictions where judges have little or no discretion in sentencing.*

Here the guilty plea concession would be a reduction from one class of crime to a less serious offense. For example, the defendant would be allowed to plea guilty to a fourth degree felony carrying a sentence of one year incarceration instead of a third degree felony with a term of 2-1/2 years. Adjustments for offense or offender factors, evidentiary problems, or cooperation with authorities might warrant a reduction of an additional degree. Regulation of charge reductions appears to be a more cumbersome and awkward process, although former Manhattan District Attorney Richard Kuh enacted regulations similar to those proposed to govern charge reductions.

*See* Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975).

233. *See infra* notes 251-52 and accompanying text.

alone are sufficient to serve the interests of both defendants and prosecutors. To continue to allow charge reductions and dismissals would enable plea bargaining participants to circumvent the regulated process of determining sentence concessions.

This proposal would limit prosecutorial discretion in making sentence recommendations by applying to prosecutors requirements for structured decision-making similar to those imposed on judges by presumptive sentencing statutes.<sup>234</sup> In each case, the prosecutor would begin with a presumptive sentence specified by statute for each criminal offense. The presumptive sentence would then be adjusted to take into account the following four variables:

- (1) whether the defendant pleaded guilty or contested his guilt;<sup>235</sup>
- (2) the circumstances of the offense and characteristics of the offender;<sup>236</sup>
- (3) the probability of acquittal at trial;<sup>237</sup> and
- (4) any cooperation by the defendant with law enforcement authorities.<sup>238</sup>

The written guidelines would specify what adjustments to the presumptive sentence are warranted if any of these factors are found to be present. The following paragraphs discuss these adjustments more fully.

Defendants who plead guilty should be entitled to a modest sentence discount in exchange for their willingness to forgo trial. Without this discount, even those defendants with little chance of acquittal at trial have little or no incentive to plead guilty.<sup>239</sup> If all defendants elected to go to trial, the government's prosecutorial, defense, and judicial resources obviously would be overwhelmed.<sup>240</sup> The amount of this sentence discount should be large enough that most defendants who perceive they have little or no likelihood of acquittal at trial will plead guilty, but that most defendants who have a substantial possibility of being acquitted will not be psychologically coerced into entering a

234. See ALASKA STAT. §§ 12.55.125-.165 (1980); ARIZ. REV. STAT. ANN. §§ 13-701 to -702 (1978). One of the earliest proposals for enacting a presumptive sentencing scheme was REPORT OF THE TWENTIETH CENTURY TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 20-34 (1978). The task force's report went into great detail specifying criminal offenses and breaking them down into degrees of seriousness so that the presumptive sentence would be appropriate to the offense committed. *Id.* at 37. The enactment of presumptive sentencing was made more realistic by Professor Singer's excellent analysis which categorized offenses more broadly by the interest of the victim jeopardized. See R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUALITY AND DESERT 35-110 (1979).

235. See *infra* notes 239-43 and accompanying text.

236. See *supra* notes 182-85 and *infra* notes 245-50 and accompanying text.

237. See *infra* notes 251-52 and accompanying text.

238. See *infra* note 253 and accompanying text.

239. A number of other commentators have proposed fixed discount sentencing schemes for those who plead guilty. See Kaplan, *Observation: American Merchandising and the Guilty Plea: Replacing the Bazaar With the Department Store*, 5 AM. J. CRIM. L. 215, 222-23 (1977); Schulhofer, *supra* note 178, at 778-87; Vorenberg, *supra* note 149, at 1560-61.

240. See Enker, *supra* note 88, at 112.

guilty plea.<sup>241</sup> Dean Vorenberg suggests that a sentence discount of ten or twenty percent should encourage the requisite number of desired pleas.<sup>242</sup> This figure appears to be a reasonable one with which to begin; the amount of the discount may be modified as the effects of sentencing discounts on defendants' decisions whether to plead are observed. Excessive sentence discounts should be constitutionally suspect because they place a burden on the defendant's exercise of constitutional rights and negate the voluntary nature of his plea.<sup>243</sup>

If prosecutors were allowed only to grant defendants identical

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241. Because criminal defendants, like all people, vary in their adverseness to risk, there is no magical percentage for a sentence discount which would guarantee that all defendants will make decisions regarding pleas that legislators, judges, prosecutors, or attorneys would regard as wise or rational.

242. See Vorenberg, *supra* note 149, at 1561.

243. See *Corbitt v. New Jersey*, 439 U.S. 212, 227 (1978) (Stewart, J., concurring). See also *supra* notes 97-142 and accompanying text.

At first glance, explicitly providing for such a sentence discount appears uncomfortable, and perhaps even unconstitutional, for those who will visualize the full criminal trial as the prototype of the American criminal justice system. While accepting the constitutionality of plea bargaining with its give and take, see *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978); *Brady v. United States*, 397 U.S. 742, 751-55 (1970), the Supreme Court has struck down on due process grounds schemes which expose the defendant to higher penalties because of his exercise of a constitutional right. See, e.g., *North Carolina v. Pearce*, 395 U.S. 711, 723-26 (1969); *United States v. Jackson*, 390 U.S. 570, 581-83 (1968). However, in *Corbitt v. New Jersey*, 439 U.S. 212 (1978), a majority of the Supreme Court upheld the constitutionality of a New Jersey sentencing scheme which provided a mandatory sentence of life imprisonment for defendants convicted by a jury of first degree murder, but which allowed a lesser penalty if the defendant waived his right to trial and entered what was essentially a no contest or *nolo contendere* plea. *Id.* at 226. The majority's opinion neither expressly sanctioned nor disapproved a statutory scheme involving a fixed sentence discount in exchange for a guilty plea, but the language of the opinion suggests that the majority would be inclined to uphold such a system:

That system permits a proper amount of leniency in return for pleas, leniency that is denied if one goes to trial. In this sense, the standard of punishment is necessarily different for those who plead and those who go to trial. For those who plead, that fact itself is a consideration in sentencing, a consideration that is not present when one is found guilty by a jury.

*Id.* at 224 n.14. The majority was careful, however, to distinguish the New Jersey scheme in question from a fixed sentence discount system. It observed that the sentencing judge under the New Jersey system still had discretion to impose a life sentence after the defendant pled "*non vult*" and that the sentence reduction was not mandatory or automatic, as it would be in a fixed sentence discount system. *Id.* at 216-17, 224 n.14.

Four other justices indicated their belief that a fixed sentence discount scheme probably would be unconstitutional. Justice Stewart concurred in the result reached by the majority, but disagreed with its reasoning. *Id.* at 226-28. While finding that the New Jersey sentencing scheme did not create an "impermissible burden" on the defendant's constitutional rights, Justice Stewart also found that state statutes creating sentencing differentials for those who plead guilty were more suspect than sentencing differentials arising out of plea bargaining:

Could a state legislature provide that the penalty for every criminal offense to which a defendant pleads guilty is to be one-half the penalty to be imposed upon a defendant convicted of the same offense after a not-guilty plea? I would suppose such legislation would be clearly unconstitutional. . . .

*Id.* at 227. Justice Stewart's hypothetical is obviously an extreme example, and does not indicate how he would treat a statutory sentencing differential of less than one-half; for example, the 10% or 20% discount proposed in this article.

Justice Stevens, dissenting and speaking also for Justices Brennan and Marshall, not only found the *Corbitt* scheme unconstitutional, but also probably would find a fixed sentence discount scheme unconstitutional:

fixed sentencing discounts, legitimate functions of plea bargaining would be impaired. Prosecutors would not be able to offer additional sentencing concessions to defendants who cooperated with law enforcement authorities, those who had a substantial possibility of being acquitted at trial, or those who the prosecutor believed were entitled to sentence concessions because of factors relating to the defendant and the specific crime charged. Although guilty plea concessions should be subject to regulation to ensure rational sentencing practices and equal treatment of defendants, sentence concessions should, nevertheless, vary according to the circumstances of the individual case.

When the prosecutor makes adjustments to the presumptive sentence recommendation attributable to the second variable—the characteristics of the offender and the circumstances of the offense—he is performing the same function as judges currently do under presumptive sentencing statutes.<sup>244</sup> If the prosecutor detects any of the aggravating circumstances specified in the guidelines, such as the use of firearms, the infliction or threatening of serious physical harm, or a prior criminal record, then his sentence recommendation should be for a sentence greater than the presumptive one.<sup>245</sup> A sentence less than the presumptive sentence would be warranted by a finding of mitigating factors such as provocation by the victim, the youthfulness of the defendant, or the minor role played in the crime by the defendant.<sup>246</sup>

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In contrast, a defendant who faces a more severe range of statutory penalties simply because he has insisted upon a trial, is subjected to punishment not only for the crime the State has proved but also for the "offense" of entering a "false" not-guilty plea. . . . [T]he implementation of such a policy inevitably produces a due process violation of the most basic sort.

*Id.* at 232-33 (Stevens, J., dissenting).

A system providing modest sentence discounts for those who plead guilty and forgo their right to have the government prove its case appears to be constitutional and it is likely that a majority of the Supreme Court would uphold such a scheme. *See* Schulhoffer, *supra* note 178, at 780-86; Vorenberg, *supra* note 149, at 1560, 1562 n.135. Acknowledging the legitimacy of sentence discounts for those who plead guilty is little more than recognizing the existing reality of plea bargaining. *See supra* notes 55-57 and accompanying text. *See also* Corbitt v. New Jersey, 439 U.S. 212, 219 (1978); Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). A court which would uphold plea bargaining but strike down a fixed sentence discount would be either blind to reality or hypocritical. Indeed, a modest fixed sentence discount should be less constitutionally suspect than plea bargaining. *See* Schulhoffer, *supra* note 178, at 783-86. The choice facing many defendants in plea bargaining, between long sentences after conviction by juries or much shorter sentences after a guilty plea, is more coercive and realistically imposes a much greater burden on the exercise of constitutional rights than does a standardized sentence discount granted by statute. Further, providing sentence discounts by statute would contribute to more equal treatment of defendants than occurs under the current case-by-case determination of guilty plea concessions.

244. *See supra* notes 182-85 and accompanying text.

245. These factors correspond with those designated in presumptive sentencing statutes. *See, e.g.*, ALASKA STAT. § 12.55.155(c) (1980); ARIZ. REV. STAT. ANN. § 13-702(D) (1978). *See also* R. SINGER, *supra* note 233, at 75-79; TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 40-48 (1976).

246. For comparable factors listed in presumptive sentencing statutes, *see* ALASKA STAT. § 12.55.155(d) (1980); ARIZ. REV. STAT. ANN. § 13-702(E) (1978). *See also* R. SINGER, *supra* note 233, at 75-99; TWENTIETH CENTURY TASK FORCE REPORT ON CRIMINAL SENTENCING, FAIR AND CERTAIN PUNISHMENT 40-48 (1976).

Further, the prosecutor can consider relevant mitigating or aggravating circumstances other than those specifically listed in the guidelines if he finds that failure to consider such factors would result in manifest injustice.<sup>247</sup>

Under this proposal, if the prosecutor finds that the importance of the mitigating factors substantially outweighs the importance of any aggravating factors present, he may recommend a sentence that is up to thirty percent less than the presumptive sentence.<sup>248</sup> Conversely, if aggravating factors substantially outweigh mitigating factors, the recommended sentence may exceed the presumptive sentence by as much as

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247. Cf. ALASKA STAT. §§ 12.55.165-.175 (1980) (upon a finding of "extraordinary circumstances" which otherwise would result in "manifest injustice," a three judge panel may impose a sentence greater than those provided under the presumptive sentencing statutory sections).

The guidelines proposed in this section can be categorized as "presumptive" ones, using the terminology of Professor Frase. See Frase, *The Decision to File Federal Criminal Charges: A Quantitative Study of Prosecutorial Discretion*, 47 U. CHI. L. REV. 246, 298 (1980). Professor Frase, in his proposal for the adoption of guidelines governing the prosecutor's charging decision, distinguishes between "mandatory rules" that bind the prosecutor, "presumptive rules" that should be binding absent unusual circumstances, and "factors" or "guidelines" which merely suggest a certain result. *Id.*

Similarly, Professor Davis distinguishes between rules which "confine" discretion, and rules which merely "structure" the exercise of discretion. See 2 K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 167 (1978). Confining discretion, according to Davis, is eliminating it in certain areas. *Id.* Structuring, on the other hand, is "controlling the manner of the exercise of discretion within the boundaries." *Id.* at 169. Particular rules may both confine and structure discretion:

A rule may provide that over here at the right end the answer is always yes, and that over here at the left end the answer is always no; when it does that it confines discretion to the middle territory. But the rule may go on and structure the discretion in that middle territory. For instance, it may provide that in exercising discretion the agency will consider three factors.

K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 103 (1969). The guidelines of this proposal both confine and structure discretion. They confine discretion by limiting adjustments attributable to equitable factors to less than 30%, absent extraordinary factors; they structure discretion by specifying what factors should be considered within those parameters.

248. Cf. ALASKA STAT. § 12.55.155 (1980) (listing aggravating and mitigating factors and providing for sentence adjustment).

The treatment of multiple offenses by an offender warrants individual attention. How is a defendant charged with multiple offenses to be handled? This issue exists in all sentencing structures, but is largely obscured when the sentencing judge exercises wide discretion. See TWENTIETH CENTURY TASK-FORCE ON CRIMINAL SENTENCING, *FAIR AND CERTAIN PUNISHMENT* 27 (1976). To establish a determinate or presumptive sentencing structure and then allow the sentencing judge to impose sentences for multiple crimes either consecutively or concurrently in the court's discretion is to vitiate restrictions on sentencing discretion. A compromise is needed to ensure that defendants are punished for additional crimes when warranted, but that prosecutors and judges cannot "stack" charges or consecutive sentences to yield a period of incarceration grossly disproportionate to the criminal activity. In any event, the method of dealing with multiple offenses must be consistently applied.

It is suggested here that concurrent sentences should be applied when the multiple charges arose out of the same transaction or closely related transactions. Cf. ALASKA STAT. §§ 12.55.155(c)(9), 12.55.155(c)(17) (1980) ("multiple victims" and "a continuing series of criminal offenses" listed as aggravating factors under presumptive sentence statute). The additional criminal activity which arises out of the same transaction can be considered an aggravating factor on the single charge. Unrelated criminal acts should be punished by consecutive sentences, or at least each additional crime should carry an additional increment of punishment, if not the full term of a consecutive sentence. See D. JONES, *supra* note 1, at 205-07; Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48, 52-54 (1975).

thirty percent.<sup>249</sup> The prosecutor may recommend a sentence greater or less than those established under these parameters only if he demonstrates to the court by clear and convincing evidence that manifest injustice would otherwise result.<sup>250</sup>

The third variable to be considered by the prosecutor under the guidelines is the strength of the government's case; if there is a substantial possibility of an acquittal, the defendant should be entitled to an additional modest sentencing discount. Adjustments attributable to the possibility of acquittal will be rare because the strengthened preliminary hearing will screen out those cases where there is not a reasonable likelihood of conviction.<sup>251</sup> There will remain, however, a few cases in which the prosecutor entertains no serious doubt about the factual guilt of the defendant, but which nonetheless involve difficulties of proof, fundamental facts in dispute, or other reasons suggesting a substantial possibility of acquittal.<sup>252</sup> In these cases the defendant should be granted an additional sentence discount, of perhaps fifteen to twenty percent, if the prosecutor certifies to the court that there is reasonable doubt as to the likelihood of conviction.

The fourth and final factor justifying an additional sentencing concession to the defendant is his cooperation with ongoing investigations or his testimony against co-defendants.<sup>253</sup> Absolute prohibitions

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249. This proposal relies upon a straight percentage approach for adjusting the presumptive sentence recommendation to fit the particular case. This approach raises an additional issue. When, if ever, should a defendant whose crime warrants a sentence recommendation calling for incarceration be sentenced instead to a non-incarceration sanction such as probation? Obviously this cannot be accomplished merely by reducing the sentence by a percentage. Sentencing is really a two-step procedure. First, a decision is made as to whether the defendant should be incarcerated. The second decision is what the length of the incarceration should be.

The characteristics of the offender and the circumstances of the offense, as well as the crime charged, should influence the decision whether the offender should be incarcerated because these factors directly relate to the level of the defendant's culpability. Conversely, the other variables, such as whether the defendant pled guilty, the possibility of acquittal, and the defendant's cooperation with law enforcement authorities, should not be considered in the initial decision as to whether to incarcerate the defendant. *See infra* note 253 and accompanying text.

250. *Cf.* ALASKA STAT. §§ 12.55.165-.175 (1980) (sentences greater than those under presumptive sentence statute provided for if "extraordinary circumstances" exist and "manifest injustice" would otherwise result).

251. Where the prosecutor entertains serious doubts about the guilt of the defendant even though the case survived the preliminary hearing, the prosecutor should unilaterally dismiss those charges as a matter of professional ethics. *See* Kuh, *supra* note 248, at 50; Schulhoffer, *supra* note 178, at 773-78. Courts should carefully scrutinize such dismissals to assure they are not ruses designed to sweeten the guilty plea for a defendant charged with multiple crimes. It is reasonable to place the burden of proof on this issue on the prosecutor, because the preliminary hearing has already determined that there is sufficient evidence to support a guilty verdict and find it credible. *See supra* note 224 and accompanying text.

252. Some attempts to regulate plea bargaining insist that no compromise should be allowed in this instance, and that the prosecutor should either dismiss the charges or try the case. *See* Kuh, *supra* note 248, at 50; Schulhoffer, *supra* note 178, at 823-24. Such a requirement unrealistically attributes to prosecutors an ability to predict correctly trial results in all cases.

253. This proposal for dealing with defendants who cooperate with law enforcement authorities is similar to Professor Schulhoffer's treatment of the same situation. *See* Schulhoffer, *supra* note 178, at 824. *See also* Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's*



against plea bargaining for this purpose either prevent prosecutors from using guilty plea concessions to encourage a defendant's cooperation with authorities, or else encourage prosecutors to circumvent plea bargaining bans. On the other hand, giving prosecutors a *carte blanche* to make charge reductions or sentence recommendations in exchange for cooperation with authorities is another opportunity for prosecutors to circumvent plea bargaining regulation. Without oversight, prosecutors might use the defendant's cooperation as a justification for routinely "sweetening the deal" for the defendant. Defendants should not be entitled to a discount merely because they confess their own involvement in criminal activities or disclose the participation of others. Instead the prosecutor should be required to find that the defendant's cooperation is of significant help to law enforcement authorities and could not be obtained without the inducement of the sentence discount.

## 2. *Statement of Reasons Justifying Guilty Plea Concessions*

When a prosecutor makes a sentence recommendation at a guilty plea hearing, he should state in detail and in open court how he arrived at the recommendation. Courts,<sup>254</sup> Congress,<sup>255</sup> and commentators<sup>256</sup>

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*Office*, 11 CRIM. L. BULL. 48, 59-60 (1975). Both the Schulhoffer and Kuh proposals deal with regulation of charge reductions instead of sentence concessions.

Absent compelling circumstances, neither the possibility of an acquittal nor the defendant's cooperation with law enforcement authorities justifies granting probation to a defendant when application of the sentencing guidelines yields a sentence involving incarceration. A percentage reduction in the amount of time to be spent incarcerated should provide sufficient incentive to encourage a defendant to plead guilty when there is a substantial risk of acquittal. Similarly, when the defendant is entitled under this proposal to a sentence reduction because of his cooperation with authorities, only under the most compelling circumstances should a defendant whose individual characteristics suggest incarceration as a sanction instead receive probation. The defendant may be granted probation in a few rare instances when the sentencing judge finds by clear and convincing evidence that:

- (1) the defendant's cooperation with law enforcement authorities cannot be obtained any other way;
- (2) his cooperation is of significant value to law enforcement authorities; and
- (3) a non-incarceration penalty adequately reflects the seriousness of the offense and poses no risk of harm to the public.

254. See, e.g., *Environmental Defense Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 596-98 (1971). In *EDF v. Ruckelshaus*, the court of appeals reviewed the decision of the Secretary of Agriculture to refuse to suspend the federal registration of the pesticide DDT. *Id.* at 588. The Secretary failed to provide an adequate explanation for his decision. *Id.* at 596. In remanding the case to the Secretary, the court of appeals instructed him to make "a fresh determination . . . identifying the factors relevant to that determination, and relating the evidence to those factors in a statement of the reason for his decision." *Id.* The court further expounded upon the necessity for this requirement:

Discretionary decisions should more often be supported with findings of fact and reasoned opinions. When administrators provide a framework for principled decision-making, the result will be to diminish the importance of judicial review by enhancing the integrity of the administrative process, and to improve the quality of judicial review in those cases where judicial review is sought.  
*Id.* at 598.

255. The Administrative Procedure Act provides that "the denial in whole or in part of a written application, petition, or other request of any interested person made in connection with any agency proceeding . . . shall be accompanied by a simple statement of the grounds for denial." 5 U.S.C. § 555(d) (1976).

256. See 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 167-71 (1978); K. DAVIS, DISCRETION-

alike have recognized the importance of requiring administrators to explain their discretionary decisions; such reasoned elaborations prevent arbitrary decisions<sup>257</sup> and facilitate judicial review.<sup>258</sup>

The prosecutor's statement of reasons justifying the bargaining concessions should indicate which aggravating or mitigating circumstances are present and explain why the prosecutor believes that the mitigating factors outweigh the aggravating factors (or the reverse). The explanation should also include any extraordinary circumstances which the prosecutor believes warrant a greater than typical change in the presumptive sentence, the evidence supporting the existence of facts constituting such circumstances, and the prosecutor's argument that the extraordinary circumstances warrant a substantial modification of sentence. This type of reasoned elaboration necessarily will be lengthier than those merely indicating the existence of aggravating or mitigating circumstances already delineated in the guidelines. The prosecutor also will explain to the court any bargaining concessions based upon a significant possibility of acquittal or the defendant's cooperation with law enforcement authorities.<sup>259</sup>

The combination of written guidelines governing prosecutorial guilty plea concessions and statements to the court explaining such concessions does much to eliminate the problems associated with plea bargaining. These requirements force prosecutors to consider their plea bargaining decisions in view of specified and objective criteria, and to explain the application of the criteria to their decisions. This process significantly lessens the inconsistencies in guilty plea concessions which result from the informal and haphazard nature of unregulated plea bargaining.<sup>260</sup> By reducing the sentencing differentials between trial defendants and guilty plea defendants, the proposal reduces the coer-

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ARY JUSTICE: A PRELIMINARY INQUIRY 103-06 (1967). Professor Davis states, "A main way to structure discretion is through stating findings and reasons and following precedents." 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 169 (1978). Dean Vorenberg has proposed a statement of reasons explaining plea bargaining decisions. See Vorenberg, *supra* note 149, at 1565-66. See also Thomas & Fitch, *Prosecutorial Decision Making*, 13 AM. CRIM. L. REV. 507, 550-51 (1976). Other commentators suggest such a requirement when the prosecutor declines to file criminal charges. See Frase, *supra* note 247, at 292; Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036, 1036-85 (1972).

257. See *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584, 598 (1971); 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE 167-71 (1978); Thomas & Fitch, *supra* note 256, at 550-51.

258. See *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 851-53 (1970).

259. Ordinarily, the prosecutor should inform the court of the nature of the defendant's proposed cooperation and the importance of such cooperation to law enforcement authorities. In rare cases when disclosure of the nature of the cooperation would put the informant in jeopardy of physical harm or economic coercion, or would appear to unreasonably endanger a significant ongoing investigation, the prosecutor need not make public the nature or importance of the defendant's cooperation, but such information should be provided to the court for *in camera* consideration.

260. See *supra* notes 143-66 and accompanying text.

cion on the defendant to plead.<sup>261</sup> The regulation of sentencing concessions also prevents sentences which are overly lenient when compared with those provided for in the sentencing statute or those received by defendants sentenced after trial.<sup>262</sup> Finally, this proposal unveils the exercise of prosecutorial discretion to public view; the public can learn the reasons for the prosecutor's bargaining concessions by studying the written guidelines and the prosecutor's explanations of the application of such guidelines.<sup>263</sup>

### C. Judicial Review of Guilty Plea Concessions

#### 1. Review by the Sentencing Judge

Judicial review is firmly entrenched as a part of administrative procedure.<sup>264</sup> Traditionally, courts have regarded the actions of the prosecutor as virtually unreviewable,<sup>265</sup> although the Supreme Court has reviewed decisions of other agencies to initiate or not to initiate enforcement proceedings.<sup>266</sup> Perhaps the most important reason why courts refuse to review the prosecutor's decisions is the lack of standards with which to evaluate his discretionary choices.<sup>267</sup> The written guidelines previously discussed provide the necessary standards for judicial review.<sup>268</sup>

Under this proposal, the sentencing judge would review the prosecutor's sentence recommendation as if he or she were reviewing the actions of an administrative agency. The trial court should determine not only whether the prosecutor properly considered the applicability of aggravating and mitigating circumstances modifying the presumptive sentence, but also whether the provisions regarding the strength of

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261. See *supra* notes 52-70 and accompanying text.

262. See *supra* notes 56-57 and 167-69 and accompanying text.

263. See *supra* notes 191-99 and accompanying text.

264. See generally *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971); 5 U.S.C. §§ 701-706; K. DAVIS, *ADMINISTRATIVE LAW TREATISE* 371-94 (1958 & Supp. 1982). Section 701 of the Administrative Procedure Act, 5 U.S.C. § 701 (1976), provides for judicial review except where there is a statutory prohibition on review or where "agency actions are committed to agency discretion by law." The latter exception has been construed very narrowly. See *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410; Berger, *Administrative Arbitrariness and Judicial Review*, 65 CALIF. L. REV. 55 (1965).

The scope of review under the Administrative Procedure Act is outlined in 5 U.S.C. § 706 (1976), which holds unlawful agency actions which fail to meet any of six standards. See also 4 K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, 114-230 (1958), *id.* at 518-85 (Supp. 1982). For present purposes, the two most important grounds for reversal of agency actions are that such actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;" or "unsupported by substantial evidence . . ." 5 U.S.C. § 706(2)(A), (E) (1976).

265. See *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Newman v. United States*, 38 F.2d 479, 480 (D.C. Cir. 1977); *Powell v. Katzenbach*, 359 F.2d 234, (D.C. Cir. 1965), *cert. denied*, 384 U.S. 906 (1966); Gifford, *supra* note 93, at 678-79, 682-85, 709-16.

266. See, e.g., *Dunlop v. Bachowski*, 421 U.S. 560, 574-76 (1975); *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 249-51 (1967); *Moog Industries v. FTC*, 355 U.S. 411, 414 (1958).

267. See *Inmates of Attica Correctional Facility v. Rockefeller*, 477 F.2d 375, 380 (2d Cir. 1973); Gifford, *supra* note 93, at 683, 704-08.

268. See Vorenberg, *supra* note 149, at 1571-72.

the state's evidence and the defendant's cooperation with law enforcement authorities were properly applied. If the judge finds that the guidelines were properly applied, he should sentence the defendant in accordance with the prosecutor's recommendations.

Effective review of the prosecutor's application of guidelines may require a hearing on at least some issues.<sup>269</sup> The existence of most aggravating and mitigating circumstances regarding the offense itself can be gleaned from the trial court record. Other aggravating circumstances, such as the defendant's criminal record, can be proved easily in most instances. However, the prosecutor, defendant and victim of the crime<sup>270</sup> should all have the opportunity to present evidence relevant to aggravating and mitigating circumstances. In addition, the trial judge should have available a presentence report completed by the probation department concerning the offender and the offense.<sup>271</sup> The presentence report would contain information regarding the defendant's

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269. A hearing with certain procedural rights may be constitutionally required. Compare *Specht v. Patterson*, 386 U.S. 605, 610 (1967) with *Williams v. New York*, 337 U.S. 241, 252 (1948). In *Specht*, the trial court sentenced the defendant, who had been convicted of the crime of indecent liberties, to an indeterminate term of one day to life imprisonment under the Colorado Sex Offender Act. 386 U.S. at 607-08. Sentencing under the Act was triggered by the trial court's "opinion" that the defendant constituted "a threat of bodily harm to members of the public." COLO. REV. STAT. § 16-13-207 (1973). The court's determination was based upon a psychiatric report, with no opportunity for the defendant to cross-examine the psychiatrist or to present testimony on his own behalf. The Supreme Court held that the statute violated the defendant's due process rights which required that "he be present with counsel, have an opportunity to be heard, be confronted with witnesses against him, have the right to cross-examine and to offer evidence of his own." 386 U.S. at 610.

Earlier the Supreme Court held in *Williams v. New York*, 337 U.S. 241 (1948), that a defendant had no due process right to confront or cross-examine witnesses who supplied information used in the presentence report, even when the trial judge sentenced the defendant to death. *Id.* at 243, 252. In *Specht*, the Supreme Court declined to overrule *Williams*, but indicated its unwillingness to extend *Williams* to sentencing procedures requiring separate hearings and new findings of fact. *Specht*, 386 U.S. at 608.

It is not clear what procedural rights, if any, are constitutionally mandated for the defendant at the hearing described in the text. It can be argued that unlike the statute in *Specht*, this proposal does not necessarily require a specific sentence if the court finds specified facts. However, in the sentencing process described, the finding of specified facts which constitute aggravating or mitigating factors leads to modification of the presumed sentence. See *supra* notes 244-50 and accompanying text. Presumably, therefore, the due process clause requires certain procedural rights under *Specht*. See also *Gardner v. Florida*, 430 U.S. 349, 358 (1977) (plurality opinion of Stevens, Stewart, and Powell, JJ.). However, the procedural rights which are mandated by the due process clause, according to Justice Stewart, do not "implicate the entire panoply of criminal trial procedural rights." *Id.* at 358 (Stewart, J., concurring). See also *Patterson v. New York*, 432 U.S. 197, 214-15 (1977); *United States v. Bowdach*, 561 F.2d 1160, 1174-75 (5th Cir. 1977).

270. See *infra* notes 279-87 and accompanying text.

271. The ABA Standards on Criminal Justice already suggest that the trial judge order a pre-plea investigation before deciding whether to accept or reject a plea bargaining agreement. See STANDARDS FOR CRIMINAL JUSTICE STANDARDS RELATING TO PLEAS OF GUILTY § 14-3.3(b)(1) (2d ed. 1980). Many federal probation offices, and presumably many probation offices in state systems, begin the presentence investigation immediately upon the arrest or arraignment of the defendant, before the defendant enters a plea or agrees to enter a plea. See Note, *The Presentence Report: An Empirical Study of its Use in the Federal Criminal Process*, 58 GEO. L.J. 451, 452-57 (1970). However, the Federal Rules of Criminal Procedure prevent the disclosure of a presentence report to the Court prior to a determination of guilt. See FED. R. CRIM. P. 32(c)(1).

prior record, employment history, family and social background, and a description of the circumstances surrounding the offense. Such information would supplement that provided by the prosecutor, defendant, and victim, which might be incomplete or biased.

The standard of review employed by the sentencing judge to review the prosecutor's application of guidelines should vary according to which of the factors the court is reviewing. The trial court should grant considerable deference to the prosecutor's determination that there is a significant possibility of acquittal or that the defendant's cooperation with law enforcement authorities is significant because the prosecutor is clearly in the best position to make these determinations. Nonetheless, the court should review these determinations to ensure they are not ruses to justify overly generous sentencing discounts for the defendant. Accordingly, the correct standard of review for these determinations should be a "clearly mistaken"<sup>272</sup> or "abuse of discretion"<sup>273</sup> test.

When reviewing the prosecutor's application of guidelines relating to the characteristics of the offender and the circumstances of the offense, the level of review should vary depending upon the nature of the sentence recommended by the prosecutor. If the prosecutor recommends the presumptive sentence, without adjustment for aggravating or mitigating factors, great deference should be given; the presumptive sentence is intended to be the sentence in the typical case.<sup>274</sup> In these instances, a recommendation of a presumptive sentence should be rejected by the sentencing judge only when shown to be clearly mistaken. A higher degree of scrutiny is warranted when the prosecutor has adjusted the presumptive sentence after finding either aggravating or mitigating circumstances listed in the prosecutor's guidelines or "extraordinary circumstances" warranting modification of sentence. The burden of persuasion should be on the prosecutor both to prove the existence of the facts constituting the aggravating or mitigating factor and to convince the court of his conclusion that such facts constitute an aggravating or mitigating circumstance. In those cases in which the prosecutor finds that "extraordinary circumstances" justify an adjustment of more than thirty percent from the presumptive sentence, the prosecutor must show that a "manifest injustice" would result absent such a departure from the range of presumptive sentences provided for by the guidelines.<sup>275</sup>

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272. The "clearly mistaken" standard is one frequently used when appellate courts review the sentencing decisions of trial courts. *See, e.g.,* Leuch v. State, 633 P.2d 1006, 1010 (Alaska 1981); Hayes v. State, 617 S.W.2d 127 (Mo. App. 1981); Smith v. Commonwealth, 599 S.W.2d 900, 909 (Ky. 1980).

273. The "abuse of discretion" standard is one typically applied to the review of administrative decisions. *See supra* note 264.

274. *See* Juneby v. State, 641 P.2d 823, 832-35 (Alaska App. 1982).

275. *Cf.* ALASKA STAT. § 12.55.165 (Supp. 1982) (allowing three judge panel to sentence de-

The guidelines governing offender and offense factors will be applied not only in cases in which the defendant pleads guilty, but also when the defendant is convicted at trial.<sup>276</sup> They must be applied in both situations in order to preserve the fixed discount attributable to entering a guilty plea. Uniformity of application suggests that the prosecutor should apply the guidelines in both contexts, but other considerations may point to having the judge make sentencing decisions following trial.<sup>277</sup>

Judicial review of the prosecutor's application of sentencing guidelines encourages the prosecutor to apply the guidelines in a consistent and fair manner. The court will disregard the prosecutor's sentencing recommendation in those cases in which the prosecutor misapplied the guidelines, either through inadvertence or in an effort to circumvent the guidelines. The trial court's review of the prosecutor's application of the guidelines, in an open forum and with the opportunity for input from the victim of the crime,<sup>278</sup> should go a long way toward restoring public respect in the criminal justice system. This proposal opens to public view and critique the plea bargaining and sentencing functions—the articulation of standards contained in the guidelines and the prosecutor's explanation of the application of these guidelines removes the shroud of mystery from the criminal process and allows the public to evaluate intelligently the actions of the prosecutor and the judge.

## 2. *Victim Participation in the Guilty Plea Hearing*

Victims of crimes should be offered the opportunity to participate in guilty hearings<sup>279</sup> so that they can offer additional information about the offense and express their viewpoints regarding appropriate sentences.<sup>280</sup> Their roles should not extend to a veto of the proposed

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defendant to term longer or shorter than those provided for in presumptive sentence statute when "extraordinary circumstances" would otherwise result in "manifest injustice").

276. The provisions of the guidelines relating to a discount for pleading guilty or significant possibility of acquittal, and usually those relating to cooperation as an informant, will be irrelevant in sentencing defendants convicted at trial.

277. See generally Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 296-98 (1972). The prosecutor may be less suited temperamentally to perform a sentencing function after engaging in combat with the defendant at trial. See also *supra* note 232.

278. See *infra* notes 279-87 and accompanying text.

279. Other commentators have made similar suggestions. See N. MORRIS, *THE FUTURE OF IMPRISONMENT* 55-57 (1974); A. ROSSETT & D. CRESSEY, *supra* note 71, at 174. A number of jurisdictions formally allow victims some limited input into the plea bargaining and sentencing process. See, e.g., FLA. STAT. ANN. § 921.143 (West Supp. 1982); N.Y. CRIM. PROC. LAW § 170.40 (McKinney 1981). The Florida statute goes furthest by granting victims the right to be heard or to submit written statements to the court prior to the sentencing of any defendant who enters a guilty plea. FLA. STAT. ANN. § 921.143 (West Supp. 1982). Statutes in several other jurisdictions merely provide that victims be notified of the dispositions of cases. See, e.g., CAL. PENAL CODE § 11116.10 (West 1982); WIS. STAT. ANN. § 950.04 (West 1982). Many, if not most, prosecutors' offices and trial courts take the attitudes of victims into account in plea bargaining and in sentencing.

280. Granting victims a statutory right to participate actively in plea bargaining and sentencing decisions raises the specter of lengthy conferences characterized by victims who are hysterical

sentences, but as described below they should be granted a limited right to appeal the defendant's sentence.<sup>281</sup>

Victims participating in guilty plea hearings will experience many of the same positive psychological benefits which ordinarily are realized at trial, but are absent in plea bargaining.<sup>282</sup> They will be treated as people whose viewpoints count and will experience a sense of catharsis as they personally participate in society's decision as to how to deal with offenders. The vengeful instincts of victims will be channeled in a socially constructive manner, and victims will be engaging in self-help to restore the previous state of psychological equilibrium in their lives.<sup>283</sup>

The presence of the victim may also have a substantive impact on sentencing decisions. As previously noted, it is in the best institutional interests of all of the "insiders" of the criminal justice system, that is, the judge, prosecutor, and defense counsel, to dispose of cases through guilty pleas rather than to proceed to trial.<sup>284</sup> This often results in sub-

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regarding the offenses and are vengeful toward the offenders. Several jurisdictions have experimented with victim input into plea bargaining, and these experiences tentatively suggest that such conferences are administratively feasible and that victims participate in a meaningful and responsible manner. In a study conducted by Professors Kerstetter and Heinz in Dade County, Florida, judges, defendants, victims, and police officers were given the opportunity to participate in pretrial conferences and express their viewpoints on the appropriate disposition of charges. See W. KERSTETTER & A. HEINZ, PRETRIAL SETTLEMENT CONFERENCE: AN EVALUATION xi-xii (1979); Heinz & Kerstetter, *Pre-Trial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC'Y REV. 349 (1979). The survey showed that these conferences tended to be quite brief, and indeed that the presence of the police officer, victim, and defendant at the conference tended to expedite the prompt settlement of cases. W. KERSTETTER & A. HEINZ, *supra* at 44-46, 131. More importantly, judges involved in the project reported no difficulty in keeping order between victims and defendants. *Id.* at 130. Surprisingly, victims were not intransigent and generally did not demand harsh sentences for defendants. *Id.* The validity of these observations is corroborated by a separate study of plea bargaining in the Buffalo, New York area which revealed that in 86% of the cases, the dispositions of the cases in plea bargaining conformed to the victims' views of what was appropriate. See Note, *Factors Affecting the Plea-Bargaining Process for Erie County: Some Tentative Findings*, 26 BUFFALO L. REV. 693, 701 (1977).

281. See *infra* notes 292-94 and accompanying text.

282. See *supra* notes 200-05 and accompanying text. Professors Heinz and Kerstetter found that victims who participated in pretrial conferences were more satisfied with the way their cases were handled than were their counterparts who were not invited to participate. See W. KERSTETTER & A. HEINZ, *supra* note 280, at 124.

283. Professor Norval Morris is even more effusive and speculative in describing the psychological benefits of victim involvement, although he acknowledges making his arguments "with trepidation." N. MORRIS, THE FUTURE OF IMPRISONMENT 55 (1974). Morris suggests that the defendant's opportunities for self-reform are increased when he is forgiven by the victim of the crime. *Id.* at 56-57. Conversely, when the victim confronts the accused as a real flesh and blood human being, the victim recognizes that the aggressor is not "just a nameless fear in the night" but is instead part of a "larger existential misery of this human encounter." *Id.* at 57.

284. Professors Rossett and Cressey describe proposals to include victims and defendants in pre-plea conferences as breaking up the "committee on criminal justice" system:

In that system, a single judge, prosecutor and public defender serve the same courtroom, collectively processing all the felony cases coming into it. The three members of the committee work with each other daily, face-to-face, sometimes for years. These justice committees, like all committees, develop stereotyped routines which get cases processed but which give only passing individual attention to each.

A. ROSSETT & D. CRESSEY, *supra* note 71, at 173.

stantial concessions by the prosecutor to induce pleas.<sup>285</sup> The victim, however, is not a regular participant in the criminal justice system, and his presence would encourage the participants to fulfill their obligations in a responsible manner. The guidelines suggested above obviously require a significant amount of discretion in characterizing the offense and the offender and in applying the guidelines. In some instances, the prosecutor may find it in his interest to apply the guidelines in a less than fully accurate or honest manner in order to achieve a pre-determined sentencing result. The presence and input of the victim, together with the victim's right to appeal the proposed sentence in egregious cases, should serve to check such behavior.<sup>286</sup> The victim's rights when the guidelines have been applied in a clearly erroneous manner are more fully discussed below.<sup>287</sup>

### 3. *Appellate Review*

Appellate review of sentences is necessary to correct disparities both among sentences of comparable offenders and among the sentencing standards of various prosecutors and trial courts within a jurisdiction.<sup>288</sup> Appellate opinions considering sentencing will aid in the development of detailed sentencing criteria to be used by prosecutors and trial courts in the future.<sup>289</sup> These benefits of appellate review of sentencing will result in increased respect for the sentencing process among both offenders and the public.<sup>290</sup> In addition, appellate review serves as a guarantee that the trial court, the prosecutor, and the defense attorney will not conspire to circumvent the sentencing regulations in order to reach a predetermined result.

If the sentencing judge rejects the prosecutor's sentence recommendation, the prosecutor as well as the defendant should have the right to appeal.<sup>291</sup> Yet another party also should be granted the right to

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285. See *supra* notes 56-57 and 167-69 and accompanying text.

286. Professors Heinz and Kerstetter found little substantive impact on sentencing practices attributable to the input from victims. W. KERSTETTER & A. HEINZ, *supra* note 280, at 104-08. Sentencing judges did notice an increase in information available to them that was useful in sentencing. However, victim participation had little measurable input on sentencing. It is important to note that the procedure surveyed in their study included neither the use of guidelines nor appellate review of sentences by either defendants or victims.

287. See *infra* notes 292-94 and accompanying text.

288. Appellate review of sentences has been endorsed by the ABA Advisory Committee on Sentencing and Review. See STANDARDS RELATING TO THE APPELLATE REVIEW OF SENTENCES 21 (1968). At least twenty-two states allow appellate review of sentences under some circumstances. See Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep*, 68 J. CRIM. L. & CRIMINOLOGY 122, 124-25 (1977); Comment, *Appellate Review of Sentences: A Survey*, 17 ST. LOUIS U.L.J. 220, 254-62 (1972). Several states with presumptive sentencing structures allow appellate review. See, e.g., ALASKA STAT. § 12.55.120 (1980); 42 PA. CONS. STAT. ANN. § 9781 (Purdon 1982).

289. See ABA ADVISORY COMM. ON SENTENCING AND REVIEW, STANDARDS RELATING TO THE APPELLATE REVIEW OF SENTENCE 21 (1968).

290. *Id.*

291. Most current statutes granting appellate review of sentences allow only the defendant to



appeal the sentence. Prosecutors' applications of the guilty plea con-

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initiate the appeal. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 13-4033-4037 (1978); ILL. REV. STAT. CH. 110A, § 615(b) (1981); N.Y. CRIM. PROC. LAW §§ 450.30, 470.15 (McKinney 1979).

Granting the prosecutor the right to appeal a sentence believed to be too lenient raises the issue of whether an increase of sentence on appeal or on remand violates the defendant's rights under the double jeopardy clause of the sixth amendment. Recent Supreme Court decisions hold that granting the prosecutor a statutory right to appeal the defendant's sentence and seek an increase in sentence does not necessarily violate the double jeopardy clause, but there may be a double jeopardy violation in other cases where the re-sentencing involves a jury and the finding of specific facts in addition to those constituting the elements of the offense. *See Bullington v. Missouri*, 451 U.S. 430, 446 (1981); *United States v. DiFrancesco*, 449 U.S. 117 (1980). In *DiFrancesco*, the prosecutor appealed the defendant's sentence under the provisions of the Organized Crime Control Act, 18 U.S.C. §§ 3575-3576 (1976). The Act provided for an increased sentence for a defendant found by the court to be a "dangerous special offender" and granted the United States the right to appeal the sentence. The defendant alleged that allowing the government to appeal the sentence constituted a violation of the double jeopardy clause. The Supreme Court rejected the defendant's argument and held that the double jeopardy clause is not a complete barrier to appeal by the prosecution in a criminal case. *United States v. DiFrancesco*, 449 U.S. 117, 132 (1980).

However, less than six months after *DiFrancesco*, the Supreme Court in *Bullington v. Missouri*, 451 U.S. 430, 446-47 (1981), struck down a Missouri statute allowing the prosecutor to appeal the defendant's sentence. The Missouri law provided that after the defendant was convicted of capital murder, the trial court would conduct a separate presentence hearing before the same jury that had found the defendant guilty. In this hearing, the jury would consider evidence presented by the prosecutor and by the defendant to determine whether any of ten aggravating circumstances or seven mitigating circumstances specified in the statutes existed. In order for the jury to impose the death penalty, it would have to find beyond a reasonable doubt that aggravating circumstances existed and that such circumstances were sufficient to warrant the imposition of the death penalty.

In the first trial, the defendant was convicted of capital murder, but the jury sentenced the defendant to life imprisonment instead of death. Subsequently, the defendant appealed his conviction and the appellate court granted his motion for a new trial. The prosecution attempted in the second trial to seek the death penalty. The defendant alleged that because the jury in the first case had imposed life imprisonment, that the State's attempt to seek the death penalty placed him in double jeopardy.

The Supreme Court agreed with the defendant's argument. The Court noted a number of factors which distinguished *Bullington* from *DiFrancesco*. *Id.* at 437-41. The Missouri statute involved a determination of sentence by the jury, not by the court. The prosecution had to establish certain facts beyond a reasonable doubt. The jury was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute, but rather was simply making "an either/or" choice between the two possible punishments of death and life imprisonment. All of these factors, according to the majority in *Bullington*, made this proceeding a "trial on the issue of punishment," which placed the defendant in jeopardy. *Id.* at 438. In addition, of course, *Bullington* is distinguishable from *DiFrancesco* because it involved the death penalty. *Id.* at 450-51 (Powell, J., dissenting). Although not expressly mentioned by the Supreme Court, the differences in the procedural stances of the *DiFrancesco* and *Bullington* cases may also be significant. In *Bullington*, the prosecutor sought to impose a higher penalty on the defendant after the defendant had appealed his conviction. In effect, if the court had ruled differently in *Bullington*, the defendant would have been penalized for exercising his right to appeal. *Cf.*, *North Carolina v. Pearce*, 395 U.S. 711 (1969) (due process violated by judge's imposition of more severe sentence after defendant's appeal of conviction).

It is difficult to predict what the Supreme Court's response to the sentencing proposal contained in this article would be. On one hand, unlike the statute which was ruled unconstitutional in *Bullington v. Missouri*, 451 U.S. 430 (1981), this proposal does not involve the jury in sentencing, does not require the prosecutor to establish any additional facts beyond a reasonable doubt, does not involve the death penalty, and does not face the judge with an "either/or" sentencing situation. However, as in *Bullington*, and unlike *United States v. DiFrancesco*, 449 U.S. 117 (1980), the prosecutor or judge is not given "unbounded discretion to select an appropriate punishment from a wide range authorized by statute." *Bullington v. Missouri*, 451 U.S. 430, 438

cession guidelines may be manipulated to provide overly lenient sentences for the defendant. The prosecutor may be motivated to provide a hidden and excessive discount for pleading guilty because of his personal and institutional interests in having cases disposed of through pleas rather than trials. Granting the victim of the crime standing to appeal is desirable to ensure that the prosecutor does not acquiesce in overly lenient sentences. This is a revolutionary proposal,<sup>292</sup> but not one without precedent in analagous situations in civil cases.<sup>293</sup> The Supreme Court has allowed private competitors to intervene to challenge consent decrees entered into by the Justice Department in anti-

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(1981). The finding of aggravating or mitigating factors, and the application of these factors to the defendant's sentence, does involve "issues to resolve," "rules or tests or standards," and a definite effect on the sentence. *Id.* at 444. On balance, however, it would appear likely that the Supreme Court would uphold the constitutionality of the proposed sentencing scheme.

The Alaska statute which allows the state to appeal the trial court's determination of sentence avoids the double jeopardy problem by providing that when the state appeals the sentence, the appellate court may not "increase the sentence but may express its approval or disapproval of the sentence and its reasons in a written opinion." ALASKA STAT. § 12.55.120(b) (1980). The statute further provides that if the defendant has appealed the sentence, the defendant's right to argue that he has been placed in jeopardy twice is waived and the sentence may be increased. ALASKA STAT. § 12.55.120(a) (1980).

292. A substantial argument can be made that so dramatic a change in the traditional two-party (government/defendant) criminal process violates the due process clause of the fifth and fourteenth amendments. *See generally In re Winship*, 397 U.S. 358, 361-62 (1970); *Duncan v. Louisiana*, 391 U.S. 145, 155 (1967). The role of the public prosecutor originally emerged to replace prosecutions initiated and conducted by private citizens. *See Langbein, Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 443-46 (1974). To suggest that victims may now hire independent counsel to pursue appeals in criminal cases would alter that process fundamentally. The Supreme Court has held certain characteristics of the criminal justice system to be guaranteed by the due process clause of the fourteenth amendment even though such guarantees are not explicitly provided for in the Bill of Rights. *See, e.g., In re Winship*, 397 U.S. 359, 361-62 (1970) (proof beyond a reasonable doubt). In deciding that these aspects of the process are sacrosanct, the Supreme Court relies upon "virtually unanimous adherence" to the procedures in common-law jurisdictions and the prevalence of such procedures during "our early years as a Nation." *Id.* It can be argued that a "two-party" criminal process is guaranteed to defendants and that defendants cannot be forced to face legal arguments from both prosecutors and independent counsel for victims.

293. In *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969), the district court had ordered the Board of Education for the District of Columbia schools to take certain steps to end discrimination in the schools. *Id.* at 183-85. The Board of Education elected not to appeal, but parents of school children sought to intervene under Federal Rule of Civil Procedure 24(a)(2) for purposes of prosecuting the appeal. *Id.* at 177-78. The court of appeals granted the parents standing for purposes of appeal because, according to the court, the parents had met the requirements of Rule 24(a)(2) which permits such intervention "when the applicant claims an interest relating to the . . . transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest. . . ." FED. R. CIV. P. 24(a)(2). The court of appeals' statements about why the Board of Education might not adequately represent the interests of the parents bears striking resemblance to the reasons why prosecutors may not adequately represent victims of crimes:

In this case, the interest of the parents who wish to intervene do not coincide with those of the Board of Education . . . Moreover, considerations of publicity, cost, and delay may not have the same weight for the parents as for the school board in the context of a decision to appeal. And the Board of Education, buffeted as it like other school boards is by conflicting public demands, may possibly have less interest in preserving its own untrammelled discretion than do the parents.

*Smuck v. Hobson*, 408 F.2d 175, 181 (D.C. Cir. 1969).

trust actions.<sup>294</sup>

Allowing defendants and victims to appeal the defendant's sentence invites a tremendous increase in the workload of appellate courts unless a method of gleaning serious appeals from frivolous ones is adopted. Pennsylvania's solution to this problem is to make allowance of sentence appeals discretionary with the appellate court when "it appears that there is a substantial question that the sentence imposed is not appropriate. . . ." <sup>295</sup> Under this proposal, discretionary appellate sentence review should be sufficient to deter prosecutors and trial courts from circumventing sentencing regulations and to interpret those guidelines to aid prosecutors and trial courts in applying them fairly and consistently.<sup>296</sup>

## V. CONCLUSIONS

Motives lie behind the myth that plea bargaining is a legitimate and desirable means of resolving criminal cases because all involved parties consent to plea agreements. For society, plea bargaining offers a quick, inexpensive and informal alternative to the full-blown criminal trial.<sup>297</sup> More insidiously, legitimation by consent obscures from public view a wide array of problems arising from plea bargaining.<sup>298</sup> Further, plea bargaining serves the personal and institutional interests of both prosecutors and defense attorneys. For them, justice by accommodation lessens their workloads,<sup>299</sup> reduces the risks of loss at trial

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294. See, e.g., *Cascade Nat'l Gas Corp. v. El Paso Nat'l Gas Co.*, 386 U.S. 129, 135-36 (1967). The suggestion implicit in this proposal, that someone other than a person who is formally a party or intervenor at the trial court level should have standing to seek appeal under some circumstances, echoes a similar suggestion made by Professor Shapiro in the context of judicial review of agency proceedings. See Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 HARV. L. REV. 721, 767 (1968).

295. 42 PA. CONS. STAT. ANN. § 9781(b)(1) (Purdon 1982). The right to appeal is further limited by the provision that no appeal is permitted beyond the limited one to the appellate court. 42 PA. CONS. STAT. ANN. § 9871(b)(1) (Purdon 1982). Other jurisdictions have limited appeals of sentence by defendants to sentences of more than one year. See ALASKA STAT. § 12.55.120 (1980).

296. A stringent standard of review of the trial court's sentence should not be required. In a similar procedural context, the U.S. Supreme Court purports to limit its appellate review of lower court decisions reviewing administrative actions to deciding whether the lower court "misapprehended or grossly misapplied the substantial evidence standard" for reviewing agency action. See, e.g., *Mobil Oil Corp. v. Fed. Pwr. Comm'n*, 417 U.S. 283, 292 (1974); accord, *NLRB v. Pittsburgh Steamship Co.*, 340 U.S. 498, 502-03 (1951). But see *Gainesville Utilities Dep't. v. Fed. Pwr. Comm'n*, 402 U.S. 515, 527 (1971); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 505-06 (1951). See generally K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES, SUPPLEMENT TO ADMINISTRATIVE LAW TREATISE* 683-85 (1976).

Similarly, appellate review of sentences is usually limited to whether the sentence is "clearly mistaken." See *Leuch v. State*, 633 P.2d 1006 (Alaska 1981); *Hayes v. State*, 617 S.W.2d 127 (Mo. App. 1981); *Smith v. Commonwealth*, 599 S.W.2d 900, 909 (Ky. 1980). However, in deciding whether the trial court's interpretation of the guidelines is correct, and in deciding what weight should be given to the existence of an aggravating or mitigating factor, the Alaskan appellate courts make their own judgment. See *Juneby v. State*, 641 P.2d 823, 834 (Alaska App. 1982).

297. See Enker, *supra* note 88, at 112.

298. See *supra* notes 96-209 and accompanying text.

299. See *supra* notes 42 and 76 and accompanying text.

which would distress the client or the public,<sup>300</sup> and allows them to maintain cordial working relationships with each other and with judges.<sup>301</sup>

This justice of joy is disturbed by dissonant alarms from those familiar with plea bargaining as it actually takes place. The costs of plea bargaining are paid not in dollars, but through inequality of treatment of defendants,<sup>302</sup> inaccurate guilty pleas,<sup>303</sup> essentially involuntary relinquishments of constitutional rights by defendants,<sup>304</sup> sentences which do not reflect the legislature's intent,<sup>305</sup> and a loss of public respect for the criminal justice system.<sup>306</sup>

Critics of plea bargaining argue that it should be prohibited,<sup>307</sup> or even that the entire adversarial criminal process should be replaced with an inquisitional one modeled on European systems.<sup>308</sup> Neither proposal is realistic. Attempts to ban plea bargaining have failed because prosecutors and defense attorneys have an interest in continuing plea bargaining and are in a position to undermine plea bargaining bans.<sup>309</sup> Further, plea bargaining does have legitimate functions<sup>310</sup> and avoids the considerable expense of granting all defendants trials with the full panoply of procedural rights.<sup>311</sup> Similarly, to replace the criminal justice system as it exists in the United States with an inquisitional system similar to those on the European continent is both politically infeasible and potentially fatal to rights traditionally regarded as fundamental in this country.<sup>312</sup>

The solution proposed in this article accepts plea bargaining as an ongoing reality, but replaces the existing *ad hoc* and informal process with an administrative model for determining guilty plea concessions. In this way, the advantages of plea bargaining are preserved at the

300. See *supra* notes 40 and 78 and accompanying text.

301. See *supra* note 77 and accompanying text.

302. See *supra* notes 143-66 and accompanying text.

303. See *supra* notes 128-42 and accompanying text.

304. See *supra* notes 104-27 and accompanying text.

305. See *supra* notes 167-89 and accompanying text.

306. See *supra* notes 191-209 and accompanying text.

307. See, e.g., Alschuler, *supra* note 71, at 1313-14. See also *supra* note 209.

308. See generally L. WEINREB, *supra* note 38, at 117-46; Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); Langbein and Weinreb, *Continental Criminal Procedure: "Myth" and Reality*, 87 YALE L.J. 1549 (1978). Professor Weinreb's proposed version of the inquisitional model would grant the investigating magistrate, a judicial officer, the charging, plea bargaining, and investigative functions currently performed by the prosecutor in the adversary system. See L. Weinreb, *supra* note 38, at 122-39. A second judicial officer, the presiding judge, would be responsible for presenting the evidence at trial, and the prosecutor and defense attorney would be relegated to the role of advisors to the court. *Id.* at 142-43. The traditional jury would be replaced with a panel including both lawyers and lay participants, themselves empowered to ask witnesses questions. *Id.* at 140-42.

309. See *supra* note 210.

310. See *supra* notes 243-44 and accompanying text.

311. See Enker, *supra* note 88, at 112.

312. See Morris, *Book Review*, 91 HARV. L. REV. 1367, 1368-69 (1978) (reviewing L. WEINREB, *DENIAL OF JUSTICE: CRIMINAL PROCESS IN THE UNITED STATES*).

same time that the problems associated with plea bargaining are eliminated or at least ameliorated. Prosecutors may still offer defendants limited sentence concessions to avoid costly trials when guilty verdicts are likely or when the facts of a particular case warrant sentence concessions. However, the factors that the prosecutor can take into account when making sentence concessions, and the amount of such concessions, are specified by guidelines. Finally, application of these guidelines by prosecutors is subject to judicial review.

Major structural changes in the criminal justice system will be required for implementation of this proposal; gone will be the case of the defendant who pleads guilty to one count of a five count felony indictment after a two minute conference between the prosecutor and his attorney. The proposal mandates a lengthier preliminary hearing, a more sophisticated sentencing hearing, and the possibility of frequent sentence appeals. The prosecutor is required to determine guilty plea concessions by the application of multi-factor guidelines instead of by case evaluations based upon generally accepted practices or "gut feelings." With experience, however, prosecutors should be able to "pigeonhole" most cases and determine and justify sentence concessions expeditiously.<sup>313</sup> The expense necessary to implement this proposal will be significantly less than the costs resulting from banning plea bargaining and affording every defendant the opportunity for a full-blown trial.

The proposal contained in this article also fundamentally alters the prosecutor's role in the criminal process. It clarifies the prosecutor's role as an administrator, whose sentencing concessions reflect equitable factors, such as the characteristics of the offender and the circumstances of the offense, not merely whether the original charges are provable at trial. In this role, the prosecutor becomes a quasi-judicial officer when making guilty plea concessions and loses his freedom to make discretionary choices without reference to guidelines and without oversight from the court. The prosecutor also openly assumes the dominant role in determining sentences for defendants who plead guilty; at least in some jurisdictions this is only a legitimation of the prosecutor's current control over sentencing.

Inevitably one must measure whether the ills associated with current plea bargaining are significant enough to warrant major reforms. However, a system of criminal justice where most defendants plead guilty without a trial has many hidden costs which are often overlooked—psychologically coerced pleas, unequal treatment of defend-

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313. The application of the guidelines and the statement of reasons justifying the sentence concessions need not be complicated. Prosecutors can use checklists or brief notation to explain their sentencing concessions. *Cf.* Thomas & Fitch, *supra* note 256, at 522-24 (use of these "short forms" in application of similar guidelines governing prosecutor's charging decisions).

ants, unwarranted leniency in sentencing and the loss of public respect. These are not trivial blemishes. Sometimes what appears to be a bargain is not really a bargain at all.