Irene Gomez-Bethke Papers.

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TASK FORCE ON

SENTENCING DISPARITY IN HENNEPIN COUNTY

REPORT AND RECOMMENDATIONS

TASK FORCE ON SENTENCING DISPARITY
IN HENNEPIN COUNTY

*Bill Mullin, Chairperson
UCM Board of Directors

Donald Barbeau
Judge
Hennepin County District Court

*Vince Beyl
Special Programs Consultant
Court Services

Willie Mae Dixon
Community Worker
Legal Rights Center

*Walter Duffy
Minneapolis City Attorney

*Ronald Edwards
UCM Board of Directors

*Gary Flakne
Hennepin County Attorney

Robert Grams
Professor
Augsburg College

Manuel Guerrero
Attorney and Former Chairman
Chicano Studies Department
University of Minnesota

*Doug Hall
Executive Director
Legal Rights Center

*Bill Kennedy
Chief Hennepin County
Public Defender

*Polly Keppel
Minneapolis League of
Women Voters

Bryan J. Maciewski
Former Indian Planner
State of Minnesota
Department of Corrections

Ron Meshbesher
Private Attorney

Eugene Minenko
Chief Judge
Hennepin County District Court

Diana Murphy
Judge
Hennepin County District Court

*Allen Oleisky
Judge
Hennepin County District Court

*William Posten
Judge
Hennepin County District Court

*Peter J. Thompson
Private Attorney

*Kenneth Young
Director
Department of Court Services

*Members who were present during the task force voting on the report.

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INTRODUCTION

A report, by Augsburg College Sociology Professor Robert Grams, documented that Blacks and Native Americans received straight jail sentence more often that whites in Hennepin County District and Municipal Court. The report also indicated that Blacks and Native Americans represented by a public defender received straight jail more often than whites represented by a public defender.

In December of 1976, the Urban Coalition of Minneapolis was contacted by the Chief Hennepin County Public Defender who requested the organization's assistance in dealing with the conclusions stated in the Grams' report.

After some thoughtful deliberation, it was the organization's decision to pull together a task force made up of all the key actors in the criminal justice system, community based organizations involved in legal defense, and representatives of the Black, Native American and Latino communities. The purpose of the task force was to work toward pinpointing some reasons for the disparities, and to recommend plans of action to alleviate them. It was hoped that having a broadly representative task force would provide a balanced framework by which to approach the problem.

After months of dicussions and work sessions, the following report and its recommendations was adopted by the UCM Sentencing Task Force. Clearly, this task force, which was plagued with many apparently irreconcilable differences, would not have made these important first steps toward change and communication without the dedication of many task force members, the persistance and leadership of its Chair, William Mullin, and the staff work of Arturo Perez, UCM Assistant Director of Community Outreach.

Earl D. Craig, Jr.
President

JUDICIARY

In the original UCM staff report, there were recommendations made related to the judiciary that have since been tabled by the Sentenceing Task Force. The recommendations were broad in scope and would have greatly altered the present judicial structure. The majority of the task force did not wish to move toward sweeping change but instead to suggest some intermediate changes that might help in relieving sentencing disparity. What follows is a discussion of the suggestions that were made.

One of the key elements in the maintenance of an equitable sentencing system is the individualized consideration of each case. It is very critical that judges have as much information about defendants as possible and that all possible alternatives to incarceration are presented. Judges should hear from the prosecutor and defense counsel and community advocates for the accused, to obtain all information concerning all alternatives to incarceration. Most judges now do this, some do not.

Another area of importance is defining what criteria were used in sentencing a defendant. Currently, judges sometimes state their reasons for sentencing a defendant. It is our recommendation that judges state, for the record, the reasons they sentenced a defendant to a term of incarceration and why all alternatives were rejected. This would be an important step because it would force the judges to sit down and write out specific criteria they employed.

The statistical value of recording reasons for sentencing would be great. Essential data concerning criteria for sentencing used by judges, sentencing patterns and other significant information could be made available. This would provide solid research material for studies that could measure the

performance of the bench, pointing out problems areas that develop in the sentencing process. It would also be of great help in trying to develop remedies for problems that occur.

We agree with what is in the ABA Standards on Probation, that "The judge should begin his reasoning process from the assumption that probation is the best sanction, and be moved from that assumption as the particular facts of the case before him call ..."[1] We also agree with the ABA stance that "The probation decision should not turn upon generalizations about types of offenses or the existence of a prior criminal record, but should be rooted in the facts and circumstances of each case. The court should consider the nature and circumstances of the crime, the history and character of the offender, and available institutional and community resources."[2]

The premise that incarceration should be the last resort is a valid one. Unfortunately, in the current system, minority people don't stack up as well as whites. In determining the character of the individual, the report of the probation officer can be potentially laced with culturally biased interpretations. The judge may, however unconsciously, decide the fate of a minority defendant from a biased perspective. It may be because the person is not dressed well, because the person is unemployed, doesn't own a car, has had to move from place to place to avoid high rents, etc. The experience of being a minority person in an anglo world cannot be easily understood by the criminal justice system.

To some degree the cultural bias that does exist in the system has contributed to the development of diversion programs geared toward white defendants. There are not enough diversion programs or alternatives to

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[1]ABA Standards on Probation, Approved Draft, 1970. p. 4.

[2]Ibid. p. 10.

incarceration that are geared toward serving the minority client. Given this lack of alternatives, there are few options a judge can consider in determining a sentence. Those minority people who are lucky enough to get into a diversion program often have trouble because the therapy or program philosophy are culturally alien. Quite often the blame is placed on the defendant, making it even harder for other minority defendants to get into programs.

It becomes obvious that there is a critical need to develop alternatives to incarceration geared toward the needs of minority defendants. It is our opinion that the bench should, as a branch of the Hennepin County criminal justice system, strongly support the effort to organize a conference on alternatives to incarceration for minority defendants.

OFFICE OF THE EVALUATOR

The concept of an office of the evaluator funded by the Hennepin County Board located outside the Hennepin County criminal justice system is supported by the task force. The office should be created and operate for a period of two years to study and monitor disparities in the Hennepin County criminal justice system. The evaluator would conduct statistical studies of the system; and would, therefore, be given access to all pertinent records. The committee recommends the review, and if necessary the amendment, of the Minnesota Privacy Act, to assure maximum effectiveness of the above office. The evaluator would periodically submit reports to the Henenpin County Board. The creation of this office would be a significant gesture by the system, acknowledging the need to look at its operation more closely.

Along with the creation of an office of the evaluator, it would be advisable to establish two committees to advise and work with the evaluator. One committee should be made up of people within the criminal justice system, while the other committee should be made up of community people, particularly minority people. Both committees would also assist the evaluator in: a) reviewing the affectiveness of changes made in the criminal justice system, and b) making recommendations that would alleviate sentencing disparity, as well as any other types of inequities. If the office of the evaluator were not funded, the two committees should still be created. The two committees should hold frequent joint meetings so that views may be exchanged.

COMMUNITY CORRECTIONS

Hennepin County is presently developing a community corrections plan pursuant to state statutes. As part of the development of that plan, specific

and detailed attention must be given to the treatment afforded minority defendants. The development of that plan must include continuing input from the minority community so as to insure that the end product truly addresses the needs of the minority defendants. In approving programs for participating in the community corrections plan, county officials should insure that those programs effectively address the needs of the minority community, and the cultural differences those communities have with the dominant white culture. Hennepin County must recognize its responsibility to adequately fund programs for the minority defendant.

CONFERENCE ON ALTERNATIVES TO INCARCERATION

It is strongly recommended that the Hennepin County Community Corrections Advisory Board, with the strong support of the Hennepin County Bench, take the lead in developing a conference which would focus on alternatives to incarceration for the minority defendant. The Hennepin County Board should, if necessary, provide funding for the conference. The conference would take a look at minority oriented diversion and community corrections programs that exist in other cities throughout the country, but would not end its work there. Hopefully, the conference would move toward developing a strategy for the funding and implementation of exemplary minority oriented diversion and community correction programs. An ongoing mechanism for criminal justice system and minority community consultation and cooperation on this very important subject should also be established.

PUBLIC DEFENDER

Staff of the Urban Coalition has met several times with the Public Defender and various members of his staff. On these occasions, we have expressed a variety of concerns related to the study done by Professor Grams, which data is discussed below. We have also articulated the concerns expressed by some members of the Task Force about the number of cases that are taken to trial by the Public Defender's Office (data which the staff has collected in this regard is below). Some members of the Task Force suggest a connection between the low percentage of cases taken to trial and the Grams' data on racial disparities in sentencing. We have discovered no evidence -- repeat, no evidence -- linking these two serious issues.

In the study done by Professor Robert Grams on sentencing disparity in Hennepin County, it was discovered that American Indian and Black defendants represented by Hennepin County Public Defenders were receiving straight jail sentences three times more often than were whites represented by the same Public Defenders. Other data in the Grams' study indicated that minority defendants represented by private attorneys have about the same likelihood of receiving jail sentences as white defendants represented by private attorneys, and as white defendants represented by the Public Defender.

The Hennepin County Public Defender conducted a study of its own records, to a) test the validity of the data in Professor Grams' study, and b) to find the cause of the disparities. The results of their study did not invalidate the conclusions in the Grams' study and also did not find reasons for the disparities. In a further effort to find reasons for the racial disparity shown by the Grams' study, the Hennepin County Public Defender's Office will conduct a thorough re-study and analysis of the raw data used by Professor Grams.

In 1976, according to a Public Defender statistical study put together for the Urban Coalition by that office, the Hennepin County Public Defender's Office handled 8,016 cases, both felony and misdemeanor. Out of the 8,016 cases handled, only 1.573 percent were taken to trial (1.96% felony, 1.47% misdemeanor). The most recent national study done on Public Defenders was done in 1973 by the National Legal Aid and Defender Association (NLADA). In that 1973 study entitled "The Other Face of Justice," 71,205 Public Defender cases were analyzed (a combination of felony and misdemeanor cases). Out of those 71,205 cases, 26.9 percent were taken to a bench trial, while 3.0 percent were taken to a jury trial. The total percentage of cases taken to trial was 29.9%.[2] It must be pointed out again that these are from a study done three years before the data from the Public Defender's Office; and we agree with the Public Defender's Office that there are some problems with that study, but we strongly believe the contrast is highly suggestive. (On the question of the low number of trials, the Public Defender's staff point to the pressures within the whole system for taking fewer and fewer cases to trial, and argues that it is just as likely that minority clients are benefiting more by the plea bargaining process -- as opposed to trial -- as it is that they are suffering).

The Hennepin County Public Defender's Office has taken some steps to deal with these problems. It has instituted the Dispositional Adviser Program, a program designed to assist Public Defenders in making alternative disposition or sentencing recommendations for its clients. The results of this program, at this point, demonstrate that the program should be continued and indeed expanded.

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[2]The Other Face of Justice, conducted by the National Legal Aid and Defender Association. A Report of the National Defendery Survey, funded by the Law Enforcement Assistance Administration of the U. S. Department of Justice, 1973, p. 30.

In addition, Urban Coalition staff has been informed that there are possible options being considered by the Public Defender's Office in relation to training. A program to train new public defenders in effective plea negotiation, training in plea negotiation might help the inexperienced public defender represent his client better. Second, a program to train public defenders in how to defend a minority defendant before a white jury, is being developed. The Urban Coalition supports these kinds of training efforts and encourages the Hennepin County Public Defender's Office to implement them.

In the course of our conversations with the Chief Public Defender, we expressed our desire that clients be given a choice in picking the public defender they want to defend them. The Chief Public Defender, explained that administrative scheduling difficulties would not allow for this type of system to exist. However, we feel that there should be some degree of flexibility that would allow for clients to make certain decisions related to which public defender will defend them. It is our contention that the Public Defender ought to come up with a plan to provide options for their clients.

Lastly, we agree with Bill Kennedy and his staff that none of the issues can be <u>effectively</u> studied or remedied by looking solely at the Public Defender's Office. The whole system should be studied. Further, it is the belief of the staff of the Urban Coalition that this is a public responsibility, whether with LEAA funds or Hennepin County funds, but it should be done. Having said this, however, we do not mean to suggest that the Public Defender's Office should wait until this overall study takes place.

RECOMMENDATIONS

We recommend that the Hennepin County Public Defender's Office make a strong effort to re-study the data used in the Grams' study, along with any additional data they feel would be useful to gather and analyze, in order to pin-point the reasons for the racial disparity shown by the study in the way the Public Defenders handle their cases.

We recommend that the Hennepin County Public Defender's Office conduct a study of its office in an effort to identify the reasons for the low number of cases taken to trial, and to determine whether a link exists between that factor and the racial disparity in the way it defends its clients.

We recommend that the Public Defender's Office intensify its training of new (and, for that matter, more experienced) public defenders in plea bargaining and representing minority clients.

We recommend that the Hennepin County Public Defender's Office allow its clients to request specific individual public defenders. If the designated public defender is unable to defend the client for any reason, the name of the defender and reasons why he is unable to defend the client should be recorded. The defendant will then be assigned another defender.

We recommend that the Public Defender's Dispositional Advisor Program be continued and indeed expanded.

COURT SERVICES

In his study of the racial disparity in sentencing in Hennepin County, Dr. Robert Grams stated in his conclusions that "The unintentional racial biases of people involved in the decision-making process are operative or reinforced in those cases where the offender does not hire a private attorney. The combination of the offender's racial status (which often includes cultural and behavorial traits), his illegal behavior and his inability or unwillingness to obtain private counsel, encourages decision-makers to see a rehabilitation program involving probation, residential care of a modified jail sentence as inappropriate."[3]

In the meetings of our sentencing task force, community members reported that minority communities believe that bias among probation officers contributes to the sentencing disparity. There has been a concern that in the investigation and development of the Presentence Investigation Report, certain biased attitudes of the probation officer writing the report may influence the content and recommendations in the report.

A great percentage of the sentence recommendations made by the probation department are followed by the judges. If there are any biases in the Presentence Investigation Report, judicial sentencing will inevitably manifest many of these biases.

Court Services has begun to move in this area. The department has identified certain criteria that have a direct influence on probation officer's recommendations for disposition. The department will be monitoring recommendations for

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[3]Grams, Robert W., Race and the Sentencing of Felons in Hennepin County, Part II, November, 1976, page 20.

incarceration using these criteria to determine whether any inconsistancies or bias are present on the part of the probation officer staff.

Court Services has also begun to act in the area of hiring more minority probation officers. If budgetary restrictions are going to limit the number of minority clients that can be hired by the department, we would hope that presently employed minority probation officers could be utilized in educating other probation officers so that they become sensitive to the cultural, social and economic reality of minority clients.

RECOMMENDATIONS

We recommend that Hennepin County Services conduct a study of its records to try and identify if any racially biased attitudes are present in the Presentence Investigation Reports. The study is presently being conducted and in coordination with an outside consultant.

We recommend that Hennepin County Court Services publically announce the standardized guidelines its probation officers employ in the preparation of Presentence Investigation Reports.

We recommend that Hennepin County Court Services continue, and step up its efforts to hire more minority probation officers.

APPENDIX

"In 1962, the year in which the panel procedure was adopted, 31.1 percent of all criminal defendants sentenced were released on probation, compared to a National average of 42.2 percent; in 1970, the figures were 59.1 percent in New York and 49.1 percent nationally, an increase of 28.0 percent and 6.9 percent respectively."

The American Criminal Law Review. "The Collective Sentencing Decision in Judicial and Administrative Contexts: A Comparative Analysis of Two Approaches to Correctional Disparity." 1973, Vol. II, p. 695-700.

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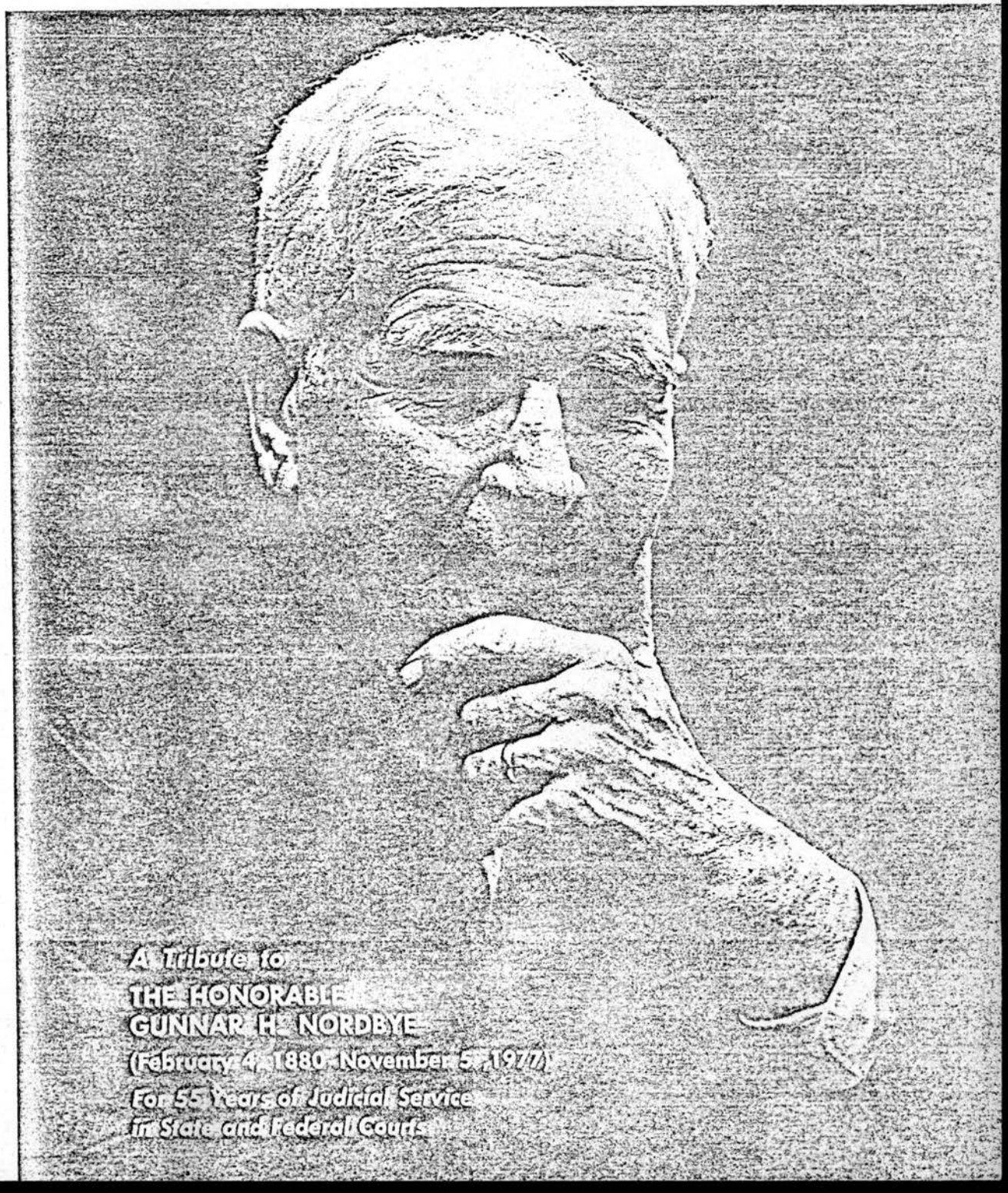

A Tribute to
THE HONORABLE
GUNNAR H. NORDBYE
(February 4, 1880 - November 5, 1977)
For 55 Years of Judicial Service
in State and Federal Courts

Plea Bargaining In Hennepin County

Present Practice and a Proposal for Change

By William J. Keppel

Guilty pleas and the related practice of plea bargaining constitute as much as ninety-five percent of all convictions in many jurisdictions,[1] including Hennepin County. Plea bargaining invariably consists of informal, off-the-record negotiations between prosecutor and defense counsel. Thus, they tend to be inaccessible to public scrutiny and difficult to control. A wide range of promises are made by prosecutors in exchange for pleas of guilty; included are promises to reduce charges, to dismiss charges, not to charge other offenses, or to seek or obtain a certain sentence.[2]

Last spring an extensive study of plea bargaining in Hennepin County was conducted by James P. Cleary and Donovan W. Frank, two of my former research assistants. The first part of the study consisted of inspection and analysis of 511 randomly selected felony cases as reflected in the records of the Hennepin County Clerk of Court.

The second phase included interviews with experienced representatives of the Hennepin County District Court Bench, County Attorney's Office, Public Defender's Office, the Minneapolis Police Department and private defense counsel.[3]

A. BACKGROUND TO THE CONTROVERSY

Plea bargaining is not a new phenomenon. It originated in seventeenth century England as a means of mitigating unduly harsh punishment.[4] Though plea bargaining was practiced from the beginning of the Republic, studies did not confirm its pervasiveness until the 1920's. Few early courts discussed the practice, and those which did, condemned it.[5]

Recently, however, plea bargaining has been formally sanctioned by the U. S. Supreme Court, the ABA and the American Law Institute.[6] Thus, in *Santobello v. New York*,[7] Chief Justice Burger recognized:

> Disposition of charges after plea bargaining is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases; it avoids much of the corrosive impact of enforced idleness during pre-trial confinement of those who are denied release pending trial; it protects the public from those accused persons who are prone to continue criminal conduct even while on pretrial release; and, by shortening the time between charge and disposition, it enhances whatever may be the rehabilitative prospects of the guilty when they are ultimately imprisoned.

Proponents also maintain that the practice allows for the flexibility necessary for the individualization of justice, that rehabilitative goals are furthered by the defendant's acknowledgement of guilt, and that deference and respect for the system are enhanced by the certainty and promptness of punishing associated with plea bargaining.

On the other hand, Irving R. Kaufman, Chief Judge of the U. S. Court of Appeals for the Second Circuit, strongly criticizes the plea bargaining system:

> A criminal trial is a rarity. With very few exceptions, virtually all criminal convictions are entered by a guilty plea. No criminal defendant or prosecutor should, in a properly functioning judicial system, be bludgeoned by cost or delay into bargaining for a plea. To the degree that a judicial system falls short of this ideal, it will certainly breed cynicism and distrust . . .
>
> We cannot ignore the perversions of justice that may be engendered by bargained pleas. There are lawyers who never try a case. Their fees are based on the assumption that the client will plead guilty, and they are conscious of the financial imperative of inducing the client to do so. The defense attorney often paints the possibility of a favorable outcome at trial in the darkest hues . . .
>
> The pressure to induce a guilty plea undermines respect for the law in a more direct way. A criminal defendant begins with a corrupt view of the world. The secrecy of plea bargaining is always tempted to permit the impression that the bargain was won through favoritism and personalities. A process that ought to be a lesson in honesty and fair play merely confirms the cynicism of those subject to it.

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1. *An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 Am. Crim. L. Rev. 435 (1976).
2. *American Bar Association Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty* at 61 (1968).
3. James P. Cleary and Donovan W. Frank, *Plea Bargaining in Theory and Practice: A Study of Hennepin County*. The authors are recent graduates of Hamline University School of Law and were admitted to practice in Minnesota in October 1977.
4. *Plea Bargaining—Justice Off the Record*, 9 Washburn L. J. 430, 432 (1970) and Stephen, *Criminal Procedure from the Thirteenth to the Eighteenth Century, 2 Select Essays in Anglo-American Legal History* 485 (1908).
5. Bond, *Plea Bargaining and Guilty Pleas* at 12 (1975).
6. *American Bar Association Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty* (1968) and *American Law Institute, Model Code of Pre-Arraignment Procedure* #350 (1972).
7. 404 U.S. 257, 261 (1972); *See also, Brady v. United States*, 397 U.S. 742 (1970).

To those who argue the elimination or reduction of plea bargaining will bring even more delay to an overcrowded court docket, Judge Kaufman states that justice is a "moral imperative" that cannot be sacrificed to expedience "without undermining society's very foundations".[8]

It has also been argued that offering leniency for guilty pleas may induce an innocent person to plead guilty,[9] that plea bargaining encourages the unequal exercise of prosecutorial discretion, and that it is unconstitutional.[10]

The ABA Standards and Present Practices

Sections 3.1 through 3.4 of the ABA Standards Relating to Pleas of Guilty, which are embodied in Minnesota Rule of Criminal Procedure 15.04, state minimums applicable to plea bargaining and agreements.

Section 3.1 states that plea bargaining shall occur only in "cases in which it appears that the interest of the public in the effective administration of criminal justice would be served". It also requires that similarly situated defendants "be afforded equal plea agreement opportunities". However, because sentence concessions generally must be sought by the defendant, a naive or uninformed defendant will sometimes plead guilty to a charge and receive a sentence grossly inconsistent with the customary practice as to a case of that kind. This poses a dilemma for correctional authorities since frequently a defendant will reach prison and discover that his sentence is much longer than those of his counterparts who engaged in successful plea bargaining.

Section 3.2 of the ABA Standards emphasizes that no plea bargain should be concluded except with the consent of the defendant after defense counsel has advised him of available alternatives. It also requires that the decision to plead guilty be made by the defendant. However, all too frequently defense counsel engages in plea negotiations with the prosecution reaching a "tentative" agreement without first consulting the client as to whether the client would be amenable to reaching a plea agreement.[11]

Although the court usually inquires into defendant's understanding of the possible consequences at the time the plea is received, this is not intended to be a substitute for advice by counsel. The court's admonition, coming as it does just before the plea is taken, may not afford time for meaningful reflection. Thus, the defendant should be fully informed by counsel as to the charge or sentence concessions tendered by the prosecution. A realistic appraisal of the value of the concessions offered by the prosecution requires that they be juxtaposed not only with the maximum possible punishment but also with the probable sentence the judge would impose in the absence of a plea of guilty. In other words, defense counsel should make an informed prediction as to the likelihood of the judge acting upon the prosecutor's recommendations so that the defendant's decision to accept the agreement is knowledgeable and voluntary.[12]

WILLIAM J. KEPPEL graduated from the University of Wisconsin Law School in 1970 and is an Associate Professor of Law at Hamline University School of Law. He was formerly a partner in the firm of Dorsey, Windhorst, Hannaford, Whitney & Halladay. During 1972, he took a leave of absence from the firm to head the Hennepin County Public Defender's Office for Misdemeanors. He has also been Chairman of the Board of Legal Advice Clinics, a member of the Boards of Legal Assistance of Minnesota and H.I.R.E.D., and a member of the Governing Council of the Hennepin County Bar Association.

Section 3.3 of the Standards state that the "trial judge should not participate in plea discussions" though the judge may indicate concurrence in the tentative agreement in advance of formal tender of the plea and subject to a consistent presentence report. However, while it may not be common practice, some judges do participate in plea negotiations and promise or predict certain concessions in the event the defendant pleads guilty. Furthermore, this standard does not compel the trial judge to receive advance notice of the plea agreement and the reasons therefor or to make any advance indication of the probable disposition.[13] Finally, the ultimate decision by the judge as to whether to grant concessions reflected in the plea agreement must be "independent"; in other words, it cannot be a "rubber stamp." However, in practice the judge's decision is often automatic and without an independent judgment as to whether the public interest in the effective administration of criminal justice would be served by granting the concessions.

B. HENNEPIN COUNTY STATISTICAL SURVEY

Dispositions of 511 felony cases over a randomly-selected three-month period are noted in Figure A. Perhaps the most surprising finding of the survey was the number of cases that actually proceeded to trial. A total of only 21 felony cases, or four percent of the total, were ultimately tried.

Another finding was that 80.8 percent of all felony cases in the sample resulted in dismissals or probation sentences. In other words, less than twenty percent of convicted felons were sentenced to prison. Of these, American Indians and Blacks received prison sentences almost twice as frequently as Whites.[14]

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8. Kaufman, *Plea Bargaining and Justice,* TRIAL (magazine) 8 (Mar. 1977).
9. *American Bar Association Project, supra* at 62.
10. Note, *The Unconstitutionality of Plea Bargaining,* 83 Harv. L. REV. 1387 (1970).
11. *American Bar Association Project* at 70.
12. *Id.* at 71.
13. *Id.* at 75.
14. This finding is consistent with those of Dr. Robert Grams, an Augsburg College Sociologist, and a recent study by the Minneapolis League of Women Voters. See, Grams and Rohde, *Racial Status and the Likelihood of Serving a Jail Sentence,* (Jan. 1976); Grams and Rhode, *Race and the Sentencing of Felons in Hennepin County* (Nov. 1976); and *League of Women Voters' Court Observer's Project, Hennepin County Municipal Court* (Sept. 1976.)

The Court ledgers indicate by a rubber-stamped notation that in 48.4 percent of cases, a plea bargain was formally filed. However, this does not accurately reflect the actual number of pleas negotiated, since in a number of additional cases where there was a guilty plea, it was evident by the lenient sentence given or the reduction in the charge that some sort of plea negotiation had transpired; yet it was not noted in the ledger. Adding these cases, approximately 75 percent of all cases appear to be disposed of by a plea bargain, which statistics are more consistent with national averages. It should be noted that Public Defender and County Attorney statistics show that about 60 percent of their cases are negotiated.

Comments of Participants

As noted above, this study also included interviews with experienced and representative members of the Hennepin County District Court, private and public defense attorneys, the County Attorney's Office and the police. The only consistent comment from each was their dislike of the plea bargaining system. Most also expressed dismay at the frequency and extent of the process. Finally, most admitted that the process degrades the criminal justice system and breeds cynicism and disrespect for the law. Why then does plea bargaining exist?

1. Efficiency

The most frequently stated reason was efficiency — in other words, avoiding the necessity of a costly and time-consuming trial. Thus it is argued that prohibiting plea bargaining will backlog the courts and require more judges, prosecutors and defenders. One member of the Bench noted that Hennepin County already handles 40 percent of all criminal litigation in Minnesota and additional judges and facilities are presently needed.

This basic justification for plea bargaining, however, is predicated on assumption without empirical proof. In fact, the evidence is to the contrary. The National Advisory Commission on Criminal Justice Standards and Goals in its *Report on Courts* strongly condemned plea bargaining as an institution and recognized that elimination of plea bargaining will not substantially increase the number of trials.[15]

In addition, in both Multnomah County, Oregon (Portland and environs) and Maricopa County, Arizona (Phoenix and environs), programs were instituted to eliminate plea bargaining. Contrary to the time-honored assumption, trials were not substantially increased when the prosecution refused to bargain. Instead, the defendant usually pleaded guilty to the charges, and a trial was not necessary. Even when a defendant was facing numerous charges, the majority still pleaded guilty to all charges.[16]

In Multnomah County the county attorney set up a special unit of six assistant county attorneys to prosecute burglary, aggravated robbery and fencing, as well as felony murders that occurred in the commission of those crimes. The rule followed was no plea bargaining unless a case deteriorated or unless a burglar was willing to testify against his fence. However, if more than one charge of the same sort was pending against a defendant, the county attorney may accept a guilty plea to one charge and not press others since courts are likely to give concurrent rather than consecutive sentences. The results have been impressive. In the first six months of the program, the plea bargaining rate was a mere 2.7 percent, the conviction rate ninety percent, and trials increased only three percent.

In jurisdictions which are prohibiting or limiting the practice of plea bargaining, prosecutors still recognize exceptional cases when plea bargaining is necessary. For example, a case may be so weak that a plea to some other charge may be preferable to going to trial and losing the entire

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15. *Report on Courts* (January 23, 1973).
16. Berger, *The Case Against Plea Bargaining*, 62 A.B.A.J. 621, 624 (1976).

FIG. A — SUMMARY OF 511 FELONY CASES IN HENNEPIN COUNTY (by race)

RACE	NO. OF CASES	GUILTY PLEAS AND PLEA BARGAINS		TRIALS		FINAL DISPOSITIONS			
		No of Pleas/ Bargains	Bargained Filed**	No.	Conviction Rate	Charge(s) Dismissed	Probation	Incarceration	Other Non-Incarceration
White	363 (71.0%)	350 (96.4%)	169 (46.6%)	13 (3.6%)	46.1%	27.0%	49.0%	16.7%	7.3%
Black	103 (20.2%)	97 (94.2%)	48 (49.5%)	6 (5.8%)	66.7%	27.5%	32.3%	27.5%	12.7%
American Indian	25 (4.9%)	24 (96.0%)	16 (66.7%)	1 (4.0%)	100.0%	20.0%	52.0%	28.0%	0.0%
Other*	20 (3.9%)	19 (19.0%)	4 (21.1%)	1 (5.0%)	100.0%	60.0%	10.0%	20.0%	10.0%
TOTAL	511 (100.0%)	490 (95.9%)	237 (48.4%)	21 (4.1%)	57.1%	28.1%	44.8%	19.2%	7.9%

* Also includes cases with no racial designation

** Existence of plea agreement is reflected in records of Clerk of District Court

case. This could happen when, for example, a critical witness has died or is unavailable. Another situation often justifying a plea bargain is a first-time offender whose case may require special treatment. However, a bargain is clearly the rare exception.

It should be noted that a representative of the Hennepin County Attorney's Office noted that if plea bargaining were abolished, there would be an increase in some trials, but there would also be an increase in guilty pleas. Eventually, after an initial backup on the court calendar, he predicted that the process would probably be in the same position as it is now with plea bargaining.

2. A Break for the Guilty

A second reason for plea bargaining, at least for defendants, is that a bargain is invariably a break for the guilty. This was recognized in interviews with private defense counsel and the Public Defender's Office. However, it was also strongly criticized by the police and some members of the Bench. It is certainly not a legitimate reason to continue the practice.

3. Incompetent Prosecutors and Defense Counsel

Public and private defense counsel, while stating that they would not negotiate a plea when a client affirms his innocence, also state that the high percentage of plea agreements result from the prosecutors offering deals that even an insistent defendant could not turn down, hinting at incompetence in the ranks of the County Attorney's Office. The police were also critical of the prosecutors' propensity to "wheel and deal," viewing some as poor trial attorneys and sometimes over-awed by defense counsel. However, the Office considers itself "second to none" in the country.

Some defense counsel were also singled out for criticism. Judges agreed that private defense counsel were usually more tenacious than public defenders, but the Public Defender's Office is generally held in high esteem by the District Bench. The strongest criticism of defense counsel came from private counsel about their colleagues who are accused of using plea bargaining as an expeditious way to lighten their load and make easy money. They noted that some were charging a higher fee for a negotiation than would be charged for a full-scale trial.

One experienced defense lawyer stated that a beneficial effect of abolishing plea bargaining would be to "rid the criminal justice system of incompetent attorneys who have no expertise and no belief in criminal trial practice" and who earn a good livelihood negotiating cases "at the expense of their clients' constitutional rights" and without any intention of ever trying a criminal case. Indeed, a prominent private defense lawyer stated that the pressuring by some defense counsel of clients to accept a "deal" and to plead guilty was the thing that bothered him most about the plea bargaining process.

4. Overcharging of Offenses

Public and private defense counsel and members of the Bench note that unwarranted overcharging (presenting "unrealistic charges" in light of the actual offense) by the County Attorney's Office results in a necessity to negotiate to bring the final plea within reasonable limits, thus institutionalizing plea bargaining. The fact that well over half of all cases are negotiated strongly suggests either overcharging or improper reductions of legitimate charges. This, of course, could be remedied by the County Attorney's Office.

5. Shorter Sentences

The Public Defender's Office suggested that plea bargains may result in shorter sentences than would be awarded upon a verdict of guilty after trial. However, this claim was denied by the Bench. Indeed, they noted, sentences sometimes are more favorable to an accused at the end of a trial since a judge is able to learn more about a defendant at trial and the circumstances of a crime during the trial than in the process of plea bargaining.

6. Weak Cases and Lack of Cooperation

A member of the County Attorney's Office stated that one reason for plea bargaining is the lack of cooperation the office sometimes receives from the public and potential witnesses for the prosecution. As noted above, the collapse of a case because of unavailable critical witnesses or failure of other material proof has generally been a recognized reason for bargaining. However, the "collapse" should be material, genuine and unanticipated (should arise after issuance of the complaint or return of the indictment) to justify a negotiation.

7. First Offenders

One experienced police officer noted that plea bargaining previously had been confined to defendants who were first offenders. As indicated above, first offenders, especially those in need of special treatment, are recognized as subjects for negotiated pleas even where severe restrictions on the process have been imposed. However, Minnesota Statute §609.135 permits discharge of first-offending defendants after a designated period of time if the defendant commits no new offenses, somewhat eroding this justification for plea bargaining.

Other Criticisms of the Process

The interviews uncovered additional criticisms of the plea bargaining process which include the following:

(Continued on page 28)

PLEA BARGAINING (Continued)

1. Broad and generally unsupervised discretion in the hands of prosecutors may result in unequal and inconsistent agreements amongst similarly situated defendants,[17] thus having a negative effect on rehabilitation;
2. Negotiations and agreements erode Constitutional rights of defendants, including the right to trial by jury and the presumption of innocence;
3. Negotiating sentences invades the province of the court;
4. Noninvolvement of victims of crime in the negotation process results in their, and thus society's, interests in justice and fair play being ignored;
5. Involvement of police officers in negotiation decisions would help protect the community interest (though this suggestion was roundly criticized by defense counsel);
6. Too much of the process is secret and off-the-record, thus making supervision and control difficult;
7. Pleas are formally approved in a sham proceeding in which the defendant must state no promises were tendered (when, in fact, he would not plead without such promises) and, all too often, without full knowledge of alternatives and under pressure by his attorney; and
8. Favorable plea agreements depend on who is doing the negotiating (in other words, the personalities of particular prosecutors and defense counsel) which may result in a "cozy" arrangement of supposed adversaries, or, as one judge labeled it, "the unholy alliance."

C. RECOMMENDATIONS FOR REFORM

The above discussion has revealed two "legitimate" reasons for plea bargaining (weak cases and first offenders), one suspect reason (efficiency) and a host of "illegitimate" reasons and hostile criticisms. The vague ABA Standards have failed to ameliorate the continued proliferation of "bad" bargains, at least from the perspective of the victims and the public. Thus, any fair analysis of the process compels the conclusion that it should be altered and reformed.

Control over the plea bargaining process, and thus the focus of reform, is in the County Attorney's Office and the Bench. No plea agreements will occur unless (a) the prosecutors negotiate and agree or (b) the judges accept and approve the agreements. However, the primary control must be in the County Attorney's Office which should direct the following:

1. Stop as far as possible the practice of overcharging; and
2. Prohibit plea bargaining except where (a) the case has genuinely collapsed, (b) one co-defendant is willing to testify against a more significant defendant, (c) the defendant is a first offender who is charged with a non-violent offense of a less serious nature, or (d) the defendant pleads guilty to the most serious of multiple charges arising out of the same course of conduct.

To ensure consistency, and thus equality of treatment and predictability, these exceptions should be strictly applied and no others should be recognized.

The County Attorney should also consider consulting the victim and/or arresting officer, where applicable, prior to a plea agreement, explaining its terms and the reasons therefor and obtaining their reactions to the proposed agreement.[18] However, their approval would not be required.

To open up the process to public scrutiny and to provide an intra-office check which should provide uniformity and consistency, when a plea agreement is reached, it must be reflected in a detailed narrative record available to the public.[19] This written agreement, which would be prepared by the negotiating Assistant County Attorney and approved by the County Attorney or the head of the Criminal Division, would be the primary justification for the agreement to the Court.

Thus, it must clearly and completely detail the reasons why the circumstances of the case fall within one of the above four exceptions and that it therefore is in the public interest to conclude the plea agreement. In addition, it should reflect the comments of the victim and/or arresting officer, where applicable. Only a detailed narrative, as opposed to some kind of checkoff of reasons system, would serve this purpose.

Furthermore, requiring the negotiating county attorney to prepare a written narrative will ensure careful analysis and deliberation of the circumstances of the particular case and defendant. Finally, it will provide a clear and useful record for the Court to use in evaluating the agreement for possible approval.

The County Attorney s Office does presently utilize a plea negotiation form which purports to reflect ABA Standards by requiring a checkoff of applicable reasons for the negotiation from a list of some twelve. It also provides a place for approval of the negotation by the County Attorney or one of three top assistants.

However, some of the so-called "reasons" are vague (*e.g.*, "The defendant has made trial unnecessary and there are good reasons for not having a trial" or "The defendant by his plea has aided in ensuring the prompt and certain application of correctional measures to him"). Most of the other "reasons" are not sufficiently detailed or certain so as to provide either a meaningful exposition of the justification for the agreement or a meaningful tool for the court to evaluate it (*e.g.*, "There is a possible deficiency in the proof requisite to convict" or "There is a conceivable issue as to the admissibility of the State's evidence").

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17. *An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiations*, 13 AM. CRIM. L. REV. 435, 462 (1976).
18. *Report Says: End Secrecy in Plea Bargaining*, 6 LEAA Newsletter 12 (Aug. 1977) states that the "victim has a right to be heard and that information which only the victim may be able to supply can be of value to the prosecutor in assessing the nature of the case."
19. See *Id.* at 1, 12. The federally-funded study discussed therein calls for removing plea bargaining "from behind closed doors and a record kept of all discussions." *See also, Plea Bargaining in the United States (Phase I Report)* 38-39 (Sept. 1977) prepared under grant from the National Institute of Law Enforcement and Criminal Justice, U.S. Dept. of Justice (". . . the application of sunshine to the process is a necessary first step in restoring the proper balance between the adversary system and plea negotiations. The American Bar Association is now reviewing its *Pleas of Guilty* standards and is considering approaches which would bring more of the process into the open.")

Consequently, it is not surprising that the private defense attorneys interviewed in this study stated that ABA Standards and the stated considerations are not followed with any diligence. Moreover, one stated that the County Attorney's check-list and formalized procedures are nothing more than a "public relations gimmick" for the purpose of legitimizing their actions.

Finally, the Court, prior to accepting a negotiated plea, should make the required independent judgment that the plea is in the public interest and should ensure, by careful examination of the County Attorney's written narrative justification and by probing questions on the record, that the conditions permitting a plea agreement do, in fact, exist.

Not only will such a judgment result in an agreement which is in the public interest, however. It will also guarantee uniformity and equality of treatment of similarly situated defendants by the County Attorney's Office, and thus by the criminal justice system so far as this goal is achievable.

Conclusion

Some will no doubt claim that the recommended system is "naive"; others may wish to rebut some of the particular criticisms reflected herein. There may also be attempts to place the "blame" on some other group or persons (as was certainly the case during the interviews with participants in the plea bargaining process). However, the purpose of this article is not to determine culpability. Its purpose is simply to analyze present practices, to consider available alternatives and to recommend a workable solution.

I am convinced that the plea negotiation system recommended herein is workable. I am also convinced that it could be implemented forthwith without significantly burdening the criminal justice system. In addition, most, if not all, of the strong criticisms of the present system would be eliminated. If the Phoenix and Portland experiences are indicators, most of the guilty would plead guilty. Similarly situated defendants would be treated uniformly. The criminal defense bar would be made up of lawyers who would be prepared to go to trial. Rehabilitation would be aided. The criminal justice system would gain much-needed respect.

Hennepin County Bar Association Bar Memorial Ceremony

WEDNESDAY, FEBRUARY 15

By J. KENNETH DEWERFF, *Chairman, Bar Memorial Committee*

The Annual Hennepin County Bar Association Bar Memorial Ceremony memorializing members who have passed away during the past year will be held at 9:00 a.m. on Wednesday, February 15, 1978, at the Minneapolis City Council Chambers, OLD COURTHOUSE. *Chief Judge Eugene Minenko will preside over the full court, composed of the Hennepin County District Municipal and Probate Court Judges.*

Special music will be rendered by Burt Hanson, vocal soloist, accompanied by harpist Don Anderson.

Fellow attorney Clyde Anderson will deliver the main address. Coffee will be served at the conclusion of the ceremony. Invitations are being sent to members of the families of those being memorialized. All Hennepin County lawyers and friends are urged to attend.

The Hennepin County Bar Association Bar Memorial Committee, as a result of a request by a number of sources, requests members of the Bar Association to immediately notify Nancy Klossner, Executive Assistant of the Hennepin County Bar Association, of the passing of any member; and to furnish her with a complete, but concise, biographical resume of the departed member. This will be used to inform all the news media so that the passing of a member, and his professional record, will not go unnoticed by the general public.

The cooperation of all members of the Bar Association in this regard will be appreciated.