ALASKA'S BAN ON PLEA BARGAINING

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Plea bargaining was banned by Alaska's Attorney General in August of 1975. The ban extended to all crimes, and forbade both charge and sentence negotiations. Its effects, evaluated by the Alaska Judicial Council in a two-year study, were to increase some sentences, increase trials modestly, and—surprisingly—increase the productivity of the criminal justice system. Explicit plea bargaining appears to have been substantially reduced, without any noticeable commensurate increase in implicit bargaining. The Alaska experience strongly suggests the need to reexamine contemporary thinking about plea bargaining.

On July 3, 1975, the Attorney General of Alaska, Avrum Gross, issued written instructions forbidding all district attorneys and their assistants from engaging in plea bargaining. This prohibition extended to all felony and all misdemeanor prosecutions filed as of August 15. They could not offer to reduce charges or dismiss counts in multiple-count complaints, informations, or indictments as a *quid pro quo* for guilty pleas. Nor could they request the court to impose any stated sentence; they could only recite the facts. The Attorney General announced this new policy in a jurisdiction in which explicit sentence bargaining had been central to the practice of criminal law for as long as most experienced lawyers could recall.

In short, before August 15, 1975, very explicit plea bargaining was a fully institutionalized reality in Alaska, and one that had gained total judicial acceptance.[1] Against such a backdrop, how could the Attorney General have presumed to change all

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[1] Alaska Criminal Rule 11, patterned on Federal Rules of Criminal Procedure 11(e), requires the judge to inquire in open court about the terms of any plea bargain, and to place them on the record. Further, in the event the judge decides to impose a heavier sentence than the parties have agreed upon the rule allows the defendant to withdraw his plea of guilty though (as in the Federal Rule) it does not automatically replace the judge with another who will hear the contested case.

of this by fiat? And why would he have wanted to do such a thing anyway? To answer the question of "how," one must understand something of Alaska's unusual Department of Law, headed by the Attorney General.

Avrum Gross was not elected by the voters of Alaska; he was appointed by Governor Jay Hammond for a four-year term starting in December, 1974. Mr. Gross's Department of Law consists of a criminal and a civil division, the former headed by a Deputy Attorney General for Criminal Affairs who has supervisory authority over all District Attorneys and their assistants.[2] Since all state prosecution personnel in Alaska are answerable to Mr. Gross, Alaska is a very unified jurisdiction from an administrative standpoint.[3]

Why did the Attorney General choose to proceed so boldly against all the tides and traditions of the Alaskan legal community? Some have seen "political" motivations behind his decision and have interpreted his policy as a tactic in the "war against crime." Because the Attorney General was a member of the American Civil Liberties Union and a liberal Democrat in a Republican administration, his single-handed elimination of the "dirty practice" of plea bargaining can be seen as a smart political move—an anti-lawyer, populist, post-Watergate, coup. On the other hand, in all his public statements Mr. Gross has insistently rejected these rationales and advanced rather academic, structuralist arguments, emphasizing the "proper role of the courts" in sentencing.[4] He has said that his policy is aimed at "cleaning up" the "least just aspect of the criminal justice system." In public utterances he has emphasized "quality of justice" over any punitive approach to social control.

In March, 1976, the National Institute of Law Enforcement and Criminal Justice awarded the Alaska Judicial Council a $300,000 grant to study the impact of the Attorney General's

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[2] Each district attorney is chief prosecutor for one of Alaska's four judicial districts, which replace the county form of government familiar in the rest of the United States.

[3] Still, not surprisingly, significant local variation affected how the statewide policy was received and implemented in each office. Statistical evidence clearly showed that the city in which the case was prosecuted was one of the most important variables in its final disposition.

[4] He has said that the purpose of his policy is to "return the sentencing function to the judges," and to eliminate the former practice under which the courts acted as "rubber stamps" for sentences negotiated in advance by the parties. Mr. Gross asserted that district attorneys sometimes settled cases for "illegitimate reasons," such as a psychological aversion to conflict, or a desire to avoid work. By the same token, he claimed that judges wishing to "move" cases might at times approve negotiated sentences that were not in the interest of justice, and defense attorneys might expedite bargaining for economic reasons inconsistent with the interests of their clients.

policy on Alaska's criminal justice system. We had two basic questions: first, whether the policy had in fact been carried out; and second, its effects on Alaska's criminal justice system. We approached the study from two perspectives. First, we conducted 400 interviews in Anchorage, Fairbanks, and Juneau, the cities upon which our study focused. By the conclusion of the study we had spoken with most Alaskan judges, prosecutors, public defenders, and private criminal defense counsel, some on three separate occasions between 1975 and 1978. The study had a large statistical component as well. We systematically collected information from 3,586 case files involving about 2,300 defendants processed through the criminal justice system during the year before the policy went into effect (Year I) and the year following the change (Year II).[5] Our overall statistical objective was to form a detailed description of the Alaska system during these "before and after" years. We sought to discover variables[6] associated with any of a variety of outcomes (such as charge rejection, dismissal, acquittal, conviction, probation, and sentence length). With this picture in focus we could then introduce the additional variable of the plea bargaining ban to see how the new "wild card" affected the pattern of outcomes.

I. WAS PLEA BARGAINING ELIMINATED IN ALASKA?

The answer to this question depends in large part on how one defines "plea bargaining" and what is meant by "eliminated." Most experienced judges and attorneys easily agreed

[5] For Anchorage, Fairbanks, and Juneau we captured data on all felony arrests, whether or not they went to court. This information was taken from booking sheets in the state jails, the files of the "own-recognizance" release project, and police incident reports. We then traced the arrested cases through the court system to see whether a complaint was filed in the lower courts or whether the case was screened out by the prosecutor; if the case entered the court system we followed it through all dispositional stages to final trial court outcome. We were fortunate because Alaska, a new jurisdiction, keeps exceptionally complete records.

[6] We systematically collected some 200 variables for each of the 3,586 cases, including the following: the type and number of charges, the previous criminal history, age, race, sex, income, employment history, job status, and bail situation of the defendant, the identity of the sentencing judge, the type of defense attorney (public defender, court-appointed, or private), and whether the case arose during Year I or Year II.

In addition, we gathered information about the strength of each charge against the defendant. We hypothesized that for purposes of making a deal, much depended upon whether the case was viewed as strong or weak from the perspectives of prosecution and defense. We looked for the presence of a confession, any statement by the defendant, identifiable physical evidence linking the defendant to the commission of the crime, the promptness of arrest, any search warrants issued in the case, eyewitness identifications, amount and nature of any drugs involved, the value of any property involved, the extent of any injury to the victim, and the type of weapon (if any) used by the defendant.

that explicit sentence bargaining, so thoroughly institutionalized prior to the Attorney General's edict, practically disappeared. Our statistical evidence showed that the frequency of what was once the dominant practice among experienced criminal attorneys declined drastically: sentence recommendations occurred in only 4 to 12 percent of convicted cases, depending on the location. Follow-up interviews persuaded us that this low incidence of sentence bargaining in 1976 declined still further in 1977 and 1978, to the point where it is now a rarity for a prosecutor to recommend a specific sentence (i.e., a number of months or years) in a criminal case. If this occurs, it is usually pursuant to a "special exception" within the ambit of the policy itself.[7]

The status of "charge bargaining" was more equivocal. There is no doubt that within the first six to eight months after the policy was implemented a great deal of charge bargaining took place, which clouds the statistical picture for Year II.[8] However, our interview data tend to show that much of this dried up in 1977 and 1978, especially in Fairbanks. When charge bargaining occurs today it most commonly involves dropping one or more counts from a multiple-count indictment. Multiple charges are quite typical in prosecutions for forgeries, bad checks, and drug sales. Prosecutors tell us they drop counts because they believe the sentence will be unaffected by the fact that the defendant is convicted, say, on three counts of forgery rather than six.[9]

Most criminal lawyers who practiced in Alaska in the days

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[7] In his first memorandum to prosecutors the Attorney General said: "Like any general rule, there are going to be some exceptions to this policy." He went on to order that in any allegedly exceptional case in which permission to plea bargain was requested, written approval by him or his deputy would be required. A study of the requests for exceptions showed that most of those granted involved charges of child molestation, (where a trial might prove psychologically damaging to the principal witness), cases in which particularly complex evidence might entail a difficult and costly trial, or cases involving informants trading specific (lenient) sentence recommendations for testimony against other defendants. Although very few official exceptions were granted—perhaps 50 during the first two years—interviews indicate that more exceptions were probably made without the written approval required by the Attorney General's memorandum.

[8] There was very little change between Year I and Year II in the average number of charges filed per defendant, or in the numbers of charges dismissed. There was a very slight drop in the number of pleas to reduced charges, but it was not statistically significant. In sum, there were no statistical indications from which one might infer change in charge bargaining practices.

[9] Prosecutors may be wrong about this. Our statistical analysis indicates that for some types of offense sentence length tends to increase in proportion to the number of charges against the defendant. In Class 3 (property) crimes, each additional charge *filed* (whether or not the defendant was convicted on it) is associated with an increased sentence length. In Class 5 (drug) crimes, *either* situation is associated with an increased sentence. Thus a prosecutor who dismisses some charges against a defendant on the theory that the sentence on

of plea bargaining say that things are different now. It is harder to find someone to talk to in the prosecutor's office. Experienced defense counsel who have developed good working relations with individual district attorneys sometimes report success at negotiations, but even they usually concede that plea bargaining significantly affects only a minority of their cases. Less experienced defense counsel, particularly younger members of the public defender's staff, report that plea bargaining is virtually nonexistent in their practices except in some multiple-count cases, other "weak spots,"[10] and situations in which the district attorney is "giving away ice in the winter."

Defense counsel sometimes complain that since they are now unable to evaluate any case as a "sure plea," more motion practice and trial preparation is routinely required. When they believe the state has a strong case, defense counsel sometimes say there is not much they can do to influence its final disposition; they feel forced to advise their clients to plead guilty in the context of "wide-open sentencing." Under these circumstances, some lawyers are reluctant to accept such cases at all or they do so with the understanding that their main efforts will be to develop a strong record at sentencing. If they do accept criminal cases, other than as "sentencing lawyers," they feel they must "gear up" for trial, which means increased fees. Some lawyers say they simply refuse private criminal cases because clients cannot afford the fees, or because the attorney honestly believes that the actual benefits of his services are not likely to be worth what he must charge to prepare a competent defense. This has led to the claim that the new policy has had its strongest negative impact on middle-class defendants who can neither afford high-priced legal talent nor qualify for representation by the public defender.

From the perspective of prosecutors, there seems to be nearly universal agreement that they are working much harder than they used to. At the same time, many are relieved at being out of the sentencing business. One even said: "My job is fun now, and I can sleep nights." Those individual prosecutors

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the other counts will not be affected operates on what appears to be a false premise.

[10] For example, a "weak spot" may occur when there are multiple defendants, each represented by separate counsel, and some defendants are apparently more culpable than others. It may be relatively easy for a competent defense attorney to make a deal—particularly if his client is not too "heavy"—and especially if the district attorney would like to see the more experienced lawyer out of the case altogether when the remaining defendants reach trial.

who never enjoyed talking to defense attorneys are also happier. One defense attorney put it nicely: "It's not cool anymore to be a mellow D.A."

Having obtained a conviction, the prosecutor now tends to step aside from the case and assume a "hands-off" attitude toward sentencing.[11] This casts a heavier burden on sentencing judges, some of whom have objected that they would like more guidance from the district attorney. Some judges believe that a district attorney abdicates his responsibilities by not making specific recommendations; others are happier with what they consider their "new" freedom to sentence as they see fit—a freedom they always enjoyed under the law, in any event. Hostility to the new policy, a desire to expedite the calendar, or simple concern for fairness to defendants led some judges to make express sentence commitments in chambers, effectively circumventing the ban on prosecutorial plea bargaining by engaging in direct dealings with defense counsel.

This form of judicial plea bargaining was abruptly halted by *State* v. *Buckalew* (561 P.2d 289, 1977). In this case a second-year law student had pleaded guilty to possession of 79 pounds of marijuana and a quantity of hashish oil, a felony punishable by imprisonment for up to 25 years. During a conference in chambers attended by both counsel, Judge Buckalew indicated to the defendant that he could probably expect a maximum sentence of 90 days in jail, to be served in a way that would not conflict with law school classes, and that the judge would consider deferring imposition of the sentence to allow the student to clear his record, once he had successfully completed a period of probation. The district attorney objected to the judge's recommendations and petitioned the supreme court for relief in the nature of a writ of prohibition against Judge Buckalew to prevent imposition of the sentence.

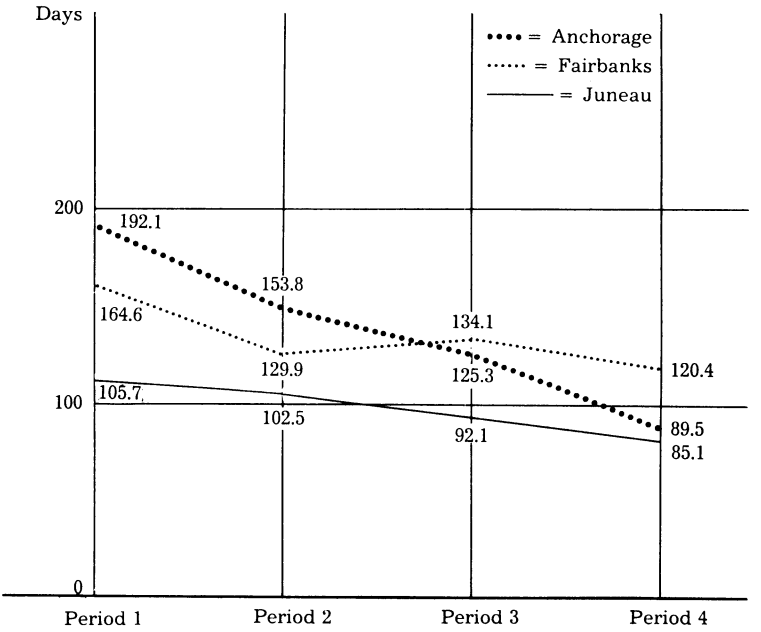
Although the supreme court expressly found that Judge Buckalew was acting entirely in good faith and out of a sense of genuine concern for justice, they upheld the position of the prosecuting attorney and expressly forbade all trial judges from engaging in "either charge or sentence bargaining" because to do so would place an intolerable burden on the defendant and tend to cast doubt on the fairness of any subsequent plea or sentence (561 P.2d 289, 292). *Buckalew* was

[11] This was not the Attorney General's intention. He emphasized several times that he expected prosecutors to bring to the court's attention "all factors relevant to a consideration of sentence rather than recommending a *particular* sentence" (memo of July 3, 1975).

decided subsequent to *State* v. *Carlson* (555 P.2d 269, 1976), a judicial "charge-bargaining" decision in which the supreme court employed a separation-of-powers rationale to prohibit a superior court judge from accepting a defendant's plea to a lesser-included offense without approval of the prosecutor. Through these two decisions, the supreme court of Alaska effectively terminated plea bargaining by trial judges and closed what otherwise would have been a major loophole in the policy.

II. WERE THE FLOODGATES OPENED?

When the Attorney General first announced his decision to ban plea bargaining, panic spread through the Alaska court system. There was considerable apprehension that defendants would refuse to plead guilty, leading to an overwhelming volume of trials—the standard *in terrorem* predictions advanced



Year	*Period*	*Dates*
I	1	8/15/74 to 1/14/75
	2	1/15/75 to 8/14/75
II	3	8/15/75 to 1/14/76
	4	1/15/76 to 8/14/76

FIGURE 1: Mean court disposition times for cases that went to court, by location and time period (N = 3,143 cases).

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against any proposed curtailment of plea bargaining. At the very least, a massive slowdown in the criminal docket was anticipated.

None of these dire predictions came to pass. In fact, just the opposite occurred. In Anchorage, Fairbanks, and Juneau there was a dramatic *decrease* in disposition time, measured from the date of filing a complaint to final trial court outcome. In Anchorage, for example, this period decreased from an average of 192.1 days for felonies in Year I to 89.5 days in Year II. Similar, if less dramatic, efficiencies were achieved in the other two cities.

Did the plea bargaining ban cause this decline in disposition times? Clearly not. We found that toward the end of Year I, well *before* the new policy was announced, disposition times were decreasing (see Figure 1). The speed-up is probably attributable to administrative and calendaring changes only tangentially related to plea bargaining. Nevertheless, it is significant that introduction of the plea bargaining ban did not reverse this trend; if anything, speed of disposition accelerated as the courts were spurred by anticipation of the deluge to come.[12]

What about the expected wave of trials? Although the rate of trials did increase substantially, the projected onslaught never materialized. In Anchorage, trials increased by about 97 percent between Year I and Year II, but even then only 57 felony charges were tried in Year II. In Fairbanks, by contrast, a much smaller city but the most "adversarial" in Alaska, 72 felonies were tried in Year I and 90 in Year II, an increase of only 25 percent. This does not seem like very many trials, unless one considers that there were only three lawyers in the Fairbanks district attorney's office who tried felony cases, and that the typical Alaskan felony trial lasts for at least three days, and often much longer.

III. IMPACT ON SENTENCES

Since the Attorney General's primary objective was to

[12] The court system, in addition to moving to a master-calendaring system in Anchorage at about the same time as the institution of the plea bargaining ban, also tried to curtail continuances. One judge said: "We'll only grant a continuance if the guy has a heart attack and two broken legs." The Attorney General also encouraged prosecutors to avoid seeking continuances and, according to defense attorneys, they became very difficult to obtain. Several other administrative changes were made; according to court administrators most were intended "to take care of the increased number of trials expected."

"turn sentencing over to the judges," one would expect the policy to have a substantial impact on sentencing practices. This was indeed the case. One effect, despite the Attorney General's disavowal of any intention to get tough, was a trend toward more severe sentences. In all felony classes, the chances that a convicted defendant would receive an active prison sentence longer than 30 days increased from 42 to 48 percent, and this increase was statistically significant.

About the time the ban on plea bargaining went into effect there was a demand for tough sentencing for violent crimes; this was proclaimed by newspapers and various vocal public organizations and individuals, including members of the state legislature, police groups, the Taxpayers Defense League, and others. Mr. Gross himself said that his policy was "strongly influenced" by a 1975 plea bargain that led to a lenient sentence for a "violent killer" (*Time*, August 28, 1978, p. 44).

We examined 1,044 violent-crime charges and found that the new policy against plea bargaining had *absolutely no impact* on sentences.[13] Violent crime had always received rather stiff treatment in Alaska, despite media assumptions to the contrary, and this pattern remained static.

There was, however, a very substantial increase in the severity of sentences for persons convicted of burglary, larceny, receiving and concealing stolen property, and malicious destruction of property (Class 3). Oddly, this seemed to operate in a highly selective fashion, affecting only relatively "clean" defendants—those with a single felony charge against them, or with no prior convictions, or who were charged with the least serious offenses among the property felonies (such as receiving

[13] For purposes of statistical analysis we subdivided the cases into logically and legally related statutory offenses. Class 2 included crimes involving violence or threat of violence, such as rape, robbery, and assault with a dangerous weapon; Class 3 included property crimes "by stealth," such as burglary, larceny, and receiving and concealing stolen property; Class 4 included crimes of "deceit," such as issuing a bad check, forgery, fraud, and credit-card fraud; Class 5 included all drug felonies; Class 6—which was very small—included "morals" felonies, such as lewd and lascivious acts against a child, and contributing to the delinquency of a minor. Class 1 included only extremely serious offenses, such as first degree murder and kidnapping, in which convictions regularly resulted in life sentences. These were too few to analyze statistically, and inappropriate for inclusion in any other class.

Class 2 (violent) offenses comprised 30 percent of the total charges, Class 3 (property) 32 percent, Class 4 (fraud, forgery, and embezzlement) 15 percent, Class 5 (drugs) 20 percent, Class 6 (morals) 3 percent, and Class 1 (murder and kidnapping) 1 percent. These proportions changed very little between the two years, indicating that differences in disposition patterns were not due to changes in the mix of offenses prosecuted.

The average active (actual prison) sentence for all offenses in Class 2 was about 28 months in both Year I and Year II. (Sentences to "straight probation" were counted as zero (0) for all computations.)

and concealing stolen property or malicious destruction). All else being equal, such defendants received sentences 53 percent longer in Year II.[14]

That this impact was a "true" effect of the policy is also supported by our interviews. Defense attorneys suggested that their most "routine" cases involved first offenders charged with minor property crimes. These clients usually had few legal defenses but were not "unattractive" as defendants. Since they were young, usually had insignificant prior criminal records, and were nonviolent, lawyers expected open sentencing to result in probation—even without the insurance policy provided by a Rule 11(e) plea bargain. They were surprised to find that in a significant number of cases the judges did not evaluate their clients in the same way. Following the ban, "clean kids" served longer prison sentences and were granted probation less frequently than before.

Multiple regression and interview results were strongly supported by a contingency table analysis (Mantel-Haenszel) that analyzed the likelihood that a defendant would receive a sentence of at least 30 days in prison, rather than probation or a shorter prison term. The odds that "clean" Class 3 defendants would serve a prison sentence of 30 days or more increased by a factor of four after the new policy went into effect.

In crimes of fraud, forgery, and embezzlement (Class 4) and in drug felonies (Class 5), we discovered a dramatic increase in severity of sentences which we could attribute to no factor other than the new policy. For frauds and forgeries, the increase was 117 percent; in drug crimes it was 233 percent. These findings were again supported by the Mantel-Haenszel contingency table method, which showed that both groups of defendants were more likely to receive active prison sentences of 30 days or more.[15]

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[14] First, we conducted a one-way stepwise analysis of variance; this tested most of the variables in the study against sentence length to isolate those significantly associated with variation in active time. These included the number of companion cases, the specific crime, the race, age, and employment status of the defendant, whether he was on probation or parole at the time of the offense, the type of attorney, and the identity of the sentencing judge. (This, and an earlier study [Alaska Judicial Council, 1977], both found that judges differed greatly in the sentences they imposed on similarly situated defendants, a finding that will surprise few lawyers.) We then conducted a multiple regression analysis in which all of these factors were controlled. This analysis revealed a 53 percent increase in sentence length in Year II for the offenses and offenders described above.

[15] Of these defendants, 3.5 percent received a sentence of 30 days or more during Year I; 16.1 percent received such a sentence during Year II. By com-

Our interviews and the statistical analysis combined give evidence that the Attorney General was successful in turning sentencing over to the judges. This produced a strong, if selective, effect on sentence severity. Violent criminals, who always received substantial incarceration, did not fare any worse. The ones who really ended up holding the short end of the stick were the relatively minor property offenders, the drug offenders, and the people who wrote bad checks, embezzled, or committed credit-card offenses.

Most of those judges we interviewed between 1975 and 1978 who agreed they were sentencing more severely attributed this not to the policy against plea bargaining but to what they called

parison, the worst offenders in this Class (those charged with burglary or felonious larceny *and* charged with more than one felony *and* who had one or more prior convictions) received sentences over 30 days at a rate of 85.7 percent in Year I, but only 56.3 percent in Year II; however, this change was not statistically significant.

For Class 4 (check, fraud, and embezzlement) crimes, the chances of a sentence of 30 days or more increased from 40 to 51.4 percent; for Class 5 crimes, they increased from 36.1 to 54.1 percent (the latter was significant at .05 or less) (see Table 1).

TABLE 1

PERCENTAGE OF DEFENDANTS RECEIVING AN ACTIVE SENTENCE OF 30 DAYS OR MORE IN CASES RESULTING IN CONVICTION, BY POLICY YEAR AND OFFENSE CLASS

	Year I 1974-75	Year II 1975-76
All Offenses	42.4 (739)	48.1[a] (694)
Class 1	92.3 (13)	83.3 (12)
Class 2	54.8 (219)	55.2 (201)
Class 3	31.9 (216)	38.2 (283)
Class 4	40.0 (125)	51.4 (70)
Class 5	36.1 (144)	54.1[a] (111)
Class 6	45.5 (22)	52.9 (17)

a. Year I-Year II difference significant at .05 or less.

increased "public pressure."[16] This may simply be another way of saying that, with the advent of the new policy, the buck stopped with the judge. Under the old system, sentences were derived through a participatory process involving the defendant, his attorney, and the prosecutor. Whether or not one agrees with the Attorney General that the judge acted as a mere "rubber stamp," he was clearly more an approving authority than an initiating agent with sole responsibility for the disposition. After the policy, the judge could no longer rely upon the district attorney's recommendation, or any agreement among counsel, to justify the sentence. As the judge's role changed, so did the severity of the sentences imposed.

IV. WHAT DOES IT ALL MEAN?

Much shorter disposition times, greatly increased sentences for certain offenders but not others, an increase in the number of trials but a smaller one than expected, and the surprisingly consistent agreement among defense attorneys, prosecutors, and judges that plea bargaining has been very substantially reduced—many of the study's findings are "counterintuitive." Why? Why do defendants continue to plead guilty at almost the same rate as before? Why should sentences increase for some types of crime and not others? Why have "under the table" substitutes for plea bargaining not arisen?

It is clear that the Attorney General's ban on plea bargaining has been implemented far beyond local expectations. This appears to be conceded even by most opponents of the policy. Why, then, did prosecutors follow a policy that required more work from them, more preparation for trial, and less certainty about the outcomes of their cases?

Prosecutors, for the most part, found that they liked the policy. It increased their power relative to the defense. Most cases are not negotiated. But when the pressure mounts beyond the willingness of an individual assistant district attorney to hold firm, the rhetoric "we don't make deals" is often a strong opening gambit for a round of bargaining. Or, as one district attorney put it: "It's not that there isn't *any* plea bargaining. It's just that the power to negotiate is now localized in

[16] Judges in Alaska are probably less subject to public pressure than judges in other states, who are initially chosen by election. Alaska has a Missouri Plan system of judicial nomination and appointment for all levels of the judiciary. Judges are appointed by the Governor from a list of qualified candidates certified by the Alaska Judicial Council; however, they periodically stand (unopposed) in retention elections.

the chief prosecutor, and when that's the case, there is much less bargaining."

The policy also decreased prosecutors' responsibility for sentencing. Although they felt the pressure of heavier workloads, many were happy that they did not have to "waste their time haggling over sentences, and listening to a long story about what a good guy the defendant is." District attorneys believed their work had become "more professional" as a result of the policy change; some looked back on "the old days" as a time when they had been "lazy" and "afraid of trials."

Although defense attorneys were often able to point out a number of "weak spots"—situations conducive to prosecutorial flexibility—there was substantial agreement that a new regime was now in effect and that it was more rigid. Under the previous system there was a general expectation that nearly any case could be bargained. (Of course, where the circumstances were particularly egregious the concessions a prosecutor could offer—or reasonably expect any judge to follow—might be so limited as to preclude agreement.) Nevertheless, before the ban routine cases were routinely disposed of by specific agreements as to charge and sentence, sometimes without much concern for the strength of the evidence or other tactical considerations. Negotiation was viewed as part of a lawyer's function, almost a matter of professional etiquette.

Under the new regime, negotiation is decidedly the exception. Still, defense counsel keep trying. If the defendant has the time and money, his attorney will frequently work very hard to turn what is ostensibly a simple case into a more complex one that might seem to the prosecutor to be "exceptional," and therefore open to bargaining. Even if these tactics are successful, they often result only in a reduction of the charge and not in an explicit sentence bargain. And often in the eyes of defense counsel the reduction might only reflect the charge that ought to have been filed in the first place.

So why do defense attorneys continue to advise their clients to enter guilty pleas? The answer seems to be that some cases are "triable" while others simply are not; they are "naturals" for a guilty plea. One defense attorney put it this way: "Now if the guy is a 'boy scout,' I might advise him to enter a guilty plea. Keep the image consistent—he cooperated all the way." On the other hand, some defendants, no matter how much they "go along with the program," will never get any concessions by pleading guilty. For example, Alaskan judges

are not moved to sympathy by cooperative rapists.[17]

Prevented from obtaining guaranteed sentences through negotiation with the prosecutor, defense attorneys sometimes try to find other forms of insurance. The best of these, direct discussion of the sentence with the judge, was forbidden by the Supreme Court of Alaska. Resourceful attorneys tried to perfect techniques for judge-shopping, initiated discussions with victims, police, and presentence investigators, and sought more elaborate sentencing hearings when they could find receptive judges. Each approach has occasionally benefited the defense. But when all was said and done, most defendants continued to plead guilty even if they had to walk into an open sentencing for the crimes with which they were originally charged—the classic "leap from an unknown height." Defendants probably changed their pleas because they perceived that, in view of the strength of the evidence against them, going to trial would be a useless act.[18]

The combination of a continuing flow of guilty pleas and the administrative reforms mentioned earlier tends to explain the decline in disposition time. Another explanation was suggested by some attorneys and judges: where it was quite clear that the prosecutor was determined not to engage in meaningful discussions with the defense there was little point in requesting a continuance. The defendant was going to end up pleading guilty anyway, and the judge was the one who would make the sentencing decision unaided. This finding alone—that the courts were not inundated with trials because the rate of guilty pleas remained fairly constant—casts doubt on many familiar assumptions about the administrative necessity for plea bargaining.[19]

Many judges, like many defense attorneys, remain somewhat skeptical about the merits of banning plea bargaining. Some openly engaged in negotiations with defense counsel until the practice was forbidden by the supreme court. Others, who did not object to such negotiations in principle, still did

[17] Not a single person convicted of a forcible rape during the period of our study received probation. The mean sentence for this offense was 7.8 years.

[18] This was often the perception of their attorneys, who sometimes said that they were reluctant to go through a full trial where there was no "triable" question of fact; they feared that the judge would disapprove of the expenditure of state time and money on such cases. Under these circumstances, there was often a suspicion lurking in the lawyer's mind that his convicted client would have to pay the bill in the end, perhaps in the form of a longer sentence.

[19] Alaska has a small population and is unusual in its unified court system and statewide control of prosecutions. Perhaps, therefore, our findings cannot easily be generalized to other jurisdictions. Nonetheless, they strongly suggest that current thinking about plea bargaining needs to be revised.

not participate out of deference to the Attorney General's experiment. Very few were opposed to all forms of plea bargaining, however. One reason they favored negotiation was that participation by several parties in the sentencing decision was seen by some as inherently superior to the present system of sole responsibility. Some judges complain that though their responsibilities have increased dramatically, they have very little opportunity to give sentencing the kind of consideration it merits. This is partly because of calendaring practices that do not allow sufficient time to review the defendant's file, partly because of other obligations that shorten the time available for sentencing hearings, and partly because, even if they had unlimited time to hear evidence, the law itself offers relatively little guidance. One judge suggested that sentencing

> [is the] kind of decision which, on the civil side, would mandate at least a two-to-three day hearing. The "solution" to this was supposed to be the pre-sentence report. . . . Abolishing plea bargaining throws the ball back to the judge. The problem is: what *is* the factual record, and what legal principles determine what information is relevant to the sentencing decision?

The strangely selective lengthening of sentences renders dubious the assumption that justice is best served by leaving it to "the private senses of good and evil" of individual judges, as one eminent jurist has said (Frankel, 1973:24). After three years of urging by the Judicial Council, with support from the supreme court, the Alaska Legislature approved a revised criminal code in June 1978 (effective January 1, 1980) that mandates a system of presumptive sentencing for repeat felony offenders.[20] Although first offenders will not be subject to presumptive sentencing under the new law, the supreme court has appointed a committee of trial judges charged with formulating empirically based sentencing guidelines for them. The Judicial Council's plea bargaining statistics form a partial data base for the guidelines. If the experiment is successful, the guidelines may eventually be adopted as rules by the supreme court. Perhaps, in time, limitation of prosecutorial discretion in plea bargaining will interact with legislative and judicial sentencing guidelines to bring about real improvement in the quality of justice.

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[20] The criminal code sets a limited sentence range for each class of felony. The prosecutor or defense attorney may ask for a hearing on aggravating or mitigating factors; depending on the findings, the judge may raise or lower the sentence within the range provided. The court may sentence outside the presumptive range, but this requires referral of the case to a special three-judge panel. Alaska also has appellate review of sentences.

V. LOOKING TO THE FUTURE

Aside from showing that the incidence of plea bargaining *can* be substantially reduced without wrecking a criminal justice system, the Attorney General's policy and its evaluation have had the merit of illuminating important contemporary issues in criminal justice. Most lawyers in Alaska would probably agree that some of the evils once attributed to plea bargaining remain. Prosecutors and judges are influenced by many factors in their official behavior. Some of these, such as vacation plans and fishing trips, are "illegitimate." Others are simply aspects of reality: a shaky prosecution witness, a faulty police investigation, or an attractive defendant may provide irresistible inducements to bargain, and make negotiated settlement seem by far the most sensible recourse.

The plea bargaining ban has rigidified prosecutorial responses to some degree, and it has placed more decisional responsibility on the judges. But it has been unable to eliminate badly exercised discretion and the concomitant potential for bias. A defendant's income still affects the quality of the trial or pre-plea representation he can obtain.[21] Some defendants who go to trial, other factors being equal, still appear to serve more time than those who plead guilty.[22] There are indications that race, income, and employment status still have a telling impact on sentence.[23] In the light of what we conclude to have been a relatively successful attempt to ban plea bargaining, the

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[21] Loglinear multiple regression analysis shows that type of attorney apparently makes a difference in sentence length for every class of crime. For example, having a private attorney is associated with a 52 percent reduction in sentence lengths for violent crimes. Having a public defender in a fraud crime, on the other hand, is correlated with an increase in sentence length of 683 percent. In general, contingency table analysis using the Mantel-Haenszel statistic also indicates that type of attorney is associated with the defendant's likelihood of going to prison: representation by a private attorney generally reduces the defendant's chances of prison, and representation by the public defender (or court-appointed attorney) increases them.

[22] Loglinear multiple regression analysis shows that sentences are significantly longer after trials for crimes of violence (445 percent longer). No such "differential" appears in property crimes, and there were too few trials for fraud and drug crimes in the two years to perform a reliable analysis. It is uncertain, however, whether these differentials truly represent added punishment for going to trial.

[23] Without detailing such effects, (since these vary by type of crime), it is worthwhile to note some of the more striking findings. In violent crimes, youthfulness (ages 17 to 20) and higher income are significantly associated with a reduction in sentence length. An increase in sentences is associated with the defendants who are separated or divorced. In property crimes, unemployment and membership of a minority race (either Black or Native Alaskan) are associated with increased sentence length. Being female is associated with reduced length in fraud sentences, whereas being 21 to 26 years old or a member of a minority race is associated with increased sentence lengths in this class. Very marked, and highly significant sentence-length increases are associated with Black defendants charged with drug crimes.

real responsibility of this much maligned practice for the evils attributed to it must be reexamined.

REFERENCES

ALASKA JUDICIAL COUNCIL (1977) *Alaska Felony Sentencing Patterns.* Anchorage: Alaska Judicial Council.

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Because multiple regression analysis has limitations with this type of data, contingency table analysis using the Mantel-Haenszel statistic was also performed. We tested for the effect of various factors on the likelihood of a prison sentence of 30 days or more, compared with a shorter term or probation. Factors found significant in the multiple regression analysis were also significant in this second, independent analysis. Obtaining the same results from two such different statistical methods makes it very unlikely that any of the results were "flukes" (see Table 2).

TABLE 2

ESTIMATED EFFECT OF VARIOUS FACTORS ON LENGTH OF PRISON SENTENCE FOR CLASS 5 FELONIES (DRUG OFFENSES)[a]

Factor	Percentage Increase or Decrease in Average Sentence Length as Result of Presence of Factor[b]
Nature of Offense: sale of narcotics to person age 21 or older (as compared with all other Class 5 felonies)	+130
Companion Felony Cases	
Each companion felony *case*	+51
Each companion felony *conviction*	+76
Each companion felony conviction of a codefendant	+57
Defendant's Criminal Record	
Each prior felony conviction	+134
On probation or parole at time of offense	+183
Defendant's Race: Black	+467
City where Court Located: Fairbanks compared with Anchorage and Juneau	−49
Policy Year: Year II compared with Year I	+233

Number of Cases: 255

Proportion of total variance explained (R^2): .49

a. Cases in which defendant initially charged with Class 5 felony; may have been convicted of a misdemeanor.

b. Probation treated as zero if no active prison sentence imposed.