THE JUDICIAL APPROACH TO PLEA BARGAINING[1]

Plea bargaining[2] may be described as an agreement between the prosecution and defence that one or more charges against the defendant will be withdrawn in return for a *plea of guilty* to an agreed charge. Similarly, an agreement may be negotiated with the judge to the effect that if a plea of guilty is heard, then a more lenient sentence will be imposed. Bargains like this may occur in a number of ways:

(i) A bargain may be struck between the two sides before formal charges are laid. In this situation, the court may not be aware of the bargain unless the evidence is such that the court sees a great discrepancy between the charge as laid, and the facts. In England, for example, there is evidence to suggest that this type of bargaining takes place before magistrates courts and to some extent before higher courts. In 1969, for example, the *Court of Appeal* had to deal with three cases where it was evident that this type of bargain had been struck.[3] All three were cases where the offence charged was totally disproportionate to the facts as found.

In *R.* v. *Coe*,[4] Coe and his accomplice Molyneaux pleaded guilty to a large number of housebreaking and larceny offences.

The prosecution took the case before magistrates to be dealt with summarily.

Molyneaux was given a 12 months suspended sentence. Coe was committed to Quarter Sessions for sentence and released on bail. While on bail, he committed three more offences and was eventually given 30 months imprisonment. Against this he appealed.

Lord Parker was at a loss to understand how it came about that the prosecution invited magistrates to deal summarily with indictable offences.

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1. Paper delivered to The First Judicial Conference of The South Pacific, Western Samoa and American Samoa, January 10-13, 1972.
2. The American materials are voluminous. See e.g. Newman: Pleading Guilty for Considerations: A Study of Bargaining Justice (1956) 46 Jour. of Crim. Law 780; Goldstein: Police Discretion Not to Invoke the Criminal Process: Low Visibility Decisions in the Administration of Justice (1960) 66 Yale L.J. 543; Note in (1964) 32 Univ. of Chicago L.R. 167; Official Inducements to Plead Guilty: Suggested Morals for a Market Place; Arnold: Law Enforcement—An Attempt at Social Dissection (1932) 42 Yale L.J. 1; note in (1964) 112 Univ. of Penn. L.R. 865; Alschuler: The Prosecutor's Role in Plea Bargaining (1968) 36 Univ. of Chicago L.R. 50.
   For the British position, see two articles by the author: An Exploration of Plea Bargaining: (1969) Crim. L.R. 69; Plea Bargaining and the Turner Case (1970) Crim L.R. 559. See also Davis: Sentences for Sale: A New Look at Plea Bargaining in England and America (1971) Crim. L.R. 150 and 218.
3. **R. v. Coe** (1969) 53 Cr. App. R. 66; Kings Lynn Justices **ex p. Carter** (1969) 53 Cr. App. R. 42; **R v. Everest** (1969) 53 Cr. App. R. 20.
4. (1969) 53 Cr. App. Rep. 66.

> "No doubt" he said, "it is convenient in the interests of expedition, and possibly in order to obtain a plea of guilty . . . but there is something more involved than convenience and expedition. Above all, there is the proper administration of criminal justice to be considered; questions such as the protection of society, and the stamping out of this sort of criminal enterprise."[5]

Lord Parker also said that there was no excuse for the magistrates. Their duty, he said, in the case of indictable offences, is to begin to inquire into the matter as examining justices, and to deal with the case summarily only if it can be brought fairly and squarely within the Magistrates Courts Act.[6]

While, then, this type of bargaining has been severly criticized, there is no doubt that if the case merits, a bargain will take place as long as, it seems, the charge is not so totally unrelated to the facts as to make the position untenable.

It is indeed true to say that in the whole field of plea bargaining, it is only the bargain that goes wrong, or the bargain that reaches an extreme, that comes to the attention of appeal courts or the public.

In the United States, bargaining of this nature is a part of the everyday administration of justice.[7] As we shall see later, due to prevailing conditions there, the District-Attorney's power to bargain with the defendant is very great. The cases seem to suggest that U.S. courts are more concerned with the fact that a plea of guilty is freely and voluntarily made, than with any requirement that the charge should be consonant with the facts of the case.[8]

(ii) A second type of plea bargaining occurs where the *court* may be asked by the prosecution for its permission to withdraw one or more charges if the defendant has made it known that he will plead guilty to a specific charge or to a lesser charge. Similarly, a bargain may be struck and the judge informed in open court. In the U.S., the Codes of Criminal Procedure of a number of states provide for this means of bargaining.[9] In England, a recent study by the Oxford Penal Research Unit[10] suggests

5. Ibid. at p. 68.
6. Ibid. at p. 69.
7. See in particular (1964) 112 Univ. of Penn 865 at pp. 870-71; Randall: The Enforceability of the Plea Bargaining in Criminal Prosecutions (1966) at pp. 7-10.
8. **Shelton v. United States** 242 F. 2d 101 (C. Apps. 5th Cir. 1957) rev'd on rehearing 246 F. 2d 571 (C. Apps. 5th Cir. 1957) rev'd on Solicitor-General's confession of error 356 U.S. 26 (1957); **Martin v. United States**, 256 F. 2d 345 (C. Apps. 5th Cir. 1958), 358 U.S. 921 (1958); **Brown v. Beto**, 377 F. 2d 950 (C. Apps. 5th Cir. 1967); **Brady v. U.S.** 397 U.S. 742 (1970); **U.S. ex. Rel. Thurmond v. Mancusi** 275 F. Supp. 508 (Dis. Ct. E.D. N.Y. 1967); **Cortez v. United States** 337 F. 2d 699 (C. Apps. 9th Cir. 1964).
9. See e.g. The New York Code of Criminal Procedure S 342a: "In any case where the court, upon the recommendation of the District-Attorney, and in furtherance of justice, accepts a plea of guilty to a crime or offence of a lesser degree or for which a lesser punishment is prescribed than the crime or offence charged, it shall be the duty of The District-Attorney to submit to the court a statement in writing in which his reasons for recommending the acceptance of such a plea shall be clearly set forth."
10. See R.F. Purves: The Plea-Bargaining Business: Some Conclusions from Research [1971] Crim. L.R. 470.

that this type of bargaining readily goes on in higher courts. But this does not mean to say that it does not also occur before magistrates courts. (iii) Bargains may also be made as to sentence. Here, the prosecution will tell the accused that if he pleads guilty as charged, then the prosecution will seek a lenient sentence from the judge. In the U.S., it sometimes happens that the judge will meet with prosecution and defence and give an opinion as to what sentence he is minded to impose, should he hear a plea of guilty.[11] In England, however, in the case of *R. v. Turner*,[12] Lord Parker pointed out that a judge should never do this.[13]

The whole question of bargains as to sentence also raises the important consideration of whether a plea of guilty should, per se, mean that a more lenient sentence will be imposed. In the U.S., there are a number of cases where the court has taken judicial notice of the fact that a plea of guilty shows remorse and is the first step towards rehabilitation.[14] The limited English case-law on the matter suggests that something more positive must be shown in demonstrating remorse such as to merit a lenient sentence.[15]

(iv) In the U.S., it is usual for the District-Attorney to bargain for information. Charges may be reduced or dismissed if the accused furnishes the D.-A. with required information. This type of bargain is most common in cases involving drug offences.[16]

These, then, seem to be the major forms of plea bargaining. The list is not exhaustive and indeed there are numerous variables which may be thought of as operating, especially in the U.S.

ADVANTAGES AND DISADVANTAGES OF PLEA BARGAINING

1. *Advantages to the Accused*

It is true to say that the main reason for the accused to bargain is that he is looking for a mitigation of his sentence. But I think that there are also other reasons. He may well wish to avoid the rigours of a full-blown criminal trial. He may wish to avoid pre-trial delays which, in some jurisdictions, will involve a stay in prison. He may wish to avoid the

11. See **People ex. rel. Farina v. Klein** 145 N.Y.S. 2d. 515, 208 Misc. 797, aff'd. 154 N.Y.S. 503, 2 AD 2d 777; **People v. Siciliano**, 56 N.Y.S. 2d 80, 185 Misc. 149 (1945).
12. [1970] 2 All E.R. 281, C.A.
13. Ibid. at p. 285.
14. See e.g. **Commonwealth v. Kennan** 179 Pa. Sup. 145, 115A 2d. 386 (1955); **Dewey v. U.S.** 268 F. 2d. 124 (8th Cir. 1959); See also the remarkable case of **U.S. v. Wiley** 267 F. 2d. 453 (7th Cir. 1959), 278 F. 2d. 500 (7th Cir. 1960).
15. **R. v. Davies** [1965] Crim. L.R. 251; **R. v. Regan** [1959] Crim. L.R. 529; **R. v. de Haan** [1967] 3 All E.R. 618.
16. See Goldstein: Police Discretion Not to Invoke the Criminal Process: Low Visibility Decision in the Administration of Justice (1960) 69 Yale L.J. 543 at p. 562; Randall: The Enforceability of the Plea Bargain in Criminal Prosecution (1966) at p. 3.

publicity that goes with a criminal trial. Professor Newman has suggested[17] that the label which goes with some crimes, especially sexual offences, is sought to be avoided. Or again, he says, the disabilities that go with a felony record are a factor motivating a plea of guilty to a lesser charge. It may well be that a courtroom-wise defendant with a bad criminal record will be influenced by the fear of judicial wrath should he plead not guilty. It is, however, clear, that should it be found that the judge did in fact give a harsher sentence believing that the accused should have pleaded guilty, then this will be regarded as judicial misconduct.[18] In the U.S. it has been held that such conduct amounts to a denial of due process.[19]

2. *Advantages to Criminal Administration Authorities*

Prosecuting authorities and the public can gain considerable advantages from plea bargaining where the system of criminal administration is overburdened with work. In England, the Police will be allowed to clear their books, while in the U.S., the District-Attorney, whose career may well depend on the number of convictions obtained, may demonstrate the efficiency of his department.

Thus, where the prosecution case is not as strong as it should be—for example, where the evidence is not sufficiently cogent, witnesses are unreliable or identification is inadequate;—a negotiated plea of guilty will ensure a conviction and allow manpower to be concentrated elsewhere. Properly organised, such expedition will save the taxpayer the expense of a costly trial.

3. *Disadvantages to the Accused*

It has been found that both in the U.S. and Britain, the negotiation of a bargained plea of guilty is a hurried affair. The Oxford Study,[20] for example, gives a picture of negotiations conducted on the day of trial with conferences quickly convened and discussions conducted in haste.[21] The picture is similar in the context of the overburdened offices of prosecutorial authorities in the U.S. This has led certain researchers to call for formalization of the process,[22] and to certain states putting down the procedures to be followed in their Codes of Criminal Procedure.

17. (1965) 46 Jour. of Crim. Law 780.
18. See R. v. Regan [1959] Crim. L.R. 529.
19. Euziere v. U.S. 249 F. 2d (10th Cir. 1957); U.S. v. Tateo 214 F. Supp. 560 (Dist. Crt. S.D.N.Y. 1963).
20. [1971] Crim. L.R. 470.
21. Ibid. at p. 473.
22. See Subin: Criminal Justice in a Metropolitan Court: The Processing of Serious Criminal Cases in the District of Columbia Court of General Sessions (1966). For a discussion of the merits of formalization and of Subin's book, see the author's article in [1969] Crim. L.R. 69 especially pp. 76 and 77.

Of course, the problem that arises when proceedings are of this hurried nature, is whether the accused is fully aware of what is happening to him. In short, is the plea of guilty made knowingly and voluntarily?

And it is not only the hurried nature of the bargaining that causes concern with regard to knowledge and voluntariness. The whole concept of plea bargaining raises the issue of whether the plea of guilty is voluntarily made. Do prosecutorial authorities or judges by threats or promises induce a plea of guilty, thereby eliminating the complete voluntariness of the accused's plea? In the U.S., a plea of guilty is an implied waiver of the constitutional rights contained in the 5th and 6th Amendments. We will see that most appeals in that country are predicated on the proposition that these rights are not waived voluntarily or that the accused was denied due process under the 14th Amendment.

4. *Disadvantages to the Proper Administration of Criminal Justice*

The fact that plea bargaining exists as a working part of a criminal process means, in essence, that the punishments provided by the criminal law are not meted out as intended by the legislature. It is true to say that modern theories of sentencing are moving away from the old concept of having the punishment fit the crime, to one of tailoring a sentence to meet the individual's need. But where plea bargaining is involved, the charge or sentence is tailored for the individual not on the basis of his reformative needs but on the basis of the evidence against him, the most expeditious means of dealing with him, and the desire to register a conviction. In short, plea bargaining is a negation of the declared values of the administration of criminal justice.

But we must be realistic about the matter. Due to the pressure on the courts and on law enforcement agencies, and the desire to get convictions in the context of rigorous rules of evidence and standards of proof, plea bargaining does go on, and in some jurisdictions on a large scale.

In the U.S., plea bargaining is such an accepted part of criminal administration that a vast number of abuses have appeared in the operation of the system. There is some dispute, however, as to the nature and extent of plea bargaining in Britain. To a discussion of these systems I will turn directly.

Before doing so, let me note that it is argued that guilty pleas as a result of bargaining save both time and money. But it will be remembered that a large number of bargains for pleas of guilty are concluded on the day of trial. The result may well be that the court will be unable to bring forward other pending cases at such short notice. This will mean a great waste of court time.

THE AMERICAN EXPERIENCE

In the U.S., plea bargaining is regarded by most lawyers as a desirable feature of the criminal process. This is due to a number of factors.

1. In many states, penal statutes are extremely severe and sentences, in practice, can be very long. This fact has motivated Professor Karlen[23] to say:

> "The bargained plea is a useful device for ensuring that a defendant will be punished, while avoiding at the same time the risk of an unduly harsh penalty allowed by the legislature."

2. In the U.S., the crime rate is high and there is a great deal of pressure placed on the criminal process. There is a need to clear cases from the books wherever possible. Indeed, in some jurisdictions it takes up to a year to bring a case to trial after arrest.[24] It has been suggested that if the level of guilty pleas were reduced, the process of criminal administration might well grind to a halt.[25]

3. Note also the District-Attorney's desire that a number of convictions be obtained and the inherent advantages and disadvantages of plea bargaining already mentioned.

Such are the conditions in the U.S., that procedures for plea bargaining have been set down by the American Bar Association,[26] enacted in the Criminal Codes of a number of states, and also in *The Federal Rules of Criminal Procedure.*

Rule 11 of the Federal Rules provides:

> "A defendant may plead . . . guilty, or with the consent of the court nolo contendere. The Court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily and with an understanding of the nature of the charge."

(This rule sets down quite stringent procedures, as do the rules in other Codes of Criminal Procedure. It will be interesting to hear from the learned judges of the Tenth Circuit of the United States Federal Court present today how such Rules of Procedure are operated in practice.)

But plea bargaining is acceptable and respectable in the eyes of the profession and the judiciary. The result is that the number of guilty pleas has increased. *The President's Commission on Law Enforcement*[27] estimated that in some U.S. jurisdictions, 90% of all criminal convictions are by pleas of guilty. One would assume that many of these were made

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23. Karlen: Anglo-American Criminal Justice (1967) at p. 155.
24. See Davis: Sentences for Sale: A New Look at Plea Bargaining in England and America [1971] Crim. L.R. 150, 218 at p. 219. Mr. Davis examines the pressures placed on the process of criminal administration in the State of New York.
25. Ibid. at p. 219.
26. American Bar Association: Standards Relating to Pleas of Guilty (1967).
27. The President's Commission on Law Enforcement: Task Force Report—The Courts (1967) p. 9.

as a result of plea bargains. For example, *Subin*[28] in his study of the *District of Columbia Court of Sessions* estimated that nearly 40% of cases disposed of by the court after pleas of guilty are the result of plea bargaining.

Given the current American ethos, grave problems arise as to the operation of the system. I have already noted that a plea of guilty is an implied waiver of constitutional rights. The question arises as to whether a plea is knowingly and voluntarily made. Indeed, there is a great fear expressed by commentators[29] that within the present system as operated, is is very possible for an innocent man to plead guilty to avoid the possible consequences of a criminal trial and the harsh inflexible penalty that might follow.

Since the case-law on the subject is voluminous and inconsistent, I will deal briefly with the position a) when the prosecutor has been involved in negotiations, b) when the judge has negotiated a plea.

a) *Prosecutor-Induced Pleas*

The usual standard of conduct for valid constitutional waiver is that the plea of guilty is made knowingly and voluntarily. A plea of guilty is made knowingly and voluntarily where a prosecutorial inducement does not contain false or misleading information. If the prosecutor promises the defendant that he will be given a specific sentence and this later turns out to be untrue, has the plea of guilty been made knowingly? U.S. courts, however, have tended to base their opinions not on the knowledge aspect but on the voluntariness aspect of the problem. This is so even where the case involves the giving of inaccurate information.[30]

WHAT IS VOLUNTARINESS?

1. It is clear that a plea of guilty induced by threat of physical force is not a plea voluntarily made. In *Waley* v. *Johnston*,[31] for example, an F.B.I. agent threatened to throw the defendant out of a window if no plea of guilty was heard. Held – an involuntary plea.

2. Where a promise or threat does not relate to reduction of charge or sentence but for example to prosecute the case vigorously if there is no plea of guilty heard, then such a plea is made voluntarily.

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28. Supra, footnote 23.
29. See especially the discussion in Official Inducements to Plead Guilty: Suggested Morals for a Marketplace [1964] 32 U. of Chic. L.R. 167 at pp. 174-186.
30. **Machibroda** v. **U.S.** 368 U.S. 487 (6th Cir. 1962), cf. U.S. ex rel. **Wissenfeld** v. **Wilkins** 281 F. 2d. 707 (2nd Cir. 1960).
31. 316 U.S. 101 (9th Cir. 1942).

The prosecutor in *Kent* v. *U.S.*[32] told the defendant that unless he pleaded guilty, the defendant's fiancee would be charged as an accessory. A plea of guilty was entered and the fiancee was not prosecuted.

The Appeals Court in determining the voluntariness question said:

> "We are not prepared to say that it can be coercion to inform a defendant that someone close to him who is guilty of a crime will be brought to book if he does not plead guilty. If a defendant elects to sacrifice himself for such motives, that is his choice."[33]

Again in *Parrish* v. *Bete*,[34] the defendant was an uneducated youth who was held on death row for 6 months. He was threatened with being "burned" in the electric chair and was pressed by his mother and lawyer to accept a 99 year sentence. This was held to be a voluntary plea.

3. The threat may be a promise merely to go to trial unless the defendant pleads guilty, in which case the prosecutor may dismiss certain charges or accept a plea of guilty to a lesser charge. The attitude of the courts to such bargains is well summed up by the author of a note in the University of Chicago Law Review in 1964:[35]

> "Although such threats may interfere with the right to go to trial in the sense that it tends to persuade the defendant not to go to trial, courts have *not* been moved to hold prosecutor bargains unconstitutional or a resulting plea involuntary . . . The question of the validity of these inducements is generally avoided or assumed away by the courts without discussion of the constitutional problems."[36]

Perhaps one could also say that courts may be influenced by the fact that a threat or promise by the prosecutor who does not have the ultimate power to sanction is not to be regarded as having a gravely substantial influence. This is especially so if we agree that the courtroom-wise accused will be influenced by other factors like the probability of conviction, the possible sentence in the light of his record, and, who the judge is.

b) *Judge-Induced Pleas*

The judge, in the U.S., plays an active role in the plea bargaining process. His consent, it seems, is required for a change of plea or a change of charge in some jurisdictions. He may also receive a recommendation from the prosecution as to a desirable sentence, or will meet with all the parties to discuss the sentence he will impose should a plea of guilty be forthcoming.

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32. 272 F. 2d. 795 (1st Cir. 1959).
33. Ibid. at p. 798.
34. 414 F. 2d. 770 (8th Cir. 1959).
35. [1964] 32 Univ. of Chic. L.R. 167.
36. Ibid. at p. 175, citing Martin v. U.S. 256 F. 2d 345 (5th Cir. 1958) and Shelton v. U.S. 242 F. 2d. 101 (C. Apps. 5th Cir. 1957).

When the judge is thus involved, the question again arises whether a plea is made knowingly and voluntarily. Courts of Appeal again concentrate on the vountariness aspect of the question. In *Pilkington* v. *U.S.*[37] it was held that a mistake by the judge in outlining the statutory range of sentences available was a denial of due process in that the plea of guilty was not made voluntarily.

When the judge is involved, what threats can he be said to make to the accused? The judge certainly has a greater power than the prosecutor to carry out a threat since it is with him that the sentencing power resides. If the judge recommends a given sentence if a guilty plea is heard is he threatening more severe punishment if the accused goes to trial? Or is he threatening an unfair trial if the accused pleads not guilty–if he talks of the sentence before trial is he overturning the presumption of innocence? Can we however distinguish between a judge who merely talks about the results of being found guilty on the one hand, and a judge who talks of the alternatives of a plea of guilty or not guilty in the context of the case at hand? This line seems to be a narrow one. What again if the judge remains silent when approached? Is this to be regarded as an implied threat, when one is operating in a system where it is common for the judge to give an opinion of the case?

It was established in *Commonwealth* v. *Senouskas*[38] in 1937 that a promise by a judge of any kind of sentence before hearing the evidence is judicial misconduct. The fact that this had to be re-iterated in *Euziere* v. *U.S.*[39] in 1957 and in *U.S.* v. *Tateo*[40] in 1963 shows that the practice still goes on.

Another problem that arises when a judge recognises the practice of plea bargaining is whether a plea of guilty will inevitably mean that a more lenient sentence will be imposed. U.S. courts have taken judicial notice of the fact that this is so.[41] In *U.S.* v. *Wiley*[42] the trial judge in commenting on his disposition of Wiley said:

> "In sentencing Wiley, I seriously considered his prospects for rehabilitation. When he originally changed his plea from guilty to not guilty, there was no remorse in this man. The other defendants did stand conscience striken in repentance before the court."[43]

The question therefore arises, that if the court will impose a lighter sentence for a guilty plea, is there an implied threat that if an accused

37. 315 F. 2d. 204 (4th Cir. 1963).
38. 328 Pa. 69 (1937).
39. 249 F. 2d. 293 (10th Cir. 1957).
40. 214 F. Supp. 560 (Dist. Ct. S.D. N.Y. 1963).
41. See e.g. **Commonwealth** v. **Keenan** 179 Pa. 145, 115A 2d. 386 (1955); **Dewey** v. **U.S.** 268 F. 2d. 124 (8th Cir. 1959).
42. 267 F. 2d. 453 (7th Cir. 1959) and see the remarkable progress of this case through the courts: 278 F. 2d. 500 (7th Cir. 1960) 184 F. Supp. 679 (N.D. Ill. 1960).
43. Ibid. 184 F. Supp. 679 at p. 687 (N.D. Ill. 1960).

pleads *not guilty* and is later found *guilty*, a heavier sentence will be imposed?

Such then, briefly, is the American system. It is easy to see that despite its utilitarian value, plea bargaining offends the basic requirements of the administration of justice. It has been suggested[44] that prosecutors in the U.S. have taken over the roles of legislator and judge, and this may well be so in many jurisdictions. It seems that the degree of control exercised by the judiciary is a key factor in regulating the system of plea bargaining. If such control is not exercised, then the values of expedition and the securing of convictions at all costs will be prevalent. On the other hand, once the judge is involved in the process, he leaves himself open to allegations that an involuntary plea was secured.

THE ENGLISH POSITION

While in the U.S., plea bargaining goes on as a working part of the administration of criminal justice, in England, the practices are far from visible. I have already mentioned some cases where judges have expressed disapproval of prevailing practices, but there has been no full blown empirical research carried on to determine the true extent of plea bargaining. The only case I know of where guidelines for dealing with the problem were set down is *R.* v. *Turner*[45] to which I shall refer directly.

In England, the process of criminal administration is rather different from the U.S. It is the police rather than the District-Attorney who hold the basic discretionary powers of laying charges. It also seems that in many U.S. jurisdictions the pressure on the courts is greater than in Britain. Perhaps there is a greater flexibility in statutory sentencing procedures in England. Also, it is sometimes suggested that the judiciary exercises a greater control over criminal proceedings than it does in the U.S., thus having greater control over plea bargaining.

In *Coe*,[46] *Everest*[47] and *Soanes*[48] the Court of Appeal was certainly at pains to point out that magistrates should be stringent in seeing that the charges brought should match the alleged facts of the case. This attitude may be compared with U.S. cases like *People* v. *Foster*[49] and *People*

44. [1971] Crim. L.R. 218 at p. 219.
45. [1970] 2 All E.R. 281, C.A.
46. (1969) 53 Crim. App. R. 66.
47. (1969) 53 Crim. App. R. 20.
48. (1948) 32 Crim. App. R. 136.
49. 278 N.Y.S. 2d. 603 (N.Y. Ct. Apps. 1967).

v. *Nixon*[50] where the New York Court of Appeals was more concerned with the voluntariness of the plea of guilty than with the correlation of charge and facts. It also seems that English courts, in looking at the plea of guilty as a factor in sentencing, tend to say that such a plea must be accompanied by a genuine demonstration of remorse before the judge will show leniency—*R.* v. *Davies*,[51] *R.* v. *Regan*.[52] But in a recent speech to the Law Society of Scotland, the Lord Chancellor of England gave a realistic analysis of the situation:

> "A judicious plea of guilty", he said, "accompanied by a discreet and concise plea of mitigation by an experienced advocate will, if he would only realize it, often get a defendant off with less."[53]

So while English law does not seem to have gone as far as American courts in regarding the plea of guilty as having an independent significance, in practice I feel the two are not all that far apart.

Taking, then, the peculiarities of the English system into account, let us look at *R.* v. *Turner*. The case itself incidentally was not a case involving plea bargaining. But Lord Parker took time to set down four rules for the guidance of judges, prosecutors and defendants when dealing with a plea bargaining situation.[54]

Rule 1: The Duty of Defence Counsel. Counsel (for the defendant) must be completely free to do his duty. That is, to give the accused his best advice, albeit in strong terms. This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case.

Rule 2: The Accused, having considered counsel's advice, must have a complete freedom of choice whether to plead guilty or not guilty.

Rule 3: There must be freedom of access between both counsel for prosecution and defence and judge.
Any discussion that is to take place must be between judge and counsel for both sides. The accused's solicitor may be present at the discussion if he so desires.

Rule 4: The judge should never indicate the sentence he is minded to impose. A statement that on a plea of guilty he would impose one sentence, but that on a conviction following a plea of not guilty he would impose a severer sentence, is one which should never be made. This could be taken as undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential.
But a judge is allowed to say, in an apposite case that, whatever happens, whether the accused pleads guilty or not, the sentence will or will not take a particular form, for example a probation order, fine, or custodial sentence.

50. 21 N.Y.S. 2d. 388 (N.Y. ct. Apps. 1967).
51. [1965] Crim. L.R. 251.
52. [1959] Crim. L.R. 529.
53. Speech to annual meeting of The Law Society of Scotland reported in the London Times, May 10th, 1971.
54. [1970] 2 All E.R. 281 at p. 285.

There seem to be some problems raised by the *Turner case*. *Rule* 4 suggests that the judge should never state that the plea of guilty is to have an independent significance in sentencing. But in referring to counsel's complete freedom to do his duty under Rule 1 Lord Parker added:

> "This will often include advice that a plea of guilty, showing an element of remorse, is a mitigating factor which may well enable the court to give a lesser sentence than would otherwise be the case."[55]

Thus counsel may indicate to his client that in the circumstances a plea of guilty will have a significance in sentencing, but a judge may never do so. Presumably therefore, if counsel makes a suggestion for a plea of guilty in strong terms based on his anticipations of judicial conduct then such a plea of guilty will be regarded as a voluntary plea. And if it turns out later that the judge was not lenient, the accused would have no complaint.

One significant step taken by Turner was to commit the judge to involvement in bargaining as to the charge to be laid.

Rule 3 states that *any* discussions that go on must be between judge and counsel for both sides.

Mr. Davis in his recent article in The Criminal Law Review[56] disagrees with my views in this area. He does not believe that Rule 3 means that the judge is to be involved in a process of plea bargaining.[57]

He suggests[58] that the involvement of the judge is merely an example of the way English courts continue to allow a sentence differentiation for pleas of guilty and not guilty without allowing the differentiation to become so totally coercive as it is in the hands of some American courts. With this I cannot agree. There is no suggestion in Lord Parker's rules that the judge and parties should not be involved in discussions to reduce a charge or dismiss a count in a charge in return for a plea of guilty.

I would venture to suggest that Rule 3 refers to such latter discussions.

In my researches I found that informal bargaining commonly went on between the parties before the trial began. These discussions did take the form of negotiations as to pleas of guilty to a lesser crime than originally charged. Indeed, my conclusions are borne out by the new study by the Oxford Penal Research Unit.[59]

55. Ibid. p. 285.
56. Sentences for Sale: A New Look at Plea Bargaining in England and America [1971] Crim. L.R. 150, 218.
57. Ibid. p. 156.
58. Ibid. p. 225.
59. See [1971] Crim. L.R. 470 at p. 471.

There, 112 defendants pleading not guilty before higher courts who appeared in a total of 90 cases, and who changed their pleas from not guilty to guilty in a plea bargaining situation were taken. In most cases, it was found, a bargain was struck on the day of trial. 48 of 112 pleaded guilty to the whole indictment, 64 negotiated pleas of guilty to some of the charges in the indictment and not guilty to others. Pleas of guilty were to lesser charges. Occasionally, these lesser charges were added to the indictment with the approval of the court specifically to accommodate negotiated pleas.[60]

My original thoughts on Rule 3, which I still hold, are as follows: The negotiations that do go on are generally of a hurried nature. But much ground is covered by informal discussion between the parties before the judge is approached. The accused is always involved and, if experienced, is aware of the consequences of the resultant plea. Such informal discussion with the background of general convenience for both sides fosters good relations between police and legal profession. The accused is aware of the fact that he is being given individual attention—the courtroom-wise accused appreciates a means whereby he is able to bargain.

But Rule 3 states that *all* discussions must be with the judge. If this means that informal discussion before approaching the judge is no longer permissible, then I think Rule 3 is a retrograde step.

Rule 3 however tends to alleviate the problem of negotiations being of a very hurried nature. If the judge is involved from the start, then I am sure that he will see to it that the accused appreciates what is happening in pleading to a given charge. But in a busy legal system can a judge afford the time to participate in negotiations as well as carry out his other duties.

I had confronted this problem in 1969[61] by suggesting that depending on the level of plea bargaining, there might well be a case for formalizing the bargaining process i.e. that there should be a procedure set down to clear the issues well before the date of trial.[62] This would ensure that the accused appreciated the nature of his plea and the judge could well be approached, within the procedure, to ascertain his views of the discussion. If everything were clarified well before trial, then time and money would be saved, in that there would be a well prepared court docket. Formalization would certainly involve a liberal discovery policy. But as long as the profession retained a strong code of ethics, I would

60. Ibid. pp. 470-71.
61. An Exploration of Plea Bargaining [1969] Crim. L.R. 69.
62. Ibid. p. 76.

not see a great problem arising from this. The Oxford Unit however disagree with formalization as an answer. Their suggestion is that:

> " . . briefs could be delivered and conferences held at an earlier stage; barristers should be less ready to dispose of briefs to their colleagues so late in the process that counsel into whose hands the brief falls has only the shortest familiarity with its contents."[63]

Whether this is the answer, and whether this can be done, at least as a first step, in a busy legal system, only time will tell.

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63. [1971] Crim. L.R. 470 at pp. 473 and 475.

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