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PLEA BARGAINING

In critical analysis and evaluation of his chosen profession, Chief Justice Warren Burger has very aptly observed: "In a supermarket age we are trying to operate the Courts with cracker-barrel corner grocery methods and equipment."

Nowhere is this statement more apropo than in the field of criminal law. This is one of the facts of life with which we, as lawyers, have to live. Lest we forget the deplorable status of the criminal dockets, we are daily and constantly reminded of the unsatisfactory existing situation by critics on all sides, both in and out of our profession. That the limelight should be focused predominately on the criminal law area is not surprising inasmuch as the details of most crimes and the trials resulting therefrom are far more newsworthy than the factual background and trial activities in litigation involving real estate titles, personal damages, etc.

Our congested criminal dockets result, in the main, from three general causes. First is the enormous population increase over the last half a century which has automatically caused a tremendous upsurge in the number of criminal cases. Second is the advent of entirely new varieties and kinds of cases which came about because of economic and

of all of the necessary individuals for the trial of a criminal case is not at all a simple task. What is involved is bringing together a Judge, 25 or more prospective jurors, lawyers for both sides, witnesses, court reporters, a bailiff, and any other necessary persons at the same time and at the same place. The absence of one individual vital to the proceedings will delay the entire process and will waste great amounts of time and money. We all know that the greatest amount of criticism which has been levied against our system of criminal justice has developed from its seeming inefficiency in bringing a case to trial within a reasonable period of time.

Now I certainly do not maintain that efficiency of operation must be the sole controlling test of the worth of a criminal justice system; however, the work of the courts can be efficient without jeopardizing basic safeguards. Indeed, inordinate delay in bringing a case to trial is often one of the greatest threats to the individual rights of the defendant. Further, both the accused and the public are entitled to a prompt disposition of any charges of criminal action.

Notwithstanding each individual's basic entitlement to a full trial on any criminal charge against him, satisfactory functioning of our courts has been dependent on the entertaining of pleas of guilty in a sufficient number of cases. Historically and statistically, systems of courts throughout this country (including the number of personnel and facilities involved) have been based on the premise that approximately

social changes, new laws promulgated by the Legislators, and decisions within the court system. Finally, the failure to bring up to date the methods and machinery involved in administering our criminal judicial system has been a large contributing factor to the current undesirable situation. It is in this last area that the practitioners of criminal law are in an excellent position to improve the existing conditions of our criminal dockets.

One tool readily available for use in speeding the effective administration of criminal justice is the practice of "plea-bargaining". In the past, this practice - sometimes also referred to as "plea negotiation", "plea discussion" or "plea agreement" - has been little understood, too infrequently used, and rarely discussed. The basic reason for the failure to utilize this procedure appears to stem from a fear by the parties to the trial that their motives in engaging in the plea-bargaining would be misunderstood. Solicitors feared that the general public would believe that the concessions they gave the defendant were obtained by improper influence, personal favoritism, or other possibly even more improper considerations. Defense counsel appear to have been concerned lest their action in negotiating would seem to reflect a lack of zeal on their part for their clients' rights; particularly prevalent appears to have been a feeling that they would be accused of "selling out" of the defendant's chance of acquittal for the benefit of not standing trial.

Significantly, the same philosophy involved in plea-bargaining -

90% of all defendants will plead guilty, leaving the necessity for a full trial on the merits in the cases of only 10% of accused persons. This may no longer be a valid premise upon which to base our needs. Further, any change in the percentage rate necessitates additional personnel, facilities and delays entirely disproportionate to the change in ratio. For instance, a reduction from 90% to 80% in guilty pleas probably requires twice the judicial manpower and facilities; a reduction to 70% probably trebles this demand. Even more important, the increase in delays in bringing cases to trial encountered as a result of any reduction in the guilty plea rate, though not exactly calculable, is clearly tremendous.

In urging the merit of plea-bargaining to you, I suggest the intelligent, advised, negotiation of guilty pleas results in a number of benefits to the defendant, to the system of justice, and to society as a whole. I hasten to add that in referring to the defendant I refer only to a guilty defendant, because certainly a plea of guilty could never be beneficial to an individual who is innocent of the criminal charge against him.

Among the considerations that may serve to justify granting concessions to a defendant who has agreed to enter a plea of guilty are the following:

1. By his plea the defendant is aiding in insuring prompt

1. Continued

and certain application of correctional measures to him.

2. It has been said that the entry of a plea of guilty is the first step in the rehabilitation of an individual. Whether this is always true or not, by such a plea the defendant does acknowledge his guilt and shows, to some extent, a willingness to assume responsibility for his conduct.

3. In certain cases, by virtue of their pleas of guilty, the defendants make public trial unnecessary where there are good reasons for not having the matters involved dealt with in public trials. Typical of these types of cases are the ones involving sex offenses, particularly with child witnesses, where appearances of the victims in the courtroom can lead to embarrassing, sometimes traumatic, experiences.

4. Another type of case warranting consideration of concessions is that wherein the defendant has offered or has already given cooperation when such cooperation has resulted in or may result in successful prosecution of other offenders engaged in equally or more serious conduct.

5. Still another situation justifying concessions to the defendant is one where by his plea of guilty, he has aided in avoiding delay not only in disposition of his case, but also in the disposition of other cases, and has thereby increased the probability of prompt and certain application of correctional measures to other offenders.

Perhaps foremost of the obstacles in the path of effective plea-bargaining is the widespread fear of public reaction to such agreements. There is really no doubt that any public suspicion of the parties to such agreements has its genesis in the fact that the agreements are usually sub rosa. By being secretive and sometimes hypocritical about these practices we automatically engender suspicion of our motives. By an honest, open, and above board approach to plea-bargaining we can allay the fears and trepidation of the general public with regard to this type of negotiation in criminal cases.

One of the most often heard arguments against plea-bargaining involves the claim that a situation is created which is likely to induce innocent persons to plead guilty to offenses they did not commit. Of course, this danger of an improvident plea is rendered absolutely nil when the defendant is afforded the services of a competent defense counsel, for it is inconceivable that ethical counsel would ever

that is, settlement without extended litigation and its attendant delay - is recognized and approved in the practice of civil law. So too, I submit to you that plea agreements, properly and intelligently entered into, are valid and important means of serving the legitimate ends of society and the interests of the defendants involved.

Now, in making that statement, I recognize, as do we all, that our entire system of justice is predicated upon the individual defendant's entitlement to his "day in court". In a special and peculiar sense the findings and the sentence are the products of the Trial Court for it alone, of all agencies of the law, is authorized to "adjudge" the matter under consideration. True it is that review agencies are empowered to take varying sorts of actions with regard to the case, but their functions are secondary and derivative. They merely affirm or disaffirm. The Trial Court, on the other hand, determines the guilt or innocense and, where appropriate, the punishment for the crime as basic primary propositions. Thus, in view of the effect which the determinations of the Trial Court can have on the defendant's liberty, property, social standing - in fact, his whole future - his entitlement to a full scale trial in open court of the issues of criminality and punishment therefor should not be lightly waived.

Conversely, however, it must be readily acknowledged that our adversary system encourages contention and promotes delay. The trial of the criminal case develops into a highly complex production. The assembly

advocate or participate in the entry of a guilty plea by a client who denied commission of the criminal act charged. Further, any professionally qualified defense attorney who participates in plea-bargaining would be remiss in his duties if he did not fully and adequately explain to his client all the factors involved in the plea of guilty so that the client's decision will be a knowing and voluntary one. Among the items which should be fully explained are the meaning of the charge, what acts amount to being guilty of the charge, the consequences and ramifications of a plea of guilty to the charge, and the range of possible punishments which could ensue as a result of a finding of guilty of the charge. Only with a full awareness of all of these matters can a defendant intelligently participate in the decision as to what shall be the nature of his pleas and as to whether it will be to his advantage to enter a negotiated plea of guilty.

Yet another commonly encountered objection to plea-bargaining is based upon the idea that there is something unethical about this type of transaction, inasmuch as justice and liberty are not fit subjects for bargaining and barter. However, obviously the type of plea-bargaining which I have advocated should not be subject to objection on ethical grounds because it is open and subject to control, it protects both innocent and guilty defendants, it furthers the best interest of society, and it leaves no leeway for improperly motivated arrangements leading to miscarriages of justice.

Referring again to the philosophy of Chief Justice Burger, he has made the following comments on this subject: "Plea-bargaining is a misunderstood concept. It has been given invidious connotations which range from misleading to false. The American Bar Association Committee of the Criminal Justice Project has cleared the air by promulgating standards for plea discussions. Plea discussions leading to disposition of cases are indispensable to any rational administration of criminal justice."

In my judgment, the only other alternatives available to us in our attempts to reduce the backlog in the criminal dockets and to ensure speedy trials would be one of the following:

1. Vastly increase our prosecution, defense, and judging facilities and personnel to the point where we could handle speedily all indicted personnel regardless of their pleas. This course of action would quickly exhaust the qualified talent available and result in an overall decline in the level of performance of officials.

2. A second course of action would be to cause all defendants to go to trial but not increase our personnel and facilities. This would result in delays, rushed and cursory treatment of cases, possible denial of constitutional rights, and unjustified convictions and acquittals.

3. The third alternative course of action would be to arbitrarily reduce the number of prosecutions and try only the more serious offenses but bring them to trial speedily. The undesirability of this course of action and the inequities involved in letting even a percentage of criminal offenses go unpunished and untried solely because of a bogged down criminal justice system are obvious.

Faced with these distasteful and objectionable alternatives, it is manifest that reasonable, practical, honest plea discussions and plea agreements provide a far more desirable avenue leading toward the ultimate goal of resolving the current dilemma in our courts.