

A COMPARATIVE LOOK AT PLEA BARGAINING IN  
AUSTRALIA, CANADA, ENGLAND, NEW ZEALAND, AND THE  
UNITED STATES

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ABSTRACT

*In a world where the vast majority of criminal cases are resolved through some means other than the popularly depicted criminal trial, it is fundamental to a comprehensive understanding of comparative criminal procedure to study and appreciate the different mechanisms for criminal case resolution in different nations. This*

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culture in England in the Early Modern period. Judge Harvey has an interest in the immediate and wider impact of technology on the law and legal culture and continues researching in this field.

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*Article developed through a series of conversations (and ultimately a panel discussion) between six international criminal justice professionals—practicing attorneys, scholars, and judges—regarding the nature and effects of plea bargaining (and its comparative substitutes) in their respective countries. Providing a comparative look at different mechanisms for criminal case resolution, this Article examines the applicable practices and procedures in the common law nations of Australia, Canada, England, New Zealand, and the United States.*

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## INTRODUCTION

Criminal trials hold a prominent place in the Western popular culture and public imagination. In the United States, the trial's place would undoubtedly be marked by movies such as *Presumed Innocent*, *To Kill a Mockingbird*, and *A Lesson Before Dying*. Real life sensational criminal trials, such as those of O.J. Simpson, Casey Anthony, and Leopold and Loeb, captivated America. In Australia, those popular films are *Breaker Morant* and *A Cry in the Dark*, while in England it may be *Witness for the Prosecution* and the various *Rumpole of the Bailey* programs. Canadians viewed *An Officer and a Murderer* and *Murder Unveiled*, and many New Zealanders certainly bought tickets to see *Beyond Reasonable Doubt* and *Heavenly Creatures*. Their lists of "trials of the century" might include Pauline Parker and Juliet Hulme, Ruth Ellis and Gary Dodson, Paul Bernardo and Karla Homolka, and John Wayne Glover (New Zealand, England, Canada, and Australia, respectively). Yes, it is truly a fascination we all seem to have with the criminal trial.

In the real world of criminal justice, though, the trial has increasingly taken a distant back seat to the plea-bargained resolution of the matter. This Symposium looks at all sorts of issues in the United States related to such negotiated deals. In this Article, six experienced criminal justice professionals provide a comparative view of plea bargaining, laying out what it means in the five common law nations of Australia, Canada, England, New Zealand, and the United States.

## I. THE ISSUES

Our approach identifies a number of key issues common to our five countries, with each of us reflecting on our own national approaches to these matters. Each of us has responded to the particular issues as laid out by our editor, Professor Marcus, who has then blended the responses together, as indicated below.

*A. Defining Plea Bargaining*

*What is meant in your nation by the term “plea bargaining”?*

Each criminal justice professional participating in this project understands the common U.S. term “plea bargaining.” As we can see, however, the prevailing terms in the nations do differ.

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Australia, Hon. Justice Fiannaca: In Australia, “plea bargaining” is the informal process by which a prosecuting authority and defense counsel negotiate the charge(s) on which the prosecution will proceed, and/or concessions that may be made by the prosecution in relation to sentencing, including the facts on which sentencing should proceed, with a view to arriving at a mutually acceptable agreement according to which the defendant will plead guilty.<sup>1</sup> It is not a process in which the court has any formal role.<sup>2</sup> The practice has been recognized in case law, if only to identify its limitations in affecting the final outcome of criminal proceedings and to delineate the roles of the parties and the court.<sup>3</sup>

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1. See Asher Flynn, *Fortunately We in Victoria Are Not in That UK Situation: Australian and United Kingdom Legal Perspectives on Plea Bargaining Reform*, 16 DEAKIN L. REV. 361, 371 (2011).

2. See MATTHIAS BOLL, PLEA BARGAINING AND AGREEMENT IN THE CRIMINAL PROCESS: A COMPARISON BETWEEN AUSTRALIA, ENGLAND AND GERMANY 5 (2009) (ebook) (“[I]n Australia ... the prosecution’s choice whether to charge a lesser offence does not require the approval of the court.”). In *Maxwell v The Queen* (1996) 184 CLR 501, 534 (Austl.), Gaudron and Gummow JJ noted, “The integrity of the judicial process—particularly, its independence and impartiality and the public perception thereof—would be compromised if the courts were to decide or to be in any way concerned with decisions as to who is to be prosecuted and for what.”

3. See, e.g., *Barbaro v The Queen* (2014) 253 CLR 58, 76 (Austl.) (holding that the prosecution cannot assist the judge in determining the defendant’s sentence, and that “the sentencing judge, alone, [is] to decide what sentence will be imposed”) (footnote omitted); *GAS v The Queen* (2004) 217 CLR 198, 210-11 (Austl.) (distinguishing and categorizing the different responsibilities held by the prosecutor, the defendant, and the judge throughout the plea bargaining process); *Maxwell*, 184 CLR at 511-514, 534 (holding that, save to prevent an abuse of process, or where there is evidence that the plea is the result of ignorance, fear, duress, or mistake on the part of the defendant, a trial judge has no power to review a prosecutor’s decision to accept a plea of guilty to a lesser offence, nor to intervene and reject the plea).

The label attached to the practice will depend on the jurisdiction.<sup>4</sup> The term “plea negotiations” (leading to “plea agreements”) is preferred in some jurisdictions, including Western Australia, because of the “deal making” connotations associated with “bargaining” and the understanding we have of the formalized system in the United States.

As the New South Wales Law Reform Commission (NSW LRC) explained in a 2013 consultation paper, “[m]ost Australian jurisdictions incorporate plea negotiations into prosecutorial practice, and the practice does not vary widely between jurisdictions.”<sup>5</sup> I will focus below on the experience in Western Australia, because I am most familiar with that jurisdiction.<sup>6</sup> However, the general approach and rationale are common across the jurisdictions, and indeed, as will be seen below, all jurisdictions are bound by guiding principles elucidated by the High Court of Australia.<sup>7</sup>

Plea negotiations in Australia can be part of a structured case conferencing system managed by a court, but generally they involve informal discussions and correspondence between the prosecution and defense.<sup>8</sup> They can occur at any time before the trial of the charges brought against a defendant, and even after a trial has commenced.<sup>9</sup> It may be, for instance, that the course of the evidence adduced by the prosecution during a trial gives rise to a reconsideration of

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4. There are nine legal jurisdictions, each of which has its own legislation and prosecuting authority: the Commonwealth, six states, and two territories. Terms used include “charge bargaining,” “plea negotiations,” and the very neutral “pre-trial discussions.”

5. N.S.W. LAW REFORM COMM’N, ENCOURAGING APPROPRIATE EARLY GUILTY PLEAS: MODELS FOR DISCUSSION ¶ 4.25 (2013), [http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/\\_assets/lrc/m73165113/cp15\\_encouraging%20appropriate%20early%20guilty%20pleas\\_models%20for%20discussion\\_nsw%20law%20reform%](http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/_assets/lrc/m73165113/cp15_encouraging%20appropriate%20early%20guilty%20pleas_models%20for%20discussion_nsw%20law%20reform%20) [https://perma.cc/F56E-535K] [hereinafter NSW LRC]. At the time of writing, the Commission had not published a final report.

6. In this regard I acknowledge the very helpful contribution of my colleague, Amanda Forrester, Consultant State Prosecutor, which I have incorporated.

7. See *infra* notes 25-26 and accompanying text.

8. See Vicki Waye & Paul Marcus, *Australia and the United States: Two Common Criminal Justice Systems Uncommonly at Odds, Part 2*, 18 TUL. J. INT’L & COMP. L. 335, 349 (2010). Even when it is part of structured case conferencing, the court facilitates the process but has no role in the negotiations.

9. See OFFICE OF THE DIR. OF PUB. PROSECUTIONS FOR N.S.W., PROSECUTION GUIDELINES OF THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS FOR NEW SOUTH WALES 37 (2007), [http://www.6windeyer.com/au/downloads/DPP\\_Prosecution\\_Guidelines.pdf](http://www.6windeyer.com/au/downloads/DPP_Prosecution_Guidelines.pdf) [https://perma.cc/76AD-DPXS] [hereinafter NSW GUIDELINES] (“Negotiations between the parties are to be encouraged and may occur at any stage of the progress of a matter through the courts.”).

the prospects of conviction on the charge being tried. This may prompt discussion about acceptance of a plea of guilty to a lesser offense of which the defendant could be convicted on the indictment. If such a plea were entered and accepted by the prosecution, the jury would be discharged without being required to return a verdict.<sup>10</sup>

In all Australian jurisdictions, however, plea negotiations are encouraged, and sometimes mandated, to occur at an early stage in the management of a case.<sup>11</sup> The purpose of negotiations is to explore whether the case can be resolved without trial, and the sooner that happens in the conduct of the case, the greater the benefits to the defendant, any victim, and the State, if agreement is reached.<sup>12</sup>

The process can be instigated by either the prosecution or the defense.<sup>13</sup> Generally, if an offer has not been forthcoming from the defense, it is part of the prosecutor's case management responsibilities to inquire whether the defendant intends to plead guilty to any offense.<sup>14</sup> It is an aspect of the exercise of prosecutorial discretion, which, in the context of prosecutions in the superior courts,<sup>15</sup> is first applied in deciding whether to indict for the offense(s) charged by

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10. See *Criminal Procedure Act 2004 (WA)* s 107 (Austl.).

11. As the NSW LRC states, "a plea agreement is an early resolution mechanism." NSW LRC, *supra* note 5, ¶ 4.1.

12. See Waye & Marcus, *supra* note 8, at 353 (noting that plea bargaining "performs an important utilitarian function" in Australia by saving costs and protecting victims from stress).

13. See GORDON SAMUELS, OFFICE OF THE DIR. OF PUB. PROSECUTIONS FOR N.S.W., REVIEW OF THE NEW SOUTH WALES DIRECTOR OF PUBLIC PROSECUTIONS' POLICY AND GUIDELINES FOR CHARGE BARGAINING AND TENDERING OF AGREED FACTS ¶ 9.1 (2002), [http://www.lawlink.nsw.gov.au/report/lpd\\_reports.nsf/files/Report%201.PDF/\\$FILE/Report%201.PDF](http://www.lawlink.nsw.gov.au/report/lpd_reports.nsf/files/Report%201.PDF/$FILE/Report%201.PDF) [<https://perma.cc/7Y LX-F7W7>]. (Note: The reference in the review to Commonwealth and Queensland policies against a prosecutor initiating negotiations is no longer applicable. Changes in those policies have removed the prohibition. The Commonwealth guidelines specifically allow the prosecution to initiate negotiations.)

14. See Flynn, *supra* note 1, at 375 ("Prosecutorial Discretion Policy 2 encourages them to initiate discussions with the defence practitioner, regardless of whether the defence approaches them.")

15. The Superior Courts are the Supreme Court, the District (or County) Court of each State and Territory, and the Federal Court in the Commonwealth jurisdiction. Plea negotiations also occur in courts of summary jurisdiction (Magistrates' and Local courts) in respect of non-indictable offenses or "either way" offenses that remain in the summary court. Generally, there is less case management involved in that jurisdiction, and prosecutors often will not have a brief until a short time before a hearing. Consequently, any plea negotiation is more likely to be instigated by the defense.



the police, or for some other offense(s), or, indeed, for any offense at all.<sup>16</sup> Generally the prosecutor will indict for the offense that best reflects the criminality of the alleged conduct, as disclosed by the available evidence, and for which there are reasonable prospects of conviction.<sup>17</sup> There are other public interest considerations that may affect the decision.<sup>18</sup> Even where there are reasonable prospects of conviction, there remains scope to consider the strength of the case and other pragmatic considerations to determine whether the State should accept a plea to a lesser offense.<sup>19</sup> The assessment can be attended with considerable complexity, particularly in cases involving multiple defendants, where the relative strength of the case against each defendant and their relative culpability and preparedness to assist the authorities will have a bearing on any plea negotiations.<sup>20</sup>

If there is a prospect that the accused would plead guilty to a lesser offense, or to some of the offenses originally charged, the question is whether a conviction for the lesser offense, or lesser number of offenses, would adequately reflect the defendant's criminality and serve the public interest, while giving regard to the benefits of resolving a prosecution without trial.<sup>21</sup> In many cases the answer will be in the negative, and there will be no scope for reducing the charge or the number of charges. It may be, however, that in those cases the defendant would be prepared to plead guilty if the prosecution makes certain factual concessions which tend to reduce the seriousness of the alleged offense, or if the prosecution agrees to

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16. See MICHAEL ROZENES, PROSECUTORIAL DISCRETION IN AUSTRALIA TODAY 3 (2004), [http://www.aic.gov.au/media\\_library/conferences/prosecuting/rozenes.pdf](http://www.aic.gov.au/media_library/conferences/prosecuting/rozenes.pdf) [https://perma.cc/J8MY-KW42]. The general course of prosecution from charging by an investigating authority to resolution is discussed later. See *infra* Part I.I.

17. See DIR. OF PUB. PROSECUTIONS FOR W. AUSTR., STATEMENT OF PROSECUTION POLICY AND GUIDELINES 2005 ¶ 75 (2005), [http://www.dpp.wa.gov.au/\\_files/statement\\_prosecution\\_policy2005.pdf](http://www.dpp.wa.gov.au/_files/statement_prosecution_policy2005.pdf) [https://perma.cc/E778-MGUX].

18. See *id.* ¶¶ 23-33, 58 (describing the many different public interest factors that should be considered to determine whether a prosecutor should proceed with a case).

19. See *id.* ¶ 75 (noting that "a prosecutor may agree to discontinue a charge ... where the evidence available to support the State may be weak").

20. See *id.* ¶ 31 (listing the many factors that should go into a prosecutor's decision to enter plea negotiations with a defendant).

21. See *id.* ¶¶ 73-75 (noting that a plea bargain can benefit the accused person and the community, but such a plea should be accepted only if it "reasonably reflects the essential criminality of the conduct and provides an adequate basis for sentencing").

make a submission that a particular sentencing option is open or that the offense falls within a certain level on the scale of seriousness for such offense. Of course, a plea agreement may involve any combination of the above considerations, and will usually include an agreed statement of the facts on which the court will be asked to sentence.<sup>22</sup>

In relation to factual and sentencing concessions, care is taken not to engage in a “bargain,” whereby the State might be seen to be offering a concession to induce a plea of guilty. The State may be asked to indicate its position on sentencing in the event that the defendant was to plead guilty. Ordinarily, such an indication would not be given in the absence of all relevant sentencing materials. Moreover, it should be no more than an indication of the State’s submission consistent with principle and precedent, having regard for the agreed facts and giving weight to the mitigating value of the plea of guilty and any assistance the defendant may have provided to the authorities.<sup>23</sup> It will not bind the sentencing judge.

In some jurisdictions, the indication of the prosecution’s sentencing submission is regarded as part of the plea agreement, and there was a practice (considered to be consistent in Victoria with decisions of the Court of Appeal in that state) whereby the prosecution would make a submission to the court not only about the type of sentence, but about the appropriate range or quantum of imprisonment, where imprisonment was appropriate.<sup>24</sup> That practice now appears to be prohibited by the High Court decision of *Barbaro v The Queen*.<sup>25</sup> In *Barbaro*, the justices held that the practice was wrong

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22. See NSW GUIDELINES, *supra* note 9, at 38 (noting that a negotiated and agreed-upon set of facts may be prepared by the prosecution and defense during plea negotiations).

23. See OFFICE OF THE DIR. OF PUB. PROSECUTIONS FOR W. AUSTR., JOINT PROTOCOL BETWEEN THE OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS AND THE LAW SOCIETY OF WESTERN AUSTRALIA REGARDING CIRCUMSTANCES IN WHICH LETTERS OF RECOGNITION WILL BE MADE AVAILABLE TO DEFENCE COUNSEL ¶¶ 7-8 (2011), [http://www.dpp.wa.gov.au/\\_files/Recognition\\_Protocol\\_ODPP\\_LawSociety.pdf](http://www.dpp.wa.gov.au/_files/Recognition_Protocol_ODPP_LawSociety.pdf) [<https://perma.cc/U3MU-UFNE>]. Occasionally, a decision may be made not to pursue a prosecution against a defendant who has provided significant assistance to an investigating authority, but such assistance is more often dealt with as a sentencing consideration, with the authority providing the court with a letter recognizing the assistance (known as a “letter of comfort” or “letter of recognition”). See *id.* ¶¶ 7-9.

24. See *R v MacNeill-Brown* [2008] VSCA 190 ¶¶ 58-59 (Austl.).

25. (2014) 253 CLR 58, 76 (Austl.).

in principle and should cease, as it is for the sentencing judge alone to decide what sentence to impose.<sup>26</sup>

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Canada, Hon. Justice Pomerance: In Canada, we tend to use the term “resolution discussions.”<sup>27</sup>

In Canada, all criminal matters are subject to statutorily mandated judicial pretrial discussions, where Crown and defense counsel meet with a judge.<sup>28</sup> The pretrial judge is disqualified to serve as the trial judge.<sup>29</sup> At the meeting, there is to be discussion of the issues at the trial, to determine how much time is required for the litigation.<sup>30</sup> In addition, it is contemplated that the presiding judge might express his or her views on the merits of issues, in an effort to streamline the case and restrict issues to those that are genuinely deserving of a hearing.<sup>31</sup>

Superimposed on this process, many judges also engage in the practice of discussing resolution of the charges.<sup>32</sup> Within Canada, there is a difference of opinion amongst the judiciary as to how far judges ought to go with this process.<sup>33</sup> There are a variety of

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26. *See id.* One commentator has suggested the decision “will undermine the fairness and effectiveness of the sentencing process,” and that “[l]egislation is desirable and necessary to negate the impact of the decision.” Mirko Bagaric, Editorial, *The Need for Legislative Action to Negate the Impact of Barbaro v The Queen*, 38 CRIM. L.J. 133, 133 (2014). The ramifications of the decision have been considered recently by the Victorian Court of Appeal in *Matthews v The Queen* [2014] VSCA 291 ¶ 29 (Austl.).

27. *See* MILICA POTREBIC PICCINATO, DEP’T OF JUSTICE OF CAN., PLEA BARGAINING 1 (2004), <https://perma.cc/7JWC-ZLHT> (noting that in Canada “there was a movement away from the use of the term ‘plea bargaining’ and toward more neutral expressions such as ... ‘resolution discussions’”).

28. *See* Criminal Code, R.S.C. 1985, c C-46, s 625.1 (Can.).

29. *See* PICCINATO, *supra* note 27, at 10 (“It should be noted that the pre-trial conference judge will not preside over subsequent substantive courtroom proceedings related to the matter without the consent of both parties.”).

30. *See* Criminal Code, R.S.C. 1985, c C-46, s 625.1 (Can.).

31. *See id.*

32. *See* PICCINATO, *supra* note 27, at 10 (“As a neutral guide, the judge may also be of great assistance in helping the parties identify their differences, and, where appropriate, reconcile them.”).

33. *See* PUB. PROSECUTION SERV. OF CAN., PUBLIC PROSECUTION SERVICE OF CANADA DESKBOOK: § 3.7 RESOLUTION DISCUSSIONS, at 12-13 (2014), <http://www.ppsc-sppc.gc.ca/eng/pub/fpsd-sfpg/fps-sfp/tpd/d-g-eng.pdf> [<https://perma.cc/9FU6-GZA7>] [hereinafter PPSC DESKBOOK] (“A system of judicially-supervised pre-trials exists in most jurisdictions, although the

approaches, ranging from disinclination to active participation.<sup>34</sup> Generally, judicial pretrial discussions are structured by forms, procedures, and practice memoranda issued by the courts.<sup>35</sup>

Although there are differences of opinion, experience would suggest that discussion of resolution with counsel can achieve appropriate results that are consistent with the interests of justice. In some jurisdictions, pretrial judges are encouraged to express candid and blunt views. It is by testing the limits of each party's position that a satisfactory resolution is often reached.

It is important to stress that judges do not encourage pleas of guilt and/or particular sentences purely for the sake of efficiency. To the contrary, the sentence must be one that is fit in all of the circumstances.<sup>36</sup> But several factors come into play. Consider a case where the offender has a viable constitutional argument, which could result in exclusion of the prosecution's evidence. In this instance, a plea of guilt is indicative of significant remorse. The Crown, facing the prospect of losing its evidence, may well agree to a lesser sentence on a plea. This is an appropriate sentencing discount based on a recognized mitigating factor.

In other instances, a plea and agreed-upon sentence serve other interests, such as sparing a vulnerable victim the additional trauma of testifying in court.<sup>37</sup> In many resolution discussions, counsel agree on a joint position to be put forward to the court.<sup>38</sup>

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form may differ from one jurisdiction to the next.”).

34. See PICCINATO, *supra* note 27, at 9 (describing various degrees of judicial involvement in resolution discussions).

35. For example, in the Ontario Superior Court of Justice, pretrial conferences are governed by section 625.1 of the Criminal Code, *see* R.S. 2002, c 13, s 50 (Can.), and the Criminal Proceedings Rules: subrules 28.04(1)-(3), (5), (6), and (8). Form 17, the Pre-trial Conference Report, is to be filled out and filed by both Crown and defense counsel prior to the pretrial conference. *Id.* at s 28.04(2).

36. See PPSC DESKBOOK, *supra* note 33, at 6 (“Fairness also means that the Crown should honour all negotiated plea or sentence agreements unless fulfilling the agreement would clearly be contrary to the public interest.”) (footnote omitted).

37. See PICCINATO, *supra* note 27, at 9 (noting that “victims may also benefit from resolution discussions” because it will relieve them from the burden of having to testify in open court).

38. See *id.* at 2 (noting that sentence discussions will allow the prosecutor and defense counsel to make a joint recommendation for a range of sentences that can be submitted to the court).

In Canada, there is a test to be applied by a judge before rejecting a joint position on a sentence put forward by experienced counsel. Such a position is to be rejected only where the court is satisfied that the proposed sentence is disproportionately lenient, or would “bring the administration of justice into disrepute.”<sup>39</sup> Only in these exceptional circumstances is a judge entitled to “jump” a joint submission, imposing a higher sentence than that endorsed by counsel.<sup>40</sup>

Of course, resolution discussions also take place without a judicial participant serving as referee.<sup>41</sup> Sometimes, by the time of the judicial pretrial discussion, counsel have already reached an agreement through independent discussions.<sup>42</sup>

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England and Wales, Professor McEwan: There is no formal process for plea negotiation in England and Wales.<sup>43</sup> In general, prosecutors are not allowed to address the court on issues of sentence, which remain entirely within the court’s discretion.<sup>44</sup> In all but the most minor cases, however, the Crown Prosecution Service (CPS) selects the charge, which allows conversations to take place between counsel.<sup>45</sup> Negotiations with the defense are conducted by the CPS

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39. *Id.* at 8 (citing *R. v. Dorsey* (1999), 123 O.A.C. 3d 342 (Can. Ont. C.A.)).

40. *See id.* (noting that “judges are legally obligated not to reject a joint submission,” but that “the sentence that will be ultimately imposed is entirely within the [judge’s] discretion”).

41. *See id.* at 9 (recognizing that “[m]ost resolution discussions occur solely between the prosecutor and defence counsel”).

42. *See id.* (recognizing that counsel are required to notify the court if an agreement has been reached before the beginning of trial).

43. *See* Stephen Hockman, *A New Framework for Plea Negotiation in Fraud Cases*, BARRISTERMAG., <http://www.barristermagazine.com/barrister/index.php?id=186> [<https://perma.cc/7KRH-SYFC>] (last visited Mar. 20, 2016) (noting that “there is at present no formal procedure for plea negotiation” in England).

44. *See* John Baldwin & Michael McConville, *Plea Bargaining and Plea Negotiation in England*, 13 LAW & SOC’Y REV. 287, 288 (1979) (“Indeed, one of the central features of the English judicial system is the extent to which trial judges have been able to retain their sentencing discretion.”).

45. CROWN PROSECUTION SERV., THE DIRECTOR’S GUIDANCE ON CHARGING: GUIDANCE TO POLICE OFFICERS AND CROWN PROSECUTORS ISSUED BY THE DIRECTOR OF PUBLIC PROSECUTIONS UNDER S37A OF THE POLICE AND CRIMINAL EVIDENCE ACT 1984 § 2, at 1 (3d ed. 2007), [http://www.cps.gov.uk/publications/docs/dpp\\_guidance.pdf](http://www.cps.gov.uk/publications/docs/dpp_guidance.pdf) [<https://perma.cc/C3SN-N2CF>] (noting that “Crown Prosecutors will determine whether a person is to be charged”).

or a barrister representing them.<sup>46</sup> But any agreement to accept a plea to a lesser charge cannot provide a high degree of certainty of what sentence is likely to be imposed.<sup>47</sup> Also, many judges think they have the power to disallow a plea of guilt not compatible with the alleged facts.<sup>48</sup>

Plea discussions between prosecution and defense before trial have taken place for many years.<sup>49</sup> Being informal in nature, they take place in private and go unrecorded.<sup>50</sup> Such discussions inevitably occur at a late stage in the process after a defendant has been charged, following what might have been an extremely lengthy investigation. When the defense changes its plea on the day of the trial, the trial goes “cracked”—the late plea means that the case will not be heard, and so another case has to be moved up the court list. This can lead to chaos, as counsel for the next case may be engaged elsewhere, witnesses not called, and so on.<sup>51</sup> Hence, there is pressure to enter a plea earlier—for example, in pretrial hearings.

A judge may give an indication as to the maximum sentence on a guilty plea but only if the defense asks for such an indication;<sup>52</sup> the court retains an unfettered discretion to refuse to give it or to

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46. See MIREILLE DELMAS-MARTY, *EUROPEAN CRIMINAL PROCEDURES* 211 (2002) (“When the Crown Prosecution Service has taken over, a further discussion of the charges can occur between the accused and the Crown prosecutor.”).

47. See Baldwin & McConville, *supra* note 44, at 288 (noting that “it [is] difficult for the prosecution to offer the defence any promise with respect to the sentence” because offenses in England do not carry fixed sentences and are at the judge’s discretion).

48. For example, in *R v. Sutcliffe* (1981), the famous case of the “Yorkshire Ripper,” the judge refused to accept a plea of guilty to manslaughter by way of diminished responsibility, despite prosecution willingness to do so and despite unanimous psychiatric opinions. See GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* 422 (15th ed. 2014).

49. See Monty Raphael, Joint Head of Fraud and Regulatory, Peters & Peters, Conference Presentation at the European Criminal Bar Association Autumn Conference: Plea Bargaining and the Role of the Lawyer 1 (Oct. 4, 2008), [http://www.petersandpeters.com/sites/default/files/publications/pmrPleaBargainingandtheroleofthelawyer\\_0.pdf](http://www.petersandpeters.com/sites/default/files/publications/pmrPleaBargainingandtheroleofthelawyer_0.pdf) [<https://perma.cc/3WTN-TZX7>] (“It has long been the case in the UK that informal negotiations take place.”).

50. See *id.* (noting that plea discussions are “often held in private between defence lawyers and prosecutors”).

51. See Peter W. Tague, *Guilty Pleas or Trials: Which Does the Barrister Prefer?*, 32 MELB. U. L. REV. 242, 246 (2008) (“Cracked trials are reviled for wasting expensive preparation by judges, and by the prosecution and defence, as well as for inconveniencing witnesses.”).

52. See *R v. Goodyear* [2005] EWCA (Crim) 888 [51] (“[C]ounsel is entitled to advise the defendant that an advance indication of [the maximum] sentence may be sought from [the judge].”).

postpone giving it.<sup>53</sup> But once given, it is binding on any judge who tries the case.<sup>54</sup>

To encourage plea discussions in serious and complex fraud cases to take place earlier, the Attorney General has issued guidelines intended to offer a formal, transparent framework to facilitate such negotiations to take place.<sup>55</sup> The *Fraud Review* saw such guidelines as “more an evolutionary change than a revolutionary one.”<sup>56</sup> Once an agreement has been reached as to the pleas, discussion as to the sentence will follow with a joint submission being presented to the court.<sup>57</sup> The court has absolute discretion as to whether it sentences in accordance with the agreed joint submission.<sup>58</sup> It is not essential that the defendant be legally represented,<sup>59</sup> though in a serious case that is likely (subject to recent changes to legal aid that are causing no end of problems, including barristers going on strike just when some notorious, serious frauds are about to come to court). The new guidelines give prosecutors a new role as to sentence in the sense of drawing up a joint recommendation to the court, but they have nothing to offer by way of discounts, immunity, or other incentives.<sup>60</sup>

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53. *See id.* at [54] (recognizing that the judge may give an indication as to the maximum sentence of a guilty plea, but that there are certain factors that may stop him from doing so).

54. *See id.* at [61] (“Once an indication has been given, it is binding and remains binding on the judge who has given it, and it also binds any other judge who becomes responsible for the case.”).

55. *See* OFFICE OF FAIR TRADING, FRAUD REVIEW, FINAL REPORT 242-43 (2006), <http://northeastfraudforum.co.uk/wp-content/uploads/2013/10/fraudreview.pdf> [<https://perma.cc/26KZ-Z4EF>].

56. *Id.* at 251.

57. *See* ATTORNEY GEN.’S OFFICE, ATTORNEY GENERAL’S GUIDELINES ON PLEA DISCUSSIONS IN CASES OF SERIOUS OR COMPLEX FRAUD ¶ D9 (2009), <https://www.gov.uk/guidance/plea-discussions-in-cases-of-serious-or-complex-fraud--8> [<https://perma.cc/S455-JKBJ>] (“Where agreement is reached as to pleas, the parties should discuss the appropriate sentence with a view to presenting a joint written submission to the court.”).

58. *See id.* ¶ D10 (noting that “[t]he prosecutor should bear in mind all of the powers of the court” upon presenting the joint submission).

59. *See id.* ¶ C1 (noting that “[t]he prosecutor will not initiate plea discussion with a defendant who is not legally represented,” but that a non-represented defendant may approach the prosecutor to initiate the discussion).

60. Nowhere in the Attorney General’s guidelines, for instance, are Crown prosecutors permitted to grant immunity. *See id.*

New Zealand, Hon. Judge Harvey: We do not use the term “plea-bargaining” in any official or unofficial sense. Rather, counsel may ask the judge for a “sentence indication.”<sup>61</sup> The practice grew up informally and was the subject of a few cases that refined the process, but it has now been incorporated into the Criminal Procedure Act 2011.<sup>62</sup> The sentence indication process functions within the wider process and procedures set down by the Act.

The background to the legislation is that it was enacted to streamline court procedures and make them more efficient. For that purpose, there are a number of time limits and time frames set for various steps in the process, and these steps interlink with other legislative requirements, primarily the Criminal Disclosure Act, which sets out the obligations of a prosecutor to make disclosure to the defense.<sup>63</sup>

There are three major stages to the process. The first stage is generally described as administration, or the steps that are taken to bring a case to a point where it can be considered ready for trial.<sup>64</sup> There are certain timeframes within this administration process; ideally, after a first appearance, the case should be adjourned for either ten or fifteen working days depending upon the type of case and the nature of the disclosure to be made.<sup>65</sup> At a second appearance, a plea is required together with an election of jury trial if appropriate.<sup>66</sup>

The matter then goes to a case review hearing, which should occur at a maximum of forty-five working days after the second appearance.<sup>67</sup> At the case review hearing, a judge may give directions regarding the management of the case to facilitate resolution of the interests of justice.<sup>68</sup> At this hearing, a case management memorandum is filed, setting out information about the progress of

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61. Criminal Procedure Act 2011, pt 1 s 60 (N.Z.).

62. *See id.* pt 1 ss 60-65.

63. *See* Criminal Disclosure Act 2008 (N.Z.).

64. *See* MINISTRY OF JUSTICE, CRIMINAL PROCEDURE ACT 2011: OVERVIEW OF THE NEW PROCESS 1 (2013), <http://www.justice.govt.nz/services/service-providers/information-for-legal-professionals/documents/cpai-infosheets/infosheet-2-criminal-procedure-process-overview> [<https://perma.cc/L3PY-U4V8>].

65. Criminal Procedure Rules 2012, s 4.1 (N.Z.).

66. Criminal Procedure Act 2011, s 51.1 (N.Z.).

67. Criminal Procedure Rules 2012, s 4.2(a) (N.Z.).

68. Criminal Procedure Act 2011, s 55 (N.Z.).



the case and what may be required, whether there are any pretrial hearings or evidence challenges, difficulties with witnesses, difficulties with dates, and so on.<sup>69</sup> This memorandum is prepared after consultation between the prosecution and defense.

The trial itself marks the third stage. It is generally at the case review hearing that a sentence indication may be sought, although a sentence indication may also be sought at the second appearance. Once a sentence indication has been sought, a date for the hearing of the sentence indication is set.<sup>70</sup> For this purpose, the clock stops. If a sentence indication is set at the second appearance, the forty-five working day requirement to a case review hearing is suspended until the sentence indication process has been completed.<sup>71</sup> If a sentence indication is sought at the case review hearing under normal circumstances, the next important hearing would be the trial callover, which is meant to be forty working days after the case review hearing.<sup>72</sup> Once again, that process is sometimes suspended until the sentence indication has been completed.<sup>73</sup>

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United States, Ms. Brook: There is no formal definition of plea bargaining in the United States.<sup>74</sup> Plea bargaining can take place

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69. *See id.* s 55-56.

70. *See id.* s 62.

71. There is nothing in the Act or Rules that states that the forty-five working day requirement is suspended pending a sentence indication. However, under section 54 of the Act, a matter is sent to case review only once a defendant pleads not guilty. Criminal Procedure Act 2011, s 54 (N.Z.). If no plea is entered pending sentence indication, then the forty-five day rule also remains pending.

72. *Timeframes*, N.Z. MINISTRY JUST. (June 2013), <http://www.justice.govt.nz/services/service-providers/information-for-legal-professionals/criminal-court-processes/timeframes> [<https://perma.cc/SC8W-9LRM>].

73. The Act and Rules do not expressly provide for this suspension of time. However, section 58 of the Act allows a judge to “make any other directions in relation to the management of the case” to facilitate resolution of the proceedings. *See* Criminal Procedure Act 2011, s 58 (N.Z.). Similarly, Criminal Procedure Rule 1.7 allows a judge to extend a time for doing anything in a proceeding. Criminal Procedure Rules 2012, s 1.7 (N.Z.). Either of these provisions could allow a judge to put a trial callover on hold pending a sentence review, even though not expressly provided.

74. Plea bargaining practices vary greatly from state to state in the United States depending upon numerous factors, including the governing laws of the particular state, the amount and type of funding available to prosecutors and defense counsel, and the number and

any time prior to the beginning of a trial. Plea bargaining could even happen during trial, but that is extremely rare given the constitutional and policy considerations involved. It can involve negotiations on any aspect of the case, including what charges will be brought, what facts will be included in the agreement, and what sentence will be requested. All negotiations occur directly between the parties without any mediator or neutral overseer because the judge hearing the case is prohibited from becoming involved in plea negotiations.<sup>75</sup>

Rule 11 of the Federal Rules of Criminal Procedure governs all federal plea proceedings and is also the rule prohibiting a judge's involvement in plea proceedings.<sup>76</sup> Under the Rule, a defendant may plead not guilty, guilty, or *nolo contendere*.<sup>77</sup>

Plea negotiations, however, may begin long before Rule 11 comes into play. In some cases, the prosecution may reach out to the person who is a target of its investigation before any charges are filed and offer the target a potential benefit in exchange for the target's cooperation against others. The prosecution may want the target to provide names or other information about a larger crime or may want the target to wear a wire or to record phone calls. Or, the prosecution may want to know if the target would be willing to actively seek out other persons to become involved in a sting operation.

Sometimes it is the defense that initiates negotiations. Highlighting the potential benefit of cooperation, this affirmative attempt to come to an agreement with the government is often called the "race

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type of crimes charged, among others. For purposes of this discussion, therefore, I will focus mainly on the practices and rules governing federal plea bargaining. Of course, even in federal court, practices vary some from district to district, but the governing rules and policies are basically the same.

75. For a sharp rebuke of a trial judge's involvement in the plea negotiation process, see *United States v. Hemphill*, 748 F.3d 666, 672 (5th Cir. 2014) (indicating "an absolute prohibition on all forms of judicial participation in or interference with the plea negotiation process" and observing that "this blanket prohibition admits of no exceptions and serves several important concerns" (quoting *United States v. Pena*, 720 F.3d 561, 570 (5th Cir. 2013) and citing *United States v. Miles*, 10 F.3d 1135, 1139 (5th Cir. 1993))).

76. See FED. R. CRIM. P. 11.

77. *Id.* Although rare, pleas of *nolo contendere* do usually involve negotiation. A *nolo contendere* plea, which literally translates as "no contest," has become something of a rarity, although it is still sometimes requested in corporate cases because it allows a court to find the defendant guilty without risk that the plea itself can later be used against the defendant in a civil suit.

to the courthouse,” meaning whoever gets there first is likely to benefit the most.<sup>78</sup> Unfortunately, it can be the more culpable defendants who receive the most significant benefits and the lowest sentences. Because lower level and generally poor defendants usually have little useful information, they may end up receiving longer sentences than those higher up the chain.<sup>79</sup>

Benefits can take many forms. Occasionally, there will be an agreement not to charge at all or to dismiss all charges. More often, the prosecution will agree to limit the number and type of charges brought or to dismiss certain counts. The U.S. Sentencing Commission Guidelines Manual must be referenced and the defendant’s actual sentencing guidelines must be accurately calculated in every federal case.<sup>80</sup> Moreover, the Guidelines group together offenses and amounts whether they are charged or not.<sup>81</sup> Thus, dismissal of counts may not be meaningful unless some charges require the imposition of mandatory minimum sentences (which many federal and state crimes do) or unless the agreed-upon new charges carry extremely low maximum sentences as compared to the original charges. An example would be an agreement to dismiss a drug distribution count carrying a mandatory minimum sentence of ten years, and to replace it with a charge of using a communication facility to further a drug crime, which carries a maximum sentence of four years and the possibility of probation. Charge bargains may also involve the dismissal of particular charges that carry manda-

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78. See Todd A. Berger, *After Frye and Lafler: The Constitutional Right to Defense Counsel Who Plea Bargains*, 38 AM. J. TRIAL ADVOC. 121, 138-39 (2014) (discussing the “numerous benefits defendants may gain through the plea bargaining process”).

79. This still all-too-common result was criticized by Judge Easterbrook more than twenty years ago in *United States v. Brigham*:

Mandatory minimum penalties, combined with a power to grant exceptions, create a prospect of inverted sentencing. The more serious the defendant’s crimes, the lower the sentence .... Discounts for the top dogs have the virtue of necessity, because rewards for assistance are essential to the business of detecting and punishing crime. But what makes the post-discount sentencing structure topsyturvy is the mandatory minimum, binding only for the hangers on. What is to be said for such terms, which can visit draconian penalties on the small fry without increasing prosecutors’ ability to wring information from their bosses? 977 F.2d 317, 318 (7th Cir. 1992) (citations omitted).

80. 18 U.S.C. § 3553(a)(4)(A)(i) (2012).

81. See U.S. SENTENCING GUIDELINES MANUAL § 3D1 (U.S. SENTENCING COMM’N 2014).

tory consequences in other forums, such as charges that count as “crimes of moral turpitude” in immigration proceedings.

Negotiating the sentence is also possible. For example, the prosecution can agree to a particular sentence, to a particular guideline range, or to a percentage of a sentence. Or, it can agree not to oppose the sentence requested by the defense. The government, however, cannot restrict victims from making recommendations under the broad victims’ rights statute.<sup>82</sup>

The parties may agree to a specific sentence or to use a particular section of the Guidelines. Unlike most plea agreements, which allow courts to impose sentences other than what is recommended in the agreement, such an agreement binds the sentencing court once the court accepts the agreement.<sup>83</sup>

In exchange for any of these benefits, prosecutors in many federal districts require waivers from the defendant.<sup>84</sup> These can range from broad waivers requiring the defendant to waive all sentencing issues on appeal and through collateral attack, to narrow waivers of the right to appeal a specific issue agreed to in the plea agreement.<sup>85</sup> Although the use of waivers has been approved by every appellate court to rule on the practice, waivers raise many constitutional and ethical questions that have not yet been considered by the Supreme Court.<sup>86</sup> The prosecution’s requested waiver of the right to collaterally attack the effective assistance of counsel has caused so much controversy that the Attorney General’s Office recently released a memorandum prohibiting prosecutors from requesting effective assistance of counsel waivers.<sup>87</sup> Such requests are particularly ironic

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82. *See id.* § 6A1.5.

83. The parties can also agree to a “conditional” plea under which the defendant is allowed to plead guilty and still preserve the right to appeal specified pretrial issues, such as a Fourth Amendment search and seizure issue litigated in a motion to suppress or a pretrial motion challenging the sufficiency of the indictment. Under the rules, both the government and the court must consent to such a plea. FED. R. CRIM. P. 11(a)(2).

84. *See* Andrew E. Taslitz, *Prosecutorial Preconditions to Plea Negotiations: “Voluntary” Waivers of Constitutional Rights*, 23 CRIM. JUST. 14 (2008).

85. *See id.* at 15.

86. For a thorough discussion of these questions, see generally Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015). For a list of cases approving appellate waivers, see *United States v. Khattak*, 273 F.3d 557, 560-61 (3d Cir. 2001).

87. *See* Press Release, U.S. Dep’t of Justice, Attorney General Holder Announces New Policy to Enhance Justice Department’s Commitment to Support Defendants’ Right to

in light of the Supreme Court's recent decisions in *Padilla v. Kentucky*,<sup>88</sup> *Lafler v. Cooper*,<sup>89</sup> and *Missouri v. Frye*,<sup>90</sup> which explicitly held that defendants are constitutionally entitled to the effective assistance of counsel during plea negotiations.

### *B. Frequency of Use*

#### *How often is plea bargaining used?*

For this question, we attempted to determine the actual use of plea negotiations in the five nations. It was not so surprising to see the very high numbers for the United States, as these have been discussed and debated for a long time. What was truly striking, however, was that we were unable to find any reliable numbers for most of the other nations, even when we know the practice is widespread.

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Australia, Hon. Justice Fiannaca: I am not aware of any relevant statistics in Australia,<sup>91</sup> but I can confidently say the practice is used frequently. Its prevalence is recognized by the NSW LRC in its 2013 consultation paper CP 15<sup>92</sup> and has been referred to in previous studies.<sup>93</sup> It is an essential part of the role of a prosecutor to

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Counsel (Oct. 14, 2014), <http://www.justice.gov/opa/pr/attorney-general-holder-announces-new-policy-enhance-justice-departments-commitment-suppoeet> [<https://perma.cc/8HU2-P4BW>].

88. 559 U.S. 356 (2010).

89. 132 S. Ct. 1376 (2012).

90. 132 S. Ct. 1399 (2012).

91. It would be difficult to collate such statistics, given the informal nature of the process and likely variations in record-keeping systems.

92. See NSW LRC, *supra* note 5, ¶ 1.6.

93. See, e.g., Asher Leigh Gevaux Flynn, *Secret Deals & Bargained Justice: Lifting the Veil of Secrecy Surrounding Plea Bargaining in Victoria* 27 (Aug. 26, 2009) (unpublished Ph.D. dissertation, Monash University), <http://arrow.monash.edu/au/vital/access/manager/Repository/monash:29437> [<https://perma.cc/G4V8-YVZ9>]. Dr. Flynn has since published several articles concerning plea bargaining. See *Dr. Asher Flynn: Refereed Journal Articles*, MONASH UNIV., <http://profiles.arts.monash.edu.au/asher-flynn-refereed-journal-articles> [<https://perma.cc/E3Q2-79KN>]. For an interesting comparison of the role of plea bargaining in Australia and in other countries, see generally OLE KRAMP, *HOW TO DEAL WITH THE DEALS: THE ROLE OF PLEA BARGAINING IN AUSTRALIA AND GERMANY—A COMPARISON* (2008) (ebook).

identify matters where it is appropriate to have discussions with the defendant's legal representatives with a view to resolving the matter without trial, as discussed above.

It remains to be seen whether the decision in *Barbaro v The Queen* will affect the frequency of plea negotiations in those jurisdictions where the prosecution had previously made submissions about the appropriate sentencing range as part of a plea agreement.<sup>94</sup>

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Canada, Hon. Justice Pomerance: Recognized as “an integral element of the Canadian criminal process,”<sup>95</sup> plea bargaining has gained wide acceptance in Canada. Precise and current numbers are difficult to find, but it appears that a strong majority of criminal prosecutions are resolved by pleas.<sup>96</sup> Again, this will vary from province to province. I do not have any definitive statistics to offer. We undoubtedly have statistics that speak to the prevalence of guilty pleas as opposed to trials. However, there is no way of knowing the extent to which those cases were the product of formal resolution discussions.

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England and Wales, Professor McEwan: There are few statistics as such,<sup>97</sup> though some assert that the number of guilty pleas has

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94. (2014) 253 CLR 58.

95. *R. v. Burlingham*, [1995] 2 S.C.R. 206, 208 (Can.).

96. See Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 973-74 (1983) (suggesting that, based on a survey of available studies, approximately 70 percent of successful prosecutions in Canada “are disposed of by guilty pleas”); Simon N. Verdun-Jones & F. Douglas Cousineau, *Critical Analysis of Plea Bargaining in Canada*, in CANADIAN CRIMINAL JUSTICE SYSTEM 177, 187 (Craig L. Boydell & Ingrid Arnet Connidis eds., 1982) (requesting additional studies concerning the frequency of plea bargaining).

97. Recent reports indicate that the vast majority of criminal cases in at least some of the courts in England and Wales are resolved by plea bargaining. See MINISTRY OF JUSTICE, CRIMINAL JUSTICE STATISTICS 2013: ENGLAND AND WALES 13 (2014), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/312021/criminal-justice-statistics-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/312021/criminal-justice-statistics-2013.pdf) [<https://perma.cc/6MP7-KQ8Y>].

increased in recent years.<sup>98</sup> But the Crown Court caseload, far from decreasing, has significantly increased.<sup>99</sup> One U.S. scholar studying the situation in England and Wales observed that the number of guilty pleas considered for sentencing in the Crown Court rose sharply between 1974 and 1988, but then fell back by 2002.<sup>100</sup> He offered no explanation of the recent reduction, but a combination of diversionary measures and discontinuances might hold the key.<sup>101</sup>

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New Zealand, Hon. Judge Harvey: Neither I nor Professor Marcus was able to locate good data as to the number of cases resolved by guilty plea, though it is surely large and getting larger.<sup>102</sup>

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United States, Ms. Brook: Today, an overwhelming number of criminal prosecutions in our country are resolved by guilty pleas. Plea bargaining occurs in the vast majority of those cases in both state and federal courts. Indeed, it has been reported that in most U.S. jurisdictions, plea bargaining occurs more than 90 percent of the time.<sup>103</sup>

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98. It has been estimated that 70 percent of all Crown cases are resolved by way of plea bargain. MINISTRY OF JUSTICE, JUDICIAL AND COURT STATISTICS 2011, at 9 (2012), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/217494/judicial-court-stats-2011.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/217494/judicial-court-stats-2011.pdf) [<https://perma.cc/2N45-T6A5>].

99. The Crown Court's trial caseload increased 4.5 percent from 2005 to 2007, with further increases expected. NAT'L AUDIT OFFICE, HM COURTS SERV., ADMINISTRATION OF THE CROWN COURT 10 (2009), <http://www.nao.org.uk/wp-content/uploads/2009/03/0809290.pdf> [<https://perma.cc/26QB-AQXM>].

100. See Herbert M. Kritzer, *Disappearing Trials? A Comparative Perspective*, 1 J. EMPIRICAL LEGAL STUD. 735, 747-48 (2004).

101. *Id.*

102. Indeed, our research efforts turned up an Official Information Act request to the Ministry of Justice in December 2012 for just such information. *Plea Bargaining: Brendon Mills Made this Official Information Act Request to Ministry of Justice*, FYI.ORG.NZ (Jan. 28, 2013), [https://fyi.org.nz/request/plea\\_bargaining](https://fyi.org.nz/request/plea_bargaining) [<https://perma.cc/3NSM-YB5S>] ("I would like to know how often plea bargaining (ie an offender pleads guilty in return for a lesser charge/sentence) is used in the New Zealand justice system."). The Ministry responded by noting that "the Ministry of Justice does not hold any records of instances of plea bargaining." *Id.*

103. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) ("Ninety-seven percent of federal

### C. Procedural Safeguards

*Does your nation have procedural safeguards in place for the protection of the defendant? To ensure integrity in the process for the prosecution?*

To a certain extent, this question seeks out institutional responses to the now common bargaining practices to determine if there is indeed a formal structure in place. What we find is a wide range. At one end of the spectrum is the recent and detailed statutory scheme in New Zealand. At the other, the English lawmakers and judges seemingly are only reluctantly coming now to the acknowledgment of, and acquiescence in, the practice of plea bargaining.

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Australia, Hon. Justice Fiannaca: There are no legislatively-sanctioned safeguards. The cornerstone of the protection of both the defendant and the State consists of case law that reinforces the principle that judges make the sentencing decision, not the parties.<sup>104</sup> That may be cold comfort to a defendant who is seeking

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convictions and ninety-four percent of state convictions are the result of guilty pleas.”) (citations omitted); see also Cynthia Alkon, *The U.S. Supreme Court’s Failure to Fix Plea Bargaining: The Impact of Lafler and Frye*, 41 HASTINGS CONST. L.Q. 561, 565 (2014); Laurie L. Levenson, *Peeking Behind the Plea Bargaining Process: Missouri v. Frye & Lafler v. Cooper*, 46 LOY. L.A. L. REV. 457, 459-63 (2013). The underlying statistical reports bear out these remarkable numbers. See, e.g., GLENN R. SCHMITT & JENNIFER DUKES, U.S. SENTENCING COMM’N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2012, at 4 (2012), [http://www.uscc.gov/sites/default/files/pdf/research-and-publications-research-publications/2013/FY12\\_Overview\\_Federal\\_Criminal\\_Cases.pdf](http://www.uscc.gov/sites/default/files/pdf/research-and-publications-research-publications/2013/FY12_Overview_Federal_Criminal_Cases.pdf) [https://perma.cc/3M48-ZTSJ]; MD. STATE COMM’N ON CRIMINAL SENTENCING POLICY, 2013 ANNUAL REPORT 38 (2014), <http://msccsp.org/Files/Reports/ar2013.pdf> [https://perma.cc/NAH8-PUXT]; VA. CRIMINAL SENTENCING COMM’N, 2013 ANNUAL REPORT 30 (2013), <http://www.vsc.virginia.gov/2013AnnualReport.pdf> [https://perma.cc/BK5H-BZQX]; STATE OF WASH. CASELOAD FORECAST COUNCIL, STATISTICAL SUMMARY OF ADULT FELONY SENTENCING: FISCAL YEAR 2013, at 21 (2014), <http://digital.archives.wa.gov/WA.Media/do/824EEE7B42A212A8FA67C030E74617FE.pdf> [https://perma.cc/DZ75-69GY].

104. See *Barbaro v The Queen* (2014) 253 CLR 58, 58 (Austl.); *GAS v The Queen* (2004) 217 CLR 198, 211 (Austl.). There have been a number of cases in Western Australia where concessions by the prosecution in respect of sentence were not accepted by the judge at first instance, and those decisions were approved on appeal. See *Drage v Western Australia* [2015] WASCA 145 at [47], [61]; *McMaster v The Queen* [2004] WASCA 52; *Griffin v The Queen*



some certainty about the benefit he will receive by pleading guilty, particularly as the High Court has said it is the defendant's responsibility to decide whether to plead guilty. This decision cannot be "made with any foreknowledge of the sentence," other than the advice provided by his representative on what might reasonably be expected to happen.<sup>105</sup>

The system of plea negotiations relies to a substantial extent upon trust between the parties. Maintaining a record of what is agreed, in an agreed form of words, is an obvious safeguard, which was commended by the High Court as the proper approach.<sup>106</sup>

Defense lawyers will usually obtain confirmation in writing of their client's instructions. These will contain an acknowledgement from their client of the advice they have received and their understanding of the significance of the guilty plea.<sup>107</sup>

There are measures in place in the various jurisdictions, in the form of prosecution guidelines and internal procedures, to safeguard the integrity of the process for the prosecution and provide some measure of protection for a defendant. For instance, the Western Australian Guidelines stipulate that a plea will not be accepted if "the accused person intimates that he or she is not guilty of any offense."<sup>108</sup> Also, they specifically provide that "[m]ultiplicity of charging should never be used in order to simply provide scope for plea negotiation."<sup>109</sup> In terms of safeguarding the integrity of

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[2001] WASCA 11.

105. *GAS*, 217 CLR at 210-11. In Western Australia, section 9AA of the Sentencing Act 1995 provides some guarantee of a quantifiable amount of mitigation for a plea of guilty, although only by reference to the maximum discount applicable (25 percent) when the plea is entered at the first reasonable opportunity. See *Sentencing Act 1995* (WA) s 9AA (Austl.). This does not preclude further reductions for other mitigating factors.

106. In *GAS v The Queen*, the Court observed that such a record: should reduce the scope for misunderstanding what is to be, or has been, agreed. It should serve to focus the minds of counsel, and the parties .... Most importantly, it enables counsel for both sides to be clear about the instructions to be obtained from their respective clients and the matters about which, and basis on which, counsel should tender advice to their respective clients. There should then be far less room for subsequent debate about the basis on which an accused person chose to enter a plea of guilty.

*GAS*, 217 CLR at 214-15.

107. See also LEGAL AID QUEENSL., CRIMINAL LAW DUTY LAWYER HANDBOOK ¶ 12-10 (6th ed. 2014), <https://perma.cc/9VKX-VFAS>.

108. DIR. OF PUB. PROSECUTIONS FOR W. AUSTL., *supra* note 17, ¶ 76(b).

109. *Id.* ¶ 58(c).

the process, the Guidelines stipulate that “[c]harge negotiations must be based on principle and reason, not on expedience alone” and that “[a] written record of the charge negotiation must be kept in the interests of transparency and probity.”<sup>110</sup> They further provide that a plea will not be accepted if “to do so would distort the facts disclosed by the available evidence and result in an artificial basis for sentence.”<sup>111</sup> They require consultation with the investigator and victim, which must be recorded.<sup>112</sup> In particular, the views of the investigator and victim must be obtained before “any substantial and otherwise relevant and available evidence is omitted from a negotiated statement of facts ... [although] the overriding consideration [will be] the public interest.”<sup>113</sup> Finally, a plea to a lesser offense or to only part of an indictment will be accepted only if approved by a senior prosecutor who has delegated authority from the Director of Public Prosecutions.<sup>114</sup>

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Canada, Hon. Justice Pomerance: In some Canadian jurisdictions, such as the province of Ontario, counsel adhere to a formalized process and fill out pretrial forms in advance of the meeting, setting out their positions on the issues.<sup>115</sup> These forms help to structure the meeting by identifying issues that typically arise in criminal cases. They also, in an ideal world, force counsel to think through the case before entering the pretrial.

Of course, safeguards also flow from the ethical obligations that rest upon Crown and defense counsel. The defense lawyer has an obligation to take any resolution proposal to the accused for his or her consideration.<sup>116</sup> There are clearly defined limits on the

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110. *Id.* ¶ 74.

111. *Id.* ¶ 76(a).

112. *Id.* ¶ 70A.

113. *Id.* ¶ 77.

114. *Id.* ¶ 80.

115. See ONT. SUPERIOR COURT OF JUSTICE, FORM 17, PRE-TRIAL CONFERENCE REPORT, <http://www.ontariocourtforms.on.ca/forms/scjcpr/form17/CSR-17-28-rev1113-En.pdf> [https://perma.cc/L7HA-K2K4].

116. See CAN. BAR ASS'N, CODE OF PROFESSIONAL CONDUCT, ch. 9, ¶ 13 (2009).

circumstances in which a defense lawyer can ethically plead a client guilty.<sup>117</sup>

The Crown has an obligation to discuss any proposed resolution with the complainant/victim in the case and/or the investigating officer.<sup>118</sup> This is not to say that the Crown is bound by such input. To the contrary, the Crown, as a quasi minister of justice, must make an independent determination of whether a resolution is in the public interest.<sup>119</sup>

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England and Wales, Professor McEwan: The only process that involves the judge at all is that he *may*, not *must*, indicate a sentence under *Goodyear* and only on the defense's request.<sup>120</sup> Even in the special fraud structure described, the judge is not involved at all and is entitled to ignore the joint recommendation as to sentence.<sup>121</sup> The defendant may be unrepresented—unlikely at present in serious fraud cases—but there are problems regarding proposals on legal aid for serious trials, and we have had delays to hearing some serious fraud cases currently up for trial because of barrister strikes over fees.<sup>122</sup> Protections from prosecutor's guidelines only are cited, which set out prosecutor duties as to confidentiality and fairness for the fraud negotiations.<sup>123</sup>

Otherwise, the only protections are in the professional Codes of Ethics that apply to any solicitors and barristers involved.<sup>124</sup> Maybe it would be unnecessary to do more since parties are not in a position to make promises regarding sentencing. The only direct

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117. *See id.*

118. *See* PICCINATO, *supra* note 27, at 14.

119. *See id.* at 6.

120. *See* R v. Goodyear [2005] EWCA (Crim) 888 [56]-[57].

121. *See Directors' Guidance to Accompany the Attorney General's Guidelines on Plea Discussions in Cases of Serious or Complex Fraud*, CROWN PROSECUTION SERV. (May 24, 2012), [http://www.eps.gov.uk/publications/directors\\_guidance/director\\_s\\_guidance\\_to\\_accompany\\_the\\_attorney\\_general\\_s\\_guidelines\\_on\\_plea\\_discussions\\_in\\_cases\\_of\\_serious\\_or\\_complex\\_fraud.html](http://www.eps.gov.uk/publications/directors_guidance/director_s_guidance_to_accompany_the_attorney_general_s_guidelines_on_plea_discussions_in_cases_of_serious_or_complex_fraud.html) [https://perma.cc/J953-EFJM] [hereinafter *Directors' Guidance*].

122. Owen Bowcott, *Criminal Justice Delays Grow as Legal Aid Boycott Takes Hold*, GUARDIAN (July 8, 2015, 10:55 EDT), <http://www.theguardian.com/law/2015/jul/08/criminal-justice-delays-legal-aid-boycott> [https://perma.cc/4MZK-GURH].

123. *See Directors' Guidance*, *supra* note 121.

124. *See* BAR STANDARDS BD., *THE BAR STANDARDS BOARD HANDBOOK* 23-58 (2d ed. 2015).

effect on sentencing in a British plea bargain would be where the Crown accepts a plea to a lesser offense that carries such a low maximum (compared with that for the initial charge) that the court's hands are effectively tied (subject to the alleged power to reject the guilty plea). But such cases are rare, because most sentencing takes place a long way short of the maximum. It is far more likely that the judge will refuse to accept the plea if the maxima are miles apart, as in the case of rape, which carries a maximum of life imprisonment, rather than sexual assault (formerly indecent assault), which would carry a maximum of six months in the magistrates' court.<sup>125</sup> Most magistrates are lay persons and so are unlikely to take issue with a case where an apparently inappropriate plea of guilty has been accepted by the prosecution. However, there is an increasing tendency to prefer district judges, formerly stipendiary magistrates, for the lower courts. These judges are professionals and may take a stronger line and insist the case be sent up to the Crown Court, where the maximum for sexual assault would be ten years.<sup>126</sup>

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New Zealand, Hon. Judge Harvey: Yes, procedural protections are set out in the Criminal Procedure Act 2011.<sup>127</sup> As I advised before, the sentence indication process in New Zealand developed informally. The important thing about the provisions of the Criminal Procedure Act is that statutory validation is given to the sentence indication process. The various procedures and, in particular, procedural safeguards make it clear that a sentence indication can only be sought by an accused person.<sup>128</sup> Furthermore, section 61(3) of the Act sets out the type of information that a judge should have before making a sentence indication.<sup>129</sup> Full submissions are filed by both prosecution and defense setting out the various aggravating and mitigating circumstances of the offense and the offender together

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125. See Sexual Offences Act 2003, c. 42, §§ 1(4), 3(4)(a) (U.K.).

126. *Id.* § 3(4)(b).

127. Criminal Procedure Act 2011 (N.Z.).

128. *Id.* s 61(1).

129. See *id.* s 61(3).

with authorities that may justify an argument for setting a sentence at a particular level.<sup>130</sup>

The Act also provides in section 62(4) the circumstances where a second sentence indication may be sought and given.<sup>131</sup> Under the informal practice prior to the Act, there was variation in approach to seek a sentence indication, and the Act makes it clear that a second indication can be sought only where there is a change of circumstances.<sup>132</sup>

The practice prior to the enactment of the Criminal Procedure Act was that the judge who gave the sentence indication would be the judge who sentenced. If it transpired that the judge who sentenced after a sentence indication was different than the indicating judge and the sentencing judge disagreed with the indication, the accused should have been given an opportunity to reconsider the plea on the basis of the earlier indication. That provision is not contained in the legislation but is a matter of practice.

The importance of the provisions of sections 60-65 of the Act is that they clarify matters of practice where there had previously been some variation under the informal scheme.

The statutory recognition of the previously informal process of sentence indications has clarified the validity of such process beyond doubt. The statute makes it clear what is required by the indicating judge and introduces an element of finality—the one chance rule—subject to changing circumstances.

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United States, Ms. Brook: Rule 11—like similar state provisions<sup>133</sup>—contains the only enforceable procedural safeguards governing plea agreements.<sup>134</sup> The most detailed section of the Rule specifies what the court must do before it can accept a defendant's plea of guilty. The Rule requires the court to “address the defendant

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130. *Id.* s 67.

131. *See id.* s 62(4).

132. *Id.*

133. *See, e.g.*, CAL. PENAL CODE §§ 1192.1-.5 (West 2015); 725 ILL. COMP. STAT. 5/113-4 (West 2015); MASS. R. CRIM. P. 12; TEX. CODE CRIM. PROC. ANN. art. 26.13 (West 2015); VA. CODE ANN. §§ 19.2-254, 19.2-296 (West 2015).

134. *See* FED. R. CRIM. P. 11.

personally in open court” to make sure the defendant understands exactly what it means to plead guilty and what the defendant is giving up by pleading guilty.<sup>135</sup> The court must explain to all defendants that, if they plead guilty, they will be giving up the constitutional rights associated with a trial listed in the Rule.<sup>136</sup>

The Rule also requires the court to describe the salient terms of the plea agreement.<sup>137</sup> These include the government’s right to use any statements made by the defendant against the defendant in a prosecution for perjury, the nature of the charges, the maximum and minimum possible penalties, and the terms of any waivers.<sup>138</sup> Most recently, the Rule added a provision requiring courts to notify all defendants seeking to plead guilty that anyone pleading guilty who is not a U.S. citizen may be removed from the United States, denied citizenship, and denied future admission to the United States.<sup>139</sup>

The court must also satisfy itself that a defendant is voluntarily pleading guilty and that no promises have been made outside of the plea agreement itself.<sup>140</sup> Finally, the Rule requires the court to ensure that there is a sufficient factual basis for the plea.<sup>141</sup> This is generally accomplished by asking the prosecution to read the factual basis set out in the plea agreement and then asking the defendant whether he or she agrees with the facts as written. Some courts require defendants to state in open court exactly what they did.

Although most plea agreements are accepted by the courts, a plea is occasionally rejected because the court believes it is unjust, the factual basis is inadequate, or the defendant has been coerced or misled into pleading guilty.<sup>142</sup> When that happens, the court must inform the defendant that he or she may withdraw the plea and that the court may then treat the defendant less favorably than contemplated by the plea agreement.<sup>143</sup> Because all bargaining

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135. *Id.* r. 11(b)(2).

136. *Id.* r. 11(b)(1)(F).

137. *Id.* r. 11(b)(1).

138. *Id.*

139. *Id.* r. 11(b)(1)(O).

140. *Id.* r. 11(b)(2).

141. *Id.* r. 11(b)(3).

142. *Id.* r. 11(b)(1)-(3).

143. *Id.* r. 11(c)(5)(C).

occurs outside the presence of the court, however, courts know so little about the case or the equities prior to the plea that rejections are rare.<sup>144</sup>

As a rule, “United States Attorneys have wide discretion in negotiating guilty pleas in criminal cases.”<sup>145</sup> In 2010, the U.S. Attorney General issued a memorandum on charging, modifying earlier memoranda issued by the Department of Justice. The new memo stated:

Plea agreements should reflect the totality of a defendant’s conduct. These agreements are governed by the same fundamental principle as charging decisions: prosecutors should seek a plea to the most serious offense that is consistent with the nature of the defendant’s conduct and likely to result in a sustainable conviction, informed by an individualized assessment of the specific facts and circumstances of each particular case. Charges should not be filed simply to exert leverage to induce a plea, nor should charges be abandoned to arrive at a plea bargain that does not reflect the seriousness of the defendant’s conduct. All plea agreements should be consistent with the Principles of Federal Prosecution and must be reviewed by a supervisory attorney. Each office shall promulgate written guidance regarding the standard elements required in its plea agreements, including the waivers of a defendant’s rights.<sup>146</sup>

#### *D. Restrictions*

*Are there any restrictions as to the types of defendants or cases for which bargaining is not allowed?*

One could easily imagine a criminal justice system in which certain sorts of crimes were considered off limits for negotiating. What

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144. If a court does reject a plea agreement and the defendant is allowed to withdraw the plea, the defendant has three choices: attempt to negotiate a different agreement which will be more acceptable to the court, plead “blind” without any agreement, or go to trial.

145. U.S. DEP’T OF JUSTICE, U.S. ATTORNEY’S MANUAL § 9-16.030 (2000), <http://www.justice.gov/usam/usam-9-16000-pleas-federal-rule-criminal-procedure-11#9-16.030> [<https://perma.cc/WE9T-5E8S>].

146. Memorandum from Eric H. Holder, Jr., Attorney Gen., to All Fed. Prosecutors (May 19, 2010), <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/holder-memo-charging-sentencing.pdf> [<https://perma.cc/R58G-842Y>]. It should be noted that the policies described in Mr. Holder’s memo are not enforceable by the courts.

the responses make clear is that in all the subject countries, no serious crime is considered off the bargaining table.

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Australia, Hon. Justice Fiannaca: There are no such restrictions in Western Australia, and I am not aware of any in other Australian jurisdictions. There will ordinarily be limits, however, that attach to the authority of any particular prosecutor (other than a Director or Deputy Director of Public Prosecutions), depending on their position within the hierarchy of a prosecuting office, as to the type of offenses they can compromise without obtaining authority from someone at a higher level.<sup>147</sup>

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Canada, Hon. Justice Pomerance: There are no restrictions on the types of cases that can attract resolution discussions. They can occur in any and all cases, including homicide prosecutions.

\* \* \*

England and Wales, Professor McEwan: With no formal system in place, we do not have such restrictions.<sup>148</sup>

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New Zealand, Hon. Judge Harvey: I do not understand that to be the case. If a sentence indication were to be sought for murder, the indication would relate to a minimum parole period. Murder carries an automatic life sentence upon conviction.<sup>149</sup>

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147. See NSW LRC, *supra* note 5, ¶ 1.13.

148. For an overview of the practice, see ANDREW ASHWORTH & MIKE REDMAYNE, *THE CRIMINAL PROCESS* 301 (4th ed. 2010).

149. See Sentencing Act 2002, s 102 (N.Z.).



United States, Ms. Brook: The only restrictions would be internal restrictions imposed by the Attorney General on the U.S. Attorneys and would change with different administrations. I am not aware that any such restrictions currently exist. Plea bargaining is allowed in every type of case, including murder and terrorism cases, although a prosecutor may refuse—or be instructed to refuse—to negotiate in a particular case.

### *E. Roles*

*What is the role of the lawyers and the judge in the process?*

Once again, we were looking to see if the set rules differ greatly in the countries in which our colleagues practice, judge, and teach. They differ considerably.

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Australia, Hon. Justice Fiannaca: Although from time to time, in pretrial directions hearings, judges<sup>150</sup> may make comments designed to encourage one or both of the parties to reconsider their position, the judge has no role in plea negotiations. The rationale was explained by Justices Dawson and McHugh in *Maxwell v The Queen*:

The decision whether to charge a lesser offence, or to accept a plea of guilty to a lesser offence than that charged, is for the prosecution and does not require the approval of the court. Indeed, the court would seldom have the knowledge of the strengths and weaknesses of the case on each side which is necessary for the proper exercise of such a function. The role of the prosecution in this respect, as in many others, “is such that it cannot be shared with the trial judge without placing in jeopardy the essential independence of that office in the adversary system.”<sup>151</sup>

The High Court has made clear that it is the State’s responsibility to decide which charges to proceed with, and that it is the judge’s

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150. For a discussion of the role of lawyers, see *supra* Part I.A.

151. (1996) 184 CLR 501, 513 (Austl.) (footnote omitted).

role to determine an appropriate sentence based on the facts presented to the court. In discussing the “plea bargain” process, the Court said that, while there may be an understanding between counsel as to what evidence will be provided, or what sentencing or legal submissions will be made at the sentencing hearing, that understanding does not bind the judge in determining the sentence, other than in the practical sense that the judge may be limited to the agreed summary of facts presented.<sup>152</sup>

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Canada, Hon. Justice Pomerance: I discuss the respective roles of the participants in resolution discussions in Part I.A.

\* \* \*

England and Wales, Professor McEwan: With no formal system in place, it is impossible to evaluate their role.<sup>153</sup>

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New Zealand, Hon. Judge Harvey: The lawyer initiates the process by requesting a sentence indication.<sup>154</sup> A date is set for a hearing.<sup>155</sup> Submissions are filed by the defense and prosecution.<sup>156</sup> At the hearing, after argument the judge gives an indication as to sentence.<sup>157</sup> If accepted, the accused pleads guilty and is sentenced after the necessary reports are obtained.<sup>158</sup> The defense commonly makes further submissions at sentencing, generally to persuade the judge of factors that may reduce the indicated sentence.

The judge is not involved in any negotiations or discussions between lawyers. On occasion, sentence indications will involve dis-

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152. See *GAS v The Queen* (2004) 217 CLR 198, 211 (Austl.).

153. Suggestions as to a more formal and transparent process have been made. See, e.g., SENTENCING GUIDELINES COUNCIL, REDUCTION IN SENTENCE FOR A GUILTY PLEA: DEFINITIVE GUIDELINE, at i-ii (2007).

154. Criminal Procedure Act 2011, s 61 (N.Z.).

155. *Id.* s 62(1).

156. *Id.* s 62(3).

157. *Id.* s 62.

158. *Id.* s 61(3).

cussions between the lawyers as to the contents of a summary of facts. Also, on occasion, reductions of charges from a more serious offense to a less serious one, and sometimes agreed positions relating to aggravating and mitigating circumstances that generally are apparent from the summary of facts or surrounding evidential material, may be placed before the judge.

The position of the judge is essentially a passive one, and no discussion is entered into between the judge and counsel as to the contents of the summary of facts, although it is accepted practice that the judge may suggest, where it is clear, that there may have been overcharging. This may be more usual at a case review hearing rather than a sentence indication one.

The only time that a judge really becomes involved in a factual evaluation is where prosecution and defense have been unable to agree upon the facts; it is common practice, then, for the judge to call a disputed fact hearing to identify the facts before making a sentence indication. These hearings may take place not only within the sentence indication context but also as part of the overall sentencing process. However, disputed fact hearings are not often called for.

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United States, Ms. Brook: Because Rule 11 prohibits judges from any substantive involvement in plea negotiations,<sup>159</sup> the judge's role in the process in federal court is extremely limited.<sup>160</sup> The judge may

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159. See *United States v. Davila*, 133 S. Ct. 2139, 2148 (2013) (the parties and the Court agreed that the magistrate judge's involvement in plea negotiations violated "Rule 11(c)(1)'s prohibition on judicial participation in plea discussions").

160. Most states have similar restrictions. See, e.g., *McDaniel v. State*, 522 S.E.2d 648, 650 (Ga. 1999) ("Judicial participation in the plea negotiation process is prohibited by court rule in this state and in the federal system."); *State v. Moe*, 479 N.W.2d 427, 430 (Minn. Ct. App. 1992) ("It is error for a trial court judge to participate directly in plea agreement negotiations."); *Fermo v. State*, 370 So. 2d 930, 933 (Miss. 1979) ("[The judge] should never become involved, or participate, in the plea bargaining process. He must remain aloof from such negotiations."); *Cripps v. State*, 137 P.3d 1187, 1191 (Nev. 2006) ("[W]e expressly prohibit any judicial participation in the formulation or discussions of a potential plea agreement."); *Commonwealth v. Evans*, 252 A.2d 689, 691 (Pa. 1969) ("[W]e feel compelled to forbid any participation by the trial judge in the plea bargaining prior to the offering of a guilty plea.").

In a few states, while the courts express strong reservations about such involvement, they do not ban it outright. See *People v. Weaver*, 118 Cal. App. 4th 131, 148 (Ct. App. 2004);

only decide how much time to give the parties to negotiate and whether to accept or reject the plea agreement.

Although it might not sound like much, the judge's decision on how much time to give the parties to negotiate will almost always make a significant difference in the outcome. A decision to plead guilty should be made only after obtaining enough knowledge to make a reasonable decision.<sup>161</sup> That knowledge can be obtained only through defense investigation, through a review of the discovery material disclosed by the prosecution, or through information obtained by court order. To be meaningful, all three require time. For example, a defendant may need time to obtain old records or to find and hire an expert to show that he suffered from specific trauma as a child. Or a defendant may benefit from lengthy drug treatment prior to entering a plea. Or the court may grant a defense motion requesting that the government provide the defense with a bill of particulars or other discovery material. Having the time to engage in these activities can directly affect the terms the prosecutor is willing to include in an agreement. In addition, time will always affect the defense lawyer's ability to develop a meaningful relationship with his or her client. The better the relationship between the lawyer and client, the more likely it is that whatever plea agreement is finally hammered out will be a just agreement that is acceptable to the client.

The judge's limited role leaves it to the lawyers to play the primary role in plea negotiations. This can mean a series of discussions between the defense and prosecution lawyers, with the defense lawyer then relaying all information back to his or her client. Or it can mean a proffer session (or sessions) with the lawyers, the client, and federal agents present.<sup>162</sup> Because the prosecutor negotiating the

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Crumb v. People, 230 P.3d 726, 731 (Colo. 2010); Anderson v. State, 335 N.E.2d 225, 227 (Ind. 1975); State v. Ditter, 441 N.W.2d 622, 625 (Neb. 1989); State v. Byrd, 407 N.E.2d 1384, 1388 (Ohio 1980).

161. It is notable that the decision to go to trial or to plead guilty is one of only a handful of decisions that the defendant alone may make under the law. The defendant's decision trumps any advice counsel may give, making it even more important that the defendant receive as much information as possible prior to making the decision. The other decisions that belong to the defendant alone are whether to testify at trial, to speak in allocution at sentencing, and to appeal.

162. See, e.g., David P. Leonard, *Let's Negotiate a Deal: Waiver of Protections Against the Use of Plea Bargains and Plea Bargaining Statements After Mezzanatto*, 23 CRIM. JUST. 8 (2008).

plea does not have final say in the process, even after the defendant has agreed to a particular agreement, supervisors may ultimately reject the agreement, sending the parties back to square one.

*F. Public Debate*

*Has there been a public debate concerning plea bargaining?  
What arguments have been offered publicly in favor of or against  
the process?*

With the responses to this question, we see perhaps the sharpest division in our subject countries. In England, for instance, there appears to be little public discussion about plea bargaining beyond what we see in judicial opinions, and even these are of limited scope. In the United States, however, the debate has been both vigorous and quite public, with participants including judges, lawyers, academics, editorial writers, and lawmakers.

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Australia, Hon. Justice Fiannaca: There has not been a general public debate. Occasionally, individual cases will generate public criticism about particular plea agreements by people disaffected by the outcome. This is usually followed by commentary and perhaps public discourse in the media about the appropriateness of the prosecution compromising matters, rather than leaving it to a jury to decide the degree of culpability. Such commentaries usually overlook, or are made in ignorance of, the fact that prosecutors are generally more robust in their assessment of appropriate charges than juries tend to be in their verdicts, at least in relation to certain offenses. There have been instances in which particular interest groups have raised concerns about specific areas of criminal justice, for instance in relation to cases of domestic homicide or assaults upon police and other public officers.<sup>163</sup>

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163. In the latter case, mandatory prison sentences apply in Western Australia if certain aggravating circumstances are proved. LENNY ROTH, N.S.W. PARLIAMENTARY RESEARCH SERV., MANDATORY SENTENCING LAWS 8 (2014), [http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Mandatorysentencinglaws/\\$File/mandatory+sentencing+laws.pdf](http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/key/Mandatorysentencinglaws/$File/mandatory+sentencing+laws.pdf) [<https://perma.cc/4JZX-G5QL>]. Whether at the point of charging, or in a plea negotiation, the

Debate about the merits of plea bargaining as a process, however, has largely been left to academic writers.<sup>164</sup> Arguments that are put against the process tend to focus on:

- (1) the potential for undue pressure to be put on defendants to plead guilty;<sup>165</sup>
- (2) a “perceived lack of consideration” of victims;<sup>166</sup> and
- (3) negative perceptions of the State’s motivations for engaging in negotiations, in particular that expediency is put before justice.<sup>167</sup>

These negative perceptions are said to stem from the informality and lack of statutory regulation of the process, and the consequent belief that there is a lack of transparency and scrutiny of the conduct of the prosecutor, who is required to act in the public interest. So, while some critics are fundamentally opposed to the very notion of negotiated criminal justice, the more moderate position is that the above factors provide cogent reasons for formalizing the process.<sup>168</sup>

A particular area of concern is the sanitizing of facts as part of a plea agreement. One commentator has suggested that relevant and provable aggravating facts may be withheld from the court in order to secure a plea of guilty.<sup>169</sup> If it happens without consultation with the victim, it is “nothing less than a corruption of the legal process” and “an attempt to pervert the course of justice,”<sup>170</sup> as the court is denied knowledge of the true circumstances in which the plea was made. As stated earlier, guidelines or practice will usually provide for consultation with victims and rejection of an offer that results in

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prosecuting authority (which will be the police if the matter proceeds in the magistrates court) will need to decide whether, in the specific circumstances of the case, it is in the public interest to proceed with the aggravated offense. If the answer is resolved in the negative, the officer who is the victim, and his union, will often disagree.

164. See, e.g., Paul Gerber, *When Is Plea Bargaining Justified?*, 3 QUEENSL. U. TECH. L. & JUST. J. 1 (2003).

165. See, e.g., Flynn, *supra* note 1, at 376-82.

166. E.g., ASHER FLYNN & KATE FITZ-GIBBON, *A SECOND CHANCE FOR JUSTICE: THE PROSECUTIONS OF GABE WATSON FOR THE DEATH OF TINA THOMAS* 86 (2013) (ebook).

167. See, e.g., Flynn, *supra* note 1, at 363-64.

168. *Id.*

169. See Gerber, *supra* note 164, at 3.

170. *Id.*

a distortion of the facts, although a prosecutor must exercise judgment about whether certain facts will be essential to the sentencing process and the prospects of establishing those facts if put to proof.<sup>171</sup>

The arguments in favor of plea negotiations tend to focus on the saving of resources, the emotional and financial benefits to all parties that come from pleas of guilty, and the consequent reduction in the duration of criminal proceedings.<sup>172</sup> It is also recognized that the process encourages the parties to minimize the number of issues in contention prior to trial, in the event that agreement is not reached.<sup>173</sup> The reduction in the number of trials and the duration of those that proceed should result in cases getting to trial sooner. The need to reduce delay in the criminal justice system has certainly been an issue that has received publicity. It is generally accepted that justice is better served if trials can be heard at the earliest opportunity after all relevant evidence has been gathered, when witnesses will be more readily available and their memories of events relatively fresh.<sup>174</sup>

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Canada, Hon. Justice Pomerance: One of the foundational documents in Canada is *The Report of the Attorney General's Advisory Committee on Charge Screening, Disclosure, and Resolution*

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171. See *supra* notes 113-14 and accompanying text.

172. See NSW LRC, *supra* note 5, ¶¶ 1.5-.9.

173. See, e.g., SUPREME COURT OF WESTERN AUSTRALIA, CONSOLIDATED PRACTICE DIRECTIONS, PD 5.3, at ¶ 14 (2009), [http://www.supremecourt.wa.gov.au/\\_files/Consolidated\\_Practice\\_Directions.pdf](http://www.supremecourt.wa.gov.au/_files/Consolidated_Practice_Directions.pdf) [<https://perma.cc/4BS3-UNPM>]; Hon. Wayne Martin, Chief Justice of Western Australia, Address at the Australian Legal Convention: The Future of Case Management 11-12 (Sept. 19, 2009), [http://www.supremecourt.wa.gov.au/\\_files/Australian\\_Legal\\_Convention300909.pdf](http://www.supremecourt.wa.gov.au/_files/Australian_Legal_Convention300909.pdf) [<https://perma.cc/AX6E-LN2Q>].

174. As the NSW LRC observes: "In human terms, the stressful effects of prolongation, repeated attendance at court and ongoing uncertainty can be disruptive and distressing to victims, witnesses, relatives and others concerned with the proceedings, including the defendant." NSW LRC, *supra* note 5, ¶ 1.9. The NSW LRC inquiry appears to be the latest invitation to a public debate about the issue, albeit with the objective of promoting early resolution of criminal cases. The purpose of the consultation paper is "to stimulate discussion on what models (or combination of models) might or should be taken up and adapted to the NSW criminal justice system." *Id.* at 1.

*Discussions*, released in 1993.<sup>175</sup> The report outlined some of the perceived shortcomings of unregulated plea bargaining:

Perceived problems with plea bargaining include its secrecy; the fact that negotiated pleas bypass the procedural protections of a trial by an impartial judge and, thus, prevent coerced pleas or other unethical conduct being discovered; the tendency for counsel to take unduly harsh tactical positions to obtain bargaining leverage (a practice which the Committee has noted and disapproved of in the preceding chapter); and concern that plea bargaining outcomes will bear little relationship to the circumstances of the offence or offender, because plea bargaining is a system “in which the merits of the case take second place to the bargaining strength and skills of the parties.”

Ultimately, much of the objection to plea bargaining found in the literature is premised on the assumption that bartering and justice are two very different ideas: “Justice should not be, and should not be seen to be, something that can be purchased at the bargaining table.”<sup>176</sup>

Since 1993, resolution discussions have become far more structured, and this has addressed many of the above concerns. For example, while discussions occur in private, the judge will often place the substance of those discussions on the record in the event of a guilty plea. The very presence of a judge injects the promise of an objective referee, who is concerned with maintaining the integrity of the administration of justice.

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England and Wales, Professor McEwan: There has been no public debate, but a House of Commons Committee said that plea-bargain expansion could have “significant consequences” and needs great care and consideration.<sup>177</sup> The practice “must not drift towards a situation where it is commonplace without discussing [its

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175. ONT. MINISTRY OF THE ATTORNEY GEN., REPORT OF THE ATTORNEY GENERAL'S ADVISORY COMMITTEE ON CHARGE SCREENING, DISCLOSURE, AND RESOLUTION DISCUSSIONS (1993).

176. *Id.* at 276-77 (footnotes omitted).

177. HOUSE OF COMMONS JUSTICE COMM., THE CROWN PROSECUTION SERVICE: GATEKEEPER OF THE CRIMINAL JUSTICE SYSTEM, 2008-09, HC 186, ¶ 45 (U.K.).



desirability and] what safeguards must be put in place for defendants, victims, and the public.”<sup>178</sup> One prominent scholar expressed unhappiness with a more formal process because it would shift the balance of power if the prosecution becomes the initiator.<sup>179</sup> The Director of Public Prosecutions agreed that safeguards are needed.<sup>180</sup>

Interesting discussion can be seen in some judicial decisions. In one, *McKinnon v. United States*, the defendant resisted extradition while accused of hacking into American government (including military) computers.<sup>181</sup> He argued that American engagement in plea bargaining—including a threat that unless he agreed to be extradited, the United States would oppose repatriation to the United Kingdom to serve his sentence—was an abuse of process.<sup>182</sup> Part of his argument focused on the wide disparity between a sentence, if he cooperated, of three to four years (including six to twelve months in a low-security prison in the United States after prospects of repatriation and parole), and on the other hand, if he refused, eight to ten years or more in U.S. high-security prison.<sup>183</sup> He asserted that the disparity was “disproportionate and subjected the appellant to impermissible pressure to surrender his legal rights.”<sup>184</sup>

Lord Brown said in the House of Lords:

[T]he difference between the American system and our own is not perhaps so stark as the appellant’s argument suggests. In this country too there is a clearly recognised discount for a plea of guilty: a basic discount of one-third for saving the cost of the trial, more if a guilty plea introduces other mitigating factors, and more still (usually one half to two thirds but exceptionally three-quarters or even beyond that) .... No less importantly, it is accepted practice in this country for the parties to hold off-the-record discussions whereby the prosecutor will accept pleas of guilty to lesser charges (or on a lesser factual basis) in return for a defendant’s timely guilty plea. Indeed the entire premise of the

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178. *Id.*

179. *Id.* ¶ 41 (describing evidence from Nicola Padfield).

180. *Id.* ¶ 43.

181. [2008] UKHL 59, [2008] 1 WLR 1739, 1742.

182. *Id.* at 1747.

183. *Id.* at 1744-45.

184. *Id.* at 1747.

principle established in *R v Goodyear* ... is that the parties will have reached an agreed basis of plea in private before the judge is approached. What, it must be appreciated *Goodyear* forbids are *judicial*, not prosecutorial, indications of sentence. Indeed, *Goodyear* goes further than would be permitted in the United States by allowing the judge in certain circumstances to indicate what sentence he would pass.<sup>185</sup>

Lord Brown went on:

The Divisional Court [in the instant case] expressed their “cultural reservations” about the general American style of plea-bargaining and in particular “a degree of distaste” as to the prosecutor’s approach towards providing or withdrawing support for repatriation. These comments seem to me somewhat fastidious. Our law is replete with statements of the highest authority counselling not merely a broad and liberal construction of extradition laws (to serve the transnational interest in bringing to justice those accused of serious cross-border crimes), but also the need in the conduct of extradition proceedings to accommodate legal and cultural differences between the legal systems of the many foreign friendly states with whom the UK has entered into reciprocal extradition arrangements.<sup>186</sup>

He concluded:

It seems to me, however, no more appropriate to describe the predicted consequences of non-cooperation as a “threat” than to characterise the predicted consequences of co-operation as a “promise” (or, indeed, a “bribe”). In one sense all discounts for pleas of guilty could be said to subject the defendant to pressure, and the greater the discount the greater the pressure. But the discount would have to be very substantially more generous than anything promised here (as to the way the case would be put and the likely outcome) before it constituted unlawful pressure such as to vitiate the process. So too would the predicted consequences of non-co-operation need to go significantly beyond what could properly be regarded as the defendant’s just desserts on conviction for that to constitute unlawful pressure.... It is

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185. *Id.* at 1749 (citations omitted).

186. *Id.* at 1749-50 (citation omitted).

difficult, indeed, to think of anything other than the threat of unlawful action which could fairly be said so to imperil the integrity of the extradition process as to require the accused, notwithstanding his having resisted the undue pressure, to be discharged irrespective of the strength of the case against him.<sup>187</sup>

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New Zealand, Hon. Judge Harvey: No. The only debate has been a low-level one within the legal profession. Sentence indications are seen as a way of making the process more efficient.

\* \* \*

United States, Ms. Brook: The debate here has been both intense and prolonged, not only among the legal community,<sup>188</sup> but among the general public as well. Much of the debate is fueled by three factors: the racial disparity between those sentenced to prison and those who are not, particularly in drug cases; the enormous shift in sentencing discretion from judges to prosecutors; and the continuing revelations that innocent persons plead guilty and are sentenced to prison pursuant to plea agreements.

As mentioned above, the Supreme Court's decisions in *Lafler* and *Frye* generated a great deal of public discussion. *The Los Angeles Times* published an editorial just after the decisions were announced, entitled *A System of Plea Bargains*, which, while lauding the Court's concerns, reiterated one Justice's warning that the current plea-bargaining system "presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense."<sup>189</sup>

Several months later, *The Wall Street Journal* also published a story highlighting the risk to the innocent:

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187. *Id.* at 1750-51.

188. The debate among judges, lawyers, and scholars has raged for decades. For excellent recent overviews of the various positions and collections of the source materials, see Gregory M. Gilchrist, *Plea Bargains, Convictions and Legitimacy*, 48 AM. CRIM. L. REV. 143, 145 (2011); Levenson, *supra* note 103, at nn.3-9.

189. Editorial, *A System of Plea Bargains*, L.A. TIMES, Mar. 24, 2012, at A13 (quoting Justice Scalia's concerns).

The triumph of plea bargaining in the federal system, which has gathered pace in recent years, is nearly complete.... This relentless growth in plea bargaining has sparked a backlash among lawyers, legal scholars and judges—evidenced by recent federal court decisions, including two from the Supreme Court. Weighing on many critics is the possibility ... that the innocent could feel pressured into pleading guilty.<sup>190</sup>

An editorial in *The Washington Post* focused on how prosecutors are able to “load up on charges they can later drop, pressuring defendants to cooperate before trial and plead guilty.”<sup>191</sup>

[R]ecognizing the primary role that plea bargaining has come to play in the justice system, the Supreme Court this year [in *Lafler* and *Frye*] began to extend judicial supervision over the process, ruling that defendants have a right to competent counsel in plea negotiations. The justices should not be the only ones examining the dominance of plea bargaining. State officials, legal scholars, the Justice Department and perhaps Congress should more thoroughly consider whether and how to make the nation’s system of pleas, not of trials, more predictable or procedurally sound.<sup>192</sup>

### G. Policy

*In your opinion is plea bargaining a positive system? A necessary one?*

“Is the practice of plea bargaining a good development?”: what a difficult question to answer. Our participants bring a wealth of different experiences, in different nations, and come to answers that may themselves raise more questions than they answer.

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190. Gary Fields & John R. Emshwiller, *Federal Guilty Pleas Soar as Bargains Trump Trials*, WALL ST. J. (Sept. 23, 2012, 10:30 PM), <http://www.wsj.com/news/articles/SB10000872396390443589304577637610097206808> [<https://perma.cc/2JB8-9BLH>].

191. Editorial, *A Fairer Deal for Those Who Plea-Bargain*, WASH. POST (Oct. 3, 2012), [http://www.washingtonpost.com/opinions/a-fairer-deal-for-those-who-plea-bargain/2012/10/03/47fa81ce-081d-11e2-858a-5311df86ab04\\_story.html](http://www.washingtonpost.com/opinions/a-fairer-deal-for-those-who-plea-bargain/2012/10/03/47fa81ce-081d-11e2-858a-5311df86ab04_story.html) [<https://perma.cc/LDK8-ZGZS>].

192. *Id.*

Australia, Hon. Justice Fiannaca: Plea bargaining is a necessity. Much of the public discussion about measures to reduce delays in the criminal justice system has been led by the courts, usually by the Chief Justice of a jurisdiction. Those measures almost invariably include the need for the State and the defense to confer with a view to early resolution. That is certainly a feature of a system implemented in the Supreme Court of Western Australia (which deals with most homicide cases and armed robberies in the state), which involves colocation of a Magistrates Court within the Supreme Court precincts, presided over by Supreme Court Registrars, and the availability of voluntary criminal case conferencing (VCCC) facilitated by ex-judges of the District Court.<sup>193</sup>

The fact is that a substantial majority of defendants plead guilty to the charges brought against them.<sup>194</sup> The number of cases in which there is initially a plea of not guilty, however, is still sufficiently large that the court system would be overwhelmed if they all proceeded to trial, and significant delays would occur.<sup>195</sup>

There will usually be matters that one side or the other in a case may not be aware of, and which may affect their position. There is no doubt that the resolution of a prosecution without trial can be aided by the airing of such matters in a confidential setting, with the result that areas of contention are reduced or removed after appropriate investigations and negotiations. Achieving appropriate pleas of guilty by those means is good for victims, defendants, and other stakeholders.<sup>196</sup> Pleas of guilty provide certainty for all parties, prevent appeals (at least against conviction), and limit the time defendants may spend in custody on remand pending trial if they are refused or cannot make bail. As one of my colleagues put it, “a sentenced prisoner has greater access to programs than a remand prisoner, and a sentenced offender who should appropriately be released into the community can commence rehabilitation at the earliest stage, rather than becoming institutionalised while awaiting trial.”<sup>197</sup>

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193. See NSW LRC, *supra* note 5, ¶¶ 5.14-.24 for a detailed discussion of the system.

194. *See id.* ¶ 2.4.

195. *See id.* ¶ 2.16.

196. Any trial involves a significant imposition on witnesses and jurors and on their employers and families. *See id.* ¶ 1.9.

197. E-mail from Amanda Forrester, Consultant State Prosecutor, Office of the Dir. of

Finally, it is in the interest of the community that the resources of its prosecution service are used efficiently. In terms of trial preparation, a prosecutor's time and effort are a resource that should be allocated to cases that must inevitably proceed to trial, rather than to those in which a plea of guilty may be entered late in the process, and which could have been resolved earlier.

\* \* \*

Canada, Hon. Justice Pomerance: Resolution discussions are certainly important in Canada, given the demands on the justice system. The system benefits from having a mechanism that reduces the number of criminal trials. The extent of that benefit will vary depending upon the jurisdiction and the crush of the justice workload. In some places, it is a necessity.

That said, resolution discussions are also a mechanism for the attainment of justice. When a judge, as an objective party, presides over these discussions, she injects a "reality check" for the parties. The discussion of the case—its strengths and weaknesses—can assist both counsel in understanding the realities of their position. This, in turn, can lead to an informed and considered reassessment where appropriate. The goal is not just to achieve efficiency, but rather, to achieve justice in a more efficient manner.

\* \* \*

England and Wales, Professor McEwan: It is clearly not a necessity. Negotiations can take place without the complex array of possible charges through predictable sentences and prosecution involvement in sentences that plea bargains properly require. As I have written, if principles such as equality of arms and judicial neutrality are observed, plea bargaining is consistent with the adversarial notion of the just settlement of disputes, conferring legitimacy on the process. When legal services are unequally distributed, the bargain may be unfair, distorting accuracy of decision making and endangering the rule of law.<sup>198</sup> Here we are much more

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Pub. Prosecutions for W. Austl., to Bruno Fiannaca SC, Deputy Dir., Office of the Dir. of Pub. Prosecutions for W. Austl. (Sept. 17, 2014) (on file with author).

198. Jenny McEwan, *From Adversarialism to Managerialism: Criminal Justice in Tran-*

exercised by the legal aid cuts than anything else; it would affect freedom and equity in negotiation if defendants were unrepresented, as is likely to be the case if things carry on as they are. The effect of funding on legal advice also needs scrutiny. If counsel is paid by the State as much for a guilty plea as for a fought trial (or vice versa), that might be significant.

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New Zealand, Hon. Judge Harvey: Practice seems to have validated the effectiveness of sentence indications as a means of dealing with cases efficiently when there is little doubt as to the guilt of the accused.

I am unsure whether experience in the United States demonstrates a reluctance on the part of accused people to “bite the bullet” and take responsibility for their actions. Often cases that are “hotly contested” at the beginning result in a plea of guilty at or just before the hearing, when accused persons finally face up to the reality of the situation and the strength of evidence against them. Sentence indications can give the hesitant accused an opportunity to look ahead and ascertain a likely outcome.

The efficiencies can be summarized as follows:

- (1) Sentence indications can often result in a meritless case avoiding trial.
- (2) Sentence indications give an accused person an opportunity to consider a guilty plea well before trial.
- (3) Without sentence indications, the time allocated for trial often would collapse. From my own experience, I can recall days when an entire defended case list before a judge would collapse as a result of accused persons finally recognizing the strength of the prosecution’s case against them.
- (4) Therefore, sentence indications provide a winnowing effect with the result that more contested cases are reaching trial.

Are they a necessity? I think practice is making them so. If we were to return to an environment when sentence indications were not given, it would result in inefficiencies in court procedure, last-

minute guilty pleas, judicial and court down time, and further delays in the court process. Our court systems are quite overburdened as it is, and sentence indications do have the effect of reducing that burden to a certain degree. For those reasons, I think that, as the result of practice, they have become a necessity.

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United States, Ms. Brook: That is kind of a trick question. In these times, it may be a positive system because it is the only way to eliminate some of the more draconian enhancements that can be brought to bear by prosecutors when defendants choose to go to trial. Many of these enhancements are described in a recent study conducted by Human Rights Watch.<sup>199</sup>

Does plea bargaining conserve scarce resources, saving time and money? Absolutely. Would the system crash if every case went to trial? Again, absolutely. Is it in every defendant's best interest to go to trial? Under the current system, absolutely not.

All of these are important considerations. But, as one judge wrote: "These gains in efficiency are not ... without consequence.... The glut of plea bargaining and the pandemic waiver of [trial] rights have rendered trial by jury an inconvenient artifact."<sup>200</sup> And as another noted more recently: "Because there is no judicial check on the enhanced mandatory minimums prosecutors can inject into a case, they can put enormous pressure on defendants to plead guilty. In many cases, only a daring risk-taker can withstand that pressure. Most people buckle under it."<sup>201</sup>

Is plea bargaining a necessity? Again, that is a difficult question to answer because of the chicken and egg phenomenon. Congress has created thousands of federal crimes—so many that no one is able to count them, and many do not even require proof of criminal intent.<sup>202</sup> As we discuss elsewhere, Congress and many states have

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199. See HUMAN RIGHTS WATCH, AN OFFER YOU CAN'T REFUSE: HOW U.S. FEDERAL PROSECUTORS FORCE DRUG DEFENDANTS TO PLEAD GUILTY 4-6 (2013), [https://www.hrw.org/sites/default/files/reports/us1213\\_ForUpload\\_0\\_0\\_0.pdf](https://www.hrw.org/sites/default/files/reports/us1213_ForUpload_0_0_0.pdf) [<https://perma.cc/SJA7-4PFX>].

200. *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*4 (D. Colo. June 28, 2012).

201. *United States v. Kupa*, 976 F. Supp. 2d 417, 432 (E.D.N.Y. 2013).

202. See, e.g., Gary Fields & John R. Emshwiller, *Many Failed Efforts to Count Nation's Federal Criminal Laws*, WALL ST. J. (July 23, 2011), <http://www.wsj.com/news/articles/SB1000>



also given prosecutors unprecedented leverage in plea bargaining by enacting so many crimes that carry mandatory minimum sentences.<sup>203</sup> It is the prosecution's choice of charges today that determines the sentence, not the discretion of the court. Under these circumstances, plea bargaining does become a necessity.

#### *H. Reforms*

*If you could change your process, what would you do?*

In dealing with a recent comprehensive statutory overhaul of the system, as one finds in New Zealand, the interest in major changes is—not surprisingly—limited. With other systems, however, in which no such overhaul has taken place, at least not in recent years, some strong concerns are expressed here.

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Australia, Hon. Justice Fiannaca: I would explore measures to ensure that proper consideration of the materials by both parties, and the taking of instructions by defense counsel, take place prior to committal to a superior court,<sup>204</sup> so that discussions could be undertaken properly at an early stage. Sometimes, that capability is impeded by delays in the disclosure of materials by the investigating agency (including the obtaining of forensic reports), but there are other practical factors at play that can result in matters being listed for trial before meaningful discussions occur. In cases of legal aid defendants, for instance, the remuneration arrangements of legal aid offices tend to be a disincentive for private practitioners to do substantial work on a case early for the purpose of negotiations if there is a prospect that agreement will not be reached and the matter will proceed to trial in any event.<sup>205</sup> Such arrangements tend to

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1424052702304319804576389601079728920 [https://perma.cc/7JDR-GCPD]; see also Gary Fields & John R. Emshwiller, *As Federal Crime List Grows, Threshold of Guilt Declines*, WALL ST. J. (Sept. 27, 2011), <http://www.wsj.com/news/articles/SB10001424053111904060604576570801651620000> [https://perma.cc/2HNC-EE57].

203. See *infra* Part I.H for a discussion of the impact of mandatory minimum sentences.

204. See the response *infra* Part I.I for an outline of the committal process.

205. See, e.g., GOV'T OF S. AUSTL. ATTORNEY-GEN.'S DEP'T, REVIEW OF THE PROVISION AND PROCUREMENT OF LEGAL AID SERVICES IN SOUTH AUSTRALIA'S CRIMINAL COURTS: FIRST RE-

limit the amount of “getting up” for which the practitioner will be paid.<sup>206</sup> Any change in the process would need to address issues of that kind.

Otherwise, notwithstanding the arguments that may be put for greater oversight, judicial or otherwise, in my view there is no need to formalize the process. As my colleague put it, “regulation by definition places restrictions that would, in all likelihood, be a detriment to the process by inhibiting the flexible application of principles to obtain the best outcome.”<sup>207</sup> Published guidelines setting out the factors to be taken into account provide for transparency.<sup>208</sup> This, of course, is from a prosecutor’s perspective, but the High Court’s decisions referred to earlier tend to militate against any formalization that involves judicial intervention.<sup>209</sup>

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Canada, Hon. Justice Pomerance: In the Martin Committee Report, referred to above, Recommendation 60 provided:

The Committee is of the opinion that Crown and defence counsel have a professional obligation to meet prior to trial where appropriate to resolve issues. The Committee is of the opinion that both Crown and defence counsel have a professional obligation to act responsibly in arranging meetings and responding to initiatives aimed at resolving criminal cases as early as possible. This will reduce demand for court time and ensure that court time scheduled is used efficiently.<sup>210</sup>

This recommendation is not always honored in practice. Matters are still often resolved on the courtroom steps, leading to collapsed trial lists. In an ideal world, counsel arrive at judicial pretrials prepared to discuss all of the issues. The pretrial takes place sufficiently in advance of the trial date so that, if a case is resolved, there is time to reschedule another trial. In some jurisdictions, counsel cannot

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PORT—THE CURRENT CONTEXT § 4.3.3 (2014); *see also* NSW LRC, *supra* note 5, ¶ 1.14.

206. *See* GOV'T OF S. AUSTL. ATTORNEY-GEN.'S DEP'T, *supra* note 205, § 4.3.3.

207. E-mail from Amanda Forrester, *supra* note 197.

208. *See supra* Part I.C.

209. *See, e.g., GAS v The Queen* (2004) 217 CLR 198.

210. ONT. MINISTRY OF THE ATTORNEY GEN., *supra* note 175, at 478.

obtain a trial date until they have had a meaningful judicial pre-trial.

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England and Wales, Professor McEwan: I would remove a lot of the pressure to admit guilt at various stages of the process up to and including a formal guilty plea, particularly when the defendant is not in a position to make an informed decision. The earlier the maximum discount kicks in, the less likelihood of the defendant having had legal advice or knowing the evidence against him. Our latest guidance claims he must know the evidence against him whether he is guilty or not, so these things are irrelevant.<sup>211</sup>

I cannot see any argument in principle for involving the prosecution in the sentencing argument, which a formal system of plea bargaining would appear to require.

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New Zealand, Hon. Judge Harvey: The process has developed over the years to its present shape, underpinned by statute. The process at the moment is fairly robust.

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United States, Ms. Brook: No changes will be truly meaningful until Congress and some state legislatures eliminate or significantly decrease the number of mandatory minimum sentences and three-strikes recidivist enhancements that effectively give prosecutors the power to sentence. This power should be returned to the judges, whose role is to be impartial. Prosecutors, on the other hand, are trained to be adversaries. Our country spends a great deal of time vetting judges to ensure that they can do their jobs fairly and impartially. We should let judges use their skills and experience to do what they are trained to do rather than cede that often life-changing power to prosecutors.

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211. See ATTORNEY GEN.'S OFFICE, ATTORNEY GENERAL'S GUIDELINES ON DISCLOSURE ¶ 44 (2013) (explaining that prosecutors should disclose materials prior to a defendant's entry of a plea).

As for the process itself, I would open it up and attempt to put the parties on a more equal footing by:

- (1) reversing the government's current policy against disclosing impeaching and often other favorable evidence before a plea is entered;<sup>212</sup>
- (2) making pretrial diversion an option that must be considered in all but the most violent cases;
- (3) reversing the current federal policy that requires prosecutors to file notices of prior felonies in all but the exceptional case, to a policy that prohibits prosecutors from filing such notices in all but the most exceptional case;<sup>213</sup>
- (4) requiring federal and state departments of justice to fund and participate in pre-entry or drug courts in every district,<sup>214</sup> and
- (5) prohibiting appellate waivers.<sup>215</sup>

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212. In *United States v. Ruiz*, the Supreme Court held that defendants are not constitutionally entitled to impeaching evidence in order to make a "knowing" plea. 536 U.S. 622, 629 (2002). The Court did not discuss the government's obligation to disclose other exculpatory information prior to entry of a plea.

213. Discussed in U.S. Attorney's Manual title 9 § 9-27.300(B), the policy comes under 21 U.S.C. § 851 (2012).

214. Some federal districts across the country have created what are called "pre-entry" or drug courts. These courts are intended to divert offenders from the court system altogether by providing them with early treatment. If the treatment is successful, the charges against the offenders are either dropped or the offenders are given the option of pleading to charges that carry lesser penalties. See Marshanna Hester, *Central District's Federal Drug Court Aims to Avoid Mandatory Minimum Sentences*, CINEWSNOW.COM (Aug. 13, 2013), <http://www.cinewsnow.com/news/local/Central-Districts-federal-drug-court-aims-to-avoid-mandatory-minimum-sentences-219508271.html> [https://perma.cc/MG9R-TPRM]; Mosi Secret, *Outside Box, Federal Judges Offer Addicts a Free Path*, N.Y. TIMES (Mar. 1, 2013), [http://www.nytimes.com/2013/03/02/nyregion/us-judges-offer-addicts-a-way-to-avoid-prison.html?pagewanted%3Dalla&\\_r=0](http://www.nytimes.com/2013/03/02/nyregion/us-judges-offer-addicts-a-way-to-avoid-prison.html?pagewanted%3Dalla&_r=0) [https://perma.cc/WN3Q-YFYR]. Many states, including Arizona, Georgia, North Dakota, and West Virginia, have similar programs. See, e.g., *Drug Courts*, ARIZ. JUD. BRANCH (2015), <http://www.azcourts.gov/apsd/Drug-Courts> [https://perma.cc/2UP7-L5XB]; *Program Description*, DEKALB CTY. SUPERIOR CT. (2014), <http://www.dekalbsuperiorcourt.com/drug-court/program-description> [https://perma.cc/4LAT-A6NC]; *Drug Court Approved*, N.D. SUPREME CT. (Apr. 25, 2001), [http://www.ndcourts.gov/\\_court/news/scdrugcourt.htm](http://www.ndcourts.gov/_court/news/scdrugcourt.htm) [https://perma.cc/NGX6-B95G]; *What Is Drug Court?*, W. VA. JUDICIARY (2011), <http://www.courtswv.gov/lower-courts/adult-drug-courts/adult-drug-courts.html> [https://perma.cc/8VQN-NQJG].

215. This is already the policy of the American Bar Association. See WILLIAM SHEPHERD, AM. BAR ASS'N, RESOLUTION 113E (2013), [http://www.americanbar.org/content/dam/aba/directories/policy/2013\\_hod\\_annual\\_meeting\\_113E.docx](http://www.americanbar.org/content/dam/aba/directories/policy/2013_hod_annual_meeting_113E.docx) [https://perma.cc/BZ7A-4MTX].

*I. Case Processing*

*Could you give a sense of the case processing that goes on in your nation?*

In the United States, the push for bargaining—at least initially—was that the whole criminal justice system would be overwhelmed if there were not such negotiated resolutions because of the mass of trials being handled. Here we were trying to determine the situation if the number of felony cases coming up for trial in a particular system were much more limited; in short, is there another rationale for the process?

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Australia, Hon. Justice Fiannaca: Each Australian jurisdiction has a Director of Public Prosecutions (DPP) whose office is generally responsible for prosecuting indictable offenses<sup>216</sup> that are prosecuted in the superior courts.<sup>217</sup> All prosecutions commence in lower courts (magistrates or local courts), and indictable matters that cannot be dealt with summarily (or, in the case of “either way” offenses, which are committed to a superior court in any event) will be committed to a superior court. Depending on the jurisdiction, the DPP may assume conduct of the case while it is still in the lower court, but in all cases will have conduct of the matter once committed. When the DPP is involved in the lower court, negotiations may occur prior to committal, and on occasion may result in a matter being dealt with summarily after the charge is downgraded. Often, however, plea negotiations will occur when an accused has pleaded not guilty and has been committed for trial, and usually after substantial, if not

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216. These encompass the more serious offenses in each jurisdiction.

217. The Superior Courts are the Supreme Court and District (or County) Court of each State and Territory, and the Federal Court in the Commonwealth jurisdiction. Plea negotiations also occur in courts of summary jurisdiction (magistrates' courts) in respect to nonindictable offenses or “either way” offenses that remain in the summary court. In such cases, police prosecutors or lawyers employed by police departments or DPP offices will conduct the prosecution. Case management of summary prosecutions is generally not as structured or complex as it is for prosecutions on indictment, and prosecutors in summary courts often will not have a brief until a short time before a hearing. Consequently, any plea negotiation is more likely to be instigated by the defense.

full, disclosure of evidentiary material has been made by the prosecution to the defense.<sup>218</sup>

Western Australia is the fourth largest of the state jurisdictions. Numbers in the larger states will be significantly greater, but Western Australian statistics would be indicative of general trends. In the 2013-2014 financial year, there were 1936 matters committed to the superior courts, but the number of open cases for that period was 2910.<sup>219</sup> Of the 1936 committals, 57 percent (1104 matters) were committed for sentence (that is, after a plea of guilty was entered).<sup>220</sup> Of those, 53 percent (582 matters) were pleas of guilty on the “fast track” system, the defendant having pleaded at the earliest opportunity, without the need for full disclosure of the prosecution’s evidence.<sup>221</sup> Of the other 47 percent of matters committed for sentence, some of the guilty pleas may have resulted from negotiations, but there is no statistic available for that eventuality. Of the 43 percent of matters committed for trial, some would subsequently change to pleas of guilty, some would be discontinued, and some would proceed to trial, but the statistical models of the Office of the Director of Public Prosecutions (ODPP) for Western Australia do not provide figures for those outcomes related to committals.<sup>222</sup> The ODPP’s numbers show, however, that in 2013-2014, 766 matters were listed for trial, of which only 399 actually proceeded to a concluded trial.<sup>223</sup> Of those that did not proceed to a concluded trial, there were 21 cases where the defendant pleaded guilty during the trial and 317 listings that were vacated before the trial date.<sup>224</sup> In 135 of those, the defendant pleaded guilty, and of those pleas, 25 are recorded as being the result of negotiations, although it is possible the number was greater.<sup>225</sup>

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218. *See, e.g.*, NSW LRC, *supra* note 5, at ¶ 2.4.

219. This statistical data is not public but was made available with kind permission from the electronic case management system of the Office of the Director of Public Prosecutions (ODPP) for Western Australia on June 30, 2014. Some of the data is available in the ODPP’s annual report. *See generally* OFFICE OF THE DIR. OF PUB. PROSECUTIONS FOR THE STATE OF W. AUSTR., 2013/2014 ANNUAL REPORT 20, [http://www.dpp.wa.gov.au/\\_files/ODPP\\_Annual\\_Report\\_2013\\_14.pdf](http://www.dpp.wa.gov.au/_files/ODPP_Annual_Report_2013_14.pdf) [<https://perma.cc/3DCC-DS7S>].

220. *See id.*

221. *See id.*

222. *See id.*

223. *See id.*

224. *See id.*

225. *See id.*

In terms of sheer number, 766 listed trials may be small in comparison to many other jurisdictions. Still, with regard to the number of available judges and prosecutors in Western Australia, and the size of the community, it is generally accepted here that if all matters that were committed for trial were to proceed, it would take considerably longer for matters to get to trial than the current average timeframe of six to twelve months. The rationale for plea negotiations in Australia, however, is multifaceted, as discussed above. Avoiding delay is one facet.

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Canada, Hon. Justice Pomerance: Again, this will depend on the Canadian jurisdiction in issue.

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England and Wales, Professor McEwan: Over the last twenty years or so, we have seen “the emergence of an administration-centred management ethos engaged in inventing new ways to ‘process’ large numbers of criminals or suspected criminals at minimal cost.”<sup>226</sup> It is clear, as I wrote recently, that in England and Wales, the criminal justice system has reeled under the weight of “new criminal offences ... created by successive Labour governments, and the constant stream of reform to criminal procedures and sentencing powers.”<sup>227</sup> In the face of system overload, governments have chosen not to fund the criminal process so that it can both cope with caseload and preserve traditional safeguards. “[J]udges are now required to intervene proactively in the management of criminal cases before and during trial, to encourage agreement where possible and to ensure that trials begin promptly, are as narrowly focused as possible, and do not last longer than necessary.”<sup>228</sup>

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226. McEwan, *supra* note 198, at 519-22.

227. *Id.* at 521.

228. *Id.* at 527.

New Zealand, Hon. Judge Harvey: The Criminal Procedure Act, enacted in 2011, is new and is very process oriented.<sup>229</sup> There are time limits fixed for stages in the process to trial.<sup>230</sup> A sentence indication “stops the clock.”<sup>231</sup> The sentence indication process was originally conceived to offer an encouragement to those whose guilt could be proved to plead at an early stage. Credit and discounts are available for an early guilty plea.<sup>232</sup> I cannot say that the system cannot do without sentence indications, but there can be no doubt that meritless cases would clog the system.

Let me explain the credits and discounts that are available for an early guilty plea. This requires a discussion of the provisions of the Sentencing Act, which sets out the principles and purposes of sentencing and the aggravating and mitigating circumstances that are to be taken into account. As a result of a number of appeal decisions, the sentencing process has become a very process-driven exercise and, in some respects, almost a mathematical one. It works something like this:

- (1) Identification of circumstances surrounding the offense, including aggravating and mitigating circumstances of the offense itself.<sup>233</sup> Mitigating circumstances of the offense may be, for example, in the case of a group assault, where the accused stood on the sidelines and offered verbal encouragement rather than becoming physically involved.
- (2) Identification of aggravating and mitigating circumstances personal to the accused. This could include matters such as previous convictions (aggravating circumstances) or expressions of remorse (mitigating circumstances).<sup>234</sup>

At the end of this stage of the process, the judge is required to set a starting point for the sentencing exercise.<sup>235</sup> If an accused has

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229. *See generally* Criminal Procedure Act 2011 (N.Z.).

230. *Id.* at pts 2-3.

231. *Id.* at s 64.

232. *See* Sentencing Act 2002, s 9(2)(b) (N.Z.).

233. *See id.* s 9(1)-(2).

234. *See id.*

235. The requirement for judges to set a starting point in sentencing is set out in *R v Taueki* [2005] 3 NZLR 372 (CA), and *R v Clifford* [2011] NZCA 360. There is no authority that suggests that the same process must be followed for sentence indications. Some judges, including this author, articulate the basis for a sentence indication including the fixing of



previous convictions for similar offenses, the starting point may have an additional “uplift”;<sup>236</sup> thus, for example, a person accused of assault with intent to injure may have a starting point fixed of two and a half years together with an additional six months for previous similar offending as an uplift.

Once the starting point has been identified, various reductions may come into play, including factors such as the youth of the accused, previous good conduct, efforts to engage in self-rehabilitation, statements of remorse, and the like.<sup>237</sup> Various deductions from the starting point will then be made.

The effect of the guilty plea is then taken into account. The closer the guilty plea is to the trial date, the less reduction will be given. Essentially, a guilty plea at the earliest opportunity will attract a discount of anything between 20 and 25 percent.<sup>238</sup> A guilty plea close to trial may attract a discount of between 10 and 15 percent only.<sup>239</sup>

All of these factors, including the various discounts, are taken into account in the sentencing indication process. Depending on how early in the process the sentencing indication is being given, it may mean that the discount for an early guilty plea could be quite significant.

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United States, Ms. Brook: The answer to this question sheds light on why plea bargaining is so pervasive in this country.

(1) The imprisonment rate in the United States exceeds that of any other Western democracy.<sup>240</sup>

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starting points along with aggravating and mitigating features and the various applicable discounts.

236. See Sentencing Act 2002, s 9(1)(j) (N.Z.); *Reedy v Police* [2015] NZHC 1069 at [15] (“Parliament expressly authorises the treatment of previous convictions as aggravating factors in assessing offending.”).

237. See Sentencing Act 2002, s 9(1)-(2) (N.Z.).

238. See, e.g., *Hessell v R* [2010] NZSC 135.

239. See *id.*

240. THE SENTENCING PROJECT, FACT SHEET: TRENDS IN U.S. CORRECTIONS 2 (2014), [http://sentencingproject.org/doc/publications/inc\\_Trends\\_in\\_Corrections\\_Fact\\_sheet.pdf](http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf) [<https://perma.cc/8ZD5-67XS>]. Nonetheless, the good news is that in the past few years we have seen our incarceration rate begin to decrease. *Incarceration*, SENT’G PROJECT, <http://www>.

(2) The War on Drugs and the War on Crime resulted in a torrent of new federal and state criminal statutes: three-strikes and other recidivist laws, higher maximum sentences, mandatory minimum sentences, and the creation of the federal sentencing guidelines.<sup>241</sup> These initiatives in turn resulted in dramatic increases in the length of sentences and in a 500 percent increase in the U.S. prison population over the past thirty years.<sup>242</sup> There are currently 2.2 million persons in prisons and jails in the United States, making it the world's leader in incarceration, at least as to nations reporting such information.<sup>243</sup>

(3) As noted earlier, in recent years Congress has enacted “a proliferation of federal criminal law[s] ... that lack adequate *mens rea* requirements and are vague in defining the conduct that they criminalize.”<sup>244</sup>

In sum, over the past three decades we have seen skyrocketing rates of imprisonment, increasingly lengthy sentences, an influx of mandatory minimum sentences, a wealth of new criminal statutes, and a decreasing number of criminal statutes requiring proof of intent. All of this is true under federal law; it is sadly also true in many states.

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sentencingproject.org/template/page.cfm?id=107 [https://perma.cc/YK24-W4A7]. A recent notable illustration of this trend was the decision of the U.S. Sentencing Commission to cut the sentences of 46,000 inmates serving time for drug offenses. See Timothy M. Phelps, *Federal Government Moves to Reduce Sentences of 46,000 Drug Offenders*, CHI. TRIB. (July 18, 2014, 11:10 PM), <http://www.chicagotribune.com/news/la-na-drug-sentences-reduced-20140718-story.html> [https://perma.cc/F6W6-QGGP].

241. According to a bipartisan group of legal experts, the number of federal crimes has grown so large that “it ensnares everyday citizens who have no idea they are violating the law.” Gary Fields & John R. Emshwiller, *Criminal Code Is Overgrown, Legal Experts Tell Panel*, WALL ST. J. (Dec. 14, 2011), <http://online.wsj.com/news/articles/SB10001424052970204336104577096852004601924> [https://perma.cc/JC6Y-M2NJ]. Former Attorney General Edwin Meese estimates there are now about 4500 federal criminal statutes and over 300,000 other regulations that carry criminal penalties. *Id.*

242. *Incarceration*, *supra* note 240.

243. *Id.* See generally NATHAN JAMES, CONG. RESEARCH SERV., R42937, THE FEDERAL PRISON POPULATION BUILDUP: OVERVIEW, POLICY CHANGES, ISSUES, AND OPTIONS 1-9 (2014), <https://www.fas.org/sgp/crs/misc/R42937.pdf> [https://perma.cc/5WJ6-MXWJ].

244. BRIAN W. WALSH & TIFFANY M. JOSLYN, HERITAGE FOUND., WITHOUT INTENT: HOW CONGRESS IS ERODING THE CRIMINAL INTENT REQUIREMENT IN FEDERAL LAW 1-2 (2010), <http://www.heritage.org/research/reports/2010/05/without-intent> [https://perma.cc/6U6G-Z4Q3].

*J. The Views of Defense Lawyers*

*Do you think that defense lawyers believe plea bargaining can achieve fair results? How do defense lawyers feel about a system in which the majority of cases are not tried, and in which prosecutors and judges have great power?*

Not surprisingly, once again our participants' viewpoints differ considerably. For example, our long-term Australia prosecuting attorney has a very different viewpoint from our experienced U.S. defense lawyer.

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Australia, Hon. Justice Fiannaca: I think that, in general terms, defense lawyers in Australia regard plea negotiations as essential to achieving fair results when their client admits some criminal responsibility.<sup>245</sup> They can negotiate on the basis of the instructions they have received to achieve the best result for the defendant in terms of the charges and agreed facts, knowing that a suitable resolution without trial is highly desirable to the prosecution and the courts. The independence of the prosecution services in Australia means there is no political consequence to decisions made appropriately and in accordance with the law. Thus, defense lawyers can approach negotiations with the expectation that the matter will be considered by the prosecutor on its merits without the influence of any external pressures. Ultimately, of course, sentencing is a matter for the judge, who exercises independent judgment. The fairness of the sentence can be challenged on appeal, if issue is taken.

To the extent that concerns have been raised about the fairness of the process, they relate to the pressure that some defendants may feel to plead guilty,<sup>246</sup> whether financial, or stemming from an inability to face the stress of a trial, or from fear of a greater penalty if convicted after trial. In my opinion, however, such pressures do not reflect on the plea negotiation process itself. The process pro-

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245. The research conducted by Asher Flynn, *supra* note 93, at 205, refers to comments by defense lawyers who indicated they believed fair outcomes can be achieved.

246. *Id.* at 101.

vides a reasonable opportunity to the guilty who wish to negotiate the charges and facts to achieve a fairer reflection of their conduct, as they believe it to be.

\* \* \*

Canada, Hon. Justice Pomerance: In the past, some defense lawyers were reluctant to offer the kind of information required of them at a judicial pretrial. It was said that the defense need not disclose its strategy until the trial. There was some reluctance to give up the element of surprise.

Now, most defense counsel accept that the process can work only if they are willing to speak about the case for the defense. It is recognized that this disclosure often inures to the benefit of the accused person, as the strength of the defense's position may ultimately persuade the Crown to reconsider its approach.

That said, the potential coercive effect of plea discussions is a matter of concern. This concern has increased in Canada as we have seen the introduction of new mandatory minimum sentences in our Criminal Code and other federal statutes. In an earlier paper, I offered the following comments:

[Plea discussions and] mandatory minimum sentences may create a coercive environment that encourages false pleas of guilt—pleas entered by persons who are not guilty of the offence. This may happen where the Crown offers to take a plea to a lesser offence, one that does not carry a minimum penalty. The disparity between the sentence offered on a plea and that guaranteed on conviction may create an unhealthy inducement, as when a person who faces a minimum five year term upon conviction is offered 12 months on a plea to a lesser offence.... Tragically, we have seen cases in Canada in which innocent persons have pleaded guilty to serious crimes, only to be later exonerated.

Part of the difficulty is that a single party to the litigation—the Crown—has control over the charge that appears on the indictment, as well as the charge that might be substituted on a plea of guilt. The effect of a mandatory minimum regime is, not only to remove discretion from the judiciary, but to download that discretion to the prosecution service. Through plea resolu-

tion discussions, the Crown has authority to determine whether an offender should or should not be subject to a statutorily prescribed minimum. An election to proceed by way of indictment may mean that the offender faces a minimum sentence of one year upon conviction, rather than a minimum sentence of 90 days. That election will, in most cases, foreclose consideration of a conditional sentence. The Crown's willingness or unwillingness to accept a plea to a lesser offence will have profound implications. The Crown will have enormous bargaining power in plea resolution discussions and significant tactical advantage.

This is not to say that prosecutorial discretion is a bad thing. To the contrary, it is a necessary component of the criminal justice system and, exercised properly, promotes fairness and justice. The Crown is a quasi-judicial officer and bound by special obligations and duties associated with that role. The presumption is that the Crown will honour those duties in exercising its discretionary powers. The problem is not that the Crown has discretion; the problem is that the Crown is the *only* one with discretion. The Crown has the discretion to oust judicial discretion by proceeding on a charge with a minimum sentence. The determination of a fit and appropriate sentence, having regard to all of the circumstances of the offence and offender, may be determined in plea discussions outside of the courtroom by a party to the litigation. Where the offence calls for a minimum sentence, the judge as final arbiter is emasculated.<sup>247</sup>

In the recent case of *R. v. Nur*, the Supreme Court of Canada, striking down a mandatory minimum sentence for a firearms offense, commented on the difficulties that flow when all meaningful discretion is vested in the prosecutor:

This leads to a related concern that vesting that much power in the hands of prosecutors endangers the fairness of the criminal process. It gives prosecutors a trump card in plea negotiations, which leads to an unfair power imbalance with the accused and creates an almost irresistible incentive for the accused to plead to a lesser sentence in order to avoid the prospect of a lengthy mandatory minimum term of imprisonment. As a result, the “de-

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247. Renee Pomerance, *The New Approach to Sentencing in Canada: Reflections of a Trial Judge*, 17 CAN. CRIM. L. REV. 305, 312-13 (2013) (footnotes omitted).

termination of a fit and appropriate sentence, having regard to all of the circumstances of the offence and offender, may be determined in plea discussions outside of the courtroom by a party to the litigation[.]” We cannot ignore the increased possibility that wrongful convictions could occur under such conditions.

Second, ... the exercise of discretion typically occurs before the facts are fully known. An analysis that upholds [section] 95(2) on the basis of the summary conviction option “does not come to grips with the timing of the Crown election and the factual basis upon which that election is made[.]” The existence of the summary conviction option is therefore not an answer to the respondents’ s. 12 claim. As stated in *R. v. Smickle*, 2012 ONSC 602 (CanLII), 110 O.R. (3d) 25, at para. 110: “The Crown discretion is exercised at an early stage when all of the facts, particularly those favourable to the defence, are often not known. Often, the full facts will not be known until the trial judge delivers his or her reasons or the jury delivers a verdict.”<sup>248</sup>

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England and Wales, Professor McEwan: I have a strong concern here. The only evidence I have of defense lawyers’ take on the strictures from courts to remind defendants about pleading guilty, partly because of concern about new case management rules and client confidentiality, is a comment from a solicitor interviewed for some research:

The Court Clerk turns to me and says—has your client been advised as to the credit he will get if he pleads guilty?—because that’s what the Criminal Procedural Rules say that the court have got to ask me. My answer is—ask him yourself. I am not going to answer that question, because if I had spoken to my client about something that’s professionally privileged, you can’t ask me.<sup>249</sup>

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248. *R. v. Nur*, 2015 SCC 15, paras. 96-97 (Can.) (some citations omitted).

249. Fae Garland & Jenny McEwan, *Embracing the Overriding Objective: Difficulties and Dilemmas in the New Criminal Climate*, 16 INT’L J. EVIDENCE & PROOF 233, 247-48 (2012).

New Zealand, Hon. Judge Harvey: Prosecutors in New Zealand are amenable to persuasion when it comes to overcharging and will reduce charges to a more realistic level after discussion with counsel. I would say that overcharging is rare at least in my experience. My son, who is at the defense bar, may disagree, but he has a high success rate in getting charges reduced. Occasionally judges will intervene, generally at case review hearings where it is obvious that there has been overcharging. This depends very much upon the judicial style, and I must say that it is unusual for overcharging to take place. My son generally is able to persuade prosecutors to reduce charges when there is clear overcharging, and it is generally within that context that charges are reduced. It is therefore unusual for a judge to become involved in an overcharging inquiry.

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United States, Ms. Brook: Sometimes. I do think it depends on what kinds of offenses we are talking about and which defendants we are talking about. For poor people of color, fair results are much harder to come by, not because of deliberate racial prejudice, but rather because our criminal justice system is so stacked against poor people, and especially poor people of color.<sup>250</sup> No matter how you look at it, the numbers are staggering. Just one example: “[B]lack males have a 32% chance of serving time in prison at some point in their lives; Hispanic males a 17% chance; white males have a 6% chance.”<sup>251</sup> By the time I see my client in the lockup, he (most of my clients are men) probably has already been arrested several times, probably convicted once or twice for minor crimes, maybe served some short sentences, maybe had some serious psychological or substance abuse problems that went untreated, and now we are in federal court looking at serious time.<sup>252</sup>

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250. See Paul D. Butler, *Poor People Lose: Gideon and the Critique of Rights*, 122 *YALE L.J.* 2176, 2180, 2182-85 (2013).

251. THE SENTENCING PROJECT, *FACTS ABOUT PRISONS AND PEOPLE IN PRISONS 1* (2014), [http://sentencingproject.org/doc/publications/inc\\_Facts%20About%20Prisons.pdf](http://sentencingproject.org/doc/publications/inc_Facts%20About%20Prisons.pdf) [<https://perma.cc/D5G9-7RR9>].

252. A good example of how all these disparities ratchet up the consequences for people of color can be found in *United States v. Leviner*, 31 F. Supp. 2d 23, 33 (D. Mass. 1998). In that case, the court reviewed the defendant’s prior record and discovered that it contained a number of traffic offenses. See *id.* The court concluded: “By counting the imprisonment that

*K. The Views of Judges*

*Within your country, do judges themselves take disparate views on the merits of plea bargaining and the role that the judge should play in such discussions?*

What major differences we see here. Judges in New Zealand, operating under their recent comprehensive statutory overhaul, appear to be of a single mind in applying that scheme. In Canada, however, judges may view their roles quite differently depending on the individual and the part of the nation in which that individual sits.

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Australia, Hon. Justice Fiannaca: The cases referred to earlier tend to suggest that judges have taken different views.<sup>253</sup> The High Court decisions make it clear that a judge has no role in the plea negotiation process and cannot reject a negotiated plea unless it amounts to an abuse of process.<sup>254</sup> Such an instance may be when the plea is inconsistent with the facts or evidence on which the judge is asked to rely for sentencing.<sup>255</sup>

Although the judge must accept the plea if it is open on the facts presented, he or she is not precluded from expressing a critical opinion about the resolution, and they sometimes do, particularly

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the defendant has received for the prior offenses, the system effectively replicates disparities in sentencing in the state system. This would include not only the ordinary disparities between similarly situated defendants, but racial disparities." *See id.* (footnote omitted). The most recent study makes the same point:

Even after controlling for factors like the seriousness of the charges and a defendant's criminal history, blacks and Latinos were more likely than whites to be denied bail and more likely to be offered a harsher plea deal involving time behind bars. Blacks were also slightly more likely to be sentenced to prison than whites. When the charge was a misdemeanor drug offense, black defendants were 27 percent more likely than whites to get a plea offer that included incarceration.

Editorial, *How Race Skews Prosecutions*, N.Y. TIMES, July 13, 2014, at A18; *see also* Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333, 341-53 (1998).

253. *See GAS v The Queen* (2004) 217 CLR 198, 198 (Austl.); *Maxwell v The Queen* (1996) 184 CLR 501, 510-15 (Austl.).

254. *See Maxwell*, 184 CLR at 514.

255. *See id.* at 504.



if the charges do not adequately reflect the criminality that may appear from the evidence.<sup>256</sup> However, this is not so much an indication of an opinion about the process as it is about the particular outcome in the case.<sup>257</sup>

The same may be said of comments of courts of appeal in the various jurisdictions (including Western Australia) that have been critical of concessions that have been made about the factual basis for sentencing in individual cases.<sup>258</sup> The context tends to be when a convicted offender appeals his or her sentence and relies on the compromised factual basis as a ground for arguing that the sentence was manifestly excessive.<sup>259</sup> One could regard the courts' comments in such cases as providing guidance to the prosecution as to its proper role in such matters for future negotiations.

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Canada, Hon. Justice Pomerance: There are disparate views held by judges throughout Canada. Please reference my reflections in Part I.A.

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England and Wales, Professor McEwan: The *McKinnon* case is helpful here.<sup>260</sup> I am referring to the horror expressed by some judges, including the Court of Appeal in the same case, at the idea of the U.S. system;<sup>261</sup> but the judgment in the House of Lords suggested that it is not that alarming, so maybe attitudes are softening.<sup>262</sup> My guess is that most judges would hate to be involved in the process, but I have no evidence of that.

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256. *See id.* at 511 (citing *R v Martin* (1904) 21 WN 233, 235 (N.S.W.)).

257. *See id.*

258. *See id.* at 513-14 (citing *R v Brown* (1989) 17 NSWLR 472, 479-80).

259. *See id.*

260. *See McKinnon v. United States* [2008] 1 WLR 1739 (HL) 1742 (Eng.).

261. *See id.* at 1749-50.

262. *See id.* at 1749.

New Zealand, Hon. Judge Harvey: There are a few judges who, before the provisions of the Criminal Procedure Act came into effect, would not engage with the sentence indication process.<sup>263</sup> I am unaware now of the position, but I can say that for all of the judges—at least in the region of New Zealand within which I work, Auckland—there is no reluctance to engage with the sentencing indication process. This is especially so now that it has been given statutory validation and is seen by most judges as an important part of the criminal justice process.<sup>264</sup>

Having said that, I cannot say that judges enter the arena, roll up their sleeves, and actively broker resolutions as in some nations, but judges surely do get involved in the process and there certainly is no suggestion that it is an unseemly undertaking.

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United States, Ms. Brook: I think it is fair to say that all federal and state judges believe there is a need for plea bargaining in our criminal justice system. How their views differ is on whether too many cases today involve plea bargaining and whether the prosecution has been given too much power in the plea-bargaining process.

As for the role judges should play, U.S. judges are used to remaining outside the fray in plea bargaining, although they are certainly active in the settlement of civil cases. Whether many would choose, if they could, to become more involved in the process is unknown to me, and is, surely, most controversial.

#### *L. Strategies to Induce Guilty Pleas*

*Are you seeing system strategies designed to persuade defendants to plead guilty, aside from the issue of whether there is a formal process of plea bargaining?*

A system involving widespread plea bargaining will almost inevitably place pressure on defense counsel to recommend a client's participation in the negotiation, or that client may suffer serious

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263. See Criminal Procedure Act 2011 (N.Z.).

264. See *id.*

negative consequences. The range in views we see here, however, as to such pressure is quite pronounced.

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Australia, Hon. Justice Fiannaca: Most jurisdictions have legislative provisions recognizing the mitigatory value of a plea of guilty; some are more prescriptive than others.<sup>265</sup> In Western Australia, section 9AA of the Sentencing Act 1995 formalizes the discount to be given for the utilitarian value of pleas of guilty—that is, “to recognise the benefits to the State, and to any victim of or witness to the offence.”<sup>266</sup> The amount of the discount must be stated by the sentencing judge.<sup>267</sup> Common law principles relating to discounts for mitigating factors associated with pleas of guilty, including genuine remorse and assistance given to investigating and prosecuting agencies, still apply,<sup>268</sup> and can result in significantly greater reductions than the maximum 25 percent provided for in section 9AA for a plea entered at the first reasonable opportunity.<sup>269</sup>

I have earlier referred to concerns that have been raised about the pressures that defendants may feel to plead guilty in a system that rewards such pleas with discounts.<sup>270</sup> Critics here, as elsewhere, regard such systems as impinging on the right to trial, and a test of a defendant’s resolve to resist pleading guilty, irrespective of whether he or she is guilty or innocent.<sup>271</sup> I am not aware of any study, however, that suggests the inducement of innocent defendants into pleading guilty is a real problem. On the other hand, it is clear from the statistics I have referred to above that a significant number of defendants who ultimately plead guilty leave it to a late

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265. See NSW LRC, *supra* note 5, ¶¶ 9.27-.35 (describing sentencing discounts for guilty pleas in various jurisdictions).

266. *Sentencing Act 1995* (WA) s 9AA(2) (Austl.).

267. *Id.* s 9AA(5).

268. See NSW LRC, *supra* note 5, ¶¶ 9.23-.24, 9.30.

269. See *Sentencing Act 1995* (WA) s 9AA(4)(b) (Austl.).

270. See Asher Flynn & Kate Fitz-Gibbon, *Bargaining with Defensive Homicide: Examining Victoria’s Secretive Plea-Bargaining System Post-Law Reform*, 35 MELB. U. L. REV. 905, 915-16 (2011).

271. See *id.*

stage to do so, often after a matter has been listed for trial.<sup>272</sup> Incentives to plead guilty at an early stage are a legitimate measure to reduce wastage of resources and the deleterious effects of prolonged proceedings.<sup>273</sup>

Two Australian states have previously implemented “sentence indication” schemes by statute. Under those schemes a defendant can request from the court an indication of the penalty he or she is likely to receive before pleading guilty to an offense. The scheme in New South Wales was implemented in 1992 and was “discontinued four years later on evidence that it did not increase court efficiencies or the rate of guilty pleas.”<sup>274</sup> A sentence indication scheme was implemented in Victoria in 2007 and continues to be in effect.<sup>275</sup>

Court-supervised case conferencing has been tried in New South Wales, Victoria, and Western Australia.<sup>276</sup> The New South Wales trial was “discontinued following a review which suggested [the schemes] were not increasing the rate of early guilty pleas.”<sup>277</sup> In Western Australia, the plan, which operates in the Supreme Court, is supported by a Practice Direction.<sup>278</sup> It has functioned mainly as a means of narrowing the issues that are in contention and the evidence that will be required at trial.<sup>279</sup> It has led to resolution by the entering of pleas of guilty to the charges or alternative charges in some cases.<sup>280</sup> As part of a system of combined measures in the Supreme Court, it has been considered to be a success in resolving cases without the need for trial and reducing the length of trials.<sup>281</sup>

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272. See NSW LRC, *supra* note 5, ¶ 1.6 (“35% of all guilty pleas were submitted after the matter had been committed for trial and, most tellingly, of these approximately 61% occurred on the day of trial.”) (footnotes omitted).

273. See *id.* ¶¶ 1.7-.8.

274. NSW LRC, *supra* note 5, at 113.

275. See VICT. SENTENCING ADVISORY COUNCIL, SENTENCE INDICATION AND SPECIFIED SENTENCE DISCOUNTS FINAL REPORT 27-29 (2007), <https://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Sentence%20Indication%20and%20Specified%20Sentence%20Discounts%20Final%20Report.pdf> [https://perma.cc/DUB5-743X].

276. See NSW LRC, *supra* note 5, ¶¶ 5.1-.47.

277. *Id.* at 71.

278. *Id.* ¶¶ 5.14-.15.

279. See *id.* ¶ 5.16.

280. *Id.* ¶ 5.23.

281. *Id.* ¶ 5.24.

The system in Victoria is also reported as having been successful in assisting to achieve resolutions by increased pleas of guilty.<sup>282</sup>

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Canada, Hon. Justice Pomerance: A plea of guilt is a mitigating factor on sentence.<sup>283</sup> It is evidence of remorse and will often operate to reduce the offender's sentence.<sup>284</sup> The earlier the plea, the more mitigating its effect.<sup>285</sup> On the other hand, if there is a mandatory minimum sentence, this will remove much of the judges' discretion to award credit for a guilty plea.<sup>286</sup> In some cases, the incentive to plead guilty will realistically be gone, as the sentence imposed on a plea will not be very different from the sentence imposed after a trial.<sup>287</sup>

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England and Wales, Professor McEwan: This mainly relates to sentencing, as explained, plus courts being required to ensure the defendant has been reminded of the sentencing discount.<sup>288</sup> The more often the defendant is told about the advantages of a guilty plea, the more pressure he is under. And under new procedures, he is required in the magistrates' court to enter a plea irrespective of whether he has had prosecution disclosure or legal advice.<sup>289</sup> So if he

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282. See generally VICT. SENTENCING ADVISORY COUNCIL, SENTENCE INDICATION: A REPORT ON THE PILOT SCHEME ¶ 3.36 (2010), <http://www.sentencingcouncil.vic.gov.au/sites/default/files/publication-documents/Sentence%20Indication%20A%20Report%20on%20the%20Pilot%20Scheme.pdf> [<https://perma.cc/3AYQ-L99G>].

283. See Criminal Code, R.S.Q., c C-46, s 725(1)(b) (Can.).

284. See *id.*

285. See *R. v. Conlon*, [2011] ABPC 259 (Can. Alta.)

286. See Pomerance, *supra* note 247, at 312.

287. See *id.*

288. See SENTENCING GUIDELINES COUNCIL, MAGISTRATES' COURT SENTENCING GUIDELINES 18b-c (2012).

289. Criminal Justice and Courts Act 2015, § 46 (Eng.); see also LORD JUSTICE LEVESON, ESSENTIAL CASE MANAGEMENT: APPLYING THE CRIMINAL PROCEDURE RULES (2009), <https://www.judiciary.gov.uk/wp-content/uploads/JCO/Documents/Protocols/applying-crim-procedure-rules-dec-2009.pdf> [<https://perma.cc/F38R-BV7Y>] (explaining that "[a]t every hearing (however early) ... the court must take the defendant's plea," and that the court's obligation "does

pleads not guilty while he waits for this to happen, he will lose the discount, and the magistrates will tell him that.

\* \* \*

New Zealand, Hon. Judge Harvey: This country over the last couple of years has seen some dramatic changes to the legal aid system; although, having said that, the Public Defence Service was also developed, which now has offices in most of the main centers of the country.<sup>290</sup> Public defenders are not under any constraint to broker guilty pleas, and their primary duty is to the client.<sup>291</sup>

Having said that, at the case review stage of the progress of a case to trial, some judges will become quite active in terms of considering the case faced by an accused person and carefully ask questions about the issues that are in contest in the case. Some judges will not unquestioningly accept a suggestion that all matters are at issue, although my practice is to recognize that such a statement effectively means that the prosecution is being put to the proof. Having regard to the principle of the presumption of innocence, no contest can be taken with this, although other judges I know do not share my view and will carefully question the accused about the issues in a case. I consider myself an activist judge in trying to reach resolution but not at the expense of the presumption of innocence.

It is my experience that self-represented accused are more likely than not to maintain a not-guilty plea often on the basis of principle, or when they feel there has been some wrong done to them by prosecuting authorities, or where they merely want to have an opportunity to tell their story.

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not depend on the extent of advance information, service of evidence, disclosure of unused material, or the grant of legal aid”).

290. See *Public Defence Service History and Expansion*, N.Z. MINISTRY JUST., <http://www.justice.govt.nz/services/legal-help/legal-aid/public-defence-service/about/history> [https://perma.cc/7CH5-XQ27] (last visited Mar. 20, 2016).

291. See *About the Public Defence Service*, N.Z. MINISTRY JUST., <http://www.justice.govt.nz/services/legal-help/legal-aid/public-defence-service/about> [https://perma.cc/E8AE-L6S3] (last visited Mar. 20, 2016).

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United States, Ms. Brook: Yes. Many systemic pressures come to bear here. First, within the Federal Sentencing Guidelines themselves, defendants receive points off (the equivalent of time off) for “acceptance of responsibility.”<sup>292</sup> The decision whether to give those points off depends on whether the judge believes the defendant sincerely accepts responsibility.<sup>293</sup> A defendant who goes to trial will almost never be given those points off, regardless of whether the defendant testifies at trial.<sup>294</sup>

A third point off is also available under the Guidelines, but only to defendants who fully disclose the extent of their conduct to the government and agree to plead guilty in time for the government to avoid having to prepare for trial and permit “the government and the court to allocate their resources efficiently.”<sup>295</sup>

The Guidelines also give points off for “substantial assistance,” or in other words, cooperation.<sup>296</sup> If the government determines that the defendant substantially assisted the government in its investigation, it may file a motion stating that fact, and the court must consider the assistance in sentencing the defendant.<sup>297</sup>

Most significantly, if the prosecutor has charged the defendant with counts that carry mandatory minimum sentences, in most cases the court may sentence below the mandatory minimums only if the government files a motion stating the defendant has cooperated fully and specifically requesting that the court sentence below the mandatory minimum.<sup>298</sup>

In addition, because the risk of conviction at trial and the sentences that follow are both exceedingly high, many defendants

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292. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (U.S. SENTENCING COMM’N 2014).

293. *See id.* § 3E1.1. cmt. 5.

294. *See id.* § 3E1.1. cmt. 2.

295. *Id.* § 3E1.1(b).

296. *Id.* § 5K1.1.

297. *See id.*

298. In a smaller number of cases, in which offenders with minimal criminal histories are accused of being minimally involved in nonviolent offenses, the court may sentence below the mandatory minimum if all other statutory criteria are met. *See* 18 U.S.C. § 3553(f) (2012).

choose to plead guilty to minimize the risk of serving lengthy prison sentences.<sup>299</sup>

### *M. Trends*

*In your country are there trends or directions in systems toward both formal structure and the plea of guilty, changes not found in the past?*

Once again in reviewing responses to a basic question, we see a wide range of views.

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Australia, Hon. Justice Fiannaca: The NSW LRC inquiry provides a snapshot of directions that have been taken and some proposed to be taken in New South Wales.<sup>300</sup> They are discussed above. They do not include formalizing plea negotiations as such, apart from the use of case conferencing as a means of facilitating discussions.<sup>301</sup> Moreover, they are not new directions.<sup>302</sup> They have been found in the past.<sup>303</sup> Some have been abandoned and are now being reconsidered.<sup>304</sup> Victoria, too, has made major changes, as discussed above.<sup>305</sup> These states include our two largest metropolitan areas: Sydney and Melbourne. What is certain is that all jurisdictions in Australia continue to regard early resolution of criminal cases as an ideal worth pursuing, for reasons previously discussed.<sup>306</sup>

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299. Human Rights Watch has documented “cases that illustrate the unjust sentences that result from a dangerous combination of unfettered prosecutorial power and egregiously severe sentencing laws.” See HUMAN RIGHTS WATCH, *supra* note 199, at 2. The report finds that in fact plea agreements “have for all intents and purposes become an offer drug defendants cannot afford to refuse.” *Id.*

300. NSW LRC, *supra* note 5, ¶¶ 9.27-.28.

301. *See id.* ¶¶ 5.1-.12.

302. *See id.*

303. *See id.*

304. *See id.* ¶¶ 5.45, 9.41.

305. *See id.* ¶¶ 9.27-.28.

306. *See id.* ¶ 1.2.



\* \* \*

Canada, Hon. Justice Pomerance: In Canada, we have for many years had good reason to be concerned about delay in criminal matters. When cases are not “tried within a reasonable time,” for purposes of section 11(b) of the Charter, they must be stayed.<sup>307</sup>

In 2012, new provisions in the Criminal Code provide for “case management judges” who can manage mega-trials and make rulings that will be binding at trial, even if there is a different trial judge.<sup>308</sup> This was seen as an additional arrow in the quiver for managing long, difficult, and time-consuming cases.

In some instances, this type of management will lead to earlier resolutions.

\* \* \*

England and Wales, Professor McEwan: Recent developments include the attitude adjustment in *McKinnon*,<sup>309</sup> the Attorney General’s Guidelines regarding serious fraud,<sup>310</sup> the *Goodyear* decision (discussed in *McKinnon*),<sup>311</sup> and the emphasis on early pleas.<sup>312</sup>

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New Zealand, Hon. Judge Harvey: Certainly the Criminal Procedure Act introduces a formalized structure to the criminal trial process by setting time limits for various stages of the process. Some judges require strict adherence to time limits and require a plea upon second appearance even when disclosure has not been

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307. See Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act, 1982, c 11(b) (U.K.).

308. See Criminal Code, R.S.C. 1985, c C-46 §§ 551.1-551.6 (Can.).

309. *McKinnon v. United States* [2008] 1 WLR 1739 (HL) 1742 (Eng.).

310. See ATTORNEY GEN.’S OFFICE, *supra* note 57, ¶¶ D1-D13 (laying out plea bargaining procedure for cases involving fraud charges).

311. See *McKinnon*, 1 WLR at 1749 (citing *R v. Goodyear* [2005] 1 WLR 2532 (Eng.)).

312. See Criminal Justice Act 2003, c. 44, § 144 (Eng.)

complete. I am not one of them and believe that a plea can be entered only once proper information has been received and when proper advice based upon that information has been given. The evaluation of the strength of a prosecution's case, in my view, cannot be made when information is incomplete or insufficient. More of the new appointees to the bench are process driven, probably because they have grown up in that environment.

\* \* \*

United States, Ms. Brook: Happily, yes. There have been well-publicized discussions on just this point.<sup>313</sup> One federal judge this past year suggested that the role of prosecutors in plea bargaining be diminished and mandatory minimum sentences be eliminated.<sup>314</sup> Recognizing that both of these solutions are politically unlikely, he suggested a third, more radical, possibility—that judges other than those assigned to a case be allowed to work with the prosecution and defense as mediators or evaluators in negotiating plea agreements.<sup>315</sup>

Also, as discussed earlier, numerous state and federal offices have begun working with courts to create pre-entry or drug courts to divert some persons from the criminal justice system altogether.<sup>316</sup>

In addition, the U.S. Department of Justice has “launched a comprehensive review of the criminal justice system in order to identify reforms that would ensure federal laws are enforced more fairly and—in an era of reduced budgets—more efficiently.”<sup>317</sup> As part of its reform effort, the Attorney General said: “The reality is, while the aggressive enforcement of federal criminal statutes remains necessary, we cannot prosecute our way to becoming a safer nation. To be effective, federal efforts must also focus on prevention and

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313. See Gilien Silsby, *Why Innocent People Plead Guilty*, USC NEWS (Apr. 18, 2014), <https://news.usc.edu/61662/why-innocent-people-plead-guilty> [<https://perma.cc/94PL-N4KJ>] (describing the Honorable Jed Rakoff's speech given at the University of Southern California).

314. *See id.*

315. *See id.*

316. *See supra* note 214 and accompanying text.

317. U.S. DEPT OF JUSTICE, SMART ON CRIME: REFORMING THE CRIMINAL JUSTICE SYSTEM FOR THE 21ST CENTURY 1 (2013).

reentry. In addition, it is time to rethink the nation's system of mass imprisonment."<sup>318</sup> He went on to endorse alternatives to incarceration, including drug courts and other pretrial diversion programs, as well as a new policy that will limit when the government can invoke mandatory minimum sentences.<sup>319</sup>

#### *N. Ending Plea Bargaining?*

*Could your nation, as some have suggested, just do away with plea bargaining? Would it be wise, would it be workable?*

No one, of course, really knows the answer to the latter question, though in several nations the answer has typically been—as expressed in the English view—that the system is just too much relied upon, and too heavily used, to simply reject it now. The wisdom of the plea bargaining practice, however, is another matter entirely, as our readers will see by looking at the five responses below.

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Australia, Hon. Justice Fiannaca: Plea negotiations are part of a multifaceted approach to achieving criminal justice ideals, including early resolution of cases and a fair disposition of matters that adequately serves the community's need to bring offenders to justice.<sup>320</sup> The impact on the system of removing one facet from the equation is difficult to estimate. The expectation in my jurisdiction, however, is that it would result in additional matters going to trial and unreasonable delays in bringing cases to conclusion.<sup>321</sup> For reasons discussed above, this is undesirable for all parties.<sup>322</sup>

In my opinion, it would not be wise for prosecution services to cease engaging with defense counsel to arrive at appropriate, principled resolutions. It is entrenched as part of the management of

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318. *See id.*

319. *See id.* at 3-4.

320. NSW LRC, *supra* note 5, ¶¶ 1.5-.9.

321. *See id.*

322. *See id.*

criminal cases. In my experience, and that of my colleagues in Western Australia, the key is to adhere to the guidelines, to make decisions based on reason rather than expedience, and to be consultative, ensuring victims and investigating officers are kept informed and the process is explained. Investigating officers will generally agree with decisions that are made, and victims will generally accept such decisions, appreciating that they too benefit from the certainty of a conviction and avoidance of the trauma of a trial. The relatively few cases in which errors of judgment may occur do not provide a sound basis, in my opinion, for scrapping the process.

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Canada, Hon. Justice Pomerance: No, though the answer likely varies across Canadian jurisdictions.

\* \* \*

England and Wales, Professor McEwan: The U.K. cannot afford to! It is inevitable when the law has “ladders” of offenses of varying degrees of seriousness. Or as a cynic would say, if the cricket is on at Lord’s....

\* \* \*

New Zealand, Hon. Judge Harvey: As I have indicated, I do not think it is practical now to do away with sentence indications. I think they are part of the fabric of the criminal justice process validated by legislation and they are here to stay.

\* \* \*

United States, Ms. Brook: Although eliminating plea bargains has been suggested as a possible solution to the problems I mention above, I do not think it would be possible in the current environment. Even Michelle Alexander writes:

After years as a civil rights lawyer, I rarely find myself speechless. But some questions a woman I know posed during a phone conversation one recent evening gave me pause: “What would happen if we organized thousands, even hundreds of thousands, of people charged with crimes to refuse to play the game, to refuse to plea out? What if they all insisted on their Sixth Amendment right to trial? Couldn’t we bring the whole system to a halt just like that?”<sup>323</sup>

In response to this question, Alexander explained the risks to folks who exercise their right to trial in light of the current crush of harsh mandatory minimum sentences and three-strikes laws that shift so much power from judges to prosecutors.<sup>324</sup>

Nonetheless the caller persisted. “Can we crash the system just by exercising our rights?”<sup>325</sup> Yes, Alexander answered, we could.<sup>326</sup> It would create a constitutional crisis and force much needed changes.<sup>327</sup> But, she wondered, could she actually urge others to take the risk?<sup>328</sup>

And therein lies the rub. Because criminal defense attorneys owe their undivided allegiance to the individual client they are representing and must give that client their best advice based on the client’s desires and their understanding of the case and the law, it is impossible to imagine a scenario in which it would be in every client’s best interest to demand a trial.

## CONCLUSION

In each of the five nations we looked at in this Article, nontrial dispositions—whether called plea bargaining, resolution discussions, or sentence indications—occur in many, if not most criminal prosecutions. The somewhat dubious leader appears to be the

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323. Michelle Alexander, Opinion, *Go to Trial: Crash the System*, N.Y. TIMES, Mar. 11, 2012, at SR5.

324. *See id.*

325. *Id.*

326. *Id.*

327. *Id.*

328. *Id.*

United States, but we were struck by how little current and useful data we could find in a few of the countries such as New Zealand and England. The approaches we observed differed greatly. In the United States, judges generally are strictly prohibited from being involved in the negotiation process, whereas in Canada some—but by no means all—judges may be active participants. In New Zealand, one sees a thoughtful and quite comprehensive statutory oversight of plea bargaining, but in the other nations—see, for instance, Australia and Canada—the practices have developed without much statutory application over time, and may differ considerably in various parts of the country.

In all five of the nations, the criminal trial is certainly not dead, but serious concerns continue to be voiced as to the sheer volume of negotiated pleas and—in some of the countries—limited oversight. Moreover, a debate over this process has been active in each of the nations in the academic sphere, but one is struck by how different the public discourse has been in the various nations. In a few, it is somewhat nonexistent, and in others, plea bargaining is widely discussed from many points of view.