

12-15-1982

Plain Talk About Plea Bargaining

Harry A. Ackley

Follow this and additional works at: <https://digitalcommons.pepperdine.edu/plr>



Part of the [Criminal Law Commons](#), [Judges Commons](#), and the [Legislation Commons](#)

Recommended Citation

Harry A. Ackley *Plain Talk About Plea Bargaining*, 10 Pepp. L. Rev. Iss. 1 (1982)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol10/iss1/2>

This Article is brought to you for free and open access by the Caruso School of Law at Pepperdine Digital Commons. It has been accepted for inclusion in Pepperdine Law Review by an authorized editor of Pepperdine Digital Commons. For more information, please contact bailey.berry@pepperdine.edu.

Plain Talk About Plea Bargaining

BY JUDGE HARRY A. ACKLEY
SUPERIOR COURT OF YOLO COUNTY

I. INTRODUCTION

For those who seek a "bottom line", this article contends that: Plea bargaining between attorneys in a criminal case can never be entirely eliminated by initiative, legislative fiat or court decision.¹ Plea bargaining involving the court is an anathema. The courts are not in a position to fully understand the true reasons for a plea agreement, and should be removed entirely from the plea bargaining process and returned to their proper role of disposition once the accused has been found criminally responsible to society by plea or by a finding of guilt.² California Penal Code section

1. "The criminal justice system now disposes of virtually all cases of serious crimes through plea bargaining. Depending on the jurisdiction, as many as 99% of all felony convictions are by plea. This nontrial procedure has become the ordinary dispositive procedure of American law." Langbein, *Torture and Plea Bargaining*, 46 CHI. L.R. 3, 9 (1978).

2. One author of an exhaustive study of the entire criminal case process in Los Angeles concluded that "in theory, the courts determine the issue of guilt or innocence first and then consider the issues involved in sentencing. But in prac-

1192.5,³ mandating judicial involvement in the plea bargain process, should be repealed at once.

Sacramento County Public Defender Kenneth Wells spoke an unvarnished truth when he reminded a judicial gathering that plea bargaining is an "is" and no legislature or judge can stop such negotiations "in the trenches."⁴ It is a fact of life between adversaries in a criminal proceeding and should be recognized as such. When the public believes the parties have engaged in improper bargaining, its remedy lies at the ballot box when the district attorney stands for re-election.

II. THE BIRTH OF PENAL CODE SECTION 1192.5

The district attorney has traditionally carried considerable responsibility in determining prosecutorial policy and in administering it evenhandedly, consonant with both personal conscience and professional responsibility. Historically the responsibility upon the district attorney has been an "awesome" one.⁵ Today it is not quite so "awesome." The legislature and the high courts have interjected judicial sanction and involvement into the plea bargaining process,⁶ where it does not belong.

Before the enactment of Penal Code section 1192.5, the responsibility for both charge and settlement through plea bargaining rested with the district attorney who knew the evidence, presumably made a responsible judgment and rose or fell upon his decisions before the electorate at election time. The prosecutorial function was not blurred. The state's attorney was not shielded, or hampered as some prosecutors urge, by the shift of accountability currently found under Penal Code section 1192.5.

tice it is clear that the process of determination of guilt is very much affected by the substantive effects of conviction [as in a plea of guilty pursuant to a plea bargain]. . . . [T]his reversal of the theoretical ordering of issues reflects the social reality of the court" in which active negotiations often cause the dispositional issue to be resolved prior to a finding of guilt. L. Mather, *PLEA BARGAINING OR TRIAL?* (1971), 141.

3. CAL. PENAL CODE § 1192.5 (West 1981) for the text of the statute, see *infra* note 7.

4. Address by Sacramento Public Defender Kenneth Wells to Cow Counties Judges Conference, Timbercove Lodge, South Lake Tahoe, California (May 16, 1981).

5. See Ackley, *The Awesome Responsibility*, CAL. TRIAL LAW. A.J., Summer 1970, at 17.

6. CAL. PENAL CODE § 1192.5 (West 1981). See also *People v. West*, 3 Cal. 3d 595, 607, 477 P.2d 409, 416, 91 Cal. Rptr. 85, 392 (1970).

Section 1192.5 calls for what is, in effect, a contract to be made with a criminal defendant to be "approved by the court"⁷ and requires such covenants be considered by the court even when the bargain involves the area of probation or sentencing. The result is that the court can be required to consider a sentencing limitation as part of the bargaining process proposed by any criminal defendant before it.⁸ Once approved of, the "bargain" must then

7. CAL. PENAL CODE § 1192.5 provides in full:

Upon a plea of guilty or nolo contendere to an accusatory pleading charging a felony, other than a violation of subdivision (2) or (3) of Section 261, Section 264.1, Section 268 by force, violence, duress, menace or threat of great bodily harm, subdivision (b) of Section 288, Section 288(a) by force, violence, duress, menace or threat of great bodily harm or Section 289, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of not guilty or fixed by the court on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it.

Where such plea is accepted by the prosecuting attorney in open court and is approved by the court, the defendant, except as otherwise provided in this section, cannot be sentenced on such plea to a punishment more severe than that specified in the plea and the court may not proceed as to such plea other than as specified in the plea.

If the court approved of the plea, it shall inform the defendant prior to the making of the plea that (1) its approval is not binding, (2) it may, at the time set for the hearing on the application for probation or pronouncement of judgment, withdraw its approval in the light of further consideration of the matter, and (3) in such case, the defendant shall also cause an inquiry to be made of the defendant to satisfy itself that there is a factual basis for such plea.

If such plea is not accepted by the prosecuting attorney and approved by the court, the plea shall be by the court, the plea shall be deemed withdrawn and the defendant may then enter such plea or pleas as would otherwise have been available.

If such plea is withdrawn or deemed withdrawn, it may not be received in evidence in any criminal, civil, or special action or proceeding of any nature, including proceedings before agencies, commission, boards, and tribunals.

8. In *People v. Smith*, 22 Cal. App. 3d 25, 99 Cal. Rptr. 171 (1971), the accused offered to plead guilty to the charge of receiving stolen property, specifying a penalty of probation with restitution and one year in the county jail. Even though the district attorney indicated his acceptance of the conditional plea, the trial court expressed dissatisfaction with the process wherein it "looks to me like the possibility that the people who have violated the law are dictating the disposition of their case rather than the Judge. . . ." *Id.* at 29, 99 Cal. Rptr. at 173. The appellate court held that "[a]lthough it is within the discretion of the court to approve or reject

generally be strictly enforced under penalty of reversal.⁹

Debate over the proper court role in the plea bargaining process has frequently produced disagreement. Proponents of greater court involvement have traditionally asserted that the trouble with plea bargaining was the court involvement in approving or disapproving results of admittedly sub rosa negotiations toward settlement and disposition.¹⁰ Judicial approbation of such negotiations, it was urged, would solve the problems otherwise present in the system.¹¹ In *People v. West*,¹² the California Supreme Court prescribed the need for judicial involvement in the plea bargaining process. In *West* the court sitting en banc with no dissent, found that:

the greatest danger in the current practice lies in its secretiveness. . . .
[T]he basis of the bargain should be disclosed to the court and incorporated in the record. We should exhume the process from stale obscurantism and let the fresh light of open analysis expose both the prior discussions and agreements of the parties, as well as the court's reasons for its resolution of the matter.¹³

People v. West was decided in 1970. That same year the California Legislature joined the race toward "the fresh light of open analysis" by enacting Penal Code section 1192.5. The legislative stamp of approval upon the process provided by section 1192.5 bestows upon a felony defendant the role of offeror and places the trial court in the position of offeree. Section 1192.5 provides in pertinent part:

Upon a plea of guilty or nolo contendere to an information or indictment, the plea may specify the punishment to the same extent as it may be specified by the jury on a plea of guilty, nolo contendere, or not guilty, and may specify the exercise by the court thereafter of other powers legally available to it.¹⁴

the proffered offer, the court may not arbitrarily refuse to consider the offer." *Id.* at 30, 99 Cal. Rptr. at 174.

9. *In re Troglin*, 51 Cal. App. 3d 434, 438, 124 Cal. Rptr. 234, 237 (1975). The *Troglin* court stated that "[w]ell established is the rule that the People will be held strictly to the terms of a plea bargain made with a criminally accused. . . it seems reasonable and just, at least where no public policy, or statutory or decisional or constitutional principal otherwise directs, that the accused also be held to his agreement." *Id.* (Citations omitted.)

10. Bongiovanni, *Guilty Plea Negotiation*, 7 DUQ. L. REV. 542, 543, (1969) (quoted in *People v. West*, 3 Cal. 3d 595, 609, 77 P.2d 406, 417, 91 Cal. Rptr. 385, 383 (1970)).

11. *Id.*

12. 3 Cal. 3d at 609, 477 P.2d at 417, 91 Cal. Rptr. at 393. The court in *West* determined that the plea agreement should be fully discussed and reported in the court record so that the term would be fully stated and understood by all parties. This will not only serve to inform the public through the record of agreements being made but will also afford the appellate court a complete account of the proceeding if future review becomes necessary.

13. *Id.* at 609, 477 P.2d at 417, 91 Cal. Rptr. at 393.

14. CAL. PENAL CODE § 1192.5 (West 1981).

III. PLEA BARGAINING IN PRACTICE

Both Justice Tobriner's criticism of the plea bargain expressed in *West*¹⁵ and the codification of the new system as expressed in Penal Code section 1192.5 fail to consider realistically the conditions of the criminal trial courts.¹⁶ Sit in any criminal court in the state on any given day when a plea bargain is being sought and try and find in the record of the proceedings "prior discussions and agreements of the parties . . ." or the court's input on the "reasons for its resolution of the matter. . ."¹⁷ No court has time for such an exhaustive exploration because of the multiplicity of plea bargained cases on the calendar before it daily. Nor does any court have the ability to reach the true reasons for the presented plea bargain or conditional plea as required under Penal Code section 1192.5.

What in fact happens in plea bargained felony cases is now a litany. Any reporter's transcript will show the repetitive recitals of entered plea bargains in various forms. A statement of plea and disposition is entered, if part of the defendant's offer is made by the district attorney through a bargain or conditional plea and request for judicial approval on the court's morning Law and Motion Calendar or Trial Confirmation Calendar. The calendars are generally scheduled during ongoing trials as time permits.¹⁸ Thereafter cursory approval or rejection of the bargain or conditional plea follows. If the court approves the plea, the necessary colloquy is put into the record. If the court has doubts multiple weeks of delay ensue for probation officer reference and return

15. Justice Tobriner, writing for the unanimous court, suggested that plea disagreements should be openly discussed with the court and put on record rather than decided beforehand in lengthy negotiations between the defendant, his attorney and the district attorney. *People v. West*, 3 Cal. 595, 609-610, 91 Cal. Rptr. 385, 394-95, 477 P.2d 49, 417-18 (1970).

16. See generally *Report to the Joint Committee for Revision of the Penal Code*, 127-38, Oct 31, 1980, for a factual study of court involvement in plea bargaining in three California counties.

17. 3 Cal. 3d at 609, 477 P.2d at 417, 91 Cal. Rptr. at 393. See also *Blackledge v. Allison*, 431 U.S. 62, 71 (1977), quoted in *People v. Gallego*, 90 Cal. App. 3d 21, 28, 153 Cal. Rptr. 415, 499 (1979), wherein the court states: "Whatever might be the situation in an ideal world the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system. Their chief advantages are . . . economy and finality."

18. This procedure is the most common arrangement, but some large counties are often required to schedule several or an entire department just to handle the law and motion tasks.

and ultimate acceptance or rejection. The fresh light of analysis,¹⁹ open or otherwise, sought by Justice Tobriner in *West* is nowhere present in the cursory proceeding.

Another phenomenon which stems from the required judicial involvement, under our present system, of the dichotomy between the superior courts and the municipal courts is the following legerdemain, which further blurs the responsibility and further confounds the electorate as to who is really doing what in the entire plea bargaining process. The bargained plea in a felony case is often taken in the municipal court, which from a sentencing standpoint, has no jurisdiction over the plea.²⁰ A plea so taken is deemed entered for superior court purposes and need not be introduced again in the upper court.²¹

One can see how the responsibility for a bad bargain is elusive from the standpoint of accountability to the voting public. After the plea has been entered the matter is referred to the superior court for disposition through a sentence already approved by a municipal court judge lacking jurisdiction to pronounce it.²² This magic buck-passing, which refers cases to the superior court for sentencing within boundaries approved by the municipal court in first accepting the plea bargain, briskly clears the municipal court calendar of scheduled preliminary examinations but is pernicious in end result.

Too often the municipal court reasons that it should not reason at all inasmuch as final acceptance of the bargain rests with the superior court after approval by the lower court. Thus limitations on disposition are approved by a municipal court judge who does not bear the onus of carrying them out in close and difficult cases.²³ The dispositional issue is then presented at the superior court level by astute counsel who unfailingly pronounce that "Judge Wise approved it in the municipal court," the clear impli-

19. 3 Cal. 3d at 609, 477 P.2d at 417, 91 Cal. Rptr. at 393.

20. CAL. CONST. art. VI, § 10 gives original jurisdiction to superior courts in all causes except those given by statute to other trial courts; CAL. PENAL CODE § 1462 gives jurisdiction to the municipal court in misdemeanor criminal cases, where the offense was committed within the county where the municipal court is established. Thus in California, superior courts have exclusive jurisdiction over felonies.

21. In *People v. Toff*, 48 Cal. App. 2d 360, 361, 119 P.2d 745, 748 (1941), the procedure under CAL. PENAL CODE § 859(a), which placed a defendant who pleads in the lower court in the same position as if he had entered his plea to the charge in the superior court, was held not to violate either the state or federal constitution.

22. See *supra* note 20.

23. In most jurisdictions, arraignment and preliminary hearings can occur in the municipal court before arraignment in the superior court. Too often cases are "disposed of" in these initial proceedings without consideration of the formal delegation of responsibility contained in California law. See L. MATHER, *Plea Bargaining or Trial?* (1979) 48-54.

cation being that the superior court judge should not go against his brother at the bench in the municipal court who originally gave it his approval.²⁴

In practice, municipal court approval is without consideration of a probation officer's report,²⁵ which is usually first ordered at the time of the negotiated plea in municipal court when the plea is accepted but which is actually used upon further consideration by the superior court prior to disposition.²⁶ Such a practice demonstrates the lack of any considered or meaningful judicial involvement at the time the municipal court accepts the bargain and gives to it the requisite judicial approval before referring it to the superior court for further proceedings.

The cutting edge of public accountability is further blunted by the superior court rationale that the municipal court jurist carefully considered the problems with the case before approving the plea bargain initially, and any approved negotiated agreement is to be rejected by the superior court only in unusual circumstances. In sum, if there are repercussions from a bad plea bargain the public can always be told that the responsibility lies at the doorstep of another, be it the district attorney, the public defender or other defense counsel, the municipal court judge, the probation department, or the superior court judge depending upon who is called upon to answer the "Letters To The Editor" column or other public forum at the moment.

If the superior court refers the matter back to the municipal

24. See *People v. Superior Court (Barke)*, 64 Cal. App. 3d 710, 134 Cal. Rptr. 704 (1976). Although the municipal court accepted the plea, the superior court believed that the defendant was not guilty based on the evidence and sent the plea back with orders to withdraw it. The appellate court directed the original nolo contendere plea to be reinstated and for further proceedings by the superior court.

25. CAL. PENAL CODE § 1203 requires the acceptance of a plea or a conviction prior to any investigation or report by the Probation Department. The Probation report includes any relevant personal information of the defendant and past violations whether misdemeanors or felonies and is used to aid the superior court in its proceedings and assessment of the sentence to be imposed. See also *People v. Lockwood*, 253 Cal. App. 2d 75, 61 Cal. Rptr. 131 (1967). The court followed the recommendations of a probation report suggesting that because of defendant's past conduct and involvement in drugs she should be refused probation and rehabilitation and instead sentenced to prison.

26. For an argument in favor of increased usage of a pre-plea probation report, see *Levie*, "A Viable Alternative to Plea Bargaining" L.A.B.J. 158 (October 1976). Mr. Levie's basic arguments in favor of this procedure are that it allows a judge to be better informed regarding an accused's circumstances and background, and that disposition of a large number of cases would be facilitated, especially when considering time and cost.

court level rejecting the plea bargain many things result from the fiscal standpoint of the beleaguered taxpayer already properly disenchanted with the entire "plea bargaining" fiasco.²⁷ Consider:

(1) The cost of a now meaningless process of accepting a plea in the lower court involving a knowing and intelligent waiver of rights in presentation of the bargain and acceptance thereof in terms of courtroom, judge, attorney, bailiff, clerk, sheriff, court reporter and possible unused witness time.

(2) The cost incurred for probation office reference time to provide a written report to the superior court.

(3) The cost of courtroom, judge, attorney, bailiff, clerk, sheriff, and court reporter time at the superior court level.

(4) Add the cost for jail housing if the defendant is in custody.

(5) Finally, consider the cost if the superior court judge who rejected the first plea and is later disqualified under Civil Procedure Code section 170.6.²⁸ If the municipal court accepts a slightly different plea bargain after reference back, that modified plea bargain must again be considered by the superior court.²⁹

It has been over ten years since the pronouncement of *West* and the enactment of Penal Code section 1192.5 and the hoped-for enlightened judicial participation in the plea bargaining process.

27. The case of *People v. Superior Court (Barke)* 64 Cal. App. 3d 710, 134 Cal. Rptr. 704 (1976), is a classic case of superior court to municipal court ping pong which wastes time and money. In that case, the municipal court accepted a plea bargain which the superior court would not. Upon return of the case for a preliminary hearing, the municipal court refused to change the plea and recertified the case to the superior court. The superior court again refused to accept the plea and again returned the case to the municipal court. The municipal court finally granted the motion to withdraw the plea, and set a preliminary hearing. The People then petitioned for and obtained a writ of mandate directing that the original plea bargain be reinstated and that the case proceed to the superior court for the third time on that plea.

28. CAL. CIV. PROC. CODE § 170.6 (West Supp. 1982), this section, concerning disqualification of judges, provides that the original superior court judge who refused the first plea may be disqualified upon oral or written motion by the defendant. The defendant must establish prejudice to his case and if the judge is disqualified the matter will be assigned or transferred to another judge at the convenience of the court.

29. The challenge is timely if made after consideration of the plea bargain but before the plea bargain is finally accepted. *Lyons v. Superior Court*, 73 Cal. App. 3d 625, 628, 140 Cal. Rptr. 826, 828 (1977). See also *Smith v. Contra Costa Mun. Court*, 71 Cal. App. 3d 151, 153, 139 Cal. Rptr. 121, 122 (1977) (defendant's motion to disqualify was untimely even though made prior to the probation report and sentencing because it was made after the plea was accepted). *Fraijo v. Superior Court*, 34 Cal. App. 3d 222, 225, 109 Cal. Rptr. 909, 911 (1973). The challenge is untimely if made after the plea bargain has been accepted. *People v. Barnfield*, 52 Cal. App. 3d 210, 215, 123 Cal. Rptr. 859, 861 (1975) (defendant's motion to disqualify the judge in the probation revocation hearing was untimely because the revocation hearing was merely an extension of the original probation imposition under the plea agreement).

Where are the courts and the public they serve in the present quagmire of mandated judicial participation? On a day-to-day basis the judge handling the criminal docket is directly faced with a plethora of "I'll tell you what I'm gonna do" offers from criminal defendants, supposedly offers the court cannot refuse.³⁰ A few examples:

(1) I'll plead if the court will agree with the district attorney's abandonment of his right to argue for a state prison commitment or other disposition.³¹

(2) I'll plead if you make my sentence run concurrently, and not consecutively.³²

(3) I'll plead if you strike my prior drunk driving conviction and let me attend an alcoholic rehabilitation program instead of suspending my driver's license.³³

(4) I'll plead if you agree that I stand convicted by my plea to an offense that is neither presently charged against me nor even a lesser included offense under the accusatory pleading.³⁴

30. See *supra* note 8; see also *supra* note 14 and accompanying text.

31. *People v. Kaanehe*, 19 Cal. 3d 1, 11, 559 P.3d 1028, 1035, 136 Cal. Rptr. 409, 416-17. The defendant was charged with theft and perjury. The plea agreement included only the prosecutor's promise to intervene in the department of corrections factual study but not that he would argue any particular disposition of the case. Kaanehe's counsel stated the bargain as follows:

[We have] the final understanding that at the time of the imposition of judgment and sentence the people would give up their right to recommend or argue disposition of the case, reserving however unto themselves the right to call to the . . . Court's attention any factual inaccuracies. . . in any reports or studies or presentence reports.

Id.

32. *People v. Simpson*, 90 Cal. App. 3d 919, 924, 154 Cal. Rptr. 249, 252 (1979). Pursuant to the plea bargain in the action in question (number 63728), the appellant entered a plea of guilty to second degree burglary with the understanding that any sentence imposed "will run concurrent" with any sentence imposed for probation violation in action number 62648. The court, having approved the plea bargain, could not sentence appellant to a punishment more severe than that specified in the plea agreement and could not proceed other than as specified therein.

33. *People v. Gallego*, 90 Cal. 3d Supp. 21, 31, 153 Cal. Rptr. 415, 421 (1979). The defendant's motion to withdraw his guilty plea was denied, resulting in a conviction of drunk driving. The appellate court held the trial court had abused its discretion in denying the defendant the right to take part in an alcohol program in lieu of defendant's drivers license being suspended as provided for in his plea bargain.

34. *In re Troglin*, 51 Cal. App. 3d 434, 124 Cal. Rptr. 234, 237 (1975). A plea may even be taken to an offense even though the court would be without jurisdiction to convict the defendant of that offense. The *Troglin* court stated the rule as follows:

[U]pon a plea bargain's guilty plea a defendant, at his request or acquiescence, may be convicted of a lesser included offense not charged, and the statutory definition of which "does not logically compose a part of the

(5) I'll plead guilty if the court goes along with the prosecutor's agreement with me not to "recommend or fight against" a commitment to the California Youth Authority.³⁵

(6) I'll plead to one count if the court agrees to dismiss two counts and further agrees in advance to follow the recommendation of the department of corrections after a referral for a ninety day study under Penal Code section 1203.03.³⁶

(7) I'll plead guilty to oral copulation if you strike the allegations that I did it by force, strike the allegation of my prior felony conviction and dismiss fourteen other counts.³⁷

(8) I'll plead out to assault with a deadly weapon if you dismiss three other counts, strike the use of a weapon, agree that there will be "no physical state prison" and further if you release me on my own recognizance pending my report and sentence.³⁸

greater." This is even though the trial court would otherwise be without jurisdiction to convict him of the offense.

Id. (quoting *People v. West*, 3 Cal. 3d at 612, 477 P.2d at 420, 91 Cal. Rptr. at 395.)

35. *People v. Watts*, 67 Cal. App. 3d 173, 183, 136 Cal. Rptr. 496, 503 (1977). The *Watts* court noted that:

According to the declaration of Watts' trial counsel, the district attorney indicated that although he would prefer to have Watts sent to prison he would not 'recommend a fight' against a commitment to the California Youth Authority on a sentence under the youthful offender provisions of Penal Code Section 1202(b).

Id.

36. In *People v. Arbuckle*, 22 Cal. 3d 749, 756 n.4, 587 P.2d 220, 224 n.4, 150 Cal. Rptr. 778, 782 n.4 (1978). Defendant was charged with assault with a deadly weapon with intent to commit murder and possession of marijuana for sale. The plea agreement stated defendant would plead guilty to the assault charge, the marijuana charge would be dismissed and he would be sentenced in accordance with the department of corrections report, which report the judge agreed to follow. The trial judge was quoted as stating his part of the agreement: "I have agreed, as has your attorney, Mr. Kenner, that before I could send you to the State Prison, I would have to get that 90-day diagnostic study and I would follow the recommendation." *Id.*

Multiple counts are often dismissed as a part of the bargain. For example, 16 of the 17 forgery counts were dismissed as part of the consideration in *In re Troglin*, 51 Cal. App. 3d 434, 437, 124 Cal. Rptr. 234, 236 (1975).

37. *People v. Collins*, 21 Cal. 3d 208, 211, 577 P.2d 1026, 1027, 145 Cal. Rptr. 686, 687 (1978). Pursuant to a plea bargain agreement, the defendant entered a plea of guilty to one count of oral copulation. In return, all allegations of the commission of that crime by means of force, and of a prior felony conviction were stricken. The other 14 counts were also dismissed.

38. In *People v. Morris*, 97 Cal. App. 3d 358, 360 n.1, 158 Cal. Rptr. 722, 724 n.1 (1979), defense counsel stated the detailed bargain in the following language:

Mr. Roland (defense counsel): At this time, Your Honor, Mr. Morris wishes to withdraw his previously entered plea of not guilty and, pursuant to negotiations with the District Attorney and discussions with the Court, to enter a plea of guilty of Count One and Two, each being a violation of Section 245(a) of the Penal Code, assault with a deadly weapon, with the understanding that Counts Three, Four, and Five would be dismissed, and that the allegation of use under 12022.5 would be stricken. *The District Attorney has indicated that there will be no physical State Prison pursuant to a negotiated plea*, and the Court has indicated that it would release Mr.

Present this random factual selection of commonplace bargains³⁹ to any group of lay citizens concerned with the escalation of crime in our society and ask if such bargains should be a part of the criminal process involving judicial participation and the answer will be no.

IV. WHY THE COURTS SHOULD NOT PARTICIPATE

The role of the court must be to stay out of the dispositional process until the question of guilt has been resolved. Only when guilt has been established by an unfettered plea, jury verdict, or court decision on the facts of the cases should the judiciary embark upon sentencing or other dispositional considerations. Earlier dispositional ponderings involving "just societal result" inevitably impose upon the court the non-judicial problems of the advocate. The responsibilities of an advocate should remain totally in the hands of the publicly elected prosecutor and defense counsel. The latter is answerable only to his client within the code of ethics controlling the relationship between them. The former, the publicly elected prosecutor, is ever answerable to his constituency at election time and forced to realistically appraise

Morris today on his own recognizance pending report and sentence with a condition, or at least a strong reminder, that there should be no violations of the law between now and the report and sentence day.

Id. (emphasis added).

39. Other examples of the various forms of plea bargain agreements follow: Defendant was charged with three counts of drug violations and one count of conspiracy. The plea agreement allowed the defendant to be placed on six years probation and serve three one-year terms, one of which was later reduced to nine months. *People v. Allen*, 46 Cal. App. 3d 583, 586, 120 Cal. Rptr. 127, 128 (1975). Defendant pleaded guilty to second degree burglary pursuant to a plea bargain where the People agreed not to oppose reduction of the charge to a misdemeanor at the time of sentencing if defendant had no prior record. Because defendant had a prior record, his probation was denied, the six month sentence was denied and defendant was sentenced to prison. *People v. Jackson*, 103 Cal. App. 3d 635, 637, 163 Cal. Rptr. 115, 116 (1980). When defendant's motion to suppress marijuana evidence was denied he withdrew his initial not guilty plea to the charge and pleaded guilty. Part of the plea of guilt assured defendant of a certain court commissioner for sentencing but that particular commissioner was appointed to a municipal court and the newly appointed commissioner denied probation and sentenced defendant to state prison. *People v. Preciado*, 78 Cal. App. 3d 144, 149, 144 Cal. Rptr. 102, 104 (1978). In *People v. Calloway*, 29 Cal. 3d 666, 669-70, 631 P.2d 30, 31, 175 Cal. Rptr. 596, 597 (1981), defendant entered a plea whereby he plead guilty to violating probation and endangering the health of a child in exchange for the court's promise not to make any findings as to certain probation violations, to order a diagnostic study under CAL. PENAL CODE § 1203.03, and to not sentence defendant to state prison.

the strength of his cases before entering into a plea agreement, an area touched upon in "The Awesome Responsibility."⁴⁰ It is time to recognize the considerations faced daily by the district attorney, and to view plea bargaining in its proper light. Properly viewed, plea bargaining is "a process by which the People, represented by the prosecutor, and a defendant negotiate an agreement for the disposition of criminal charges against the defendant"⁴¹ without the participation of or ratification by a court which can never be cognizant of all the militating considerations.

In reviewing the following partial list of some of the factors taken into consideration by the defense counsel and prosecuting attorney before engaging in plea bargaining, it will at once be clear that the court is not in a position to participate in the process.⁴² No court can participate in a meaningful way in knowing and weighing the manifold combination of such trial considerations as:

(1) The present criminal priority cases in the offices of the district attorney, the public defender or other defense counsel.

(2) How the witnesses on both sides are evaluated and will hold up or break down in the professional judgment of the trial lawyers.

(3) The availability of witnesses on both sides.

(4) The goofs and gaps resultant from inadequate investigation and assembling of the evidence.

(5) Pending charges in other jurisdictions.

(6) Parole and probation status of the accused.

(7) The geographical area of the jury selection in relation to the crimes charged and its significance toward a conviction or an acquittal.

(8) The considerations of the district attorney in rejecting statutory diversion at the threshold under the sections following and in Penal Code section 1000 or non-statutory diversion under local district attorney policy.⁴³

40. Ackley, *The Awesome Responsibility*, CAL. TRIAL LAW A.J., Summer 1970, at 17. The considerations made by the prosecutor in handling the case for the people include 1) whether to prosecute for a felony or misdemeanor, 2) how much of the limited time, budget and personnel to assign to the case, 3) whether to go forward, based upon the evidence, or drop the charges 4) whether to negotiate a plea, and if so, what terms to offer the defendant, and 5) the motive and personality of the acuser and accused involved in the alleged crime.

41. *People v. Smith*, 53 Cal. App. 3d 655, 658, 126 Cal. Rptr. 195, 197 (1975).

42. *See supra* note 40.

43. *See* CAL. PENAL CODE §§ 1000-1001.35 (West Supp. 1982). Before determining whether to even accept a plea bargain and proceeding to the the dispositional phase of the entered plea, the district attorney must determine whether the defendant is eligible for pre-trial diversion. Diversion allows the defendant to avoid

(9) Court availability problems other than in the trial court where the charges under consideration have been filed, and calendar commitments and staff distribution in those courts.

(10) The local and state law enforcement need in certain cases not to have undercover agents exposed.

(11) Joint and several trial programs under *People v. Aranda*⁴⁴ constraints.

(12) The uncertainty of the legal area involved.⁴⁵

(13) The motives of the complaining witness for the prosecution.

(14) The nature and basis of any community feeling with reference to the offense before the court.

(15) The status and condition of the victim involved in the alleged offense.

What prosecutor is going to advise the court with utmost candor along these lines?

"Your Honor, I don't know whether we can get a conviction in this rape case or not because I do not know if the jury will believe the prosecutrix. The investigative work of the law enforcement agency involved is so poor at certain points that it may not stand up in court. Besides, the defense lawyer here is excellent and my best trial man has another case going. For these reasons we ask the court to consider this lesser disposition."

Stated or not, such influences are active in the mind of any forehanded prosecutor along with myriad other considerations that cannot and should not be recorded into the record but which are everyday, valid, and practical factors which the state's attorney weighs in deciding on the likelihood a conviction can be obtained from a jury.

having to stand trial on alleged offenses, and instead, to enter some structured educational or rehabilitation diversionary program. Eligibility for diversion is based on several factors which are reviewable by the court. If the district attorney finds that the factors used in determining eligibility for diversion weigh against granting diversion the People would have a stronger basis to prosecute and provide greater leverage in the plea bargaining negotiations. If the factors tend to support a finding of eligibility and thus avoid sentencing the district attorney would be more willing to bargain.

44. Various alternatives are possible when the district attorney desires to introduce into evidence an extrajudicial statement of one defendant that implicates a codefendant. *People v. Aranda*, 63 Cal. 2d 518, 530-31, 407 P.2d 265, 272, 47 Cal. Rptr. 353, 360 (1965).

45. For example, the areas of utilization of the Red Light Abatement Law are filled with such uncertainty. See CAL. PENAL CODE § 11225 (West 1982). See also *Van de Kamp v. American Art Enterprises, Inc.*, 124 Cal. App. 3d 1023, 117 Cal. Rptr. 776 (1981).

V. THE URGED CONCLUSIONS AND CLOSING COMMENTS

Participation by the courts in negotiations with the criminally accused blurs, sometimes beyond recognition the prosecutorial function and the impartial arbiter function of the judiciary in an adversary process. Such participation erodes the concept of objective evaluation and independent consideration of just disposition *after* establishment of guilt. The encumbering costs in making the judge an improper participant in the process before guilt has been established are far too onerous for the tax-paying citizenry to longer endure.

The overbroad and poorly-drafted Gann Initiative, labeled "The Victims' Bill of Rights"⁴⁶ is but a single indication reflective of public understanding or misunderstanding and mistrust of the plea bargaining system.⁴⁷ This mistrust stems from the lack of ac-

46. Election Results, June 8, 1982, Prop. 8, §§ 1-10 Cal. Legis. Serv. 1164-69 (West) (amending CAL. CONST. art. I) (codified as amended in various sections of CAL. PENAL CODE). The measure, *inter alia*, would admit all relevant evidence without limit which would ostensibly include the products of coercion, torture, bribery, fraud, and evidence obtained in violation of constitutional proscriptions against unreasonable search and seizure. Additionally, the mandatory restitution provision is totally without guidelines as to enforcement or criteris. How does a pauper make restitution? What is the measure of restitution to a victim of a forcible sexual attack? Are there surviving "victims" of violent crime in a case of murder, and, if so, who are they and what is the amount of restitution to which they are entitled?

Proposition 8 § 7, p. 1167-68 reads in pertinent part:

Limitation of Plea Bargaining. Section 1192 is added to the Penal Code, to read:

1192.7 (a) Plea bargaining in any case in which the indictment or information charges any serious felony or any offense of driving while under the influence of alcohol, drugs, narcotics, or any other intoxicating substance, or any combination thereof, is prohibited, unless there is *insufficient evidence to prove the people's case*, or testimony of a material witness cannot be obtained, or reduction or dismissal would not result in a substantial change in sentence.

(b) As used in this section "plea bargaining" means any bargaining, negotiation, or discussion between a criminal defendant, or his or her counsel, and a prosecuting attorney or judge, whereby the defendant agrees to plead guilty or nolo contendere, in exchange for any promises, commitments, concessions, assurances, or consideration by the prosecuting attorney or judge relating to any charge against the defendant or to the sentencing of the defendant.

The actual impact upon the courts and the plea bargaining process is undeterminable at this time because each individual section's constitutionality is still open to challenge. Further, the vague language of § 7 which allows plea bargaining in only limited situations gives no guidance as to what constitutes "insufficient evidence" or any standard to determine whether a "reduction or dismissal would not result in a substantial change in sentence." *Id.*

Also worthy of note are the defects implied in the initiative, which are brought forth in the interview of Paul Gann in THE CALIFORNIA LAWYER, Sept. 1981, at 50-53.

47. Another example of the poor drafting of the initiative is found at 1192.7, which was intended to limit plea bargaining; it in fact permits unlimited plea bargaining by not including felonies at the complaint stage in the municipal court,

countability to the public for accepted plea bargains, resultant from the removal of the process from the responsibility of the district attorney. "Let us return to the fundamental concept that every prosecutor should answer to the people for every charge filed and every plea entered and that every judge should answer to the people for every sentence meted out or not meted out and every other disposition made after plea or finding of guilt."

The separation of powers with direct electorate responsibility has been eroded by bringing plea bargaining into the judicial area, and the criminal process has been demeaned by such an expansion.⁴⁸ Let us again re-shoulder the independent responsibilities of each elective office and return to the voting public the ability to measure performance in the sacredness of the ballot box.

since the draftsmen styled the limitation under section seven to apply only to an "indictment or information."

48. *People v. Orin*, 13 Cal. 3d 937, 533 P.2d 193, 120 Cal. Rptr 65 (1975); see also *People v. Orin: Penal Code Section 1385 Dismissals and the Effectuation of Plea Bargains*, 6 GOLDEN GATE L. REV. 249, 262 (1976).

