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Negotiation, Ratification, and Rescission of the Guilty Plea Agreement: A Contractual Analysis and Typology

David A. Jones*

I. INTRODUCTION

The law of contracts has developed over the centuries as a living testament to the fact that on frequent occasions human beings are liars. In social relations, in business transactions, and even in the administration of criminal justice, promises are made and promises are broken. Remedies for broken promises vary throughout our body of laws. The divorce laws of most states countenance broken promises in social relations without much regard for resulting injury to the family unit. Since passage of the Statute of Frauds in 1677, relief is more likely to be granted against the person whose falsehood has been memorialized in writing than against another whose untruthfulness has been verbal. This dichotomy was perpetuated in America's Uniform Commercial Code. A conflicting array of laws dealing with dishonesty confronted the Supreme Court of the United States when it decided Santobello v. New York a case which considered whether a guilty plea agreement negotiated between defendant and prosecutor may achieve juristic effect.

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1. This is evidenced by the fact that “no fault” divorces have become the rule rather than the exception in most states; a child is rarely heard and even more rarely represented by a lawyer during his parents divorce and custody proceedings; and in property settlements child “support” payments are limited as a rule to just that—payment for necessaries only. Nor does the child fare better in “community” property jurisdictions, since apparently the child is not recognized as being a member of the marital community.

2. 29 Car. 2, c.3 (1677).

3. See U.C.C. § 2-201 providing that a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. See also exceptions under §§ 2-201, 2-206, and 8-318 of the Code; and Note, The Doctrine of Part Performance Under UCC Sections 2-201 and 8-319, 9 B.C. IND. & COM. L. Rev. 355 (1968). See also Note, The Doctrine of Equitable Estoppel and the Statute of Frauds, 66 Mich. L. Rev. 170 (1967).

Writing the opinion of the Court in Santobello, Chief Justice Burger noted in dictum: "The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice."\(^5\) Indeed, during most of this century, criminal charges filed against most defendants in nearly every state and federal judicial unit have been disposed of without trial as part of a "gentlemen's agreement"\(^6\) to which defendants have appeared to consent.\(^9\) Most commonly, when a defendant pleads guilty to one

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5. *Id.* at 261.

6. Most charges filed against most defendants are disposed of by means of the guilty plea. See *The Plea Bargain in Historical Perspective*, 23 *Buff. L. Rev.* 499, 512-24 (1974). A study of 28 reporting states and the District of Columbia for the year 1937 revealed that in 11 of these jurisdictions convictions were obtained without trial in 90% or more of the cases; that in 25 of these jurisdictions convictions were obtained without trial in 80% or more of the cases; and that in only 4 jurisdictions (Indiana, Michigan, Pennsylvania and Utah) were convictions obtained by means of trial in more than 20% of the criminal cases reaching disposition. See *Jones, Crime Without Punishment* 70 (table 5-1) (1979) citing U.S. Bureau of the Census, *Jud. Crim. Stats.*., 1937, 9-64 (table 2 for each State) (1939). A similar pattern remained true for these and other states during the mid-1970's. Of 21 states and the District of Columbia for which comparable data was available, convictions were obtained without trial in 90% or more of the cases processed in 8 jurisdictions; convictions were obtained without trial in 80% or more of the cases processed in 17 jurisdictions; and in only 5 jurisdictions (Delaware, Kansas, Louisiana, Pennsylvania and Wyoming) were convictions obtained by means of trial in more than 20% of the criminal cases reaching disposition. See *Jones, Crime Without Punishment* 44 (table 4-1) (1979) citing selected annual reports from various state courts.

7. Most charges filed against most defendants in the United States District Courts have reached disposition by means of the guilty plea continuously since 1918. During the years between 1908 and 1975 (excluding particularly several years during World War II for which comparable data is unavailable), convictions were obtained without trial in federal courts in 80% or more of all cases during 21 years (including all years between 1945 and 1960). See *Jones, Crime Without Punishment* 74 (table 5-4) (1979) citing various reports from the United States Government.

8. Most guilty pleas are the products of bargaining between prosecutors and defense counsel. When asked what percentage of guilty pleas are bargained, 42.6% of public defenders in 43 states said that more than half were. See *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 *U. Pa. L. Rev.* 865, 902 (1964). Other studies have estimated that between 75%-99% of all guilty pleas are bargained. See, e.g., *The Role of Plea Negotiation in Modern Criminal Law*, 46 *Chi-Kent L. Rev.* 116 (1969), *Newman, Conviction: The Determination of Guilt or Innocence Without Trial* (1966); *Profile of a Guilty Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas*, 17 *Wayne L. Rev.* 1195, 1196 (1971).

9. Consent by defendants to guilty pleas appears, primarily, to be predicated upon their desire to speed-up the judicial process and to avoid trial as well as to obtain charge and/or sentence concessions as consideration for waiving the right to trial. See, e.g., Shelton v. United States, 242 F.2d 101, 115 (6th Cir. 1957) (dissenting opinion of Tuttle, J.); Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509 (1972); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 *U. Pa. L. Rev.* 439, 443 (1971). "Whether the
or two criminal charges, all or most other charges pending against
him at the same time are dismissed.\textsuperscript{10}

The \textit{Santobello} decision settled the issue of whether a guilty plea
agreement negotiated between a defendant and a prosecutor may
achieve juristic effect. In holding that the prosecutor has a legal
obligation to fulfill any promise on which the defendant has relied
to his detriment by pleading guilty, the Supreme Court may have
applied the doctrine of promissory estoppel to guilty plea agree-
ments predicated upon negotiated conditions.\textsuperscript{11} Since the Supreme
Court reasoned that a material breach of the conditions underlying
a negotiated guilty plea entitles the defendant to have either spe-
cific performance or rescission,\textsuperscript{12} the Court seems to view negotiated
guilty plea agreements as more than simple bargains—they become
formal contracts.

Five years have elapsed since the \textit{Santobello} decision was an-
nounced. Subsequent court decisions\textsuperscript{13} have been reached in light of
\textit{Santobello}, and legislatures in some states have demonstrated an
expanded concern for the need both to formalize and to standardize
the process of negotiation leading to the tender of guilty pleas by
defendant surrenders his right to a trial because of a bargain with court or prosecutor, or
exercise his right at the cost of a stiffer sentence, a price has been put on the right.” Scott v.


11. 404 U.S. at 262.

12. The majority of the Court remanded the case to the state trial court and left to the
discretion of the trial judge the choice between granting specific performance on the plea
(entitling the defendant only to be resentenced before a different judge) and rescission
(entitling the defendant to an opportunity to withdraw his guilty plea). Defendant sought the
second alternative as relief. \textit{Id.} at 263. In a concurring opinion, Justice Douglas urged that a
state court “ought to accord a defendant’s preference considerable, if not controlling, weight.”
\textit{Id.} at 267. In an opinion dissenting as to the relief only, Marshall, joined by Justices Brennan
and Stewart, argued that a defendant in the \textit{Santobello} situation should be entitled to the
relief (rescission) requested. \textit{Id.} In fact, upon remand the state court ordered specific perform-
ance for Santobello and denied him permission to withdraw the plea, although one justice
dissenting on grounds that Santobello received too lenient treatment and should have stood

13. \textit{See}, \textit{e.g.}, United States v. Ewing, 480 F.2d 1141 (5th Cir. 1973); United States v.
Hallam, 472 F.2d 168 (9th Cir. 1973); State v. Kimes, 195 N.W.2d 216 (Neb. 1972); and State
2d 200 (Fla. 1972); People v. Ramos, 102 Cal. Rptr. 502, 26 Cal. App.2d 108 (1972) (with-
drawal granted); People v. Selikoff, 41 A.D.2d 376 (1973), aff’d, 360 N.Y.S.2d 623, 35 N.Y.2d
227 (1974) (neither specific performance nor withdrawal permitted); People v. Fernandez, 359
criminal defendants.\textsuperscript{14} The most crucial question has not been answered: what impact has \textit{Santobello}, together with derivative law, exerted upon the actual practice of negotiating guilty pleas?

The Georgetown Plea Bargaining Project addressed this issue and others during the course of its nationwide data-gathering phase.\textsuperscript{15} Unlike much prior research on plea bargaining, prosecutorial discretion, and related subject-matter,\textsuperscript{16} the Georgetown Project avoided prolonged concentration on any single jurisdiction and proceeded to study available data pertaining to each of the 3,100 judicial units in the fifty states.\textsuperscript{17} On-site field visits were conducted by members of an interdisciplinary professional research staff in many jurisdictions selected at random.\textsuperscript{18} During the course of these visits, relevant

\begin{itemize}
  \item[14.] A number of these states have adopted, in part or in toto, \textit{Fed. R. Crim. P. 11}. See notes 26 & 34 infra.
  \item[15.] In addition, this Project endeavored to determine whether improper or undesirable plea bargaining practices, if any, could be corrected through better and more intensive judicial oversight of the negotiation process; and to isolate and identify specific elements of coercion and impropriety in the disposition of criminal cases through bargaining. The Project's nationwide data-gathering phase began on 1 October, 1974 and has continued throughout much of 1976.
  \item[17.] There are 3,100 separate state judicial units in the United States, including the District of Columbia Court of Appeals and Superior Courts. Of these units, 29 in Alaska are divisions, 64 in Louisiana are parishes, and 41 (38 in Virginia plus one each in Maryland (Baltimore), Missouri (Saint Louis), and Nevada (Carson City) are independent cities. The balance are counties.
  \item[18.] Sites for field visits were selected by means of a table of random numbers from a sampling frame consisting of judicial units serving a population in excess of 100,000 based on the 1970 census. A ten percent probability sample of these jurisdictions was obtained. Since one objective of the Georgetown Plea Bargaining Project is to avoid political squabbles, the names of specific jurisdictions visited, with a few exceptions, will not be mentioned in this article. These jurisdictions, are located in the following states: Alabama, Arizona, California, Colorado, Connecticut, Illinois, Indiana, Massachusetts, Michigan, Nevada, New Jersey, New Mexico, New York, North Carolina, Ohio, Tennessee, Texas and Virginia. In addition, jurisdictions located in Alaska, Florida, Iowa, Louisiana, Maryland, Missouri, Oregon
judicial and extra-judicial proceedings were observed; and key actors in different areas of the criminal justice process were interviewed. As a result of this effort, a complete and unique data base was generated, so the impact of Santobello and related law can be assessed empirically. The purpose of this article is to present such an assessment, together with its implications and recommendations for change.

II. THE GUILTY PLEA NEGOTIATION PROCESS

Most criminal defendants do not march into the courtroom and plead guilty "on the nose" to the charges at their initial appearance. In some states, a statute prescribes the amount of time that must elapse between arrest and tender of a defendant's guilty plea. During this interim period, which is prolonged routinely for three to six months in many jurisdictions and may approach or exceed a year in some, defense counsel and assistant prosecutors converse periodically as normal negotiations get underway. As these negotiations progress, a judge may be invited to participate in the formulation of sufficient consideration to support an agreement.

Ordinarily, an agreement arises out of an offer by one party and
an acceptance by another, supported by sufficient consideration. A guilty plea agreement is created in the same fashion, and it may become a contract depending upon the nature and extent of any legal obligations incurred by the parties. Sometimes a guilty plea agreement may require the fulfillment of conditions; and these may be expressed, implied in fact, or implied in law. As in any other agreement, conditions may be concurrent (mutual conditions precedent), precedent, or subsequent; and each condition, if material and unfulfilled, may cause the agreement to become breached. As in any other agreement, also, the obligations of at least one party to a guilty plea agreement may become discharged on account of the inexcusable failure of a supporting consideration. The purpose of a guilty plea agreement may become frustrated; likewise, the obligations created thereunder may become impossible to perform. Some guilty plea agreements become dishonored which may precipitate a request by at least one party to have specific performance or rescission. Because a guilty plea agreement consists of so many interfacing elements, a complete contractual analysis is in order.

A. Offer and Acceptance

The term “offer” is used more ambiguously during the process of guilty plea negotiations than during commercial transactions. An observer of plea discussions is likely to hear a prosecutor, a defense counsel, or both “offer” to bargain, or to indicate under what circumstances the other side’s “offer” to bargain might be acceptable. At what point is a formal offer made? Quite clearly, these informal proposals constitute mere preliminary inquiries, the objective of which is to enable each side to ascertain the future intentions of the other; to obtain from the other side a price quotation indicating the quality and quantity of consideration required to construct any future agreement; and to clarify the protocol for developing the procedural and substantive content of a future agreement. Until these

23. In the context of the guilty plea negotiation, a price quotation would not involve dollars but instead would consist of an estimate of the number of charges counts to which the defendant would be expected to plead guilty or nolo contendere, the seriousness of these charges counts, the minimum maximum sentence which would be imposable, and the likelihood of an alternative to commitment.

24. Counsel may discuss the need, if any, to reduce discussions to a formal or an informal writing; the feasibility of disposing of pending charges rapidly or the feasibility of delay
antecedent events have transpired, it is rare for either party to suggest the terms of a formal guilty plea agreement.

Either the prosecutor or the defendant may propose the terms of a guilty plea agreement, but defense counsel, if the defendant is represented, negotiates for the defendant. Whichever side drafts the agreement, the subject-matter may be either understood by the parties verbally or reduced to writing. Although verbal understanding is the most common, a few states require guilty plea agreements to be written.

The distinction between offeror and offeree seems less significant in relation to the guilty plea agreement than in the context of commercial transactions. Here the distinction is inconsequential because of the interface of two factors: (1) the "promise" by a defendant to plead guilty is without juristic effect unless, and until, the defendant actually tenders the plea; and (2) in most jurisdictions a guilty plea must be tendered by the defendant personally and in open court. A defendant's out-of-court "promise," especially a verbal one, to plead guilty to a criminal charge might be an executory agreement or understanding; but it cannot reach the status of an executory contract because it is not binding upon the defendant. In the absence of a record to document the knowing and intelligent waiver of his constitutional right to trial plus companion rights, a

(depending primarily upon whether the defendant is out on bail or in custody); the possibility that a guilty plea, if tendered at all, might be tendered before a specific judge selected by the defendant or at least by compromise among counsel; the availability, value, and wisdom of a sentence recommendation by the prosecutor. In the ultimate analysis, the consideration for and the conditions of a guilty plea agreement will be explored.


26. At least three states require all guilty plea agreements to be reduced to writing. See Rule 17.4(a), Ariz. R. Crim. P.; Rule 21(g)(2), N.M. R. Crim. P.; and Criminal Rule 4.2(g), Wash. Super. Ct. Elsewhere some defendants may be required to execute a written guilty plea agreement. See W. Va. Code, § 62-3-1b. Apparently in Minnesota a defendant charged only with a misdemeanor may elect to have a guilty plea petition filed by a counsel as an alternative to tendering the plea personally in open court. Rule 15.03(2), Minn. R. Crim. P. Contra, in Utah where all guilty pleas must be oral. Utah Code Crim. P., § 77-24-2. In most other states, the guilty plea itself (as opposed to the agreement, if any) must be tendered by the defendant orally and personally in open court. See, e.g., Rule 24.3(a), Ark. R. Crim. P.; Cal. Penal Code, § 1018; Rule 11(a), Ohio R. Crim. P. In some states, however, the guilty plea may be made in writing or orally, but the defendant still must be present in court, or so it appears. See, e.g., Code of Ala., tit. 15, § 288(10).

27. Id.

28. For the importance of record adequacy, see McCarthy v. United States, 394 U.S. 459 (1969) and Boykin v. Alabama, 395 U.S. 238 (1969). For the right to trial and companion constitutional rights which a defendant waives by a guilty plea, see notes 57-61 infra.
defendant has not assumed any legal obligation to go forward with a contemplated guilty plea; indeed he may repudiate a "promise" to do so at will and without penalty prior to actually tendering the plea itself. The defendant's performance alone, in the form of his tender of the plea, constitutes the minimum conduct necessary to transform a guilty plea agreement into a contract containing binding legal obligations. For this reason, the ordinary guilty plea agreement becomes a unilateral contract if it becomes a contract at all.

Where statute requires guilty plea agreements to be executed in writing this written agreement should not be regarded as evidence of the defendant's "promise" to plead guilty. The document may serve as the defendant's actual guilty plea when properly executed, acknowledged and delivered to the court for filing. In most states, the defendant who has executed a written plea agreement must appear in open court to tender a personal recognizance of the written document. In a few states, however, those individuals who are charged with a misdemeanor only may elect to execute a written petition to plead guilty or nolo contendere and cause this to be submitted to the court by defense counsel as an alternative to appearing personally before the court. Since even under this procedure the defendant's own counsel transmits the petition, presumably the petition may be withdrawn prior to counsel's delivery of the instrument to the court. The mere fact that a guilty plea petition exists in writing should not disguise its purpose, which is to facilitate the defendant's constructive performance by means of substi-

29. In addition, ratification by the court is required and in some states permission of the prosecutor must be obtained at the time the plea is tendered. See, e.g., S.C. Code § 17-23-130.
30. See note 26 supra. Many judicial units within states which do not require guilty plea agreements to be executed in writing are beginning to favor this practice. The first step toward a written plea agreement may be implementation of a policy within the prosecutor's (or public defender's) office requiring assistants to make notes in the case file concerning negotiated dispositions. The next step may be for the prosecutor to have a simple form called a "plea slip" constructed and printed. This primitive memorialization will not evidence the terms of an agreement, but it will serve as a testament to the existence of an agreement, when executed by the parties thereto. Usually only after several years of experimentation, jurisdictions are beginning to utilize complete contract forms containing carbon or "magic carbon" paper to facilitate multiple copies. Some of these local forms are very similar to the forms which have been appended to the statutes in a few states. See, e.g., Forms XVIII and XIX, Ariz. R. Crim. P.; Appendices A and B to Rule 15, Minn. R. Crim. P.; and the "written statement" form contained in Criminal Rule 4.2(g), Wash. Super. Ct. R.
31. See note 26 supra.
32. Id.
An interesting but unlikely question may evolve from use of a written plea agreement or petition properly executed by a defendant out-of-court but delivered to the prosecutor rather than to defense counsel. If the instrument contained a record of the defendant’s voluntary waivers, together with a factual basis for the plea,34 could the prosecutor enforce the terms of the document notwithstanding the defendant’s subsequent repudiation? To invest a prosecutor with such a privilege would seem to confer a warrant of attorney empowering him in effect to confess judgment against the defendant. In view of the many injustices associated with the confession of civil judgment, confession of criminal judgment should be unconscionable on its face. In any event, it must be void unless the confession is accomplished pursuant to a written instrument which at the time the instrument was executed, contained a conspicuous clause35 warning the defendant of this possible outcome. Even so,

33. In this situation, the defense counsel or other person who actually delivers the petition to the court and physically causes it to be filed acts as the agent of the defendant to constructively perform the tender of the plea. As with a deed for the conveyance of real property, a written plea petition should not be viewed as a promise to tender a plea but as a plea itself which is not tendered until delivered to the court and filed as required by law.


35. How should such a clause be drafted, assuming, arguendo, that it would be constitutional operationally, which it might not be? Would the following be sufficient? (In bold face type and red ink): WARNING: THIS AGREEMENT WILL BE IRREVOCABLE ___ DAYS AFTER ITS EXECUTION, AND WILL BIND THE DEFENDANT TO EACH OF ITS TERMS. IF THE DEFENDANT BECOMES UNWILLING OR UNABLE TO FULFILL HIS PART OF THIS AGREEMENT BY PLEADING GUILTY TO THE STATED CHARGES(S) AS AGREED, HE AUTHORIZES ANY DULY LICENSED ATTORNEY AT LAW TO CONFESS CRIMINAL JUDGMENT ON HIS BEHALF BY PLEADING HIM GUILTY UNDER THE TERMS OF THIS AGREEMENT IN ANY COURT OF COMPETENT JURISDICTION.
the prosecutor would not be enforcing a promise; he would become
the defendant's agent for the substitute tender of the plea by means
of constructive performance. Needless to say, a conflict of interest
would emerge to create an ethical dilemma.\textsuperscript{36}

Since a guilty plea agreement must result in a unilateral contract
if and when it becomes a contract at all, the defendant's perform-
ance should be charted in relation to the prosecutor's correlate
promise. In a normal unilateral contract, the offeree's performance
is tendered in response to a previous communication of the offeror's
promises. This order is followed in the majority of guilty plea agree-
ments across the nation. Occasionally a defendant may tender a
guilty plea which is conditioned upon proposed conduct by the pros-
cutor to which the latter has not consented previously. If at the
time of tender the prosecutor does agree (or may be deemed to
agree) to become bound by conditions on which the guilty plea has
been tendered by a defendant, then such a sequence may create a
reverse unilateral contract.\textsuperscript{37} Note, however, that if the defendant
tenders an \textit{unconditional} guilty plea in consideration of which no
promises by the prosecutor are expressed or implied, then no con-
tract exists between the defendant and the prosecutor.

One final point should be made concerning the discretion of the
judge before whom a guilty plea is tendered.\textsuperscript{38} Only on rare occasions
does the court become a principal party to a guilty plea agreement;\textsuperscript{39}
therefore, the ordinary guilty plea agreement requires judicial ratifi-
cation rather than acceptance or rejection. Normally, the court
should be viewed as a third party upon whose satisfaction the defen-
dant's plea, the prosecutor's promises and ultimately the entire
agreement may be conditioned.\textsuperscript{40}

\textsuperscript{36} See, e.g., A.B.A. CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-1; DR 5-101-5-107; Cali-
ifornia Rules of Professional Conduct, Rules 4-101, 5-101 through 5-103.

\textsuperscript{37} The traditional unilateral contract envisions the offeror as promisor, while in a
"reverse" unilateral contract the promisor would become the offeree, since the performance
would precede the promise. See RESTATEMENT (SECOND) OF CONTRACTS, § 57 (illustration 1); 1
CORBIN ON CONTRACTS, § 71.

\textsuperscript{38} The terminology "accept" and "reject" is recited within statutes of nearly every state
to indicate the ratification function of the judiciary. See note 86 infra.

\textsuperscript{39} On occasion, hopefully rare, a judge may bypass the prosecutor and negotiate charge,
sentence, or both with the defendant or defense counsel directly. When this event occurs, the
judge becomes a surrogate prosecutor and a principal party to the plea agreement. This
practice is discouraged by the A.B.A. and by the statutes in some states.

\textsuperscript{40} See notes 88-89 accompanying text infra.
B. Consideration

The consideration which binds the obligations of the parties to a guilty plea agreement varies. The agreements are known as plea bargains, as the Supreme Court noted in Santobello. A bargain is a mutual exchange of equivalents—of a quid pro quo. The exchange may involve a promise for a promise, a promise for a performance, or a performance for a performance, although to create a unilateral contract at least one of the exchanges must be a performance. In practice few, if any, exchanges are equivalents precisely in value; but some resemble each other more than others. Thus, while a bargain is an agreement, not every agreement constitutes a bargain. For this reason, use of the word “bargain” in the context of guilty plea agreements may not be appropriate in every instance, and should be avoided whenever possible.

Separate consideration passes from each party to the other during the birth of any contract. Consideration supplied by a prosecutor to induce a defendant to plead guilty to a criminal charge may be more tangible than consideration provided by the defendant to the prosecutor. Nevertheless, consideration flows from each party to the other, and should be discussed separately in specific relation to its source.

1. Consideration from Prosecutor to Defendant

It is common for a prosecutor to supply one or more of at least four varieties of consideration, alone or in combination, to a defendant who is contemplating the tender of a guilty plea. These varieties include horizontal charge reduction, vertical charge reduction, sentence recommendation, and forbearance of other action.

a. Horizontal Charge Reduction

In most jurisdictions, judges are unwilling (and sometimes unable) to impose consecutive sentences against a defendant except under unusual circumstances. Seldom are consecutive sentences

41. 404 U.S. 257, 260.
42. A quid pro quo indicates the exchange of this for that, rather than of something for nothing. Just as not every agreement is a contract (in absence of legal obligation(s) binding each side), not every agreement is a bargain (in the absence of a mutual exchange of equivalents).
imposed for more than two separate offenses, even if an offender has committed numerous different criminal transactions. Thus, if a defendant has been charged with a multitude of separate offenses (or separate counts of the same substantive offense), to prosecute such a defendant for more than a fraction of these charges would be meaningless in terms of sentence. For this reason, a prosecutor who is confronted with a choice between a trial or a negotiated disposition for a defendant against whom multiple charges are pending may opt for dismissing most of the charges in exchange for the defendant's plea of guilty to one or two charges. This variety of consideration flowing from prosecutor to defendant may be labelled a "horizontal charge reduction," since the quantity of separate charges rather than the seriousness of any given charge constitutes the value of the concession.

Ideally, a prosecutor would prefer to dismiss the less serious charges pending against a defendant in exchange for the latter's guilty plea to the more serious charges. In practice, however, a defendant who has been charged with numerous crimes is likely to be permitted to plead guilty to charges other than the least or the most serious. Some prosecutors will attempt at least to require the defendant whose charges have arisen out of different criminal transactions to plead guilty to crimes resulting from at least two separate transactions.

43. Reasons for this practice vary and often become confused with excuses that cloud the underlying basis for such a decision. The reason that is offered most frequently is that because prisons are overcrowded, judges must be selective both in whom they commit to confinement and in the length of any given prison sentence they do impose. Underlying reasons may be much more complex or even nonexistent. For instance, a judge may not want to take the time to impose consecutive sentences, or he may feel that consecutive sentences serve little or no useful purpose, because substantive justice can be achieved by increasing or decreasing the expected duration of a single sentence (after all, one five year sentence may be the same as two sentences of 2.5 years each). A consecutive sentence is likely to have adverse impact upon an offender's future chances for parole, however, and many judges seem reluctant to constrain parole boards in this fashion.

44. For instance, when a defendant stands charged with one serious crime (such as armed robbery) and two less serious offenses (such as simple assault and theft), he may be permitted to plead guilty to one charge (such as larceny from the person) which is less serious than armed robbery but more serious than theft. To avoid this likelihood that serious offenders will be able to "average-out" their punishments by negotiating a plea agreement, some prosecutors require that each defendant plead guilty to at least one charge which falls within the highest range of seriousness (such as a class B felony in New York where the defendant is charged with first degree robbery (B felony), first degree forgery (C felony), and first degree criminal trespass (D felony)) among the array of crimes charged.

45. A defendant who is charged with robbing ten persons during a single holdup might
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Horizontal charge reduction may be preceded by horizontal over-charging as an impetus to start the guilty plea negotiation process rolling. A defendant who has been charged with five felonies may be more willing to plead guilty to at least one felony than another defendant who has been charged initially with only a single felony. During the course of the Georgetown Project, less horizontal over-charging was identified than had been expected. The plurality of charges dismissed in most jurisdictions appeared to be legally sufficient.46

b. Vertical Charge Reductions

In addition to, or instead of, horizontal charge reduction, many defendants opt for an opportunity to plead guilty to an offense which is less serious than the offense with which they had been charged. This is particularly true of defendants against whom very few charges remain outstanding. It is true of nearly all defendants who have been charged with a criminal offense for the first time in their lives, especially if the charge is a felony. This variety of consideration flowing from prosecutor to defendant may be labelled a vertical charge reduction, since the seriousness of the individual charges instead of the quantity of separate charges constitutes the value of the concession.

The most significant vertical reduction is from a felony to a misdemeanor charge. Most prosecutors will not permit this to happen by negotiation unless the original felony was of a low grade or unless evidence supporting a higher grade of felony has become weak. The ABA standards recommended that in a situation where the seriousness of a charge is reduced, the lesser offense should bear some relationship to the greater offense. The most common reduction is

46. A charge is legally sufficient if the elements of the crime (actus reus and mens rea plus proper jurisdiction and timely prosecution) appear to be present at the time the charge is filed. It is difficult if not impossible ever to assess with certainty the trial sufficiency of a charge which reaches a disposition (such as by plea of guilty or nolo contendere) without a trial. Factors involved in trial sufficiency include: availability and quality of witnesses, age of real evidence, reputation of the defendant in the community, inter alia. See Jacoby, Summary of Pre-Trial Screening Evaluation, Phase I, (monograph submitted by the Bureau of Social Science Research, Inc. to the Law Enforcement Assistance Administration) (1975).
to a lesser included offense (LIO), where the relationship is obvious. It is common for a defendant to plead guilty to a lesser but non included offense or even to a nonincluded offense of virtually equal magnitude, for a special purpose such as avoidance of the social stigma associated with a sex offense conviction.

Vertical charge reduction may be preceded by vertical overcharging also, since a defendant who has been charged with an offense carrying a potential life sentence tends to be more eager to plead guilty to some lesser grade of felony. The Georgetown Project observed less vertical overcharging than had been expected. Jurisdictions which do abuse the charging process are likely to utilize a form reflecting the method by which crimes are classified in the state.  

c. Sentence Recommendation

In addition to a horizontal or vertical charge reduction, most defendants opt for an agreement in which the prosecutor promises to make, or to abstain from making, a specific recommendation to the court on the matter of the defendant’s sentence. In nearly every jurisdiction, the prosecutor is afforded an opportunity by the court to tender a sentence recommendation. Most judges admit that they will often be persuaded by a prosecutor’s recommendation, especially if the recommendation is favorable to the defendant. If a favorable recommendation cannot be obtained, a prosecutor’s silence at the time of sentencing is preferable to a negative recommendation from a defendant’s point of view. Unless aggravating circumstances surrounding commission of the crime are communicated to a judge he is likely to impose a sentence of average severity even if the offender’s conduct may have been peculiarly reprehensible. Seldom does information contained in a presentence investigation report provide a judge with sufficient insight into an offender’s character to facilitate substantive justice.

47. In states such as New York which have a statutory classification system (classes A-E for felonies; A-B for misdemeanors) of crimes, most offenses seem to be reduced one grade at least during the negotiation process. In states which do not have such a system, crimes are reduced frequently by generic seriousness (e.g., from armed to unarmed robbery). Consequently, during the screening process prosecutors do not always resist the temptation to overcharge as a means of compensation—to increase what appears to be a class D felony, for example, to a class C felony; or a strongarm robbery to armed robbery.

48. This is one complaint heard consistently during the course of interviewing judges during the Georgetown Project. Most judges admit that presentence investigation reports are
Guilty Pleas

d. Forbearance of Other Action

A prosecutor may decide to refrain from filing additional criminal charges against a defendant in exchange for the latter’s guilty plea. Similarly, a prosecutor may agree that special allegations will not be filed against a defendant in conjunction with the charge to which the defendant pleads guilty. Special allegations, if filed, might aver that the defendant is a predicate (recidivist or habitual) felony offender for whom enhanced punishment is warranted; or that the defendant possessed or used a weapon during commission of the offense charged.

Also, a prosecutor may refrain from initiating probation or parole revocation proceedings related to previous convictions for which the defendant was on conditional release at the time when the offense in question occurred. Less frequently, a prosecutor might agree not to file criminal charges against the defendant’s friends or relatives, particularly if the other persons might otherwise be named as the defendant’s accomplice or co-conspirator.

2. Consideration from Defendant to Prosecutor

In the ordinary course of events, a prosecutor receives some value in return for a defendant’s guilty plea, even if the defendant has received a substantial benefit. The offices of most state prosecutors throughout America operate at full trial capacity throughout the year, and, regardless of what may be the level of capacity in a given jurisdiction, prosecutors in most judicial units perceive that the peak of their trial capacity has long since been reached. Accurately

not completed sufficiently far in advance to enable proper scrutiny by them; that the reports are prepared inadequately and incompletely; and that in the final analysis a judge who sentences an offender following a guilty plea more so than after a trial is unaware of most aggravating or mitigating circumstances necessary to be considered in applying substantive justice.

49. Statutes in most states provide for at least some enhancement of punishment for offenders who had prior convictions (especially prior felony convictions) at the time when they committed the crime presently in question. Patterns vary among states, and range from discretionary enhancement at the court’s option (e.g., VA. CODE, § 53-296) to a doubling of the penalty for the first offense (e.g., ALAs. STAT., § 12.55.050(1)) to the imposition of a life term of imprisonment (DEL. CODE, tit. 11, § 3911(a)). However, most of these statutes mandate the higher penalty only if the previous convictions are alleged in the indictment for the current offense by the prosecutor, and thus become the subject of the plea negotiation process.

50. Statutes in some states enhance the penalty for an offender who possesses or uses a weapon during commission of a crime. See, e.g., CONN. STAT., § 54-118(a).
or not, they feel precluded from bringing to trial more than a fixed number of cases at a time. Based on this assumption, for them to bring one case to trial means that at least one other case which otherwise would have been tried must be disposed of in some other way.

A prosecutor benefits from the caseload reduction achieved whenever a defendant pleads guilty and eliminates the need for a trial. When a conviction can be obtained against a defendant without trial, the victim of the crime will be spared the trauma of public testimony and embarrassing cross-examination; the resources of the prosecutor's investigative staff can be concentrated on other and possibly more important cases; and the state may be spared the almost prohibitive expense of transporting witnesses to trial from distant localities. Most important, undoubtedly, is the greater certainty that conviction will be final after a guilty plea than after a trial. During a trial the defense counsel enjoys an unlimited opportunity to maneuver both the prosecution and the trial judge into procedural errors which may compel a reversal of the conviction and a new trial for the defendant.

Some authorities have theorized that an offender's progress toward rehabilitation will be inspired by his admission of guilt. Whether this is true or not, a guilty plea does result in easing the conscience of the prosecutor and the general public. A defendant who is convicted of a crime following a trial has been proven guilty beyond a reasonable doubt, but a question of innocence may linger. A defendant who pleads guilty to a crime knowingly and voluntarily cannot be totally blameless. In short, the guilty-pleading de-

51. A common expression is that there are 240 working days per year, and that a felony trial requires at least one and often two-three days to complete. Therefore, most prosecutors interviewed during the Georgetown Project noted their perception, however accurate, of a ceiling on the number of cases within their judicial unit which could feasibly be brought to trial each year. Usually, this capacity did not exceed ten percent of the pending caseload.

52. These cases must either be dismissed or be terminated by means of a guilty plea or a plea of *nolo contendere*.

53. In addition, the guilty plea may reduce the length of and need for pretrial confinement; protect the public from those who might otherwise be set free on pre-trial release; and it may shorten the time interval between charge and conviction. Santobello v. New York, 404 U.S. 257, 261 (1971).

54. *Id.* See also Brady v. United States, 397 U.S. 742, 751-52 (1969).

fendant quiets the controversy surrounding his wrong-doing.

C. Conditions

Most guilty plea agreements are predicated upon the fulfillment of one or more conditions. These may be conditions precedent or conditions subsequent, and each may be expressed in the agreement, or implied in fact or in law (constructive conditions). Different agreements contain different conditions, but a number of similarities are discernible within most guilty plea agreements from state to state, and these are worthy of individual notation.

1. Conditions Precedent

Most conditions that are applicable to guilty plea agreements are conditions precedent and as such must be fulfilled before the parties to the agreement incur binding legal obligations under an emerging contract. It may be helpful to discuss varieties of conditions precedent separately in relation to the conduct of the parties.

a. Defendant's Conduct

Before any guilty plea agreement can achieve juristic effect, the defendant must waive his constitutional rights to a jury trial, to confront his accusers, to present witnesses in his own defense, to remain silent, and to be convicted by proof beyond a reasonable doubt. Although these underlying rights are procedural, the waivers thereof should be regarded as being substantive waivers, since by his forbearance a defendant relinquishes the fundamental protection afforded by our judicial process.

In addition to substantive conditions precedent, a defendant

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56. This was the almost exclusive assumption among prosecutors prior to North Carolina v. Alford, 400 U.S. 25 (1970). Since Alford, defendants in some states have been permitted to plead guilty to criminal charges without admitting either legal or factual guilt. The assumption continues to linger, however. Note warning five in Rule 11(c), FED. R. CRIM. P., note 67 infra.
must fulfill several procedural conditions precedent before a guilty plea agreement can achieve juristic effect. He must show the court before the plea is tendered that his waiver of each constitutional right is done voluntarily,\textsuperscript{62} knowingly and intelligently,\textsuperscript{63} and that he understands the elements of the charge to which he is pleading,\textsuperscript{64} as well as at least the direct consequences\textsuperscript{65} of the conviction\textsuperscript{66} which will result from a judgment based on a plea of guilty. When required by the court, a defendant is expected to supply for the record his personal account of the factual basis for the plea,\textsuperscript{67} and to recite for

\footnotesize

63. "[A] plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentations (including unfulfilled or unfulfillable promises) or perhaps by promise . . . having no proper relationship to the prosecutor's business (e.g. bribes)." Brady v. United States, 397 U.S. 742, 755 (1970), citing 242 F.2d at 115.

As Brady suggests implicitly, the voluntary and intelligent standards are often confused with each other and may be distinguished ambiguously. See The Guilty Plea as a Waiver of Rights and as an Admission of Guilt, 44 TEMPLE L.Q. 540, 545 (1971).

64. The defendant's understanding of each element of the charge(s) to which he contemplates pleading guilty or nolo contendere is especially important under Rule 11(c), FED. R. CRIM. P. and under similar statutes that have been enacted in those states that have adopted part or all of Rule 11(c). The "factual basis" for the plea may be required to be set forth on record, also, to "ensure that the defendant is guilty of a crime at least as serious as that to which he is entering his plea." Beaman v. State, 221 N.W.2d 698, 700 (Minn. 1974).

65. Brady v. United States, 397 U.S. 742, 755 (1970). Note, however, that while direct consequences (such as knowledge of minimum and maximum sentence possibilities, consecutive sentence availability, and special sentencing alternatives) must be outlined to a defendant contemplating a guilty plea, indirect consequences need not be in most jurisdictions. See, e.g., United States v. Sambro, 454 F.2d 918 (D.C. Cir. 1971) (deportation is a collateral consequence); Cuthrell v. Director, Patuxent Institution, 475 F.2d 1365 (4th Cir. 1973) (commitment to a mental institution is a collateral consequence); Weaver v. United States, 454 F.2d 315 (7th Cir. 1971) (revocation of probation is a collateral consequence); United States v. Casanova's Inc., 350 F. Supp. 291 (E.D. Wis. 1972) (civil disability such as loss of a business license is collateral consequence).

66. A conviction results from a plea of guilty or of nolo contendere just as if the defendant stood trial and was found guilty by a court or jury verdict. Kercheval v. United States, 274 U.S. 220 (1927).

67. See note 34 supra. Under Rule 11(c), FED. R. CRIM. P., the court must address the defendant personally in open court and inform the defendant of, and determine that he understands, the following: (1) the nature of the charge and the mandatory minimum plus the mandatory maximum penalty provided by law; (2) the defendant's right to be represented by counsel at every stage of the proceedings, and to have counsel appointed if he cannot afford to retain one; (3) the defendant's right to plead not guilty and to persist in that plea by demanding a trial by jury together with an opportunity to confront and cross-examine wit-
the record his age, educational level, and a synopsis of the discussion he has enjoyed in consultation with his defense attorney.68 Some courts will request a defendant to capitulate for the record in his own words the material terms of the agreement on which tender of the guilty plea is based.69 If a written instrument is required by law or custom to memorialize the guilty plea event, the defendant must execute portions of the document in his own handwriting, and at the very least subscribe his signature and acknowledge the same under oath.70

b. Prosecutor’s Conduct

In any given jurisdiction, conditions precedent which are required of the prosecutor may be fewer in number than those required of a defendant in order to give juristic effect to a guilty plea agreement. In some states, the prosecutor must make a sentence recommendation before the defendant tenders the plea.71 When a condition such as this is required by statute or rule, it is implied in law and therefore serves as a constructive condition precedent to the emergence of any guilty plea contract providing for a sentence recommendation by the prosecutor. In states where the prosecutor’s sentence recommendation does not have to be made prior to the defendant’s tender of a plea, the agreement itself may require this sequence of events

68. The current practice in most courts is to elicit from the defendant on the record as much extemporaneous information about himself, his alleged offense(s), and his discussion(s) with counsel about the contemplated guilty plea as possible. The belief is that while a defendant may be successful in attacking collaterally a conviction obtained by a guilty plea on grounds that he nodded or grunted in response to the court’s questions without fully understanding the meaning thereof, that such a collateral attack would be unsuccessful if the admissions were in the defendant’s own words.

69. The material terms of the agreement, which necessarily comprise the consideration, reflect the quid pro quo (see note 42 supra) and, if recited by the defendant in his own words, will show that he believed he was getting something in exchange for his plea. An appellate tribunal might be more loathe to upset a conviction predicated upon a “good deal” for the defendant compared with a “poor deal.”

70. See, e.g., Rule 17.4(a), ARIZ. CRIM. P. and Criminal Rule 4.2(g), WASH. SUPER. CT. R.

71. See, e.g., IND. STATS., tit. 35, § 35-5-6-2(a).
by its expressed terms or by implication in fact.\textsuperscript{72}

In most jurisdictions, the court will require the prosecutor to summarize for the record the factual basis for the guilty plea, together with the material terms of an underlying plea agreement if one exists.\textsuperscript{73} A number of courts demand that a prosecutor recite on the record his reasons for agreeing to either charge or sentence concessions.\textsuperscript{74} This sort of conduct, when mandated of a prosecutor by law or custom, may be viewed as a condition precedent to a guilty plea contract.

An agreement is likely to contain expressed provisions detailing the specific charge concessions which a prosecutor may have agreed to permit in consideration of the defendant's guilty plea. Specifically, an agreement may call for the prosecutor to make a motion to dismiss or to \textit{nolle prosequi} one or more companion charges pending against the defendant.\textsuperscript{75} The order of events entails ordinarily the dismissal or \textit{nolle} being made immediately following either the defendant's tender of a plea or the court's ratification thereof. If there is no bar to reinstatement of the charges\textsuperscript{76} upon failure of the defendant's plea, whether companion charges are dropped before or after tender of the plea is immaterial. A condition requiring a prosecutor to dismiss or \textit{nolle} companion charges should not be viewed as a condition subsequent even if the prosecutor's motion is made

\textsuperscript{72} The agreement may recite a time limit within which the recommendation must be made, and the defendant may rely to his detriment on this as on any other promise by the prosecutor. Similarly, trade usage and custom in the locality may cause a defendant to presume that a recommendation will be made at or before a specific time even without mention of the time in the agreement proper, in which case the time limitation may be implied in fact.

\textsuperscript{73} Disclosure of an underlying plea agreement is mandated under Rule 11(e), \textit{Fed. R. Crim. P.} and under similar statutes that have been enacted in those states that have adopted part or all of Rule 11(e). \textit{See also} People v. West, 477 P.2d 409 (Cal. 1970); Shavie v. State, 182 N.W.2d 505 (Wis. 1971).

\textsuperscript{74} This is likely to be a personal demand made by many judges who insist that the prosecutor must be willing to "share the risk of blame" with the court in the event that a resulting sentence reduction achieves adverse publicity. The latter situation may occur when, in choosing between confinement and probation the court imposes a sentence of probation, only to have the defendant re-arrested shortly thereafter for committing a more serious crime.

\textsuperscript{75} A criminal charge may be terminated without trial by the defendant's plea of guilty or of \textit{nolo contendere}, or by dismissal of the charge in a prosecutor's discretion through \textit{nolle prosequi}, or by dismissal of the charge by the court following a finding of no probable cause or of insufficient evidence based upon a preliminary or an evidentiary hearing.

\textsuperscript{76} Charges may be dismissed either with or without prejudice against reinstatement at a later time, although most charges are dismissed without prejudice subject to the statute of limitations.
following defendant’s tender of a plea, since no valid judgment could be entered on the plea until after fulfillment of this condition. Normally, the parties anticipate this condition to be fulfilled coterminously, and indeed this condition might be regarded as being concurrent with the defendant’s plea tender. A concurrent condition is a condition precedent.  

\[ \text{Guilty Pleas} \]

\[ c. \text{ Judicial Conduct} \]

Most guilty plea agreements are conditioned upon the satisfaction of one very important third party—the judge who must ratify the guilty plea and the agreement before either acquires juristic effect.

Under the laws of many states, primarily those which have adopted Rule 11 of the Federal Rules of Criminal Procedure,\textsuperscript{78} the judge before whom a guilty plea is tendered must cause an allocution\textsuperscript{79} to appear on record as a condition precedent to announcing his satisfaction or dissatisfaction with the plea. Failure of a judge to make proper inquiry of a defendant on record in a Rule 11 jurisdiction will invalidate the guilty plea and void any judgment based thereon.\textsuperscript{80} In contrast, some states have held that such a ritual is not a necessary condition precedent to judicial ratification of a guilty plea agreement.\textsuperscript{81}

\[ \text{2. Conditions Subsequent} \]

In the guilty plea context, most conditions precedent seem to relate to conduct by the defendant, while nearly all conditions subsequent relate to conduct by the prosecutor. Now and then, a defendant may agree to cooperate with the prosecution by turning state’s evidence as part of a plea agreement. However, if the defendant fails to testify as expected following the disposition of pending charges, the prosecutor retains very few, if any, weapons to enforce this aspect of the agreement. In effect, once a defendant tenders a guilty plea little more can be demanded of him.

\\textsuperscript{77} \text{Restatement of Contracts, § 251.} \\
\textsuperscript{78} \text{See note 34 supra.} \\
\textsuperscript{79} \text{See, e.g., Rule 32(c)(1), D. C. Super. Ct. Crim. Div. R.} \\
\textsuperscript{80} \text{Boykin v. Alabama, 395 U.S. 238 (1969); McCarthy v. United States, 394 U.S. 459 (1969).} \\
\textsuperscript{81} \text{See, e.g., James v. State, 242 Md. 424, 219 A.2d 17 (1966).}
The most common condition subsequent associated with a guilty plea agreement involves a condition requiring the prosecutor to make a sentence recommendation to the court at a point in time which will occur following tender and ratification of the plea. In most jurisdictions, a sentence recommendation is made on the day when sentence is scheduled to be imposed, which in turn may be several weeks after judgment has been entered pursuant to an earlier tendered and ratified plea, to allow time for preparation of a presentence investigation report. This type of a condition subsequent is likely to consist of a duty without a promise by the prosecutor. The duty is for the prosecutor to make the sentence recommendation as contemplated by the defendant when the agreement was struck. Without language of promise within the agreement to show that the prosecutor guaranteed a specific sentence, the prosecutor will not be held responsible for failure of the court to follow the recommendation.82

A prosecutor must discharge a duty imposed by a condition subsequent to a plea agreement, notwithstanding the likelihood that to do so may be futile. Santobello makes this clear. There the Supreme Court vacated the sentence due exclusively to the prosecutor's failure to make a sentence recommendation on which the defendant had earlier relied to his detriment by tendering a guilty plea,3 even though the trial judge indicated that he intended to impose the maximum sentence despite any recommendation to the contrary.84

82. See, e.g., United States v. Cravatas, 330 F. Supp. 91 (D. Conn. 1971), where the court refused to allow withdrawal of a guilty plea merely because the sentence actually imposed was more severe than the defendant expected; Abrams v. Warden, 333 F. Supp. 612 (D. Md. 1971), where defendant was sentenced to imprisonment but expected probation. As the Second Circuit said in United States v. Needles, 472 F.2d 652 (2d Cir. 1973), defendant's surprise at disclosure of a prejudicial presentence investigation report and consequent sentence more severe than expected did not automatically entitle him to plea withdrawal. On the other hand, if a defendant is misled rather than merely surprised, withdrawal may be mandated. See United States v. Lester, 247 F.2d 496 (2d Cir. 1957), where the defendant's surprise stemmed from a prosecutor's promise rather than mere recommendation as to sentence; and People v. Wright, 314 N.E.2d 733 (Ill. 1974), where defendant was misled by the prosecutor into believing the latter's sentence recommendation was binding.

83. 404 U.S. 257, 258 (1971). A series of delays due primarily to tardiness in the preparation of a presentence investigation report caused an elapse of more than six months between the tender of appellant's plea on June 16, 1969, and January 9, 1970 when sentence was finally imposed. Id. Another prosecutor appeared at time of sentencing, replacing the one who had negotiated the plea. Id. at 259.

84. Id. at 259-60. The sentencing judge declared: "I am not at all influenced by what the District Attorney says, so that there is no need to adjourn the sentence, and there is no need
III. JUDICIAL RATIFICATION OF THE GUILTY PLEA

A defendant who has been charged with a criminal offense does not possess a right to have judgment entered pursuant to his tender of a guilty plea.\textsuperscript{85} By statute in most states, a judge before whom a guilty plea is tendered is invested with discretion to accept or to reject the plea.\textsuperscript{86} If the judge does accept the plea, he retains authority to concur or not to concur in the underlying plea agreement, if one exists.\textsuperscript{87} The better view is to regard the judge as a third party upon whose satisfaction the guilty plea agreement is conditioned,\textsuperscript{88} rather than as a principal party to the making of the agreement itself. In this way, the role of the judge becomes to ratify or not to ratify the plea as tendered together with other conditions upon which the plea may have been premised in the agreement.

The condition precedent of third party (judicial) satisfaction is present expressly or implicitly in every guilty plea agreement. Even if not expressed, it is a constructive condition in every agreement for a guilty plea, being implied in law in every state.\textsuperscript{89} If the judge were simply to ratify a plea agreement as drafted at the moment the plea is tendered, the condition of judicial satisfaction would be easy to understand. While some judges do this, many do not, and judicial satisfaction which is itself a condition of a guilty plea agreement, becomes imposed conditionally in turn.\textsuperscript{90} Once this happens, as it does frequently, the resulting contractual implications become difficult to interpret and it is not hard to envision that in the ensuing

\textsuperscript{86} See, e.g., Rule 402(2), Ill. S. Ct. R.; Rule 15, Wyo. R. Crim. P.
\textsuperscript{87} See, e.g., Rule 3.171(c), Fla. R. Crim. P.
\textsuperscript{88} See, e.g., COLO. REv. STATS., § 16-7-207(2)(e); TEX. C. CRIM. P., § 26.13(a)(2).
\textsuperscript{89} The condition (precedent) of third party satisfaction is well-known to the law of contracts. It is often a constructive condition, being implied in law. See 3A CORBIN ON CONTRACT § 645. Such a condition has been used typically in construction contracts requiring that a certificate of approval (evidencing satisfaction) be issued by a prenamed architect or engineer as a condition-precedent to payment of the contractor's final installment.
\textsuperscript{90} Third party satisfaction by the judge before whom a guilty plea is tendered is required by law in every jurisdiction, since there is no absolute right for a defendant to have a judgment entered pursuant to a guilty plea. Lynch v. Overholser, 369 U.S. 705, 719 (1962).
confusion the misapprehension of the defendant may become phe-
omenal.

The judicial ratification process entails necessarily two
phases—ratification of the charges to which the plea is tendered and
ratification of the sentence recommendation contemplated in the
plea agreement. In most states, therefore, the judge before whom a
guilty plea is tendered pursuant to an underlying agreement is em-
powered to choose among five alternatives: (1) ratify the plea to the
charges as tendered and ratify the sentence recommendation as
drafted in the agreement; (2) ratify the plea to the charges as tend-
ered but ratify the sentence recommendation contemplated in the
agreement conditionally or provisionally; (3) ratify the plea to the
charges as tendered but refuse to ratify the sentence recommenda-
tion contemplated in the agreement; (4) ratify the plea to the
charges conditionally or provisionally and delay consideration of the
sentence recommendation; and (5) refuse to ratify the plea to the
charges as tendered, in which instance the issue of ratifying the
sentence recommendation abates. There may be other combinations
or permutations of this ratification process, but these five should
serve to outline the complexity and the variety of choices. Each
merits a separate analysis.

A. Ratification of the Plea as Tendered and of the Sentence
Recommendation as Drafted

The easiest choice which a judge may make is to ratify the plea
as tendered and thereupon to ratify also the sentence recommended
in the agreement. Since this is the easiest choice, it seems to be
followed by the average judge in most judicial units throughout the
United States.91 A judge who exercises this choice repeatedly may
be considered to have abdicated his judicial function and conferred
upon the prosecutor the de facto authority to act as a surrogate
jurist. In less creditable but equally accurate terminology, such a
judge acts as a "rubber stamp" and simply imprimaturs the charge
and sentencing decisions made by the prosecutor. This course of

91. Interviews and observations conducted during the Georgetown Project revealed that
in nearly every judicial unit studied the plurality of jurists follow the prosecutors' sentencing
recommendations unfailingly. At least one judge in most large jurisdictions deviates from this
norm, often to the point where he ignores such recommendations completely or even forbids
prosecutors from making recommendations at all.
action offers the most certainty to a defendant that his negotiated agreement will be ratified without alteration.

When both the plea to the charges as tendered and the agreement on sentence as drafted are ratified judicially, the condition of third party (judicial) satisfaction is fulfilled at the time the plea is tendered by the defendant. As long as justice was accomplished by both the negotiation of the charges and the negotiation of the sentence, there is little about which to complain. However, this ratification pattern ignores the need for a sentencing judge to review and be guided by the presentence investigation report of the defendant. While justice delayed may be justice denied, the same result may occur when justice is administered too swiftly and on a pro forma basis. For this reason, thoughtful judges who bear in mind the need to protect the community from the predatory conduct of the offender who avoids prolonged incapacitation through his capability for plea bargaining tend to be reluctant to follow this ratification pattern. Contractual complexity may be the result.

B. Ratification of the Plea as Tendered but of the Sentence Recommendation Conditionally or Provisionally

As an alternative to ratifying both the plea as tendered and the sentence recommendation as drafted in the plea agreement, some judges will ratify the plea as tendered but the sentence recommendation only conditionally or provisionally. A common example is the judge who will accept a guilty plea to one count of theft (larceny) when the offender was charged originally with two counts of robbery (hence, the defendant has received both horizontal and vertical charge concessions) but who prefers to delay ratification of the prosecutor's sentence recommendation pending receipt and scrutiny of a pre-sentence investigation report.

Ordinarily, if the judge ratifies the sentence recommendation conditionally he reserves the right to modify the sentence if the presentence investigation report reveals the defendant's criminal history to be substantially different from that represented by counsel to the

92. The sophisticated offender who has been through the criminal justice process before learns from his prior mistakes—at least procedurally. All defendants are not alike, nor is it reasonable to believe that the prosecutor's recommendation will be just or even prudent all of the time. The criminal justice process, when working properly, should operate as a system of checks and balances and the judge should serve as an operating rather than a silent partner to administer justice actively and not merely passively.
court. As long as the report buttresses the representations of counsel, the defendant can expect that the sentence recommendation will be ratified eventually. On the other hand, a judge may ratify sentence recommendation provisionally, reserving the right to alter the ratification and modify the sentence if specific events should take place between the time of the plea tender and imposition of sentence.

This ratification pattern should not impose undue hardship on a defendant, since the conditions or the provisions are identified clearly by the court and the defendant is admonished as to what action, if any, must be taken to ensure eventual ratification of the recommended sentence. Judges who follow this pattern of ratification tend to be concerned with rehabilitation and reintegration of the offender back into the community. This type of judge is less concerned about the charges than about the sanction to be imposed, and solicits the cooperation of the defendant in determining the proper sanctions in an effort to achieve some measure at least of substantive justice.

C. Ratification of the Plea as Tendered but Refusal to Ratify the Sentence Recommendation as Drafted

Another alternative which is available to a judge before whom a guilty plea is tendered is to ratify the plea to the charges as tendered but to refuse to ratify the sentence recommendation as drafted in the plea agreement. Only a minority of judges follow this course of action routinely. However, from time to time nearly every judge may be called upon to deny the sentence recommendation which he feels has been negotiated without due regard for the protection of

93. A conditional ratification may be understood as being similar to a fee simple conditional. The ratification will continue in full force and effect as long as no information is received by the judge which refutes the representations of counsel. Thus, for the conditional ratification to be defeated, not only must the representations of counsel be erroneous, but the judge must learn of the error. Seldom does a discrepancy in this sort of information surface even if it does exist.

94. A provisional ratification may be understood as being similar to an estate on condition subsequent. The ratification does not achieve full force and effect until it is reevaluated at a specific point in time in view of the totality of circumstances known at that time. New knowledge may come to light and it may be beneficial or detrimental to the defendant, but unlike the conditional ratification the provisional ratification will not be reversed necessarily because the new information is detrimental, nor will it be continued necessarily because the information is beneficial. A provisional ratification is more aleatory than a conditional one.
the community. The derivative question which emerges immediately is whether as a result of this judicial non ratification of the sentence recommendation the defendant should be permitted to withdraw tender of his plea to the charges. A second derivative question is whether the judge must or should make a revelation of the sentence which he prefers to impose prior to the moment when the defendant is called upon to withdraw or to reaffirm his plea.95

Whenever the judge refuses to ratify the sentence recommendation made by the prosecutor pursuant to a guilty plea agreement, the actual sentence which will be imposed eventually becomes an aleatory matter. As a result, the defendant is put into a position of mistrust, uncertainty, and worry. For some judges, this practice is followed routinely as a part of the punishment process intended to unnerve defendants. For other judges, this ratification pattern is followed in an effort to prolong the sentencing decision. In either event, it does not seem necessary or prudent to delay announcement of the sentencing decision for any longer than is absolutely necessary following tender and ratification of the guilty plea itself.

D. Ratification of the Plea Conditionally or Provisionally and Delay of Sentence

Until the plea is ratified as tendered or retendered as suggested by the court to ensure ratification, the issue of a sentence must be delayed. On occasion, judges refuse to ratify a guilty plea as tendered, but prefer to ratify the plea to the charges conditionally or provisionally. Normally, a guilty plea must be ratified or the ratification must be refused at the time the plea is tendered. However, under the laws of a number of states, final disposition of charges may be made conditionally, provisionally, or delayed altogether pending the completion of some event to take place in the future. Such an event may be the defendant’s good conduct for a period such as a year’s time, or the defendant’s successful completion of a diversion or a probation program, or the defendant’s restitution to his victim. This type of a disposition may be known locally as an adjournment in contemplation of dismissal,96 or as a tentative dispo-

95. The United States Court of Appeals for the Second Circuit has answered this question negatively. See United States v. Werker, Docket No. 76-3024 (1976).

96. See, e.g., N.Y. CRIMINAL PROCEDURE LAW, § 210.46. This type of alternative sentencing procedure is known also as deferred prosecution. See, e.g., COLO. REV. STATS., § 16-7-401.
sition. Usually the array of conditions or provisions are recited by statute and little doubt lingers in the defendant's mind concerning the conduct required of him to achieve a final disposition of the charges in question.

E. Refusal to Ratify the Plea as Tendered and Abatement of the Issue of Sentence

A judge before whom a guilty plea is tendered may exercise the option to refuse to ratify the plea at all, in which situation the matter of the sentence will not be reached unless the defendant submits a revised plea or proceeds to trial and is convicted. It is rare in most judicial units for a judge to refuse to ratify a tendered guilty plea altogether, perhaps on account of the necessity for disposing of criminal cases expeditiously in most courts. When a judge does refuse to ratify a guilty plea tendered by a defendant, in most jurisdictions the plea is deemed to have been automatically withdrawn, and the defendant is permitted at his own option either to plead anew or to proceed to trial on the question of his guilt.

IV. Remedies for Disenchantment with a Guilty Plea Agreement—Rescission or Specific Performance

Two principal remedies may be available to the defendant who determines that he has entered into a guilty plea agreement improvidently. He may petition the court to have the agreement rescinded, or he may demand specific performance under the terms of the agreement. In practice, rescission is preferred over specific performance by courts in most jurisdictions.

97. By refusing to permit a guilty plea that has been predicated upon a prosecutorial concession of any kind, the court would compel a defendant to plead guilty "on the nose" as charged, or to take his case to trial. Throughout this century, most judicial units in this country have been unable or at least unwilling to take more than 10 percent of their criminal caseloads to trial, and many of these try fewer than 5 or even 1 percent. See, JONES, CRIME WITHOUT PUNISHMENT (1979); Wishingrad, The Plea Bargain in Historical Perspective, 23 BUFF. L. REV. 499 (1974).

98. See, e.g., CAL. PENAL CODE, § 1192.4.

Prior to the defendant's tender of the plea itself, neither of these remedies should be necessary, since the defendant should be capable of unilaterally repudiating a plea agreement merely by failing to tender the plea. This is simple enough for a defendant to do in jurisdictions which require tender of the plea to be made in open court by the defendant personally. If tender may be accomplished constructively by the defendant in absentia, as by means of a written petition to be delivered to and filed with the court by counsel, repudiation should be feasible by causing the instrument to be intercepted and destroyed prior to delivery or filing.

Once the defendant has tendered a guilty plea, however, a greater difficulty may be encountered if either the defendant or the prosecutor should desire to repudiate the plea agreement (or if either should decide that the agreement has become repudiated). It is accurate to suggest that once a guilty plea has been tendered by a defendant the prosecutor will be unsuccessful in disturbing the plea itself. He may breach conditions associated with the underlying plea agreement, however, at his peril. At any stage of the criminal justice process the defendant may be successful in causing his disenchantment with the plea or the agreement to be remedied. The remedies available will depend upon the point in time when a decision is made to seek relief. Three stages are crucial to remedies, and particularly to the most popular and widely granted remedy of rescission. These stages are post-tender but pre-ratification of the plea; post-ratification of the plea but pre-imposition of sentence; and post-imposition of sentence. Each of these stages should be discussed separately in conjunction with remedies available to defendants at the time.

1973). In these and other cases, the controversy occurred following sentence and generally related to the sentence exclusively.

100. This is the rule in most jurisdictions. See note 26, supra.

101. See, e.g., Rule 15.03(2), Minn. R. Crim. P.

102. Some courts will look at whether the defendant relied on the promise even if it has been broken by the prosecutor. See, e.g., Johnson v. Beto, 466 F.2d 478 (5th Cir. 1972); United States v. Carter, 454 F.2d 426 (4th Cir. 1972); Villarreal v. United States, 461 F.2d 765 (9th Cir. 1972); and Walters v. Harris, 460 F.2d 988 (4th Cir. 1972). It has been argued that a breach per se is not grounds for rescission of a plea agreement or for withdrawal of the plea itself if the promised concessions are obtained in fact. ABA Standards, Pleas of Guilty, § 2.1(a)(ii) (1968).
A. Post-Tender but Pre-Ratification Remedies

Following tender of a guilty plea, a defendant may be at the mercy of the court in the event he should desire to recant the tender. In practice most judges will allow withdrawal of the plea at this time, as is evidenced by the paucity of case law relating to withdrawal at this stage. Since judgment has not been entered until ratification by the court, the criminal justice process is not disturbed by a reversal of the defendant's decision at this juncture.

B. Post-Ratification but Pre-Sentence Remedies

In Georgia alone, the defendant retains the absolute right to unilaterally withdraw tender of his guilty plea up to the moment when sentence is pronounced. In all other jurisdictions, however, permission of the court is required and the standard adhered to generally is that of "good reason shown." Unless the defendant has demonstrated a habit or propensity for vacillation, most judges will permit rescission before imposition of sentence. Withdrawal of the plea will constitute the defendant's repudiation of the agreement and is likely to discharge the prosecutor from further duty to perform thereunder. The defendant will be returned to the status quo ante.

On the other hand, a defendant may not want to repudiate the agreement himself, but he may have reason to believe that the prosecutor repudiated it or breached a condition thereto. Rather than to seek rescission at this juncture, such a defendant may be well-advised to demand specific performance as his preferred relief.

103. GA. CRIM. P. LAW, § 27-1404. Judgment is "pronounced" under this law when the accused is officially informed by the court of the sentence. 12 Ga. App. 615, 77 S.E. 1060.

104. See, e.g., Rule 32(d), DEL. SUPER. CT. CRIM. R.; Rule 3.170(f), FLA. R. CRIM. P. In other states, however, withdrawal may be made at this juncture in the discretion of the court for any reason. See, e.g., Rule 19-1714, IDAHO R. CRIM. P.; IOWA CODE, § 777.15; and Rule 8.10, KY. R. CRIM. P.

105. This was the result in United States ex rel. Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971). In an opinion by Kaufman, J., the Second Circuit held that the defendant's successful appeal constituted a revocation of the bargain which in turn released the prosecutor from further duty. Id. at 106.

106. The defendant will be returned to the status he enjoyed prior to reaching the overturned plea agreement. See, e.g., In re Sutherland, 100 Cal. Rptr. 129, 133, 6 Cal. 3d 666, 672, 493 F.2d 857, 861 (1972). In Santobello, Justice Douglas noted that if withdrawal were permitted, "the petitioner will, of course, plead anew to the original charge on two felony counts." 404 U.S. 257, 263.
The defendant is in a good position to argue for specific performance prior to the imposition of sentence, since he has relied to his detriment by tendering the guilty plea but he still may withdraw his plea for any good reason\(^\text{107}\) in the court’s discretion up to pronouncement of sentence. Neither the court nor the prosecutor may look forward to the prospect of returning to preparation for trial so shortly after the agreement was negotiated, particularly if the breach by the prosecutor was trivial and is rectifiable without undue burden.

### C. Post-Imposition of Sentence Remedies

Both specific performance and rescission are much more difficult for a defendant to achieve following the imposition of sentence against him by the court. In most jurisdictions, the plea cannot be withdrawn at this juncture at the court’s unfettered discretion, but may be withdrawn only to avoid a “manifest injustice.”\(^\text{108}\) Similarly, most courts will not specifically enforce an antecedent guilty plea agreement unless no adequate remedy at law exists.\(^\text{109}\) The absence of an adequate legal remedy, together with the petitioner’s “clean hands” and the absence of laches,\(^\text{110}\) have been traditional conditions precedent for equitable relief on a contract. The end result has been that courts are reluctant to permit rescission of a guilty plea agreement following imposition of a sentence against the defendant, and that courts are loathe to specifically enforce such an agreement at this point or after.\(^\text{111}\)

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\(^{107}\) See note 104 supra.


\(^{109}\) The court in Barker v. State, 259 So. 2d 200 (Fla. 1972) made this clear: “In the absence of a clear showing of irrevocable prejudice to either the prosecution or defense we are reluctant to extend the status of a ‘plea bargain’ to that of a specifically enforceable contract since appropriate relief may ordinarily be afforded otherwise.” Id. at 204.

\(^{110}\) In the context of the guilty plea, an opportunity for the defendant to withdraw an improvident plea is considered to be an adequate remedy at law as a rule, at least if withdrawal is accomplished prior to imposition of sentence. Sentencing seems to be viewed as the de facto equivalent of laches, after which it is too late to enforce a prior guilty plea agreement, moreover, the defendant’s “hands” may be viewed as having become “unclean” by reason of his silence throughout the sentencing ceremony, absent a showing of fraud or other prejudice, such as judicial misrepresentation of the defendant’s exposure to confinement or death. See, ABA Standards, Pleas of Guilty, 56 (1968); Stidham v. United States, 170 F.2d 294 (8th Cir. 1948); United States v. McGahey, 449 F.2d 738 (9th Cir. 1971).

\(^{111}\) See note 109 supra. Rescission is permitted generally where “manifest injustice” can
D. Effect of Rescission

When a defendant does prevail in achieving rescission of a guilty plea agreement at any stage of the proceedings, he can expect to be returned to the status quo ante.\textsuperscript{112} By withdrawal of his guilty plea, the defendant in effect discharges the prosecution from any further duty under the repudiated agreement, and the defendant should envision the probability that he will be brought to trial on the original criminal charges pending prior to any of the negotiations which precipitated the voided agreement. It has been argued that this outcome is wrong, and that following plea withdrawal a defendant should not face prosecution on charges more serious than those to which he pleaded guilty or risk punishment greater than that specified in the repudiated agreement.\textsuperscript{113} The courts have rejected this argument,\textsuperscript{114} and justifiably so, since it contravenes basic contractual principles.\textsuperscript{115}

V. Implications of the Guilty Plea in a Contractual Setting

The appellant in Santobello relied to his detriment upon a promise made by one prosecutor and ignored by a second prosecutor who

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\textsuperscript{112} See note 106 supra.

\textsuperscript{113} See Williamson, The Constitutionality of Reindicting Successful Plea-Bargain Appellants on the Original Higher Charges, 62 Cal. L. Rev. 258 (1974). This author argues that prosecutorial vindictiveness should be presumed from this practice. Id. at 259, 291. While sentences may not be imposed as a result of judicial vindictiveness (North Carolina v. Pearce, 395 U.S. 711 (1969) or as a result of prosecutorial vindictiveness (Chaffin v. Stynchcombe, 412 U.S. 17, 27 n.13 (1973)), returning the defendant to the status quo ante following an appeal in which a guilty plea is overturned does not constitute vindictiveness per se. A rule of reason was established by the Supreme Court, based upon three criteria: (1) knowledge of the prior sentence; (2) determination of the second sentence by the same judicial authority whose handling of the prior trial was sufficiently unacceptable to require reversal; and (3) institutional interest in limiting meritless appeals. Chaffin v. Stynchcombe, 412 U.S. 17, 26-27 (1973).

\textsuperscript{114} Id.

\textsuperscript{115} That breach of one party discharges the other party from remaining obligations under the contract. See, e.g., United States ex rel. Williams v. McMann, 436 F.2d 103 (2d Cir. 1970), cert. denied, 402 U.S. 914 (1971).
succeeded the first. Counsel pointed to the doctrine of promissory estoppel and prevailed, but quite obviously a more explicit agreement would have buttressed the appellant's argument. In the five years since Santobello, it has become fashionable for both prosecutors and defense counsel to devise detailed agreements prior to the tender of guilty pleas by defendants. More important and more alarming, perhaps, has been the trend for lawyers and judges to construct elaborate guilty plea agreement forms. The "battle of the forms" has been a thorn in the side of attorneys involved in contract litigation for years, and this warfare seems to be erupting now in a new theatre—that of the disposition of criminal charges by negotiation and guilty plea without trial.

One paramount question emerges for consideration: Will a written guilty plea agreement provide a defendant with any greater security than a verbal understanding? The parties to any written agreement are always free to show by oral testimony that the writing was not a final expression of their agreement with respect to the terms contained therein. The parties remain free to modify the written contract orally even after it has been completed, since as long as the modification is not integrated into the agreement it is outside of the ban perpetuated by the parol evidence rule. Moreover, when the parties (and possibly when the prosecutor and defense counsel alone) have enjoyed a continuous relationship, course of dealing, course of performance, plus trade usage and custom may be relevant to show a waiver or a modification of any terms in the agreement which can be shown to be inconsistent to these factors.

Over the past fifteen years, courts have begun to view consumer sales contracts as being inherently different from traditional contracts, and especially different from contracts between merchants.
Courts have reconsidered in light of the consumer the wisdom of such presumptions as caveat emptor, equality of bargaining power, freedom of choice, and freedom of contract. The consumer-plaintiff has been marginally successful by raising two crucially important defenses to the enforcement of certain contracts, particularly installment sales agreements purporting to require payment for non-conforming goods. These defenses are fraud and unconscionability. Is the defendant who has been charged with committing a crime and who is confronted with the "choice" of a guilty plea or a trial any less a consumer? The doctrine of commercial unconscionability has been applied to contracts other than for the sale of goods in commerce, and there appears to be no good reason why this important doctrine cannot be applied to the disposition of criminal charges by means of the negotiated guilty plea agreement. Every guilty plea agreement should be examined to detect the presence of fraud or unconscionability.

A. The Implication of Fraud

Fraud may become a material issue surrounding the creation or fulfillment of any agreement. It may take the form of fraud on the inducement, constructive fraud or collateral fraud, each of which deserves separate mention.

1. Fraud on the Inducement

The singularly most widespread fraud pertaining to guilty plea agreements may be fraud on the inducement. It may take the form

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of deceit or duress or both. It may emanate from the prosecutor, the defense counsel, or both, or from other defendants or even the court. The defendant may be unduly frightened, particularly when he has been in pre-trial confinement for the first time. This incapacity by the defendant may be exploited by members of the bar or even of the judiciary who will misrepresent to the defendant important criteria in an effort to achieve a disposition with a conviction but without a trial. Misrepresentations are likely to consist of the following: the "firmness" of the prosecutor's plea "offer" (a representation that it will be "withdrawn" unless the defendant takes "advantage" of it within a short time period); the quantity of the evidence tending to incriminate the defendant (a representation that fingerprints, ballistics tests, and other real evidence document guilt conclusively when they do not); the quality of the evidence (a representation that witnesses are available, ready, willing, and able to testify to the defendant's guilt, when they are not); the cost and publicity of a trial (a representation that the financial burden of a trial would bankrupt the defendant's family, or that news media coverage of a trial would stigmatize the defendant or his family, when neither is likely unless the crime is sensational); the sentencing habit of the judge (a representation that the defendant will receive "mercy" after a guilty plea but "justice" after a guilty verdict by trial); and the imminence of release following a guilty plea (a representation that jail time will be computed so that the defendant's sentence following a guilty plea will be equal to the amount of confinement already served). Some of these representations are totally false, and others will be partially true. The existence of fraud should not be ruled out in the absence of a complete and objective evaluation of each of the above factors.

Fraud on the inducement could be limited, although undoubtedly not eliminated, by a mandatory "cooling-off" period within which time following entry into a guilty plea agreement the defendant could repudiate it. A cancellation period ranging up to seventy two hours has been adopted by statute in many states during which time consumers may withdraw from sales contracts. A similar period, if implemented at all, should follow tender of the plea, since the defendant may not sense the full magnitude of his actions until

126. See, e.g., PA. STAT. ANN. tit. 73, § 500-202(c)(4) (Purdon 1971) (Pennsylvania Home Improvement Finance Act).
following actual performance pursuant to the agreement. This suggestion would be a compromise between the rule in Georgia permitting plea withdrawal as of right at any time before imposition of sentence, and the rule elsewhere limiting this privilege to the court’s discretion for good reasons shown.127

2. **Constructive Fraud**

Constructive fraud is perpetrated by the commission or the omission of any legal or equitable duty, trust, or confidence. In the plea agreement context, it pertains most commonly to the failure of counsel, and not just to the failure of defense counsel. Constructive fraud may be witnessed when a prosecutor who knows the case against a defendant is weak128 fails to disclose the weakness to defense counsel. It may be present, also, when defense counsel does not investigate the legal or trial sufficiency of the prosecution’s case against the defendant; or when apprised of such weakness directly or indirectly, he fails to communicate this factor to his client.129

Constructive fraud is apparent blatantly when a defense counsel “trades-off” one client for the benefit of another or for his own social

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128. For instance, weakness may be in the form of a co-defendant’s confession that would reduce the defendant’s culpability. A prosecutor’s suppression of this evidence violates due process whether done in good or in bad faith. Brady v. Maryland, 373 U.S. 83 (1963). See also, United States v. Pisacano, 459 F.2d 259 (2d Cir. 1972), where the prosecutor withheld his knowledge that the government’s case was predicated upon perjured testimony.

129. The decision to plead or not to plead guilty should always be that of the client, and counsel has an obligation to prepare his client for this choice by illuminating all evidence for and against this course of action. See ABA Standards, The Defense Function.
benefit, at least without the written consent of all clients involved.

3. **Collateral Fraud**

Sometimes known as extrinsic fraud, collateral fraud occurs whenever the defendant is prevented from having a trial on the merits to determine his innocence or guilt to each element of every charge pending against him, for any reason whatsoever without his informed consent. In one sense, this type of fraud may take place whenever either of the other two types of fraud are perpetrated. It may be evidenced more directly, however, when defense counsel makes a revelation to the court or to the prosecutor "admitting" his client's factual or even legal guilt, which may have a disastrous effect on the sentence actually to be imposed or on the number and seriousness of the charges to which the defendant will be allowed to plead guilty.

A full providency hearing is necessary to determine the presence or absence of fraud in any manner and this kind of a hearing should take place before a jury of at least six persons rather than before the court sitting alone. A providency hearing need not become a surrogate trial, since only a synopsis of the evidence need be presented. However, the prosecutor should be compelled to affirm under oath the legal and factual bases for each defendant’s guilty plea; consequently, not only should the plea be voidable but the prosecutor be charged criminally in the event it should turn out that the evidence was not presented in good faith.

**B. The Implication of Unconscionability**

The term "unconscionability" is not always easy to define or to apply to a specific contractual situation. This is as it should be, according to one of the first judges to grant relief from a contractual obligation based upon this doctrine. It has been held that the

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130. See ABA Code of Professional Responsibility, EC 5-1; DR 5-101 through 5-107.
131. The written consent of all clients is required to alleviate a conflict of interest under California Rules of Professional Conduct, Rules 5-101 and 5-102. Undoubtedly, this is the better practice and should be required in every jurisdiction, particularly when the conflict involves representation of a client charged with a crime.
"mores and business practices of the time and place" should determine unconscionability, and that the test should not be simple or "mechanically applied." Unconscionability has been recognized as including the "absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." Unconscionability cases turn often on the amount of bargaining power possessed by the consumer party, and in the context of the guilty plea should be decided in view of the bargaining power possessed by the defendant and his counsel.

A consumer, and even more so a defendant charged with a crime, may possess sufficient bargaining power to avoid a contract altogether but not to avoid specific terms therein once he has been deceived into agreeing to the terms thereof generally. This is precisely the danger of the adhesion contract, to which the doctrine of unconscionability has been applied successfully by the courts in several landmark cases. In the guilty plea context, a defendant

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133. Id. at 450.
134. Id. at 449-450.
135. Id. The court in Williams reasoned:

Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of an agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

136. For instance, what, if anything, can the defendant do for the prosecutor? A subjective test of bargaining power seems appropriate, since bargaining power is a variable that is unlikely to remain constant across different cases. One defendant may be in a position to testify against a co-defendant and in so doing to bargain down charges pending against himself. Another defendant may be willing to return stolen property that is hidden, or lead authorities to the grave of a victim. Undoubtedly, some defendants have nothing to give in return for a charge or a sentence concession.

may become confronted by a variety of adhesive provisions. Foremost among these may be his purported "waiver" of his right to appeal the sentence or to appeal error in the proceedings, or to challenge the court's jurisdiction over the subject matter of the offenses in question. In addition, some defendants are coerced into reciting verbally on the record or in writing that no promises have been made to induce them into the guilty plea, when this is not true and both counsel plus the court are aware of the falsehood. Nevertheless, the clause must be recited to exculpate the administrators of justice.

VI. Conclusion

Since most criminal charges that are filed against most defendants reach a negotiated disposition without trial in nearly every judicial unit throughout the United States, attention has become focused upon the processes of guilty plea negotiation, ratification, and rescission. In most jurisdictions, the negotiations that lead up to the guilty plea are undertaken casually between defense counsel and prosecutors, with both substantive and procedural norms being dictated more by local custom and the personal experiences of the lawyers than by concrete design or law. Although the negotiation process might benefit from greater precision and uniformity, the serious problems that have become associated with guilty pleas tend to arise at the time of judicial ratification of the plea, rather than

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138. It has been held that a judge who accepts a guilty plea need not inform a defendant that by pleading guilty the latter waives his right to appeal errors other than jurisdictional errors. Determond v. State, 313 A.2d 709 (Md. 1974).

139. See, e.g., Item 23, Appendix A to Rule 15, Minn. R. Crim. P., which provides: "My attorney has told me and I understand that if my plea of guilty is accepted by the judge I have the right to appeal, but that any appeal or other court action I may take claiming error in the proceedings probably would be useless and a waste of my time and the court's." A guilty plea usually represents a "break in the chain of events" sufficient to prevent appeal of procedural errors. Tollett v. Henderson, 411 U.S. 258, 263 (1973). But some courts have recommended that a defendant be permitted to plead conditionally and thereby preserve certain specified rights (such as to challenge an illegal search and seizure) for appeal. See, e.g., United States v. Clark, 459 F.2d 977 (8th Cir. 1972). See also Cogan, Guilty Pleas: Weak Links in the 'Broken Chain,' 10 Crim. L. Bull. 149 (1974).


141. This was the situation in United States v. Tweedy, 419 F.2d 192, 193 (9th Cir. 1969). See also United States v. Jackson, 390 F.2d 130, 138 (7th Cir. 1968) (dissenting opinion of Kiley, J.).
during negotiations.

Very few guilty plea "agreements" are specifically written prior to the moment when the defendant formally enters his plea personally by oral communication before a judge in open court. Undoubtedly, many of the troubles that begin with judicial ratification and continue thereafter have been precipitated by misunderstandings or by outright misrepresentation of the "agreements" reached through earlier negotiations. A judge can only ratify an agreement that is presented to him in unambiguous form, and to the extent that he is mislead the court may give juristic effect to an "agreement" that does not exist. At sentencing or shortly thereafter, a defendant who is dissatisfied with the type or of the severity of the sentence is likely to disavow his guilty plea and to argue either the failure of its underlying consideration, his ignorance of its terms at time of pleading, or both. If a sufficient quantum of evidence can be mustered to support the defendant's post-plea contentions, he may be permitted to withdraw the plea. Thereafter whatever underlying agreement might exist becomes rescinded. The quantum of evidence required for withdrawal and rescission varies across jurisdictions and can be even more nebulous than many guilty plea "agreements."

Clearly, guilty pleas that are purported to be based upon an underlying negotiated agreement pose a substantial danger to the administration of justice. Our society would benefit if the precise terms underlying consideration of each guilty plea were recited with clarity as a matter of public record. The federal courts and at least half of the state courts have attempted to do this by requiring defendants or their counsel to recite the basic terms by such agreements in front of the prosecutor and in open court where a verbatim transcript of this testimony is made. However, the average defendant does not possess the capacity to recite from memory his accurate recollection of the terms underlying the guilty plea that he plans to enter. For this reason, courts should consider requiring guilty plea agreements to be written at the time when they were executed, which may be months in advance of the defendant's actual tender of the plea and which consequently may be months in advance of sentencing on the resulting conviction.

Once written, the terms of a guilty plea agreement may be recited verbally by a defendant in open court at time of pleading since the defendant can use the instrument that he previously executed to refresh his memory. A written plea agreement should contain a
detailed statement by the defendant as to the factual accuracy of the plea and his understanding of the elements of each charge, in his own words if possible. In this way, it should be difficult for a defendant to recant his admissions as to the accuracy of the charge and his understanding of the charge without committing perjury. The defendant should be required to affirm the accuracy of the agreement under oath, and the agreement that contains a jurat should be evidence of his testimony. A written plea agreement should contain a detailed statement by the prosecutor as to any reductions in the number or the severity of the charges and as to the proposed sentence recommendation. An explicit statement regarding the likelihood that such a sentence recommendation will be accepted in substance by the court should be included. An assortment of additional items may be included in a written guilty plea agreement, including but not limited to a list of the constitutional rights that the defendant will waive by pleading guilty and his acknowledgment of his understanding of the same. Both defense counsel and the prosecutor should be required to execute a jurat on the written guilty plea agreement form, after having recited thereon their understanding of the accuracy and completeness of the instrument, the terms of the agreement, and the underlying consideration for the agreement.

Whether a defendant should be allowed to revoke a guilty plea agreement prior to appearing in court to actually tender the plea is a matter of policy that can be expected to vary among the different judicial units, but should be a matter of certainty within any given jurisdiction. It is also a matter which the defendant should understand and acknowledge on the face of the instrument. If a guilty plea agreement is to remain revocable until defendant’s tender of the plea, revocation should be accomplished in a manner similar to revocation of a testamentary instrument—by destruction of the instrument. At a minimum, revocation should be undertaken by communication of this intent to all parties involved, preferably in writing. Unless the instrument’s terms are expressly of finite duration, the defendant may be in a position to compel its enforcement. In this respect, a guilty plea agreement may contain pitfalls similar to those of an executory contract for the sale of land—the defendant may disavow it today and insist that it be honored tomorrow. Finally, if the instrument is to be irrevocable and it passes constitutional muster, issues arise as to how to deal with the defendant who
executes an irrevocable guilty plea agreement duly and properly, but who refuses subsequently to appear in court to tender the associated plea. Surely, his counsel cannot plead him guilty without his consent. May the prosecutor “confess” criminal judgment against the defendant through the instrument? May the court appoint another attorney to do so? These are examples of the many derivative questions that may emerge as written guilty plea agreements become customary.

To be sure, there are additional hazards that will emerge as guilty plea agreements cease to be sub rosa and start to become memorialized explicitly for public scrutiny. As in commerce, domestic relations, and the exchange of property, however, once recognized and reduced to writing, the guilty plea agreement can be regulated objectively on a basis that will assure greater fairness to individual defendants and to the community.