Plea Bargaining—Justice Off the Record

I. Introduction

The concept of trial by jury, hailed by many as the hallmark of liberty and freedom, has often been referred to as the most admirable product of the common law.[1] Having the right to a trial by jury in a criminal case has been held to be a fundamental right, guaranteed by the sixth amendment and binding upon the States through the fourteenth.[2] In 1859, the writers of the Kansas Constitution summed up the principle in nine concise words, "The right of trial by jury shall be inviolate."[3] As a part of America's legal heritage, the presumption of innocence, the heavy burden of guilt beyond a reasonable doubt, and the right of the accused to meet his accuser face to face, are fundamental precepts.

In light of this background and the traditional concepts which set America's system of justice apart from the rest of the world, it is rather startling to discover that in the overwhelming number of criminal cases brought before the courts, guilt or innocence of the accused is not contested.[4] Rather, the entire trial process, and all its built-in protections are neatly sidestepped by the expediency of the guilty plea. It is estimated that pleas of guilty account for as high as 90 percent of the convictions entered each year.[5] In the state of Kansas, disposition of criminal cases in the district courts for the year ending June 30, 1969, resulted in 2,659 convictions, of which 2,216 were obtained by pleas of guilty,[6] or approximately 83 percent.

Looking at such statistics, it would appear that there must be good cause for an accused to surrender so readily his constitutional right to a trial and to confess his guilt voluntarily. In some instances no doubt, the accused simply acknowledges his guilt and is willing to assume the consequences which the law places upon his actions. In many cases however, there are

1. M. Morris, The History of the Development of Law 304 (1909).
2. Duncan v. Louisiana, 391 U.S. 145 (1968).
3. Kan. Const. Bill of Rights § 5.
4. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967) [hereinafter cited as Task Force Report].
5. *Id.*
6. Kan. Judicial Council Bull. 136 (Oct. 1969).

positive indications that the plea is forthcoming, not from any moralistic urge on the part of the defendant to purge his conscience of his wrong, but rather because it is in his best interests to do so. At some point, the defendant who is actually guilty of the conduct alleged, realizes that in the last analysis he is almost certain to be found guilty even after a trial and that his plea of guilty might be utilized as leverage to gain certain concessions from the prosecution. The prosecutor may be willing to deal with the accused because as a result of such a plea, he also benefits by being assured of a conviction without having to expend any more time on the case. Such strategy upon the part of the accused is known as "negotiating the plea," or "plea bargaining."

II. The Plea Bargaining Process

Basically plea bargaining is a process whereby the defendant admits his guilt in exchange for some concession on the part of the prosecution which will work to his advantage.[7] Probably the most frequent bargain attempted is an effort to gain a reduction in the charge. Defendant's position is, for example, that if the charge of burglary, which is a felony, should be reduced to unlawful entry or trespass, which is a misdemeanor, he would then be willing to plead guilty, resulting in rapid disposition of the case without a costly, time-consuming trial. Such action is advantageous to the defendant because in jurisdictions where penalties are legislatively fixed, such a bargain will automatically reduce the potential sentence and he will have a less serious record than is actually called for upon the alleged facts.[8] Variations of this type of bargain include the dismissal of other charges or potential charges which could be brought by the prosecution against the accused or perhaps third persons such as members of his family.

The other common form of negotiation is the sentence promise, i.e., the prosecutor agrees to recommend a certain sentence, or will not oppose recommendations for leniency made in behalf of the defendant. A common example is a promise by the prosecutor either not to invoke the provisions of a recidivist statute or to fail to bring the defendant's prior conviction record to the court's attention, which could result in increased punishment. Of course the sentence promise is not binding on the court, as this would be passing judgment before the plea is entered. In addition, the court is not or should not be a party to the agreement.[9] While it is recognized

7. For a detailed and comprehensive study of plea bargaining and related problems, see D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial (1966) (hereinafter cited as Newman).
8. *Id.* at 97.
9. *See* Commonwealth v. Evans, 434 Pa. 52, 252 A.2d 689 (1969). *See also* ABA Comm. on Professional Ethics, Opinions, No. 779 (1964) stating: "The judge . . . should not be a party to any arrangements in advance for the determination of sentence whether as a result of a guilty plea or a finding of guilty based upon proof."

that the judge normally follows the prosecutor's recommendation, the prosecutor can affect sentence indirectly apart from any specific recommendation. He can drop charges, consolidate counts, or as mentioned above, fail to inform the court of prior convictions.[10]

Thus, before a plea is entered, there is another adversary proceeding of no small dimension in which the prosecutor and defendant trade, in quid pro quo fashion, a guilty plea on one hand for some type of concession favorable to the defendant. As a result, the case is disposed of not unlike the pretrial settlement of a civil action for damages.[11]

Though historically entrenched in the administration of criminal justice, few areas in the law have created "a greater sense of unease and suspicion than the negotiated plea of guilty."[12] At the outset, it would appear that a procedure which allows one to negotiate his way to justice has no place in the American scheme of judicial process. In short, "justice and liberty are not the subjects of bargaining and barter."[13] Nonetheless, plea bargaining is considered by most courts, if not all, as a "commonly used tool" in the administration of justice and that its use is not fatal per se.[14]

Plea bargaining seems to have developed as a procedure to mitigate unduly harsh penalties meted out by the courts of England for rather minor offenses in the 17th century.[15] But when the cause for the procedure disappeared with enlightened legislation, the bargaining process remained with new arguments emerging for its perpetuation. Today the most prevalent reasons given for the practice are: its efficiency in disposing of a great number of cases on an overcrowded court docket; it is beneficial to both sides; and it allows the court to individualize justice to fit the particular rehabilitative need of the defendant.[16] Since plea bargaining plays such an important role in the administration of criminal justice, an inquiry into the relative advantages and disadvantages of such a process seems in order.

10. Newman 94.
11. Task Force Report 9.
12. *Id.*
13. Shelton v. United States, 242 F.2d 101, 113 (5th Cir. 1957).
14. *See, e.g.*, Ford v. United States, 418 F.2d 855, 858 (8th Cir. 1969); Parrish v. Beto, 414 F.2d 770, 772 (5th Cir. 1969); United States *ex rel.* Rosa v. Follette, 395 F.2d 721, 724 (2d Cir. 1968); Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964); Arbuckle v. Turner, 306 F. Supp. 825, 828 (D. Utah 1969); Raleigh v. Coiner, 302 F. Supp. 1151, 1157 (N.D. W. Va. 1969); State v. Whitehead, 163 N.W.2d 899, 902 (Iowa 1969); State v. Byrd, 203 Kan. 45, 51, 453 P.2d 22, 28 (1969); Saenz v. State, 218 P.2d 106 (Okla. Crim. App. 1966).
15. E. McLaughlin, *Selected Excerpts From the 1968 Report of New York State Joint Legislative Committee on Crime, Its Causes, Control and Effect on Society*, 5 Crim Law Bull. 225 (1969).
16. Note, *The Role of Plea Negotiation In Modern Criminal Law*, 46 Chi.-Kent L. Rev. 116 (1969).

III. Advantages of the Negotiated Plea

1) *Efficiency.* Without question, the most obvious advantage resulting from the bargaining process is the prompt disposition of a great number of cases. In fact, it has been asserted that as a practical matter, the court system as it exists today could not physically try all the cases coming before it without the expedience of the guilty plea.[17] The heavy case loads faced by the courts simply require a method of disposing of a certain number of cases without resorting to the trial process. The office of the prosecutor is also greatly affected in that it may turn its attention to those cases which will actually go to trial rather than having its personnel tied up in lengthy, costly court sessions where guilt cannot be factually disputed. The defendant also feels the impact of the efficient and rapid disposition of his case, spending less time in jail awaiting his turn on the clogged trial docket,[18] and hopefully on the road to rehabilitation much faster.

2) *Flexibility.* The process of plea bargaining also injects into the rather rigid system of criminal law a means by which the prosecution can dispose of the case based upon the particular facts and circumstances surrounding the defendant and his individual rehabilitative needs. It provides the opportunity to individualize justice and the ability to attain desirable conviction results.[19] Certain mandatory provisions of the statutes which in a particular situation seem unduly harsh may be avoided and a punishment selected which is best suited to the defendant who has already acknowledged his guilt.

3) *Benefits Accrue to Both Sides.* Plea negotiations allow both parties to receive some advantages which otherwise would not be possible. As for the prosecutor, it gives him the opportunity to dispose of a weak case and still be assured of a conviction.[20] It also provides the possibility of obtaining valuable information as to other criminal offenders known by the accused. The defendant, as previously mentioned, has the opportunity to obtain dismissal of charges, charge reduction, or a sentence promise. He also may benefit by other considerations such as avoiding the wide publicity that may attend the trial, and avoiding the stigma attached to certain crimes which are morally reprehensible to the public.[21] At the same time a benefit might well accrue to the defendant's victim in being spared the unpleasant experience and publicity of a trial.

17. The Challenge of Crime in a Free Society: A Report by the President's Commission on Law Enforcement and Administration of Justice 135 (1967).
18. Newman 87.
19. *Id.* at 76.
20. Note, *Criminal Law: Plea Agreements in Oklahoma*, 22 Okla. L. Rev. 81, 84 (1969).
21. Newman 97.

4) *Frugal Use of the Trial Process.* Lastly, by use of the guilty plea (more readily surrendered after plea negotiations), the judicial process is not wasted upon cases which do not lend themselves to the trial process. In the light of constitutional guarantees, this determination must be ultimately made by the defendant. (In discussing this point, it must be assumed that the accused is guilty of some criminal activity, but that the amount or degree is in question. *If the defendant asserts his innocence, then plea bargaining should not be in issue.*) By preserving the determination of guilt by trial to those cases involving some real doubt as to the issues of fact, the trial system takes on a more viable function as opposed to a mere formality. Such selectivity may enrich in people's minds the importance of our constitutional guarantees and enforce the concepts of the presumption of innocence and the burden of proof required in a criminal case.[22]

IV. Disadvantages of the Negotiated Plea

1) *Propriety.* Probably the most fundamental problem with plea bargaining is the "propriety of offering the defendant an inducement to surrender his right to trial."[23] Such a proposition can hardly be based on efficiency or expediency. The question becomes one of fundamental fairness. The relative bargaining positions of the participants are also to be scrutinized. The prosecution has all the power of his office at hand, while the defendant has only his constitutional rights with which to negotiate. Though the extension of right to counsel has tended to equalize the ability of the defendant to bargain,[24] this cannot be equated with the pressures that can be brought to bear by the prosecutor's office. Where agreements involve a sentence promise, the defendant is faced with the rather one-sided proposition that the prosecution cannot bind the court, and if the court does not go along with the sentence recommendation, the defendant may or may not be able to retract his plea.[25] In other instances, the accused may find his part of the bargain to be illusory as when the judge considers in passing sentence whether the charge has been reduced and thus looks to the conduct of the defendant rather than the charge.[26] Another possibility is that the prosecutor may drop one charge on a multi-count information, but the defendant find himself sentenced under the recidivist act.[27]

2) *Invisibility of the Process.* Perhaps as a result of the questioned pro-

22. Task Force Report 10.
23. *Id.*
24. Gideon v. Wainwright, 372 U.S. 335 (1963).
25. White v. State, 203 Kan. 687, 455 P.2d 562 (1969).
26. Newman 98.
27. *See* Mann v. State, 200 Kan. 422, 436 P.2d 358 (1968).

priety, plea agreements tend to be conducted in the shadows, separate and unobserved in the formal judicial process. There is generally no record of what transpires at the bargaining session and when routine inquiry is made as to promises or inducements offered for the guilty plea, both sides deny the existence of such proceedings.[28] The court is uninformed and thus unable to pass judgment upon the validity or fairness of the agreement, and if the defendant feels he was short-changed in the deal, he finds his own words of denial coming back to haunt him on a post-conviction appeal.[29] With nothing on the record as to any inducement or promise, the defendant is faced with the almost impossible task of showing any irregularity or coercion which would make his plea involuntary.[30]

The characteristic of invisibility in plea bargaining can be affected by other means. The warrant and complaint upon which defendant is arrested may contain multiple charges, the maximum possible under the alleged facts. Negotiations begin, and when a bargain is struck, the agreed upon charge is reflected in the information, to which the defendant pleads guilty at his arraignment.[31] The only way to detect that any bargaining might have taken place is by comparing the information to the warrant and complaint.

3) *Problem of Uniformity.* As the product of an invisible and informal process having no recognized rules or guidelines, plea bargaining varies with each prosecutor's office and with the circumstances of each case. The end result is a lack of uniformity which creates a certain amount of unpredictability. It is felt by some that predictability of result is a necessary element for criminal statutes to act as an effective deterrent to crime.[32] Also, by the very nature of the office of the prosecutor, full discretion is required in the conduct of his duties.[33] Thus, of two persons involved in criminal activity, one may be prosecuted and the other ignored; or if both are indicted, one may be able to negotiate and gain concessions, while the other is denied such an opportunity.[34] It has been acknowledged that those defendants who plead guilty are more apt to receive lenient treatment than their counterparts who take their chances on gaining acquittal.[35] Thus a person found guilty in the trial process is indirectly penalized for exercising his constitutional rights.[36] Theoret-

28. *See* White v. State, 203 Kan. 687, 455 P.2d 562 (1969); *see also* State v. Byrd, 203 Kan. 45, 453 P.2d 22 (1969).
29. *See* White v. State, 203 Kan. 687, 455 P.2d 562 (1969).
30. *Cf.* McCarthy v. United States, 394 U.S. 459 (1969).
31. Newman 91-92.
32. *Supra*, note 15, at 265.
33. Addington v. State, 198 Kan. 228, 424 P.2d 871 (1967); State v. Trinkle, 70 Kan. 396, 78 P. 854 (1904).
34. State v. Kilpatrick, 201 Kan. 6, 17, 439 P.2d 99, 108 (1968).
35. Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 Yale L. J. 204 (1956).
36. *Id.* at 220.

ically, whether a person admits his guilt or is proven guilty in an adversary proceeding, should be of no consequence as to punishment. In both cases the law has been violated. It has been argued that the defendant who pleads guilty is entitled to leniency because his plea indicates a willingness to reform. This can be countered by the argument that the plea is in many cases not a manifestation of repentance, but rather an act of prudence on the part of the defendant to gain leniency.[37]

4) *Frustration of Legislative Intent.* The opponents of the practice of plea bargaining point out that the process and the results which follow are an evasion or frustration of the policies set forth by the legislature in dealing with crime prevention and control. In this regard, it is claimed that the process is a device allowing the experienced criminal to escape the full measure of punishment required by the law, and returns such defendants to society before they are rehabilitated.[38] "The correctional needs of the offender and legislative policies reflected in the criminal law appear to be sacrificed to the need for tactical accommodations between the prosecutor and defense counsel."[39]

V. Possible Solutions

In looking at the merits of the plea negotiation, one finds a very useful and indeed necessary procedure which has its proper place in the criminal process, benefiting the accused, the prosecution, and the court. Its shortcomings, though sometimes appearing gross and shocking, are not of such a character that corrective measures could not be implemented to make plea bargaining in relation to the guilty plea, an honest and realistic alternative to the trial process. To condemn the whole process without an attempt to salvage what it has to offer is analagous to throwing out the babe with the dirty water. When considered, each of the aforementioned disadvantages could conceivably be remedied with little difficulty.

As to the propriety of such a procedure, perhaps the single, most effective step that could be taken is to convince the entire legal community that plea bargaining is a fact of life in the criminal process and that when properly safeguarded it serves a viable function in the administration of justice. Courts should deal with the problems involved in a straightforward manner rather than avoiding the issue or allowing blatent denials of its existence. "Such concealment detracts from the dignity of the court and the integrity of the judicial process."[40] Simultaneously, strict man-

37. *Id.* at 210.
38. *Supra*, note 15.
39. Task Force Report 9.
40. C. Gentile, *Fair Bargains and Accurate Pleas*, 49 Boston U.L. Rev. 514, 518 (1969).

datory measures should be implemented, preferably in statutory form, which would eliminate the abuses presently existing. With these two elements in operation, questions of propriety could well disappear. At the same time, problems of uniformity would fade in light of formal rules and guidelines, much in the same fashion that abusive police methods and coerced confessions were corrected by narrowly drawn guidelines set out by the Supreme Court of the United States.[41]

An example of the type of rules needed to accomplish these objectives is found in a tentative report prepared by an advisory committee of the American Bar Association Project on Minimum Standards for Criminal Justice.[42] The standards proposed are the result of a study made of problems inherent in pleas of guilty, including plea negotiations. In recognizing the propriety of the bargaining process, the committee stated their objective was "not to bring about a substantial shift away from the practice . . . . Rather, the attempt is to formulate procedures which will maximize the benefits of conviction without trial and minimize the risks of unfair or inaccurate results."[43] In dealing with the real problem areas of guilty pleas, the standards are directed at formulating guidelines for determining the accuracy and voluntariness of the plea,[44] the disposition of the plea withdrawal,[45] and the propriety of plea agreements,[46] with guidelines for the prosecutor, defense counsel, and the trial judge. The bargaining process is made visible by requiring the plea to be made in open court with full disclosure as to any promise or bargain made, and requiring the same to be of record.[47] Though the standards have not yet been approved, at least the guidelines are in existence and the problem areas and abuses of the bargaining process have been highlighted. The standards provide a starting point for the courts and legislatures, and hopefully will become official ABA policy.

The courts have also been active in attempting to remedy problems related to guilty pleas. The Supreme Court has emphasized the conclusive effect of a plea of guilty,[48] and has made it clear that in order to be valid,

41. *E.g.*, Miranda v. Arizona, 384 U.S. 436 (1966).
42. ABA Project on Minimum Standards for Criminal Justice, Advisory Committee on the Criminal Trial, Standards Relating to Pleas of Guilty (tent. draft 1967) [hereinafter referred to as Minimum Standards].
43. *Id.* at 3.
44. *Id.*, Minimum Standards 1.5, 1.6.
45. *Id.*, Minimum Standards 2.1, 2.2.
46. *Id.*, Minimum Standards 3.1 to 3.4.
47. *Id.*, Minimum Standards 1.5, 1.7; *see also* Medley v. Stephens, 242 Ark. 215, 412 S.W.2d 823 (1967).
48. Kercheval v. United States, 274 U.S. 220, 223 (1927); *see also* State v. Kilpatrick, 201 Kan. 6, 14, 439 P.2d 99, 107 (1968) wherein the court stated, "Where the accused in a criminal case enters a plea of guilty to the charges against him, the proceedings have passed the stage of ascertaining his guilt or innocence, and safeguards written into the federal and state constitutions assuring one accused of crime of a fair and impartial trial are no longer applicable."

the plea must be freely, knowingly, and understandingly made.[49] To insure voluntariness, the Court has required the record to show that the trial judge made specific inquiry as to the defendant's understanding of the nature of the plea and his awareness of the consequences; the Court also requires that the defendant possess an understanding of the law in relation to the facts.[50] The Court originally reached this determination in a federal case[51] through interpretation of Rule 11 of the Federal Rules of Criminal Procedure. A later case placed the same requirements upon the state courts.[52] The result of these decisions will, no doubt, affect the plea bargaining process and alleviate some of its abuse.

The final disadvantage of plea negotiation was discussed in the light of frustration of legislative intent. It would appear that if the laws are such that the judicial system routinely evades their provisions with no qualms of conscience, perhaps the legislature needs to take another look at the limits which it has imposed. In particular, it should look at the laws most commonly frustrated by the bargaining process, namely the mandatory sentencing statutes and the recidivist acts.

It is submitted that if the true purpose of incarceration is rehabilitation, the judge who has dealt with the defendant personally and has access to presentence reports, is in a much more realistic position to determine what punishment is most fitting for the defendant. With the mechanical process of mandatory sentencing, the courts condone other means of reaching "individual justice" at the risk of frustrating the legislative edicts.

If the genuine purpose of the recidivist acts is to bring about reformation by increased penalties for prior offenders[53] and to deter repeated felonies,[54] their very existence in the law seems to point to the failure of incarceration as an effective rehabilitative measure or as a deterrent. At the same time, recidivist statutes can be abused by the overzealous prosecutor as a threat in the bargaining process in obtaining a plea of guilty. Such misapplication of the statute was commented upon by the United States District Court of Montana, which stated:

> It is debatable whether such practice involves a proper use of the prior offender statute. Undoubtedly the practice may result in many instances in coercing pleas of guilty which would not otherwise be entered.[55]

If the recidivist statutes have any validity as a deterrent or added measure

49. Machibroda v. United States, 368 U.S. 487 (1962).
50. McCarthy v. United States, 394 U.S. 459 (1969).
51. *Id.*
52. Boykin v. Alabama, 395 U.S. 238 (1969).
53. State v. Murray, 200 Kan. 526, 437 P.2d 816 (1968).
54. State v. Felton, 194 Kan. 501, 399 P.2d 817 (1965).
55. Alden v. State, 234 F. Supp. 661, 670 (D. Mont. 1964).

for reform, their possible abuse in the bargaining process could be eliminated by taking its use out of the hands of the prosecutor and placing its application solely within the discretion of the judge.

VI. Plea Bargaining in Kansas

What is the status of plea bargaining in Kansas? The Kansas Supreme Court recently handed down *State v. Byrd*[56] which recognized the validity of plea discussions and plea agreements and stated that their use, when properly safeguarded, was consistent with the fair and effective administration of criminal justice. In the *Byrd* decision, the court made reference to the minimum standards recommended by the ABA committee and established guidelines, many of which are identical to the ABA proposals. The court emphasized the distinct roles of the prosecutor and judge stating that the judge should not participate in the negotiating process, and further stated that such agreements should be premised upon the understanding that they are not binding upon the court.[57] It pointed out that the county attorney could, in proper circumstances,[58] negotiate pleas, but that he should do so only with defendant's counsel. Also, similarly situated defendants should be afforded an equal opportunity to negotiate. In discussing the alternatives open to the prosecutor, the court stated the following possibilities:

> He [the prosecutor] may agree to make or not to oppose favorable recommendations as to sentence which should be imposed if the defendant enters a plea of guilty. He may seek or not oppose dismissal of the offense charged if the defendant enters a plea of guilty to another offense reasonably related to the defendant's conduct. He may seek or not oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty.[59]

By this decision, the Kansas court has given its approval to the practice of plea bargaining and has set down at least some basic guidelines to be followed. Though the bargaining procedure could be more sharply defined and broadened, it is felt that giving the bargaining process judicial recognition and putting forth some guidance is a move in the right direction. Even though the court mentioned the ABA's minimum standards, it did not indicate that they should be adopted in toto. In fact, the court evidently broke stride with the standards on the question of allowing withdrawal of a plea of guilty. The standards recommend allowing withdrawal

56. 203 Kan. 45, 453 P.2d 22 (1969).
57. *Id.*; *see also* MINIMUM STANDARDS 3.3.
58. Insight into "proper circumstances" may be gleaned from the following language used by the court: "The prosecuting attorney should be convinced of the defendant's guilt and defendant's willingness to assume responsibility for his criminal conduct. He must keep in mind the nature of the crime and have good reasons for believing a public trial is unnecessary." 203 Kan. 45, 51, 453 P.2d 22, 28.
59. *Id.*; *see also* MINIMUM STANDARDS 3.1(b).

when necessary to correct a manifest injustice and give the following example:

> Withdrawal is necessary to correct manifest injustice whenever the defendant proves that:
>
> . . . .
>
> (4) He did not receive the charge or sentence concessions contemplated by the plea agreement and the prosecuting attorney failed to seek or not to oppose these concessions as promised in the plea agreement.[60]

In the case of *White v. State*,[61] decided some two months after *Byrd*, a defendant sought to set aside his judgment and sentence on the ground that he was promised by the prosecution that if he would plead guilty to murder in the second degree, the prosecutor would recommend a sentence for a term of years. After acceptance of the plea, the prosecutor remained silent at the sentencing and the court imposed sentence for life. The trial court had not been apprised of the agreement. On the hearing of defendant's motion to modify sentence and to withdraw his plea, the court was made aware of the agreement and the prosecutor belatedly made his promised recommendation. Both motions were denied. In affirming the conviction on appeal, the Kansas Supreme Court felt any infirmity as to voluntariness had been ameliorated by the subsequent proceedings and did not feel that manifest injustice would result from refusing to permit withdrawal of the plea or modification of sentence.[62]

It appears that the Kansas court felt that the trial court would not have gone along with the recommendation of the prosecutor had he known of the bargain before sentence was passed, and therefore no injustice resulted. But this seems to ignore the psychological effect on the judge who has already determined guilt and fixed sentence, only to subsequently learn additional facts which he should have considered in fixing sentence. It is submitted that the possibility of a judge considering the agreement in determining sentence, is substantially less when he first learns of the agreement after imposing sentence, since this requires him to alter his decision. Therefore, to avoid the possibility of injustice in such circumstances, a defendant should be allowed to withdraw his guilty plea.

The Kansas Legislature has also taken steps forward in revising the substantive criminal law of the state, with the adoption of the new criminal code.[63] However, in relation to the subject of plea bargaining, the new code offers little in the way of correcting any abuses that might exist under the present law.

60. Minimum Standards 2.1 (a)(ii)(4).
61. 203 Kan. 678, 455 P.2d 562 (1969).
62. The court divided five to two, with Justices Fatzer and Fontron dissenting.
63. Kan. Stat. Ann. §§ 21-3101 to -4615 (Supp. 1969), effective July 1, 1970.

In the new code, the addition of section 21-3429 *Aggravated forcible felony*, provides for special sentencing in cases of a conviction of an aggravated felony, i.e., a forcible felony committed by a person armed with a firearm. If the crime is one punishable for a term less than life, the court is required to sentence the defendant, in addition to the term provided for the forcible felony, an additional term of 5 years for the first conviction; 10 years for the second; 15 years for the third; and 20 years for the fourth or subsequent conviction under the section. It is also provided that the additional term shall not run concurrently. It is felt that in addition to major problems developing in integrating this section with the primary sentencing provisions, this "built-in" recidivist penalty will be a tempting bargaining tool on the side of the prosecutor, which may result in abuse in the negotiating process.

Section 21-4504 *Second or third conviction of a felony*[64] is a milder version of the current section 21-107(a) Habitual Criminal Act.[65] It provides for increased punishment for recidivists upon motion of the county attorney. At best, all that can be said of the new section is that it is no longer mandatory upon the court but within its discretion. In relation to plea bargaining, this is an improvement over section 21-107(a), but it is contended here that a better approach would have been to disassociate the statute from the prosecutor's office, thereby avoiding any possibility of its abuse. It is interesting to note that neither of the provisions discussed were recommended by the Advisory Committee of the Judicial Council on Criminal Law Revision,[66] which is an indication that the code was not designed for such provisions.

The 1970 Kansas Legislature has passed an act establishing a Kansas code of criminal procedure.[67] In relation to guilty pleas, the act does not approximate the completeness of the standards set by the ABA committee, but there are some sections which may be of benefit to the plea bargaining process.

One such section, 22-3208[68] authorizes, with the consent of the court, the plea of *nolo contendere*, as a formal declaration that the defendant does not contest the charge. If accepted, a finding of guilt may be adjudged, but the plea could not be used against the defendant as an admission in any other action based on the same act.[69] Such a plea could benefit the defendant in a plea bargain in that he could avoid the kind of de-

64. *Id.*
65. Kan. Stat. Ann. § 21-107(a) (1964).
66. Proposed Kan. Crim. Code, Kan. Judicial Council Bull. (April 1968).
67. S. 483, Kan. Legislature, 1970 Sess.
68. *Id.* at 58.
69. *Id.* § 22-3209 (2) at 60.

termination that could be used against him in later proceedings and would still get prompt disposition of his case without trial.

The most significant section in regard to plea bargaining is section 22-3210 *Plea of guilty or nolo contendere*,[70] in which guidelines are set as to when such pleas should be accepted. The section requires the plea to be made in open court, and in felony cases requires in addition that the defendant be informed of the consequences of the plea, that he be addressed personally by the court to determine voluntariness, that the court must be satisfied as to a factual basis for the plea, and that a transcript of the proceedings be prepared. Many of these requirements have been established by case law.[71] This section also provides for the withdrawal of a guilty plea, or plea of *nolo contendere* at any time before sentence is adjudged, and after sentence, any time it is necessary to correct manifest injustice. It is contended here that this section is especially beneficial to the problems inherent to the plea bargaining process.

Thus one finds that in the State of Kansas, both the supreme court and the legislature have shown awareness of the problems connected with the negotiated plea. Basic guidelines have been established which will assist in remedying some of the abuses which have prostituted an otherwise useful and effective procedure in the criminal law.

Conclusion

The advantages offered by the negotiated plea, in connection with a plea of guilty, make its use a proper and effective means of disposing of criminal cases without trial. When properly safeguarded it is a realistic alternative, consistent with fair play and substantial justice, which benefits the accused as well as the judicial process. However, in its present mode of application, which is very informal and invisible, possibilities of abuse erode its effectiveness and desirability. Its disadvantages, however, are not of such a nature that they cannot be cured. Once definite procedures are established by the courts, bar associations, and legislatures which make the bargaining process visible, uniform, and respectable, questions as to its propriety and examples of its misuse will hopefully disappear.

70. *Id.*

71. Boykin v. United States, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969). It should be noted that requirements are sometimes thwarted by interpretations given by the courts. In *Goetz v. Hand*, 185 Kan. 788, 347 P.2d 349 (1959), a statute required a record of the proceedings to be made by a court reporter showing the appointment of counsel at arraignment. The court reporter was on vacation during the proceeding at issue. In a habeas corpus proceeding challenging the jurisdictional requirements imposed by the statute, the court stated that the reporter's absence and his failure to make a record of the proceedings was merely an irregularity which was not sufficient to vitiate the proceedings.

The goal to be achieved was succinctly stated by the Ninth Circuit Court of Appeals:

> The important thing is not that there shall be no "deal" or "bargain," but that the plea shall be a genuine one, by a defendant who is guilty; one who understands his situation, his rights, and the consequences of his plea, and is neither deceived or coerced.72

The State of Kansas has taken initial steps, both in the courts and in the legislature which show promise towards achieving this goal.

Robert L. Heath

Pollution Reaches the Clean Air State

I. The Problem and Dangers

The history of man is the story of the destruction of his environment. As a result of man's greed and self-centered nature, many of his institutions are based upon the faulty concept that the exploitation of nature is the *summum bonum*. The strength and systematic application of this concept have, in the course of history, produced technological miracles with no apparent awareness that man is destroying the environment upon which he is totally dependent.

Probably the greatest dangers of environmental pollution

> are those capable of causing permanent and massive ecological changes, most of which are irreversible and constitute uncónsidered decisions forced on future generations. The natural ecological balance has many trigger points—points where a small action can produce a massive and sometimes quite unexpected change.1

All forms of environmental pollution have the potential to activate these triggers to the detriment of society.

72. Cortez v. United States, 337 F.2d 699, 701 (9th Cir. 1964).

1. *Trial Enters a Think Tank*, 5 TRIAL 12, 16 (Aug./Sept. 1969), (Interview with Dr. Joel B. Searcy, Director of Halbridge House Center for Science and Technology).