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OPINION

Plea bargains ignore victims

Wallace G. Craig

Contributing Writer

Negotiated sentences are produced by "resolution discussion" - bureaucratese for plea-bargaining.

To victims, outraged at flaccid justice, the practice must seem to be a prosecutorial and judicial cop-out. I see it as tunnel-vision justice focused on the predicament of accused persons.

Plea bargaining is unacceptable expediency in the sentencing of criminals. It abnegates the constitutional obligation of our government's prosecutors and our judges to compel observance of the criminal law. Judges must have some inkling that the practice brings the administration of justice into disrepute.

It is the adversarial cut and thrust of counsel that renders true justice in a criminal trial and sentencing. No longer civilized adversaries fighting it out before an impartial judge, 21st century Crown and defence counsel have mutated into unrestrained out-of-court negotiators. Justice is denied when criminal charges are subjected to processes taken from civil litigation.

Canadians expect that persons accused of crime will receive justice in a fair trial, in public, before an impartial judge. If the person pleads guilty or is found guilty, a completely separate proceeding begins - sentencing - in which the victim and the community as a whole have a vital interest.

In 1978, professor of law Alan W. Mewett and barrister Morris Manning published the first Canadian text on the criminal law of Canada. Speaking plainly and truthfully, Mewett and Manning said "the essence of the criminal law is its public nature. A crime is, in fact, (treated) not (as) a wrong against the actual person harmed . . . but a wrong against the community as a whole. The prevention - or lessening, since total prevention is not possible - of crime cannot be left to an individual's choice but is the responsibility of . . . in particular, the police or the prosecuting authorities.

"How, then, is this lessening, or diminution, or, in theory, prevention of such a harm achieved? It is achieved by the

imposition of punishment, and while this is not adequate for the definition of a crime, it does enable us to say that an act that has been defined by the state as a crime has, as one of its criteria, the quality of being punished by the state upon proof that the accused committed that act. . . .

"It is probably beyond dispute to say that most people would now agree that the prime, if not the sole, aim of punishment and of the criminal law is the protection of the public."

In the '70s I worked with a generation of trial judges whose values were rooted in times of the Great Depression, war, and an upbringing that included responsibility and accountability. They were not restricted by appellate court sentencing guidelines. If a crime was aggravated or outrageous, the sentence reflected it; and if the convict be a repeater, a heavier sentence would be imposed. Judges of the '70s did not countenance a revolving door.

Now we have a generation of "boomer" judges who grew up in the '60s and '70s, men and women with a greater tolerance for drug addicts and traffickers, property criminals, and perpetrators of violence. Today's judges strike me as incapable of imposing punishment that might reflect the degree of harm caused by an offender. They are ideally suited to accept plea bargains involving the imposition of soft sentences, particularly conditional sentences to be served in the community. They seem quite content to cede the determination of sentences to civil servants of the Crown.

It is not surprising that Toronto and Greater Vancouver may be vying for the title of plea-bargaining capital of Canada.

In March 2001, after two reporters spent four months scrutinizing cases at Toronto's Old City Hall courthouse, the Toronto Star published Closed Doors: Justice by Plea Bargain.

A few excerpts will suffice:

"Behind closed doors, lawyers haggle over where in the punishment range the sentence will fall. When they agree, a tidy package is then presented to a judge who almost always rubber-stamps the deal. . . .

"Prosecutors have become de facto judges. Defence lawyers, knowing they enjoy a buyers market in most cases, have an edge. . . .

"Plea bargains generally take two forms: open submissions and joint submissions. In an open submission, the lawyers agree on the facts but go before a judge and ask for different punishments. In a joint submission, they agree on the facts and the punishment.

"Lawyers and judges told the Star that most plea deals are joint submissions. In the Star study, nearly 90 per cent of plea bargains were joint submissions. . . .

"Judges used to enjoy a greater role in sentencing. . . . One Toronto judge used an analogy of setting a table to describe

what happens now. 'The table is prepared by a lot of hard work by other people. When it comes time for the judge, his job is to put in a placemat, perhaps add a napkin, fill a water glass, to complete the setting,' says Mr. Justice Paul Reinhardt."

In each province, provincial prosecutors deal with offences under the Criminal Code and provincial statutes; and federal prosecutors deal with drug offences and other crimes under federal statutes. They are civil servants directed, provincially, by attorneys general, and, federally, by the minister of justice.

In British Columbia, before an information containing charges is sworn, Crown counsel must determine, on all of the evidence gathered from police, witnesses and victims that there is a substantial likelihood of conviction.

In today's criminal justice system the exercise of prosecutorial discretion too often avoids trial and produces a negotiated sentence based on an agreed and laundered statement of facts. The inevitable result - a soft sentence and another smirking, coddled criminal. Concomitantly, the victim of the thief or thug stands perplexed, reduced to mere grist in the plea-bargaining mill, and walks away - ashen-faced with dismay or red-faced with outrage - victimized by justice.

On April 9, on CKNW, Attorney General Wally Oppal characterized plea bargaining in a way that makes me wonder if he knows the endemic extent to which bureaucratic sentencing has insinuated itself into criminal justice. Responding to a caller Oppal said, "I can tell you that plea bargaining is only done when the Crown is unable to prove the original charge - and at that stage they do a plea bargain." Oppal makes me think of generals who speak of battles they have never engaged in.

A victim who says "I thought this would never happen to me" speaks for the entire community. He or she is our luckless surrogate and we must always remind ourselves: there but for the grace of God go I - and "I" includes prosecutors and judges.

When prosecutors and judges are dismissive of victims, they worsen the most distressing characteristic of property crime and violence: that it is cruelly invasive.

Pause for a moment, and imagine the endless variations of invasiveness. Here's three of mine based on actual cases.

On returning from a trip abroad you find that brazen burglars have trucked away electronic equipment, some fine antiques, and a 300-pound safe containing irreplaceable family heirlooms and jewelry. Your house is no longer your home. It has been plundered. Every time you return home and unlock the door you have a flashback to the burglary. Finally you sell and move to a gated condominium.

At the end of a pleasant evening you are just fastening a seatbelt on the passenger side of your friend's convertible when out of the shadows a young woman appears and snarls at you about your wallet. When you make a flippant remark, she brandishes a knife and thrusts it forcefully at your throat. You

pull back and raise your shoulder to protect yourself. The knife slashes into your shoulder. The sight of your own blood makes you sick. A few months later you read in the paper that a robbery charge was dropped and your assailant was given a conditional discharge for a summary assault. No prosecutor ever spoke to you. Now and forever you are ever watchful and wary.

Out for an evening with the boys in a local North Shore pub you head for the washroom just before closing. Two drunks come in and take offence at you looking at them. They attack with fists. Suddenly one attacker brandishes a beer bottle and smashes the base off it making it a jagged weapon. He shoves it at your face. You duck and the bottle slashes the side of your throat. Bouncers intervene and stem the flow of blood. Nothing will ever erase the sickening feeling of losing so much blood, the ambulance ride, the emergency ward, surgery, and recovery slowed by bouts of depression. Making matters worse is the insensitivity of the court proceedings that culminate in a plea-bargained guilty plea on the day of trial of charges of aggravated assault - a 14-year maximum offence. All that is left is the unspeakable aggravation as two unrepentant, unremorseful psychos walk out of court with house arrest of 18 months rather than a penitentiary term.

From Measure for Measure.

We must not make a scarecrow of the law,

Setting it up to fear (frighten) the birds of prey,

And let it keep one shape, till custom make it

Their perch and not their terror.

Today's plea bargaining has turned criminal justice into Shakespeare's tattered scarecrow.

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