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People v. Orin: Penal Code Section 1385 Dismissals and the Effectuation of Plea Bargains

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PEOPLE v. ORIN: PENAL CODE
SECTION 1385 DISMISSALS
AND THE EFFECTUATION
OF PLEA BARGAINS

In *People v. Orin*¹ the defendant was charged with three counts arising from the same incident. The first count was attempted robbery, the second was burglary and the third was assault with a deadly weapon.² At trial the prosecutor announced that he was ready to proceed on all three counts and that a guilty plea to the third count in exchange for dismissal of the other two was unacceptable. However, the trial judge, on his own motion, dismissed counts I and II after accepting a guilty plea to count III. The dismissal action was taken pursuant to Penal Code section 1385,³ and was characterized by the trial court as “in the nature of a plea bargain.”⁴ The People moved that the guilty plea be withdrawn and that they be allowed to go to trial on all three counts. The motion was denied and the People appealed, contending that the dismissal of counts I and II over their objection constituted an abuse of judicial discretion.

A unanimous California Supreme Court, in an opinion written by Justice Sullivan, reversed the order dismissing counts I and II, remanded the case to the trial court, and granted the defendant leave to withdraw his guilty plea to count III. The reversal order was based on the two independently sufficient grounds that: (1) the dismissals over the prosecutor’s objection, which were based solely on the defendant’s willingness to plead guilty to charge III, failed to fulfill section 1385’s requirement that judicial dismissal be “in furtherance of justice”; and (2) the trial judge’s failure to

1. 13 Cal. 3d 937, 533 P.2d 193, 120 Cal. Rptr. 65 (1975).

2. *Id.* at 940, 533 P.2d at 195, 120 Cal. Rptr. at 67.

3. CAL. PENAL CODE § 1385 (West 1970) provides:

The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading.

4. 13 Cal. 3d at 940, 533 P.2d at 195, 120 Cal. Rptr. at 67.

comply with the statutory requirement that the reasons for the dismissal be set forth in the dismissal order invalidated the dismissal.

This Comment focuses on the limitations *Orin* has placed on trial judges in the exercise of their section 1385 general dismissal power. Although the court expressly refused to analyze the transaction that occurred in *Orin* in terms of a plea bargain,⁵ this Comment will approach *Orin's* fact situation from a plea bargaining perspective in order to determine the role of the improper plea bargain. Lastly, suggestions are offered regarding the role that section 1385 should play when it is used to effectuate plea bargains in general.

I. PENAL CODE SECTION 1385

The significance of *Orin* is its clarification of the scope of the section 1385 dismissal power and its enunciation of concrete procedures for its use. It is, therefore, a welcome synthesis of over one hundred years of judicial interpretation of section 1385.

A. SECTION 1385 POWERS

Enacted in 1872,⁶ Penal Code section 1385 gives a trial judge broad dismissal power in a criminal prosecution, limited only by the requirement that the dismissal be "in furtherance of justice."⁷ This limitation has not been explicitly defined by the Legislature, and has remained a subject of judicial discretion.⁸ Section 1385 provides a means of dismissal which may be utilized by the court

5. Justice Sullivan reasoned that since the plea bargain was improper there was no plea bargain to consider. 13 Cal. 3d at 943, 533 P.2d at 197, 120 Cal. Rptr. at 69. This Comment takes the approach that *Orin* could have been analyzed in plea bargaining terms. There was a plea bargain, albeit improper.

6. Section 1385 was originally worded:

The court may, either of its own motion or upon the application of the District Attorney, and in furtherance of justice, order an action or indictment to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes.

CAL. PENAL CODE § 1385 (West 1970) (historical note). The statute was amended to its present form by ch. 1674, § 141, [1951] Cal. Stat. 3857.

7. *People v. Silva*, 236 Cal. App. 2d 453, 456, 46 Cal. Rptr. 87, 89 (1965). *But cf. People v. Ritchie*, 17 Cal. App. 3d 1098, 1104, 95 Cal. Rptr. 462, 465 (1971).

8. *See, e.g., People v. Silva*, 236 Cal. App. 2d 453, 456, 46 Cal. Rptr. 87, 89 (1965).

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or the prosecuting attorney, but it does not extend the privilege of petitioning for dismissal of a criminal action to the accused.⁹

The section 1385 dismissal power stems from the powers of *nolle prosequi*¹⁰ which were traditionally vested in prosecuting attorneys.¹¹ Since the statutory abolition of that power in 1872,¹² the actual power to dismiss a prosecution rests exclusively with the trial court.¹³ The dismissal power of prosecuting attorneys is limited to making motions for dismissal.

Although broad, the dismissal power is not absolute.¹⁴ It has, for instance, been held that:

The 1968 amendment to the Penal Code, section 1238 added subdivision 8 which gives the People the power to appeal from an order of dismissal if the defendant has not been placed in jeopardy or if he has waived jeopardy, . . . indicat[ing] to us that the Legislature, by section 1385 of the Penal Code, did not intend that a judge should have the absolute power to dismiss for any reason.¹⁵

However, the supreme court, in *People v. Superior Court (Howard)*,¹⁶ implicitly acknowledged that this dismissal power must be broad.¹⁷ Thus, two questions concerning the scope of a

9. *People v. Ellis*, 204 Cal. 39, 42, 266 P. 518, 520 (1928); *People v. Shaffer*, 182 Cal. App. 2d 39, 44, 5 Cal. Rptr. 844, 847 (1960).

10. *Nolle prosequi* is the prosecutorial power to dismiss a criminal action. This power was abolished in 1872 by the enactment of CAL. PENAL CODE § 1386 (West 1970), which provides that "neither the Attorney General nor the District Attorney can discontinue or abandon a prosecution for a public offense, except as provided in [section 1385]."

11. *People v. Superior Court (Kasperek)*, 202 Cal. App. 2d 850, 854, 21 Cal. Rptr. 178, 181 (1962); *People v. Gonzales*, 235 Cal. App. 2d Supp. 887, 890, 46 Cal. Rptr. 301, 302 (1965).

12. For a discussion of the *nolle prosequi* power see note 10 *supra*.

13. *People v. Ward*, 85 Cal. 585, 590, 24 P. 785, 786 (1890); *Leonard v. City of Los Angeles*, 31 Cal. App. 3d 473, 478, 107 Cal. Rptr. 378, 381 (1973); *People v. Parks*, 230 Cal. App. 2d 805, 812, 41 Cal. Rptr. 329, 334 (1964); *People v. Romero*, 13 Cal. App. 2d 667, 670, 57 P.2d 557, 558 (1936).

14. *People v. Superior Court (Montano)*, 26 Cal. App. 3d 668, 670, 102 Cal. Rptr. 925, 926-27 (1972); *People v. Superior Court (Schomer)*, 13 Cal. App. 3d 672, 677, 91 Cal. Rptr. 651, 653 (1970).

15. *People v. Curtiss*, 4 Cal. App. 3d 123, 126, 84 Cal. Rptr. 106, 108 (1970), citing *People v. Superior Court (Howard)*, 69 Cal. 2d 491, 501, 446 P.2d 138, 145, 72 Cal. Rptr. 330, 337 (1968).

16. 69 Cal. 2d 491, 446 P.2d 138, 72 Cal. Rptr. 330 (1968).

17. *Id.* at 504, 446 P.2d at 147, 72 Cal. Rptr. at 339.

trial judge's dismissal power come to mind: (1) why is the power so expansive; and (2) what are the recognized boundaries of this power?

The reason for the broadness of the section 1385 dismissal power lies in the nature of law itself. Legislature and judge-made law, at best, only approach the ideal of "justice" which is the goal of the legal system.¹⁸ In order to maintain a working legal system of practical rules and still leave freedom to strive for the goal of justice, avenues of broad judicial discretion must be left open. The general dismissal power of section 1385 may be resorted to when justice so dictates and more specific statutes are not applicable. Nevertheless, a statutory scheme is necessary to restrain the subjective discretion of the trial judge in order to preserve this statutory scheme and to prevent "exalt[ing] the rule of men above the rule of law."¹⁹

With regard to the boundaries within which section 1385 operates, the exercise of judicial discretion in the dismissal order is limited by two requirements: (1) the dismissal must be "in furtherance of justice"; and (2) the "reasons of the dismissal must be set forth in an order entered upon the minutes."²⁰ The following discussion treats each requirement separately.

B. IN FURTHERANCE OF JUSTICE

When evaluating whether a dismissal is "in furtherance of justice," California courts have balanced the competing interests of "the constitutional rights of the defendant, and the interests of society represented by the People" ²¹ This balancing test²²

18. See generally J. FRANK, LAW AND THE MODERN MIND (1936); E. LEVI, INTRODUCTION TO LEGAL REASONING (1949); PLATO, THE STATESMAN (classical argument that laws can never take into consideration all possible situations).

19. *People v. Superior Court (Montano)*, 26 Cal. App. 3d 668, 671, 102 Cal. Rptr. 925, 927 (1972), quoting *People v. McAlonan*, 22 Cal. App. 3d 982, 987, 99 Cal. Rptr. 733, 736 (1972). In *Montano* a guilty verdict had been reached. The trial judge, for purely subjective reasons, dismissed the charges even though there was no question as to the fairness of the trial. On appeal, the dismissal order was vacated because of the arbitrary substitution of a personal decision for the decision of the jury. See also *People v. Winters*, 171 Cal. App. 2d Supp. 876, 882, 342 P.2d 538, 543 (1959).

20. CAL. PENAL CODE § 1385 (West 1970). For the exact wording of section 1385 see note 3 *supra*.

21. *People v. Beasley*, 5 Cal. App. 3d 617, 636, 85 Cal. Rptr. 501, 514 (1970) (emphasis deleted for clarity). The original interpretation appears in *People v. Disperati*, 11 Cal. App. 469, 105 P. 617 (1909):

The legislature has not attempted to define the expression "in furtherance of justice," and therefore it is left for judicial dis-

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has resulted in the formulation that section 1385 dismissals can only be granted for those reasons "which would motivate a reasonable judge."²³

The Defendant's Interests

The constitutional rights of a defendant must be protected at all stages of the criminal law process. If these rights are threatened at any time before or during the trial, it may be necessary to dismiss the charges against the defendant. For example, in *People v. Dewberry*²⁴ a motion to suppress evidence essential to the People's case was granted at a pretrial hearing. The prosecutor made it clear that without the evidence he was not able to proceed. In this situation it was necessary to dismiss, since going to trial would only result in an unjustified detention and unconstitutional harassment of the defendant. Application of the balancing test indicated that the interests represented by the defendant's constitutional rights outweighed society's interest in prosecuting the defendant.

cretion exercised in view of the constitutional rights of the defendant and the interests of society to determine what particular grounds warrant the dismissal.

Id. at 476, 105 P. at 619.

22. Several cases describe the process being discussed as a balancing test. *See, e.g.,* *People v. Superior Court (Montano)*, 26 Cal. App. 3d 668, 670-71, 102 Cal. Rptr. 925, 927 (1972); *People v. Fretwell*, 8 Cal. App. 3d Supp. 37, 41, 87 Cal. Rptr. 356, 359 (1970).

23. 13 Cal. 3d at 945, 533 P.2d at 199, 120 Cal. Rptr. at 71, *citing* *People v. Curtiss*, 4 Cal. App. 3d 123, 126, 84 Cal. Rptr. 106, 108 (1970). *See also* *People v. Superior Court (Howard)*, 69 Cal. 2d 491, 446 P.2d 138, 72 Cal. Rptr. 330 (1968), in which the court presented considerations applicable to a dismissal under section 1385 of the Penal Code after a verdict of guilty has been returned:

A determination whether to dismiss in the interests of justice after a verdict involves a balancing of many factors, including the weighing of the evidence indicative of guilt or innocence, the nature of the crime involved, the fact that the defendant has or has not been incarcerated in prison awaiting trial and the length of such incarceration, the possible harassment and burdens imposed upon the defendant by a retrial, and the likelihood, if any, that additional evidence will be presented upon a retrial.

Id. at 505, 446 P.2d at 147-48, 72 Cal. Rptr. at 339-40. It has been stated that some of these factors are equally applicable to dismissals before trial. *See* *People v. Ritchie*, 17 Cal. App. 3d 1098, 1105, 95 Cal. Rptr. 462, 466 (1971).

24. 40 Cal. App. 3d 175, 114 Cal. Rptr. 815 (1974) (trial court's dismissal of the case against the defendant reversed on other grounds).

The Public Interest

Although *Dewberry* recognized the need for a dismissal, society has a strong countervailing interest in the prosecution of criminals. As *Orin* states:

[A]ppellate courts have shown considerable opposition to the granting of dismissals under section 1385 in instances where the People are thereby prevented from prosecuting defendants for offenses of which there is probable cause to believe they are guilty as charged. Courts have recognized that society, represented by the People, has a legitimate interest in "the fair prosecution of crimes properly alleged."²⁵

When the trial judge in *Orin* dismissed the two charges over the objection of the prosecutor, the People's interest in a fair prosecution was not given proper attention. Criminal procedure is designed to protect an individual's constitutional rights and to objectively apply the law when there is probable cause to believe that a crime has been committed and that the defendant committed it.²⁶ To allow trial judges to avoid criminal prosecution without compelling reason would deprive the People of their right to prosecute and would "frustrate the orderly and effective operation of our criminal procedure" ²⁷ Former Chief Justice Earl Warren stated in *Singer v. United States*:²⁸

The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result.²⁹

In addition to the People's right to secure convictions, the interests of society require that the procedure used be that which is most likely to serve the ends of justice. It follows that the

25. 13 Cal. 3d at 946-47, 533 P.2d at 200, 120 Cal. Rptr. at 72 (citation omitted).

26. *Id.* at 947, 533 P.2d at 200, 120 Cal. Rptr. at 72. See *Berger v. United States*, 295 U.S. 78, 88 (1935).

27. 13 Cal. 3d at 947, 533 P.2d at 200, 120 Cal. Rptr. at 72.

28. 380 U.S. 24 (1965).

29. *Id.* at 36.

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interests of society necessitate an inquiry into whether dismissal is most likely to produce a fair result in a criminal proceeding. The "fair result" requirement demands a procedure which will allow neither convictions of innocent defendants nor dismissals of guilty defendants. It is a premise of our entire criminal justice system that the system should not be avoided unless overwhelming reasons exist.

The Balancing Process

The "in furtherance of justice" requirement demands the balancing of the defendant's constitutional rights, society's interest in prosecuting properly alleged crimes and society's interest in a fair procedure. This balancing process supplies only general considerations and is by no means mathematically precise. It is thus subject to the criticism that it is an unworkable standard by which to evaluate the propriety of section 1385 dismissals.³⁰ The vagueness of the section 1385 balancing test is justified by the need to maintain the trial judge's freedom to dismiss with broad discretion. This dismissal freedom would be defeated if "in furtherance of justice" were rigidly defined. The balancing test is a legal tool designed only to aid a trial judge in making the decision necessary to the exercise of discretion, and to make that decision reviewable by the appellate court. *Orin* has clearly articulated the general considerations which must be made before the trial judge's power to dismiss a criminal prosecution by section 1385 is exercised.

C. SPECIFICATION OF REASONS

It is imperative that the trial judge set forth the reasons for the section 1385 dismissal in the minutes of the court. This requirement is "not merely directory, and neither trial nor appellate courts have authority to disregard [it]."³¹ The California Supreme Court has stated that "[i]f the reasons are not set forth in the minutes, *the order may not be considered a dismissal under section 1385.*"³² This strict adherence mandate is further evidenced by

30. However, the same doubts are inherent in each of the balancing tests routinely used in all areas of the law. Notwithstanding this criticism, balancing tests are virtually indispensable in most areas of the law. Their continued use attests to the fact that lack of mathematical precision is not fatal to their usefulness.

31. 13 Cal. 3d at 944, 533 P.2d at 198, 120 Cal. Rptr. at 70, *quoting* *People v. Beasley*, 5 Cal. App. 3d 617, 637, 85 Cal. Rptr. 501, 514 (1970).

32. 13 Cal. 3d at 944, 533 P.2d at 198, 120 Cal. Rptr. at 70, *quoting* *People v. Superior Court (Howard)*, 69 Cal. 2d 491, 503 n.7, 446 P.2d 138, 146 n.7, 72 Cal. Rptr. 330, 338 n.7 (1968) (emphasis added).

the necessity that the statement recite *specific* reasons.³³ The trial judge in *Orin* failed to specify the reasons for dismissal with sufficient clarity to satisfy the statute.³⁴ Such failure was in itself sufficient grounds for reversal of the trial court.³⁵ General reasons fail to establish "the factual basis upon which the conclusions are reached, [thereby] thwart[ing] the very purpose of the statutory requirement" ³⁶ From the recital, the appellate court must be able to determine *why* the section 1385 dismissal power was used.³⁷

Purposes of the "Specification of Reasons"

The rule necessitating strict compliance with section 1385's specification of reasons requirement arises from the purposes intended to be served by the requirement. *People v. McAlonan*³⁸ enumerates the most widely recognized purposes:

The purpose behind the requirement for specification of reasons in the minutes has been stated to be: to protect the interests of the public, to protect the public interests against improper or corrupt dismissals, to restrain judicial discretion and curb arbitrary action for undisclosed reasons and motives, and to enable the appellate court to determine whether discretion has been properly exercised.³⁹

In addition, the specification of reasons narrows the scope of review by indicating those considerations that were determinative in the dismissal. Indeed, if the factors a trial judge thought determinative of the issue were not specifically enumerated, an appellate court would face a costly, time-consuming and inaccurate method of reconstruction of the factors considered by the trial judge.⁴⁰ The writing requirement protects the public as well as the defendant from judicial abuse of section 1385 by making the determination of the trial judge susceptible to objective evaluation.

33. *People v. McAlonan*, 22 Cal. App. 3d 982, 986, 99 Cal. Rptr. 733, 735 (1972).

34. 13 Cal. 3d at 944-45, 533 P.2d at 198, 120 Cal. Rptr. at 70.

35. *Id.* at 945, 533 P.2d at 198-99, 120 Cal. Rptr. at 70-71.

36. *People v. McAlonan*, 22 Cal. App. 3d 982, 986, 99 Cal. Rptr. 733, 735 (1972).

37. 13 Cal. 3d at 944-45, 533 P.2d at 198, 120 Cal. Rptr. at 70.

38. 22 Cal. App. 3d 982, 99 Cal. Rptr. 733 (1972).

39. *Id.* at 986, 99 Cal. Rptr. at 735 (citations omitted).

40. Cf. *People v. West*, 3 Cal. 3d 595, 611, 477 P.2d 409, 418-19, 91 Cal. Rptr. 385, 394-95 (1970).

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An additional purpose of the specification of reasons requirement may be inferred from the legislative abolition of the *nolle prosequi* powers of prosecutors.⁴¹ The purpose is to prevent automatic acceptance of section 1385 dismissal motions. An automatic acceptance of the motion would, in effect, give prosecutors the power expressly taken from them by section 1386. By requiring trial judges to clearly specify the reasons for dismissal, section 1385 forces them to both inquire into and verbalize the merits of the motion, thus precluding mechanical approvals of dismissal motions. Although it is contended that this is a valid purpose, dictum contrary to this proposal appears in *Orin*.⁴²

Although *Orin* appears to mandate strict compliance with the specification of reasons requirement, it approves of language in *People v. Curtiss*⁴³ which is inconsistent with this requirement. *Curtiss* recognized that dismissals in which the minutes do not reflect the reasons are common:

A defendant, for example, is charged with four counts of burglary, pleads guilty to one count, the district attorney moves to dismiss the remaining three counts and the judge grants the motion without specifying the reasons in the minutes. In such a case, however, it is the prosecutor's own case which he is moving to dismiss and in so doing he is acting upon his own responsibility. Despite the defective procedure, no harm is done because the prosecutor obviously would not appeal from the order of dismissal.⁴⁴

By failing to specify the reasons for dismissal in the minutes, a judge acknowledges what is in essence the *nolle prosequi* power which was expressly taken from prosecutors by Penal Code section 1386. Such an acknowledgement creates the risk that a judge will not independently determine, through the balancing of interests discussed above, whether the dismissal furthers justice. However, section 1385 mandates that such balancing occur, and the failure to do so constitutes an abuse of judicial power.

There is no logical reason why the specification of reasons safeguard should exist in situations in which a prosecutor makes

41. For a discussion of the *nolle prosequi* power see note 10 *supra*.

42. 13 Cal. 3d at 945 n.10, 533 P.2d at 198 n.10, 120 Cal. Rptr. at 70 n.10.

43. 4 Cal. App. 3d 123, 127, 84 Cal. Rptr. 106, 109 (1970).

44. *Id.*

a section 1385 motion to dismiss but be disregarded in actual plea bargains. Rather, it would appear that defendants' constitutional rights can receive adequate protection only if dismissals, which clearly operate to induce guilty pleas, are always accompanied by specifications of reasons.

Failure to Specify Reasons as Grounds for Defense Appeals

One final question concerning the specification of reasons remains unanswered. May the defendant appeal on the basis of a trial court's failure to comply with this requirement? Although a defendant would not want to appeal in the majority of situations, when dissatisfied with a plea bargain he would likely demand review of the process used to effectuate the bargain. The opportunity for the defendant to challenge the propriety of a guilty plea may present itself while a defendant is serving his sentence or after the sentence has been served. While serving his sentence, the defendant may come to the conclusion that he did not get a fair bargain, or one that was comparable to bargains struck in similar criminal prosecutions. Although it may be argued that an attack on a guilty plea is moot after a defendant's sentence has been served, the defendant might be confronted with collateral consequences of the guilty plea that are so onerous as to merit judicial review.⁴⁵

*People v. Romero*⁴⁶ would not allow criminal defendants the right to appeal on the basis of an insufficient specification of reasons:

The section has nothing whatsoever to do with the rights of the defendant. For the court to fail to perform its duty, therefore, is not a matter about which a defendant can be heard to complain.⁴⁷

However, cases decided after *Romero* impliedly depart from it by holding that if the dismissal fails in this requirement it may not even be considered a section 1385 dismissal.⁴⁸ If a defendant appeals on the basis that the dismissal is not in furtherance of jus-

45. *Sibron v. New York*, 392 U.S. 40, 57 (1967). Collateral consequences of a felony conviction may include: loss of certain civil rights such as voting privileges; a permanent criminal record; prevention from obtaining certain licenses; preclusion from certain types of employment; and general stigmatization within the community.

46. 13 Cal. App. 2d 667, 57 P.2d 557 (1936).

47. *Id.* at 671, 57 P.2d at 559.

48. This aspect of *Orin* is discussed at note 32 *supra* and accompanying text.

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tice, how is the appellate court to react when it discovers that there is no specification of reasons? If it waives the specification requirement and decides the in furtherance of justice issue from the entire record, it goes against recent decisions which explicitly state that a section 1385 dismissal cannot exist in the absence of a specification of reasons.

Accordingly, appellate courts should allow criminal defendants standing to complain of the trial court's failure to meet the specification of reasons requirement. Three arguments support this contention. First, there may be no one else to guarantee that the courts use the proper procedure. Society has an interest in seeing that proper procedure is adhered to in a section 1385 dismissal. Unless a defendant is allowed to appeal on the basis of a defective specification of reasons that interest will not be protected in the plea bargaining process, for, as *Curtiss* suggests, the prosecutor will not appeal his own motion. Second, the specification of reasons is a safeguard not only to society's interest in a criminal prosecution but also to a defendant's constitutional rights. Because the defendant's constitutional rights are a basic and necessary consideration in determining whether the dismissal furthers justice, that interest needs the protection of the statement of reasons. Third, as Justice Mosk recognized in a concurring opinion in *Howard*, "we must not overlook the fundamental purpose of our penal statutes . . . [which is] 'to promote justice'" ⁴⁹ This entails protecting the defendant and preventing *nolle prosequi* powers from vesting in prosecutors through the necessity of the specification of reasons in all situations. Such protection can only be afforded by allowing defendants to appeal on the basis of such a deficiency in a section 1385 dismissal.

II. SECTION 1385 AND A PLEA BARGAINING ANALYSIS OF ORIN

It is implicit in the plea bargaining process that negotiations and actual bargaining are between the prosecutor and the defendant.⁵⁰ Since the agreement in *Orin* was made between the trial judge and the defendant, the supreme court declined to view the arrangement as a plea bargain.⁵¹ A decision could thus be

49. *People v. Superior Court (Howard)*, 69 Cal. 2d 491, 506, 446 P.2d 138, 148, 72 Cal. Rptr. 330, 340 (1968), quoting CAL. PENAL CODE § 4 (West 1970).

50. 13 Cal. 3d at 943, 533 P.2d at 197, 120 Cal. Rptr. at 69.

51. *Id.* See note 5 *supra*.

reached in *Orin* without an analysis of the section 1385 dismissal power in the plea bargaining context. Yet, the procedure by which the first two counts were dropped was similar to the plea bargaining process, and was, as the trial judge stated, "in the nature of a plea bargain."⁵² An agreement was reached whereby the criminal charges would be dropped in return for the guilty plea. As a plea bargain, the procedure was defective, but the plea was nevertheless induced by the return promise of the court. A bargain was struck, and the validity of the bargain and the relative importance of the section 1385 dismissal to the bargain should have been explored. Because the supreme court did not deal directly with the abuse of the 1385 dismissal power in the context of an actual plea bargain situation, it failed to explore the impact which the dismissal considerations of the statute have on plea bargaining. Such exploration is needed because valid and invalid plea bargains are unquestionably effectuated by the section 1385 dismissal power. Although *Orin* avoided a plea bargain analysis, the facts of the case serve as a useful means of conducting this exploration.

Plea bargaining⁵³ is statutorily⁵⁴ and judicially⁵⁵ authorized in California. As Justice Sullivan explained, the plea bargain "method of disposing of criminal prosecutions contemplates an

52. 13 Cal. 3d at 940, 533 P.2d at 195, 120 Cal. Rptr. at 67.

53. The Supreme Court has developed its attitude towards plea bargaining in the following chronology of cases: *Machibroda v. United States*, 368 U.S. 487 (1962); *United States v. Jackson*, 390 U.S. 570 (1968); *McCarthy v. United States*, 394 U.S. 459 (1969); *Halliday v. United States*, 394 U.S. 831 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969); *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Santobello v. New York*, 404 U.S. 257 (1971); *Dukes v. Warden, Conn. State Prison*, 406 U.S. 250 (1972).

The following are valuable secondary sources in the area of plea bargaining: D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* (1966); Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968); Gallagher, *Judicial Participation in Plea Bargaining: A Search For New Standards*, 9 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 29 (1974); Newman, *Pleading Guilty for Consideration: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970) [hereinafter cited as *Unconstitutionality of Plea Bargaining*]; Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082 (1967) [hereinafter cited as *Judicial Plea Bargaining*]; Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865 (1964); Comment, *The Plea Bargain in Historical Perspective*, 23 BUFF. L. REV. 499 (1974); Comment, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167 (1964) [hereinafter cited as *Suggested Morals*].

54. CAL. PENAL CODE §§ 1192.1-2, 1192.4-5 (West 1970).

55. *People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

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agreement negotiated by the People and the defendant and approved by the court."⁵⁶ In plea bargaining, adverse parties come to an agreement whereby there exists "the exchange of prosecutorial and judicial concessions for pleas of guilty."⁵⁷ Such exchanges have become a necessary procedure⁵⁸ in handling the ever-increasing volume of criminal prosecutions.⁵⁹ Thus, the safeguards of a trial are often sacrificed in the interest of judicial economy.⁶⁰ The judge's sole role in this process is to determine whether the bargain has been entered into knowingly and voluntarily.⁶¹ In both California and federal courts there is the additional requirement that the judge determine that a factual basis for the guilty plea exists.⁶²

Plea bargains are essentially contractual.⁶³ In exchange for dismissal of some of the charges against him, the defendant waives the valuable constitutional rights to the privilege against compulsory self-incrimination, the right to trial by jury, and the right to be confronted by one's accusers.⁶⁴ This exchange was present in *Orin*, in that the court dismissed two of the counts against the defendant in exchange for his waiver of the right to a jury trial on the third count. Since such dismissals can only be upheld if the requirements of section 1385 are met, the plea bargain itself should conform to the same requirements in order to avoid technically correct effectuations of bargains which are inconsistent with the spirit of the dismissal policy.

56. 13 Cal. 3d at 942, 533 P.2d at 197, 120 Cal. Rptr. at 69.

57. Alschuler, *supra* note 53, at 50.

58. NATIONAL DISTRICT ATTORNEYS ASSOCIATION, PLEA BARGAINING, THE PROSECUTOR'S PERSPECTIVE 2 (1975) [hereinafter cited as THE PROSECUTOR'S PERSPECTIVE]; *Judicial Plea Bargaining*, *supra* note 53, at 1090. See Alschuler, *supra* note 53, at 52-58; cf. D. NEWMAN, *supra* note 53, at 77, 95.

59. For a discussion of the burdens created by growing case loads see PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 25-41 (1967).

60. *Unconstitutionality of Plea Bargaining*, *supra* note 53, at 1389, 1397, 1405.

61. FED. R. CRIM. P. 11; CAL. PENAL CODE § 1192.5 (West 1970).

62. FED. R. CRIM. P. 11; CAL. PENAL CODE § 1192.5 (West 1970). ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (1968) [hereinafter cited as PLEAS OF GUILTY] states:

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such pleas without making such inquiry as may satisfy it that there is a factual basis for the plea.

Id. § 1.6.

63. Gallagher, *supra* note 53, at 45-48.

64. *Boykin v. Alabama*, 395 U.S. 238, 241 (1969).

It is generally recognized that judicial involvement in the plea bargaining process raises serious questions of infringement of a defendant's constitutional rights.⁶⁵ In *Orin* the bargain was highly suspect because it was made directly between the defendant and the judge. The "in furtherance of justice" requirement of section 1385 requires consideration of justice to the community.⁶⁶ Justice to the community demands that proper steps be taken to preserve the voluntary nature of guilty pleas, and this cannot be done by allowing judges to plea bargain directly with defendants.⁶⁷ When a trial judge takes an active role in plea bargaining negotiations the fairness of a trial court is necessarily threatened. *United States v. Tateo*⁶⁸ sets forth the principle that while the judge's intent to coerce in a plea bargain is relevant to an inquiry, it is subordinate to the actual effect of his participation in the bargaining process.⁶⁹ While the trial judge in *Orin* might not have intended to coerce the defendant, the effect of his actions was so potentially coercive that he should not have been allowed to bargain directly for the defendant's guilty plea.

The inherent threats to the criminal process when a judge takes part in the plea bargaining negotiations are numerous: (1) the substantial pressure upon an innocent defendant to plead guilty when a judge directly offers a deal;⁷⁰ (2) the actual threat to impartiality of the trial court;⁷¹ (3) the appearance of prejudgment;⁷² (4) the threat to "the dignity of the judge per se . . . [and to] respect for the entire legal process;"⁷³ and (5) the possible interference with the ability of a defendant to make a knowing plea.⁷⁴ These threats make it nearly impossible to protect a defendant's rights. Thus, the danger precludes such procedure from being used in a criminal prosecution in light of society's interest in maintaining criminal procedure which is likely to produce a fair result. Because of the potential danger to society's

65. See, e.g., *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966); *PLEAS OF GUILTY*, *supra* note 62, § 3.3a; *id.* at 72-73; *Gallagher*, *supra* note 53, at 38-45; *Suggested Morals*, *supra* note 53, at 179-87.

66. *People v. Superior Court (Montano)*, 26 Cal. App. 3d 668, 670, 102 Cal. Rptr. 925, 927 (1972).

67. *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 255 (S.D.N.Y. 1966).

68. 214 F. Supp. 560 (S.D.N.Y. 1963).

69. See *id.* at 567.

70. *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966).

71. *Gallagher*, *supra* note 53, at 44.

72. *Judicial Plea Bargaining*, *supra* note 53, at 1089.

73. *Id.*

74. *Suggested Morals*, *supra* note 53, at 179.

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interest in a fair procedure, the process used to obtain the guilty plea in *Orin* could not possibly have been "in furtherance of justice." Therefore, the trial judge in *Orin* abused the judicial discretion given him by section 1385.

The section 1385 dismissal power was improperly used in *Orin* to effectuate a judicial plea bargain. When the inducement promise in a plea bargain cannot be kept, the conviction cannot stand.⁷⁵ Since the inducement in *Orin*, *i.e.*, the section 1385 dismissal, fails, the entire plea bargain fails and the defendant must be allowed to withdraw his guilty plea.⁷⁶

III. CONCLUSIONS: THE ROLE OF SECTION 1385 IN PLEA BARGAINING

The analysis of the *Orin* judicial plea bargain suggests the proper role section 1385 should play when plea bargains are negotiated between the *prosecutor* and defendant. Since section 1385 is used to effectuate the bargain, plea bargains take on an additional requirement before they may be approved by a trial judge. Not only must the guilty plea be voluntary, knowing, and have a basis in fact, but the trial judge must also explain in writing why a bargain is appropriate and these reasons must further justice. This requirement necessarily mandates consideration of the defendant's constitutional rights and society's interests. The interests of society include: (1) the right to prosecute crimes fairly alleged; (2) the need for quick disposal of criminal cases;⁷⁷ and (3) the need for procedure which will produce a fair result.

After there has been a judicial determination as to the fairness of the bargain, the judge must set forth his specific reasons for the dismissal. This will require the judge to examine closely the bargain and the circumstances under which it was made. If such an examination is not made, it is unlikely that the judge will be able to meet the strict requirements of this provision. The mere recital of the bargain will not satisfy the necessity for specifying why the bargain is "in furtherance of justice."⁷⁸ In recognizing

75. Cf. *Santobello v. New York*, 404 U.S. 257, 262 (1971).

76. *People v. West*, 3 Cal. 3d 595, 610, 477 P.2d 409, 418, 91 Cal. Rptr. 385, 394 (1970); *Gallagher*, *supra* note 53, at 48.

77. See authorities cited at note 58 *supra*.

78. Merely stating what the bargain is does not explain why the bargain is in furtherance of justice.

the validity of plea bargaining, *People v. West*⁷⁹ stated that the "greatest danger of the current practice lies in its secretiveness."⁸⁰ Although *West* required only that the bargain be set forth, section 1385 forces an even safer procedure by requiring the motivating factors behind the bargain to be set forth. Society and defendants benefit because the process of inducing the guilty plea is scrutinized, not merely the end result. In addition, a permanent record is established which gives appellate courts a more accurate picture of the propriety of the plea bargain.

Although the addition of 1385 considerations to plea bargaining may not appear very significant, in actuality these considerations can serve the important function of safeguarding against unfair plea bargains. Recognizing the inherent dangers in plea bargaining, the American Bar Association and the National District Attorneys Association have presented model plea bargaining procedures.⁸¹ Such procedures have as their very aim the preservation of a general sense of justice both to the defendant and to society. In its application in the plea bargaining process, section 1385 may serve the same purpose.

While section 1385 holds promise for making the plea bargaining process fairer, it may never be taken into consideration. Plea bargain approval is all too often an automatic, mechanical ritual. This is due to either the court's inability to "uncover inaccuracy in the counseled defendant's plea,"⁸² or to the need for judicial economy which precludes the requisite scrutiny of the proposed bargain. The development of a proper application of section 1385 to plea bargaining is hampered by: (1) defendants' satisfaction with their plea bargains; and (2) prosecutors' initiation of plea bargains. Both go against the need for appeals to develop a standard section 1385 practice. Nevertheless, those defendants who have been led to plead guilty in return for dismissals may have open the option of appealing on the basis of the improper dismissal. If the dismissal is found to be improper the consideration bargained for fails, thereby destroying the validity of the plea bargain and allowing the defendant to withdraw his guilty plea. Such a threat to prosecutors and judges should force a safer plea bargaining process as provided for by section 1385.

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79. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

80. *Id.* at 609, 477 P.2d at 417, 91 Cal. Rptr. at 393.

81. PLEAS OF GUILTY, *supra* note 62; THE PROSECUTOR'S PERSPECTIVE, *supra* note 58.

82. *Unconstitutionality of Plea Bargaining*, *supra* note 53, at 1394.