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PLEA BARGAINING IN ENGLAND*

PHILIP A. THOMAS**

In England and Wales plea bargaining is a little discussed subject into which insufficient research has been undertaken.¹ This is in marked contrast to the United States, where extensive and sophisticated literature on the topic has developed. In the

* The body of this paper was completed in September 1977. Since that date the work of J. BALDWIN & M. MCCONVILLE, *NEGOTIATED JUSTICE* (1977) has been published which all serious students of English plea bargaining should notice. Four cases have been noted, two of which being reported: *R. v. Bird*, *The Times* (London), Dec. 7, 1977, at 2, col. 7; *R. v. Ryan*, *The Times* (London), Dec. 13, 1977, at 2, col. 8; *R. v. Atkinson*, reported in *The Times* (London), Dec. 10, 1977, at 22, col. 5; *R. v. Llewellyn*, *The Times* (London), Mar. 3, 1978, at col. 8.

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¹ "We all know, if only from informal contacts with advocates, that it does go on, though it is impossible to gauge its extent." Editorial Note, 1970 CRIM. L. REV. 310: "In Britain today very little is known of the informal bargaining processes which go on between prosecution and defence with regard to a negotiated plea of guilty." Thomas, *An Exploration of Plea Bargaining*, 1969 CRIM. L. REV. 68: "Most defendants plead guilty. Yet there is some reason to fear that not all these defendants actually regard themselves as guilty. Little research has yet been done on this problem." M. ZANDER, *CASES AND MATERIALS ON THE ENGLISH LEGAL SYSTEM* 135-36 (2d. ed. 1973):

Plea bargaining has been the subject of discussion inside and outside the court rooms of the United States for many years. It is only recently, however, that our own courts' views of such practices have been expressed, and that English writers have commented at any length on our own versions of these practices.

Davies, *Sentences for Sale: A New Look at Plea Bargaining in England and America*, 1970 CRIM. L. REV. 150: "The 'discount' on punishment allowed by the courts on a plea of guilty is now public knowledge, but there has been little public discussion of it." Williams, *The Times*, (London), Feb. 25, 1976, at 15, col. 5-6. See also A. BOTTOMS & J. MCCLEAN, *DEFENDANTS IN THE CRIMINAL PROCESS* 123-24 (1976); S. MCCABE & R. PURVES, *BY-PASSING THE JURY* (1972); Heberling, *Conviction Without Trial*, 2 *ANGLO-AM. L. REV.* 428 (1973); Purves, *That Plea Bargaining Business: Some Conclusions from Research*, 1971 CRIM. L. REV. 470; Reiss, *Public Prosecutors in the United States of America*, 5 *JUR. REV.* 19-20 (1960); Seifman, *The Plea Bargaining Process: Trial by Error?*, 127 *NEW L. J.* 551 (1977); White, Newark & Samuels, *Offences Taken into Consideration*, 1970 CRIM. L. REV. 311, 321-22.

United States plea bargaining is sufficiently "open" to have its own subject heading, "Plea Bargaining" in the *Index to Legal Periodicals*.² Yet, to look too readily and receptively across the Atlantic for authoritative explanations of plea bargaining introduces a basic trap of comparative analysis, for the researcher is not comparing like with like.³ There is less pressure on the criminal courts,⁴ no public prosecutors with discretion on sentencing recommendation,⁵ and a more flexible judicial sentencing system in England, all of which are considered as factors which promote plea bargaining in the United States. Nevertheless, the English courts, particularly those at the base of the hierarchy, are under growing work pressure, and the close professional and social relationships of the legal actors in court make it possible, sometimes even necessary,⁶ for deals to be arranged. Common

² This category has been operative since 1970. Even in the U.S. there is opinion which states that the full extent of plea bargaining is unknown. "The truth is that we just do not know how common such a system is." Enker, *Perspectives on Plea Bargaining* 113 in Appendix A, THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS, ch. 12 (1967).

³ This view has been expounded by some English scholars. "[T]he etiology of the U.S. situation . . . differs from the English at almost every level." Purves, *supra* note 1, at 475. "In England . . . there is neither the structure nor the bargaining power to nurture the system." A. BOTTOMS & J. MCCLEAN, *supra* note 1, at 124. Davies, *supra* note 1, at 221, points out the major features distinguishing the two systems.

⁴ The U.S. predicament has been described as follows: If all defendants should combine to refuse to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state in the Union. . . . The prosecutor is like a man with a revolver who is cornered by a mob. . . . The truth is that a criminal court can operate only by inducing a great mass of actually guilty defendants to plead guilty.

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

⁵ Cole, *The Decision to Prosecute*, 4 *L. & SOC. REV.* 331 (1970).

⁶ Research conducted by the author and G. Mungham on the Cardiff duty solicitor scheme and criminal advocacy indicates that busy practitioners are sometimes willing to arrange a "deal" on behalf of a client, which, supposedly, is in his best interests. However, pressure of

to both systems are the defendants: the smart, the stupid, the frightened and the confident. All are anxious to be found not guilty or, alternatively, to minimize their sentences. Is it that the English system excludes judicial plea bargaining, or has it produced a number of effective masking techniques and principles which, while publicly concealing its existence, privately support the possibility of such activity?

Statistical information regarding the magistrates courts, where over 90% of all criminal trials are heard, indicates a high incidence of guilty pleas. Zander found that 80% of defendants in the London magistrates courts pleaded guilty.⁷ Bottoms and McClean discovered in their Sheffield study of 1,316 trials that 93% pleaded guilty to all charges and a further 2% pleaded guilty to one or more charges.⁸

Much more information is available about guilty pleas in the higher courts, although structural changes in the courts' systems must be recognized when considering the earlier studies. As a whole, the various papers record a proportion pleading guilty of between 55% and 75%. Gibson established an overall guilty plea rate of 75.5% in 1956.⁹ The rate dropped to 48% by 1965 according to a study undertaken for the police,¹⁰ and in 1967 Rose found that the rate had risen to 57%.¹¹ There is some

evidence that the rate picked up at the close of the 1960's¹², but fell to just under 60% in 1972.¹³ The data of Bottoms and McClean in 1971-72 indicate that overall, 65% pleaded guilty to all charges; 10% to one or more; and 25% not guilty to all charges.¹⁴ While it is conceded publicly that plea bargaining is an essential feature to the continued operation of the lower courts in the United States,¹⁵ and that it probably takes place in England, the above figures do not present statistical evidence of the incidence or frequency of this practice. Indeed, reliable information has proved to be most difficult to obtain.¹⁶ Consequently, this article departs from the traditional focus upon inferior courts, where rough justice may be expected to be the order of the day,¹⁷ and concentrates on the superior courts, where cases are heard by a jury and a professional judge and where legal representation by a barrister is common practice. I ignore the negotiations regarding offenses and pleading which may occur at various stages between the defendant and the police, the prosecution and defense barristers and solicitors, and concentrate instead upon an examination of the role and relationship of the judge, counsel and defendant. No attempt is made to quantify the number of occasions when judicial plea bargaining occurs. This article builds upon reported cases with a view to discovering whether they illustrate the existence of a procedural and professional framework which provides the opportunity for covert judicial plea bargaining.

Two categories of judicial plea bargaining are considered. The first is *express* or *overt* plea bargaining and the second is *implied* or *covert* judicial plea bargaining. Express involvement of the judiciary in this process was unequivocally prohibited by the

time and conveyor belt operations of certain "successful" solicitors sometimes brings client-orientated values into question. A REPORT ON THE DUTY SOLICITOR SCHEME OPERATING IN THE CARDIFF MAGISTRATES' COURTS, 1973-74 (1976); Thomas and Mungham, *Duty Solicitor Schemes: In Whose Interest?*, 127 NEW L. J. 180 (1977); see generally D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974) and Blumberg, *The Practice of Law as a Confidence Game*, 1 L. & SOC. REV. 15 (1967).

⁷ Zander, *Unrepresented Defendants in Magistrates' Courts*, 1969 CRIM. L. REV. 632, 639.

⁸ A. BOTTOMS & J. MCCLEAN, *supra* note 1, at 105. The trend of these findings is similar to that of the U.S.—31,170 of the 48,244 cases filed in federal district courts in 1975 were disposed of through guilty pleas. DIRECTOR OF THE ADMINISTRATION OFFICE OF THE U.S. COURTS, ANNUAL REPORT, Table 53, at 264 (1975). According to an earlier estimate guilty pleas accounted for almost 90% of all federal and state convictions. D. NEWMAN, *THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 3 (1966).

⁹ E. GIBSON, *TIME SPENT AWAITING TRIAL*, Table 6, at 9 (1960).

¹⁰ Association of Chief Police Officers, *Trial by Jury*, 116 NEW L.J. 928-29 (1966).

¹¹ G. ROSE, ROYAL COMMISSION ON ASSIZES AND QUARTER SESSIONS 1966-69. SPECIAL STATISTICAL SURVEY, Table 22, at 34 (1971).

¹² See generally Zander, *Are Too Many Professional Criminals Avoiding Conviction: A Study of Britain's Two Busiest Courts*, 37 MOD. L. REV. 28 (1974).

¹³ LORD CHANCELLOR'S DEPARTMENT, *STATISTICS ON JUDICIAL ADMINISTRATION*, Tables 3-2 and 5-5 (1973). But see S. DELL, *SILENT IN COURT* (1971), where she indicates that in a limited study 87% of all defendants entered guilty pleas.

¹⁴ A. BOTTOMS & J. MCCLEAN, *supra* note 1, at 108.

¹⁵ Santobello v. New York, 404 U.S. 257, 260 (1971), where Chief Justice Burger stated that plea bargaining was in effect "an essential component of the administration of justice."

¹⁶ The work of J. BALDWIN & M. MCCONVILLE, *NEGOTIATED JUSTICE* (1977), has proved to be the most recent example of the problems arising from the sensitive area of plea bargaining.

¹⁷ But see Jones, *As I See It*, 141 JUST. P. 406 (1977).

former Lord Chief Justice, Lord Parker, in the leading case of *R. v. Turner*.¹⁸

The judge should . . . never indicate the sentence which 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.¹⁹

The reason for this prohibition is that to allow judicial participation "could be taken to be undue pressure on the accused, thus depriving him of that complete freedom of choice which is essential."²⁰ By overtly entering the proceedings the judge runs the grave risk of suggesting to the public that both he and the office he holds are involved principally in the swift, cost-effective administration of justice rather than the independent search for and protection of the truth and the safeguarding of the presumably innocent defendant.²¹ Two major public expectations are placed in jeopardy. The first is the operation of the adversary system, which hinges on the independence and neutrality of the judge. The second is the presumed innocence of the accused until the contrary is proved to the satisfaction of his peers, the jury. These expectations would be frustrated by open judicial participation. The result would be a short-circuiting of the trial by proffering a reduced sentence in exchange for the defendant foregoing his right to a jury trial.

The trial judge may become overtly involved in two ways. The first, and most obvious, is by communication in court to the defendant. For example, in *R. v. Barnes*,²² Mr. Justice King Hamilton, in the absence of the jury, commented adversely on the waste of time caused by hopeless defenses and

invited the defendant to reconsider his position: "I think it right I should tell you [counsel] in the presence and hearing of your client that I take a very serious view indeed of hopeless cases, without a shadow of a defence, being conducted at public expense."²³ Defense counsel indicated that he had given similar advice to his lay client, and then offered to withdraw from the case. The judge expressed the view that any other counsel would be bound to tender similar advice, and then asked the accused whether he wished his present counsel to represent him or whether he wished to defend himself. On seeking self-representation and an adjournment for one day the judge insisted that the case be heard immediately. Barnes then agreed to retain the original counsel.

Either he will have to defend himself—I do not think it right I should continue to adjourn the case so that a series of counsel can offer him advice which he continues to reject. If he does not like the advice counsel have given him, and solicitors presumably, and the advice which, in the effect, this intelligent youth will appreciate I have given him through you, he will have to defend himself, if he does not wish you to continue.²⁴

On appeal, Lord Chief Justice Parker expressed "great sympathy" for trial judges faced with "a number of hopeless cases which clogged the machine" and although the trial judge had applied "extreme pressure on the appellant to plead Guilty,"²⁵ the court did not find for the appellant on these grounds although they were considered "improper." The appeal was successful because counsel was forced into revealing what advice he had given his client. "Counsel would appear to the appellant to be siding with the judge. . . . [C]ounsel would be gravely handicapped in conducting the defence" Similarly, in *R. v. Nelson*,²⁷ the Recorder's statement to the defendant at sentencing that he could be separately tried and sentenced for other alleged offenses if he refused to have those other offenses taken into account was seen by the Court of Appeal as a threat towards the accused.

The second fashion in which the judge may seek a "bargain" with the defendant is by using counsel to transfer information to his lay client in the expectation that the source will be disclosed. Once again the pressures on the accused to heed the

¹⁸ [1970] 2 All E.R. 281. See also *R. v. Forde*, [1923] 2 K.B. 403.

¹⁹ [1970] 2 All E.R. at 285.

²⁰ *Id.* The guilty plea must be "express and voluntary." *Powtler's Case*, [1610] 11 Co. Rep. 29a, 77 E.R. 1181; *R. v. Forde*, [1923] 2 K.B. 403. The defendant must make his plea personally, *R. v. Heyes*, [1950] 34 Crim. App. 161, 162; *R. v. Ali Tasamuling*, 1971 CRIM. L. REV. 441. *United States ex rel. Elksnis v. Gilligan* 356 F. Supp. 244, 254 (S.D.N.Y. 1966): "When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office His commitment has an all pervasive and compelling influence in inducing the accused to yield his right to trial." Judge Weinfeld, 256 F. Supp. at 255, stated that judicial bargaining is more coercive than prosecutorial bargaining.

²¹ See G. Williams, *The Times* (London), Feb. 25, 1976, at 15, col. 5 where "discount" on sentencing was described as an "unhappy necessity."

²² [1970] 55 Crim. App. 100.

²³ *Id.* at 103.

²⁴ *Id.* at 105.

²⁵ *Id.* at 104-06.

²⁶ *Id.* at 107.

²⁷ [1967] 1 All E.R. 358.

advice of the judge are considered intolerable by appeal courts as illustrated by *R. v. Inns*.²⁸ The trial judge, Mr. Justice Ellison, ran foul of the *dicta* of Lord Parker in *Turner's* case. In the privacy of chambers the judge indicated to defense counsel the nature of the sentence he would impose should the defendant be found guilty. Moreover, by virtue of his refusal to allow a trial before another judge, upon request of counsel, he placed the defendant in such a position of serious apprehension as to believe his trial had taken place before it had commenced.²⁹ The Court of Appeal quashed the conviction and ordered a new trial. At the same time the court expressed its surprise and concern at this example of overt judicial intervention: "It was a most unfortunate occurrence and the court was surprised that it had ever happened. It was to be hoped that that kind of interview between a judge and counsel would not take place again."³⁰ Although a similar exchange took place in *R. v. Brook*,³¹ it must be recognized that the exposure of the judge's attempted intervention depends entirely on the attitude of counsel towards the private conversation and the use made and form of presentation of the information in subsequent conversations with the defendant. This is a feature which I now consider in some detail.

At this point I turn to *covert* judicial plea bargaining. This is made possible by three features, supported and illustrated by a series of cases within which *R. v. Turner* plays a key role. The first is the nature of the relationship which exists between counsel and the lay client, as illustrated by *R. v. Turner* and *R. v. Peace*.³² The second is the access counsel has to the trial judge in the privacy of his chambers, as endorsed in *R. v. Cain*,³³ and third is

his professional knowledge and experience that a "discount" is given by the judge on the sentence in exchange for a guilty plea. Thus, although no overt bargaining occurs—for the judge neither formally nor publically enters the process—structural characteristics are established to allow and encourage the operation of covert practices. As will be seen, the defendant's freedom of choice, which is vital to a fair trial, is "protected" by ensuring his ignorance of the reality of relationship between various professional actors in the trial. The confidence of the defendant, or "mark,"³⁴ is maintained by withholding information fundamental to the exercise of the realistic choice³⁵ which, theoretically, this person is required to make. Indeed, this process must be private, for the formal rules in *R. v. Turner* exclude the participation, or even knowledge, on the part of the defendant who is the subject of a plea bargaining operation. This contrasts with the practice in the United States where the accused is more likely to be party to the charade of voluntary pleading³⁶ and points towards an explanation why plea bargaining is generally recognized there but not in England. The effect of covert judicial participation is that it allows a benefit to be offered to the ignorant defendant, *via* his counsel, in exchange for a guilty plea. On the public level the formal independence of the judiciary is preserved by a series of social structures, rules and cases which simultaneously allow trials to be expedited by means of this clandestine process.

The first element which fosters covert bargaining is the traditional relationship between the barrister and his lay client as spelled out by Lord Parker in *R. v. Turner*: counsel "must be completely free to do what is his duty, namely, to give the accused the best advice he can, and if need be, advice in strong

²⁸ [1974] 60 Crim. App. 231.

²⁹ The appellant was not given a free choice as to his plea. The whole basis of a plea on arraignment is that . . . an accused freely said in open court what he was going to do. When the accused is making a plea of guilty under pressure and threats, he does not make a free plea and . . . All that follows thereafter is . . . a nullity.

Id. (Lawton, L.J.).

³⁰ Lawton L.J., *The Times* (London), Dec. 13, 1974, at 12, col. 3. It could be argued that this is "overt" only because defense counsel chose to make it so.

³¹ 1970 CRIM. L. REV. 600. The judge told counsel that if convicted he would send the appellant to jail. Counsel passed on the information. The Court of Appeal conceded that the appellant did not have a free choice of plea and a *venire de novo* was ordered.

³² *The Times* (London), Nov. 28, 1975, at 6, col. 7. See

³³ *The Sun*, Nov. 28, 1975, at 3, col. 1.

³⁴ *The Times* (London), Feb. 23, 1976, at 11.

³⁴ Blumberg, *supra* note 6, at 24.

³⁵ *R. v. Barnes*, [1970] 55 Crim App. 100, provides an illustration of "realistic choice" in another context. The appellant either accepted the "advice" of counsel, solicitors and the judge or he represented himself. Parker, L.C.J., in the Court of Appeal: "However, as the law stands, it is an accused person's right to have counsel under legal aid to defend him should he elect to plead Not Guilty." *Id.* at 104.

³⁶ Most defendants assume the real purpose of both the official sentencing procedure and judicial interrogation of the defendant is to protect the image of the system. A Connecticut defendant says of the inquiry: "If anybody's in the court room you know you gotta make a little show for them." J. CASPER, CRIMINAL JUSTICE, THE CONSUMER PERSPECTIVE 84 (1972). Peter Randolph, an accused person in the U.S., described his trial as follows: "It's all a phony fucking game." A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT 46 (1976).

terms."³⁷ Although formally and publicly it is the client who is seen to make the decisions,³⁸ the decision-making process is subject to the personal and private relationship of counsel and the accused. This follows a traditional pattern of dominance where client's interests are considered best served through the exercise of predominant control by the lawyer, and problem-solving and indeed effective decision-making is delegated to the professional.³⁹ Client participation in evaluating and coming to decisions is minimized.⁴⁰ This relationship is based on the assumption that the client is free to dismiss the barrister if they fail to agree on the proper course of action.⁴¹ Despite the absence of personal orders or commands from counsel this assumption does not recognize the reality of structural coercion,⁴² and finally, it introduces a vagueness about words like "consent" and "agreement."⁴³ This relationship of dominance *via*

³⁷ 2 All E.R. at 285.

³⁸ This is reflected by rules such as the one that the question of the plea must be put to the defendant personally and a plea of guilty made on his behalf by his barrister or solicitor may be quashed at least if the defendant shows dissatisfaction with a plea. *R. v. Wakefield Justices ex parte Butterworth*, [1970] 1 All E.R. 1181; *R. v. Ellis*, 1975 CRIM. L. REV. 389; *R. v. Gowerton Justices ex parte Davies*, 1974 CRIM. L. REV. 253. See notes 20, 29 *supra*.

³⁹ "They [clients] must trust their lawyer, thereby giving him authority—as an expert—to do things they only vaguely understand." A. ROSETT and D. CRESSEY, *supra* note 36. See generally H. BECKER, *THE NATURE OF A PROFESSION: EDUCATION FOR THE PROFESSIONS* (1962); T. PARSONS, *THE SOCIAL SYSTEM* (1952); and D. ROSENTHAL, *supra* note 6. This relationship is presented in the form of "service" of the lawyer. See for example, evidence of the Council of the Law Society to the Monopolies and Mergers Commission where their own characteristics of a profession are couched in terms of service; A REPORT ON THE SUPPLY SERVICES OF SOLICITORS IN ENGLAND AND WALES IN RELATION TO RESTRICTIONS ON ADVERTISING (1976); see also Hadfield, *Two Models of the Legal Profession*, 2 N. IRELAND LEGAL Q. 94-105 (1975).

⁴⁰ This is achieved not simply through personal relationships of the lawyer/client but by the use of props to create distance and alienation: the court, police presence, language, dress and ceremony. For a recent explanation of this see Carlen, *The Staging of Magistrates Justice*, 16 BRIT. J. CRIM. 48 (1976); Carlen, *Remedial Routines for the Maintenance of Control in the Magistrates Courts*, 2 BRIT. J. LAW & SOC. 101-17 (1974); King, *Roles and Relationships in Magistrates Courts*, 1976 LEGAL ACT. GROUP BULL. 7-9.

⁴¹ But see *R. v. Barnes*, [1970] 55 Crim. App. 100.

⁴² See note 40 *supra*.

⁴³ *R. v. Richards*, [1967] 51 Crim. App. 266. Counsel is not "a person in authority," unlike a policeman, for the purpose of pleading inducement. Therefore, any

duty was recently illustrated in *R. v. Peace*.⁴⁴ Peace contended that his plea of guilty was a nullity because he had lost his power to make a deliberate and voluntary choice. On the day of his trial, he stated, he met leading counsel, who told him that he did not have a chance of acquittal and that if he pleaded guilty he would probably get a borstal (reformatory school) rather than a prison sentence and that the sentence could be three to four years. Lord Chief Justice Widgery felt that the facts did not come close enough to an improper plea of guilty. An accused who pleaded guilty following and adopting the advice of counsel, "albeit unhappily and with reluctance,"⁴⁵ could not be said to have lost his power to make a voluntary and deliberate choice.⁴⁶ Widgery, L.C.J. stated that:

It would be a serious matter if it was accepted as a principle that, where counsel gave strong advice to a client indicating the prospect of his being found guilty as an alternative to pleading guilty, it was then to be said that the plea was really not the accused's plea but something which had been forced on him.⁴⁷

According to traditional theory, the client who is passive, obeys instructions and trusts the profession without criticism, with few questions or requests for information is preferable to the client who is critical, questioning and anxious to participate fully.⁴⁸ Given that lawyer domination operates, and is encouraged by means including case law, it is crucial that if discussions take place between

statement by counsel is tested not by whether it is capable of operating as an inducement, but whether in fact it impaired the defendant's free choice in making a confession of guilt.

⁴⁴ *The Times* (London), Nov. 28, 1975, at 6, col. 7.

⁴⁵ *Id.*

⁴⁶ See *Tollett v. Henderson*, 411 U.S. 258, 265 (1973). The sole inquiry of a federal court reviewing a guilty plea conviction on a habeas corpus petition is "whether the guilty plea had been made intelligently and voluntarily with the advice of competent counsel." Again, the formal responsibility and decision is that of the defendant. In *Brady v. United States*, 397 U.S. 742, 758 (1969), it was said: "Although Brady's plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt is truthful."

⁴⁷ *The Times*, *supra* note 44.

⁴⁸ Parsons, *Social Structure and Dynamic Process: The Case of Modern Medical Practice in THE SOCIAL SYSTEM* at 437 (1952); Parsons, *Research with Human Subjects and the "Professional Complex"*, 1969 DAEDALUS 358; Kadushin, *Social Distance Between Client and Professional*, 67 AM. J. SOC. 517-31 (1962).

counsel and the judge that they be done covertly. A publicized dialogue might, apart from possibly running foul of *R. v. Turner*, produce an apparent issue of conflict in the mind of the client, thereby jeopardizing his relationship with the barrister, and making the client less susceptible to the "independent" advice of his counsel.⁴⁹

The second element in this framework is the relationship between counsel and the judge, as illustrated by *R. v. Turner* and *R. v. Cain*.⁵⁰ The court in *Turner's* case stated that there must be "freedom of access between counsel and the judge" and that such private access should be to the judge in chambers, thereby excluding the defendant. This private channel of communication was based on the possibility that certain matters concerning the case and the client are best kept from the client.⁵¹ The court said that there might be cases when the defendant was suffering from an incurable disease such as cancer and did not know that fact himself. A private talk with the judge was appropriate and it was proper for both counsel to attend. This restricted access operated in *R. v. Cain*. The trial judge, Mr. Justice Melford Stevenson, sent for leading counsel from both sides and told them that he thought the appellant had no defense. Further, if the appellant persisted in his plea of not guilty he would receive a very severe sentence, but that a change of plea before he went into the witness box was bound to make a considerable difference. Defense counsel took the view that he had no choice but to go to the defendant in the cells and tell him exactly what the judge had said. As a result of this information the defendant changed his plea to guilty on three counts which were accepted by the prosecution. On appeal Widgery, L.C.J., approved and applied *Turner* insofar as the defendant no longer had "a free choice in the matter" after hearing what the judge had indicated. The direction of the court was that there should be trial *venire de novo* for there had been excessive pressure exerted on the defendant to change his plea to guilty. Whereas the appeal court confirmed the strict non-intervention of judges, it also provided an illustration of the situation in which "access" to the judge could be used by defense counsel provided that such information or opinion as the client receives is believed to stem

from the barrister and not the judge. Widgery, L.C.J., indicated that it was not uncommon for a defense counsel who did not know the judge well, and who was unfamiliar with the tariff of sentencing, to seek guidance from the judge as to what sentence he had in mind so that he might accordingly advise his client.⁵² This private communication described in *Cain's* case is far removed from the example of terminal cancer originally offered in *Turner's* case and allows the judicial will to percolate through to the defendant without breaching the rules laid down in *Turner* regarding unfair pressure. The client is open to persuasion from his barrister,⁵³ as is counsel from the judge. English plea bargaining has been described as a "delicate mutual back-scratching system."⁵⁴ It is perhaps not surprising that such a relationship between judge and counsel should exist considering the common training, work, social and educational processes that they have undergone.⁵⁵ These patterns are reinforced because relatively few people are involved.⁵⁶ As Widgery, L.C.J., stated in *R. v. Peace*:

One of the advantages that flowed from the close relationship between judge and barrister was that the barrister in that situation could go to the judge and ask him for guidance. If the judge felt disposed to give it to him, counsel would then have a reliable idea of what sort of sentence his client faced, and could advise him properly. But the whole point would be destroyed if he disclosed what the judge had told him. The confidentiality in their relationship would be broken.⁵⁷

⁵² *Brown v. Peyton*, 435 F.2d 1352, 1356 (4th Cir. 1970), cert. denied, 406 U.S. 931 (1972). "To deprive the attorney of the opportunity of talk to the judge about a guilty plea before a defendant has made up his mind to plead guilty, would deprive him of one of the most valuable tools of his defence." See *Restructuring the Plea Bargaining*, 82 YALE L.J. 286 (1972).

⁵³ See S. McCABE & R. PURVES, *supra* note 1, at 9, which showed that in their study of defendants who changed their plea that this was done in most, if not all cases, after the defendant received "certain good advice" from his legal representative. This is especially the case with late or last minute changes of plea where counsel, after reviewing the brief and assessing the evidence, speaks urgently to solicitor and defendant in a conference held, in all too many cases immediately before the trial is due to start.

⁵⁴ Parker, *Copping a Plea*, 135 JUST. P. 408 (1971).

⁵⁵ See generally H. CECIL, *THE ENGLISH JUDGE* (1970); JUSTICE, *THE JUDICIARY* (1972).

⁵⁶ Because barristers are members of regional circuits they usually operate in a few courts. Since the Courts Act 1971 certain criminal judges (*i.e.* circuit judges) are also located in particular areas. Thus, barristers and judges are in constant professional contact.

⁵⁷ Lord Widgery, *The Times*, *supra* note 44. However,

⁴⁹ See *R. v. Barnes*, [1970] 55 Crim. App. 100.

⁵⁰ *The Times* (London), Feb. 23, 1976, at 11, col. 1. Seifman, *The Rise and Fall of Cain*, 1976 CRIM. L. REV. 556.

⁵¹ [1970] 2 All E.R. at 285.

Should this be the state of the law,⁵⁸ the way is clear for the will of the judge to be imposed upon the defendant by means of his undisclosed agent, the barrister, whom the defendant wrongly believes to be the principal acting independently in his best interests. Informal discussions in the privacy of judge's chambers⁵⁹ can be changed into the considered opinion of counsel to his client as to the likely sentencing policy of the judge should the plea of not guilty fail.

The third, and final feature, is the role of sentencing "discount" which the judge operates at his discretion. The reasons for the operation of discount in this particular manner are to dissuade defendants who have no defense from having their day in court, possibly distressing witnesses as well as adding to the general inconvenience and loss of time and public money within the framework of

an overworked court. Thus the judge can employ discount on sentencing in exchange for a guilty plea. However, this process cannot be presented publicly in terms of cost effectiveness of the court's time or in fine semantic distinctions.⁶⁰ Instead it is justified through the accused's contrition and remorse which provide grounds for mitigation. Public degradation ceremonies⁶¹ are maintained by the judiciary seeking public reasons for discounts on sentences.

It is important that if counsel is to advise his client on the likely sentencing response of the judge that there must be a predictable judicial pattern and the expectation that the bargain will be honored. Predictability is enhanced by such statements as that made by Mr. Justice Ackner. While sentencing two men convicted of rape, he stated that if they had pleaded guilty they would have been jailed for about two years. Because they had not, he jailed them for three years: "Let me make this abundantly clear, since it does not seem to have penetrated very fully to the criminal fraternity, that the courts grant a discount to those who show contrition, to those who recognize their guilt."⁶²

Coupled with the knowledge of the existence of discount must be the confidence that it will be applied if a guilty plea is offered. Thus in *R. v. de Haan*⁶³ the Court of Appeal reduced the sentence imposed by the trial judge because insufficient attention had been paid to the plea: "A confession of guilt should tell in favour of an accused person, for that is clearly in the public interest ... to sentence this man ... to four and a half years is to give inadequate consideration to that miti-

it should be stated that a Practice Direction has been issued, *The Times* (London), July 27, 1976, at 5, col. 3: "*R. v. Cain* has been subject to further consideration by the Court of Appeal. Insofar as it is inconsistent with *R. v. Turner* the latter decision should prevail." See also 162 J. CRIM. L. 96 (1977).

⁵⁸ The Practice Direction set out in note 57 *supra*, refers to the *Turner* rule which states "the judge should ... never indicate the sentence which he is minded to impose ... where any such discussion on sentence has taken place between judge and counsel, counsel for the defence should disclose this to the accused and inform him of what took place." However, as stated earlier, such is the relationship between counsel and his judge that informal discussions of a general nature might not be seen by counsel as "plea-bargaining" or matters which fall narrowly within the terms of *Turner*. Even if they did counsel might still believe that to talk and advise accordingly might still be in the best interests of his client or perhaps in his own best interests given the continuing relationship he must sustain with the judge. See *The Times* (London), Feb. 25, 1976, at 15, col. 5:

The dangers inherent in the acceptable practice [discount for guilty pleas] are manifest from the reported case [*R. v. Cain*] which is exceptional only in that the trial judge's advice on plea was passed on by counsel to the defendant, rather than being expressed as counsel's opinion after conferring with the judge.

⁵⁹ On one occasion I witnessed such an event in a judge's chambers. Counsel were invited in, I was introduced, wigs were removed and during the conversation the judge's thinking on the likely sentence was stated briefly should the defendant be found guilty. At the time the term "plea-bargaining" did not occur to me and I feel confident it would have shocked the other lawyers if it had been categorized as such. Instead, it was probably done and seen as a helpful gesture to a young barrister who was anxious to provide a good service for a lay client.

⁶⁰ *R. v. Harper*, [1968] 2 Q.B. 108, 110 (Parker, L.C.J.): "This court feels that it is quite improper to use language which may convey that a man is being sentenced because he has pleaded guilty, or because he has run his defence in a particular way. It is, however, of course proper to give a man a lesser sentence if he has shown genuine remorse amongst other things by pleading guilty."

See also *R. v. Beham*, *R. v. Anderson*, *R. v. Qayyum*, *The Times* (London), July 28, 1967, at 13, col. 7 (C.A.), *R. v. Hall*, [1968] 2 Q.B. 787. "Discount" is also given in other situations, for example, because of co-operation with the police, *R. v. Alston*, 1967 CRIM. L. REV. 488.

⁶¹ See Garfinkle, *Conditions of Successful Degradation Ceremonies*, 61 AM. J. SOC. 420 (1955).

⁶² *The Times* (London), Feb. 10, 1976, at 5, col. 7. See generally on the matter of "discount" R. CROSS, *THE ENGLISH SENTENCING SYSTEM* (2d ed. 1975); C. THOMAS, *PRINCIPLES OF SENTENCING* 52, 195 (1970).

⁶³ [1968] 2 Q.B. 111.

gating element."⁶⁴ The interest of appellate courts in the predictable sentencing policy of trial court judges was expressed recently in *R. v. Deary*.⁶⁵ Counsel for the appellant went to see the judge in private to ask him, in substance, whether a custodial sentence was likely whatever the nature of the plea. The judge, who had a recorder and was sitting with two lay magistrates, said "you are safe" which was understood to mean that in no event would a custodial sentence be imposed. Nevertheless a custodial sentence was given because it was discovered that the recorder was outvoted by the magistrates. The Court of Appeal was concerned that the trial court had "gone back on its word and that some sense of grievance might be felt by the appellant and his family."⁶⁶ The appeal was allowed and a non-custodial sentence was substituted, which among other things, reaffirmed the confidence of those who gave and received advice about the sentencing patterns of judges. Not only must the sentencing scale be predictable, an indication of which may be obtained either through access to the judge in the privacy of his chambers or more generally by means of numerous appearances in front of him in the crown court, but also the barrister must be confident that the "contract" executed by the defendant will be honored by the court. Appeal courts appear to support such bargains, but the defendant is unable to offer his plea publicly in terms of a contract for a reduced sentence. It must be couched in terms of remorse and contrition. However, there is some evidence to suggest that at this level the defendant is being brought into the picture and told that repentance is rewarded: "It was trite to say that a plea of guilty would generally attract a somewhat lighter sen-

tence than a plea of not guilty after a full dress contest on the issue. Everybody knew that it was so, and there was no doubt about it. Any accused person who did not know about it should know it. The sooner he knew the better."⁶⁷ Now the accused is informed that in order to receive a reduced sentence he must plead guilty and formally act with remorse or be labelled contrite.⁶⁸ Nevertheless, the judge remains divorced from the accused who in his ignorance has been a passive object in a different and private relationship which has molded his future.

The administration of criminal justice in England and Wales is a highly complex affair which is under increasing pressure from growing crime rates and inadequate budgetary resources for the police, courts, social services and prisons to keep pace. In such an environment it is a natural economic quest for short cuts that leads to plea bargaining. Nevertheless this would be considered no justification for such a formal development.⁶⁹ Criminal justice is expected to be a social lesson and through the ceremonies of law enforcement society's values are affirmed and made visible to all. The model developed in this article incorporates a visible judicial stance of non-intervention in the defendant's decision to plead, thereby responding to the public expectation of the judicial role. Simultaneously, pressures within and imposed upon the court may be alleviated by the clandestine opportunities provided to the judiciary and counsel to speed the trial to an early conclusion. It might be attractive to think that *R. v. Cain*, the most recent reported case concerning judicial interference in the pleading decision, is an unusual

⁶⁴ *Id.*

⁶⁵ *The Times* (London), June 9, 1976, at 18, col. 8. See 1977 CRIM. L. REV. 47.

⁶⁶ *Id.* See also, *Santobello v. New York*, 404 U.S. 257 (1971). *Santobello* was charged with two felonies, both gambling offenses. He agreed to plead guilty to a minor charge of possessing gambling records in the second degree in return for the prosecution dropping the other charges and agreeing not to make any recommendation on the sentence. Owing to a misunderstanding caused by a change in the prosecution lawyer, the prosecution did in fact make a recommendation of a maximum sentence of one year. That sentence was imposed despite the protests of the defense, the judge saying that he had not been influenced by the recommendation. The U.S. Supreme Court set aside the sentence, saying that plea-bargaining was "an essential component of the administration of justice." *Id.* at 260.

⁶⁷ *R. v. Cain*, *The Times* (London), Feb. 23, 1976, at 11 (Widgery, L.C.J.). However, the Practice Direction of July 26, 1976 probably requires that *Turner* should be interpreted as prohibiting such statements for if the judge makes one, it must be reported to the defendant, who will then regard counsel's advice as an expression of the judge's views and so be deprived of the opportunity of making a completely free choice. This Practice Direction reinforces the covert practice. See *R. v. Plimmer*, [1975] 61 Crim. App. 264, 266; 40 J. CRIM. L. 153 (1976).

⁶⁸ Note the opinion of Carlen, *Remedial Routines for the Maintenance of Control in Magistrates' Courts*, *supra* note 40, where she argues that remorse and contrition are treated as variable terms to minimize the problems of management faced by magistrates at the sentencing stage.

⁶⁹ "There is something more than convenience and expedition. Above all there is the proper administration of the criminal justice to be considered." *R. v. Coe*, [1969] 1 All E.R. 65, 67 (Lord Parker).

example arising out of the actions of an intemperate judge, Mr. Justice Melford Stevenson.⁷⁰ I have

⁷⁰ See *R. v. McFadden*, *The Times* (London), Dec. 11, 1975, at 5, col. 3 (C.A.); his conduct in the Cambridge "Garden House Riot" case in 1970; *The Times* (London), Feb. 21, 1976, at 1, col. 5; *The Times* (London), Feb. 25, 1976, at 2, col. 6; and the *Western Mail*, Feb. 21, 1976, at 4, col. 1. See also Sir Peter Rawlinson, *The Times* (London), Dec. 11, 1975, at 1, col. 1: 119 *SOLICITOR'S J.* 33; 1975 *LEGAL ACT. GROUP BULL.* 283-84.

attempted to illustrate that such an analysis would be misleading. Examination of the superior courts, recent cases and professional and client relationships reveals a social and institutional framework which allows influential judicial opinion to filter through to the ignorant defendant. A rose is a rose by any other name: judicial plea bargaining is alive, well and living in the English courts.