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Victim Participation in Plea Bargains

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INTRODUCTION

There is a trend in the criminal law today to focus on the rights of victims. This trend has been manifested in actions by legislatures,[1] courts,[2] the President of the United States[3] and others.[4] Various pro-

1. *See, e.g.*, Victim and Witness Protection Act of 1982, 96 Stat. 1248 (1982), *codified in* various sections of Title 18, U.S.C. [hereinafter cited as VWPA of 1982]; Bill of Rights for Victims and Witnesses of Violent Crime Act, ILL. REV. STAT. ch. 38 §§ 1401 *et seq.* (Smith-Hurd supp. 1985); Victim's and Witness's Bill of Rights, S.C. CODE ANN. §§ 16-3-1510 *et seq.* (1985).

2. *See, e.g.*, Morris v. Slappy, 461 U.S. 1, 14 (1982):

> The court wholly failed to take into account the interest of the victim.... [I]n the administration of criminal justice, courts may not ignore the concerns of victims. Apart from all other factors, such a course would hardly encourage victims to report violations to the proper authorities; this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience such as was involved here. Precisely what weight should be given to the ordeal of reliving such an experience for the third time need not be decided now; but that factor is not to be ignored by the courts.

See also Medlin v. State, 280 S.E.2d 648 (S.C. 1981), discussed *infra* in text accompanying notes 211-12; *see generally* Nat'l Judicial College, Conference on Victims, Participants' Manual (1983).

3. President Reagan appointed a task force on victims of crime which issued its report in 1982. *See* President's Task Force on Victims of Crime, Final Report (1982).

grams have been implemented to ameliorate the crime victim's experience. For example, many states now provide compensation for victims,[5] and victim/witness assistance programs have sprung up around the country.[6] It has also been suggested that the victim's lot should be improved by granting them a right to participate in the prosecution of the defendant.[7] This article examines whether victims[8] should be accorded a

4. Commentators have recently begun to focus on victims of crime. *See, e.g.*, Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517; Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUD. 221 (1985); Gittler, *Expanding the Role of the Victim in a Criminal Action: An Overview of Issues and Problems*, 11 PEPPERDINE L. REV. 117 (1984); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L. J. 515 (1982); Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937 (1985); Herrington, *The Victim of Crime*, 26 S. TEX. L. J. 153 (1985); Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217 (1982).

In addition, various victim advocacy organizations have been formed, for example, the National Organization of Victim Assistance (NOVA), and the Victims' Assistance Legal Organization (VALOR), *see* 70 A.B.A.J. ¶25 (January 1984). The U.S. Dep't of Justice has awarded a grant to the Criminal Justice Section of the ABA to consider legislative packages on victim reform, *see* newsletter of ABA Section of Criminal Justice, Vol. 11, No. 2 (January 1984).

Finally, the public is interested in victims' rights. The Reader's Digest of June, 1985 featured a cover story entitled "Crime Victims Strike Back." *See generally* Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 949-50 (1985)(chronicling the "enormous political, media, and legal attention" recently devoted to victims' rights).

5. *See, e.g.*, statutes cited *infra* in note 273. *See generally* Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUD. 221, 223-26 (1985); Budewitz, *State Legislation in Aid of Victims and Witnesses of Crime*, 10 J. OF LEGIS. 394, 395 n.7 (1983).

6. *See* Herrington, *The Victim of Crime*, 26 S. TEX. L. J. 153 at 153 n.3 (1985) (describing various programs) and McDonald, *Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim*, 13 AM. CRIM. L. REV. 649, 672 n.128 (1976) (same). *See generally* Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUD. 221, 221 (1985).

7. A victim's right of participation has been endorsed in (1) a proposed constitutional amendment, *see* President's Task Force on Victims of Crime, Final Report, Proposed Constitutional Amendment (1982); (2) statutes, *see* S.C. CODE ANN. §16-3-1530(f)(1) ("A victim has the right to participate in the criminal justice process. . . ."); (3) the recommendations of the National Judicial College, *see* Nat'l Judicial College, Conference on Victims, Statement of Recommended Practices, II. Victim Participation ("Victims shall be allowed to participate . . . in all stages of judicial proceedings. . . .") (1983); and (4) recent articles, *see* Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 90-95; Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L. J. 515 (1982).

8. There is no consensus on the definition of the term "victim." Some jurisdictions have adopted a narrow definitioin, and some a broad definition. *Compare* NEB. REV. STAT. §29-119(2) (Supp. 1984) (victim is person who, as a result of homicide, first degree sexual assault, first degree assault or robbery has had a personal confrontation with the defendant, or suffered serious bodily injury as a result of a car accident when the driver is charged with a misdemeanor) *with* Attorney General's Guidelines for Victim and Witness Assistance, §I.C.1, 48 Fed. Reg. 143 (July 25, 1983) (victim is someone who suffers direct or threatened physical, emotional or financial harm as a result

right to participate in a specific stage of the prosecution, the plea bargain. The article begins by analyzing the costs and benefits of victim participation in plea bargains. It then examines the different types of plea bargains, and identifies the persons whose participation is necessary to a plea bargain. For this purpose, the article explores in detail the role of the parties and the court in plea bargains and the extent of the trial court's discretion to reject a plea bargain proposed by the parties. This article then analyzes recent changes in the law which grant victims some rights in plea bargains. The article concludes that within certain limits, victims should be accorded a right to participate in plea bargains. This right of participation should be implemented by granting to victims an opportunity to express their views on the proposed plea bargain to the trial judge at the plea bargain hearing before the trial judge decides whether to accept the plea bargain. If the victim is denied this right, the victim would have no cause of action but could report the judge to the appropriate judicial review commission. This article concludes that this right to be heard by the trial judge is sufficient to protect the various interests implicated. The victim's right to participate, therefore, should be limited, and the victim should not be granted any right to appeal if he or she objects to the trial judge's decision.

I. THE COSTS AND BENEFITS OF ESTABLISHING VICTIMS' RIGHTS IN PLEA BARGAINS

Is it wise policy for victims to have any rights in regard to plea bargains? Almost all entities that have considered this question in an advisory capacity endorse some rights for victims.[9] Of course, a range of

of a crime). A comprehensive review of existing definitions is beyond the scope of this article. *See generally* Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 518 n.3. Throughout this article, the term victim is limited to victims of violent felonies.

9. *See* ABA Standards Relating to Pleas of Guilty, Std. 14-3.1(d) ("The prosecuting attorney should make every effort to remain advised of the attitudes and sentiments of victims . . . before reaching a plea agreement."); *Id.* at Std. 14-3.3(b)(i) (prior to approving the plea bargain, court may require or allow victim to appear and testify); ABA Guidelines for Fair Treatment of Crime Victims and Witnesses, Guideline 6 (1983) (victims should receive notice of submission to court of plea agreement) and Guideline 10 (victims should have opportunity to consult with prosecutor prior to filing of proposed plea negotiation); President's Task Force on Victims of Crime, Final Report, Prosecutor's Recommendation 2 (1982) (prosecutors have duty to inform court of victim's view of plea bargain); Nat'l Judicial College, Conference on Victims, Statement of Recommended Judicial Practices I.B.2 (victims should receive timely notice of pretrial hearings) and II.A.5 (victims shall be allowed to participate in plea and sentence negotiations); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L. J. 515, 547 (1982); McDonald, *Towards a Bicentennial Revolution in Criminal Justice*, 13 AM. CRIM. L. REV. 649, 663-65 (1976) (by implication). *But see* Princi-

potential rights exists and the wisdom of establishing victims' rights in plea bargains can only be assessed by focusing on a particular right.

The most minimal right that might be accorded to victims is a right to information regarding the plea bargain.[10] Thus the victim could be informed of the terms of the plea bargain,[11] and of the date, time and place of the hearing at which the plea bargain will be tendered to the court for acceptance.[12] A second right is the right to be present at the hearing at which the plea bargain is presented to the court.[13] A more substantial right is the right to participate in the plea bargain decision.[14]

A. The Right to Be Informed and the Right to be Present

The first two rights identified, the right to be informed regarding the plea bargain and the right to be present at the plea bargain hearing, are relatively insignificant rights. With both rights, the victim remains a spectator and has no opportunity to affect the plea bargain decision. Moreover, to a large extent, the public currently enjoys the right to be informed and the right to be present. As to information, the terms of the proposed plea bargain become a matter of public record when the bargain is tendered to the court. The public and therefore the victim have a right to this information once it is in the public record. Likewise, the

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ples of Federal Prosecution, Part D (1980), which lists 11 "relevant considerations" the government should weigh before entering a plea bargain; the list does not include the victim's view as a "relevant consideration." By negative implication, the victim's view is irrelevant. However, this federal position was probably superseded by provisions of the VWPA of 1982 which states that the victim should be consulted by the prosecutor to get the victim's views on plea negotiations. *See* §6(a)(5)(A) and (C) of the VWPA of 1982, 18 U.S.C. §1512, discussed *infra* in notes 224-25 and accompanying text.

10. *See, e.g., infra* statutes discussed in text accompanying notes 213-16. *See also* Nat'l Judicial College, Conference on Victims, Statement of Recommended Judicial Practices I.B. (judges should encourage prosecutors to inform victims of all pretrial hearings).

11. *See, e.g.*, TENN. CODE ANN. §8-7-108 (Supp. 1985) (victim to be informed of plea bargain terms after acceptance).

12. *See, e.g., infra* statutes discussed in text accompanying note 200. *See also* ABA Guidelines for Fair Treatment of Crime Victims and Witnesses, Guideline 6 (1983).

13. *See, e.g.*, ARK. STAT. ANN. Rule of Evid. 616 (Supp. 1985) (victim has right to be present during "any hearing.").

14. *See infra* discussion in notes 226-35 and accompanying text (seven states have established right of participation). Victim participation is also endorsed in the President's Task Force on Victims of Crime, Final Report, Prosecutors Recommendation 2 (1982); ABA Guidelines for Fair Treatment of Crime Victims and Witnesses, Guideline 10 (1983); Nat'l Judicial College, Conference on Victims, Statement of Recommended Judicial Practices II.A.5 and Participants' Manual, Issue II.B.(7) *Comment* (1983) ("[T]he judge should certainly . . . receive factual information from the victim concerning [the impact of the crime] and consequential losses."); Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 90-95.

time and place of the plea bargain hearing is generally public information. As to a victim's right to be present at the plea bargain hearing, these are presumably open hearings to which the public has a constitutional right of access.[15] The victim, therefore, already has a right to be present.[16]

Aside from the fact that the right to information and the right to be present are two relatively minor rights which to a large extent already exist for the public,[17] they may be implemented for the victim in a meaningful time frame with only an incidental administrative burden.[18] The prosecutor[19] could be required to inform the victim of the following facts before the plea bargain hearing: (1) the terms of the proposed bargain; (2) the time and place of the hearing; and (3) the victim's right to attend the hearing. Victims could be granted these rights of presence and information[20] with minimal impact on the current system.

15. *See* Press-Enterprise Co. v. Superior Court, 464 U.S. 501 (1984); Globe Newspaper Co. v. Superior Court, 457 U.S. 596 (1982); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

16. Although the victim currently has these rights to be informed and to be present, the value of the rights is diminished by the timing involved. The right to information arises relatively late in the process. As to information on the terms of the bargin, the victim's right to be informed does not arise until the bargain is tendered to the court. As to information on the time and place of the plea bargain hearing, this information is presumably public but is not usually available far in advance of the hearing. This problem of timing on the right to information also impairs the victim's right to be present because the victim will not get information on the hearing schedule in time to implement the right to be present.

17. Although these rights exist, victims are rarely informed of them. *See, e.g.*, VWPA §2(a)(1) and (5), 18 U.S.C. §1501 (Congressional finding that victims are ignored and not informed regarding guilty pleas).

18. *See* Nat'l Judicial College, Conference on Victims, Participants' Manual, Issue I.C. *Comment* (victim notification systems are not costless but are relatively inexpensive due to availability of powerful information processing systems).

19. On a practical level, the prosecutor's office is the best candidate to be responsible for victim notification programs because they have information systems with the caseloads already entered. *See Id.* Many programs have placed the responsibility for victim notification with such offices. *See, e.g.*, ILL. REV. STAT. ch. 38§1404 (Smith-Hurd supp. 1985); Task Force Report, Prosecutors Recommendation 1; Guidelines for Victim and Witness Assistance §II.B., 48 Fed. Reg. 143, p. 33,776 (July 25, 1983); *see* Nat'l Judicial College, Conference on Victims, Participants' Manual, Issue I.C. *Comment* (notification programs have been established, funded and supervised by prosecutors). However, this is not the sole alternative; some notification programs are administered by victim servicies organizations and some by the courts. *See Id.*

20. For an interesting empirical study on the impact of presence and information on victim satisfaction with the sentence, see Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process*, 73 J. CRIM. L. & CRIMINOLOGY 317, 323-27 (1982) (presence in court decreases victims' assessment that sentences are too easy while information on the disposition of the case increases victims' assessment that sentences in general are too easy). *See also id.* at 327 (where victims are both informed of and present at disposition, over one-fifth reduce their demands for more severe sentences). *Compare* Hagan's conclusion that information on disposition without attendance

B. The Right to Participate

The more significant right which might be accorded victims is the right to participate in the plea bargain decision.[21] It is important to analyze what costs and benefits might result from establishing such a right.

1. The Victim's Interests

The victim has two interests in the plea bargain decision. One interest is financial: the victim is interested in restitution being imposed as part of the sentence.[22] Thus in a charge bargain, the victim wants to insure that the defendant pleads to a charge sufficiently serious to allow restitution;[23] and in a sentence bargain, the victim wants to advocate an award of restitution.[24] The victim's second interest is retribution, or revenge:[25] the victim feels he or she has been violated and that the criminal's punishment should be severe.[26] Therefore, in a charge bargain, the victim

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at court increases victims' assessment that sentences are too easy, *supra*, *with* Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 980-81 (1985) (problem of victim alienation associated with plea bargains could be solved if prosecutor simply provided more information to victims). *Accord*, J. Hernon & B. Forst, The Criminal Justice Response to Victim Harm 60 (Nat'l Inst. of Justice, Dep't of Justice, May 1984) (being informed about case outcomes correlated with victim satisfaction).

21. *See infra* note 179.

22. Nat'l Judicial College, Conference on Victims, Participants' Manual, Issue II.B.(7) *Background* (plea bargains concern victims because their restitutional interests may be disregarded); Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPPERDINE L. REV. 117, 136-40 (1984), Goldstein, *The Role of the Victim in Criminal Prosecution*, 52 MISS. L. J. 515, 529-42 (1982); Herrington, *The Victim of Crime*, 26 S. TEX. L. J. 153, 163 (1985). Federal law now provides that if the judge does not order restitution, he or she must state on the record the reasons. 18 U.S.C. §3579(a)(2). On the VWPA restitution provisions, see generally Note, *The Constitutionality of the Victims' Restitution Provisions of the Victim and Witness Protection Act*, 70 U. VA. L. REV. 1059 (1984). On the victim's interest in restitution, see generally Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 548-55; Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUD. 221, 226-27 (1985); Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 1007-17 (1985).

23. For example, a defendant initially charged with felony theft might enter a plea bargain to plead to misdemeanor theft. In this situation, the victim would want to insure that the charge to which the defendant pleads guilty accurately reflects the amount of restitution indicated.

24. Davis, Kunreuther & Connick, *Expanding the Victim's Role in the Criminal Court Disposition Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 498 (1984) (failure to obtain restitution was the second most commonly cited reason for victim dissatisfaction with case outcomes).

25. *See* Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 91 & n.282 (victims experience a positive catharsis of vengeful instincts as a result of participating in plea bargain decisions); Gittner, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPPERDINE L. REV. 117, 140-42 (1984).

26. Davis, Kunreuther & Connick, *Expanding the Victim's Role in the Criminal Court Disposi-*

would want the defendant to plead guilty to a serious charge, and in a sentence bargain, the victim would want a significant sentence imposed. The victim could protect these interests by participation in the plea bargain.

2. Society's Interests

The other interests advanced by giving the victim a right to participate in the plea bargain are society's interests. Society benefits from victim participation in plea bargains in two ways. The first is that according the victim the right to participate will result in more information being provided to the decision-maker.[27] More information, theoretically, results in better decisions. So the trial judge, when he or she is deciding whether to accept the plea agreement, will benefit from the information that the victim provides.[28]

The second benefit which accrues to society from victim participation in plea bargains is that it promotes the effective functioning of the criminal justice system. The theory is that if victims are not consulted regarding the plea bargain and so feel irrelevant and alienated,[29] they will not

tion Process: The Results of an Experiment, 75 J. CRIM. L. & CRIMINOLOGY 491, 500 (1984) ("Failure of the court to punish defendants severely enough was the most frequently cited reason for victim dissatisfaction with case outcomes, mentioned by 70% of victims."). *See also* Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 545; Herrington, *The Victim of Crime*, 26 S. TEX. L. J. 153, 154 (1985) (by implication). *But see* Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Experiment* at 172, in PLEA BARGAINING 167 (W. McDonald & J. Cramer eds. 1980) (victims' contributions to plea bargain conferences were not vengeful, vindictive or punitive; victims were not motivated by "simplistic retribution syndrome"). *Cf.* Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 964-65 (1985) ("Common assumptions regarding crime victims—that they are all 'outraged' and want revenge and tougher law enforcement—underlie much of the current victims' rights rhetoric. But in light of the existing psychological evidence, these assumptions fail to address the experience and real needs of past victims.") (footnote omitted).

27. *See* Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 90 (victim participation in plea bargain hearings allows victims to offer additional information regarding the offense); Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Study* at 171, in PLEA BARGAINING 167 (W. McDonald & J. Cramer, eds. 1980) (victims participating in plea bargain conferences functioned mainly as information providers).

28. *See* Davis, Kunreuther & Connick, *Expanding the Victim's Role in the Criminal Court Dispositional Process*, 75 J. CRIM. L. & CRIMINOLOGY 491, 505 (1984) (victim's views provide another perspective to courthouse professionals); *but cf.* Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Study* at 171, in PLEA BARGAINING 167 (W. McDonald & J. Cramer, eds. 1980) (judges disagreed on how frequently victims possessed additional helpful information).

29. *See* Nat'l Judicial College, Conference on Victims, Participants' Manual, Issue II.B.(7) *Background* ("Victims are very disturbed by plea negotiations in which the prosecutor and defense counsel take it upon themselves to compromise the case against the defendant, sometimes in flagrant

cooperate in reporting and prosecuting a crime. As a result, the system, which is dependent on them, functions less effectively.[30] Therefore, making victims feel their contribution is critical, regardless of its actual value, will motivate the victim to continue to report crime and cooperate in the investigation and prosecution. Thus, allowing victim participation in the plea bargain decision[31] would serve both the interests of the victim and of

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disregard of the facts of the seriousness of the crime as perceived by the defendant."); Davis, Kunreuther & Connick, *Expanding the Victim's Role in the Criminal Court Disposition Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 492-93 (1984) ("Victims may become frustrated and angry when they see that an assault against them may be treated only as disorderly conduct, that prosecutor and defense attorney appear to collaboate rather than act as adversaries, that their cases receive only a few minutes of the court's time, or that after pleading guilty, the defendant may be home before they are.") *See also* Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 980 (1985) (referring to the problem of "victim alienation associated with plea bargaining").

30. *See* ABA Standards Relating to Pleas of Guilty, Standard 14-3.1(d) *History of Standard*:

> The victim is all too often the forgotten person in the plea negotiation process. In some jurisdictions, the victim may not even be informed of the disposition of the case which was based upon the violation of his or her rights as a citizen. Victims who are shut out of the disposition process in this manner may develop a cynical attitude toward the criminal justice system and may become reluctant to cooperate with law enforcement officers in the future. In order to prevent these feelings, it is important that the prosecutor make every effort to contact the victim, to listen to the victim's views, and to explain the plea negotiation process to the victim.

See also §2(a) of the VWPA of 1982, 18 U.S.C. §1501 ("The Congress finds and declares that . . . without the cooperation of victims . . . , the criminal justice system would cease to function. . . ."); W. VA. CODE §61-11A-1 (Supp. 1985) (identical legislative finding); Food Fair Stores, Inc. v. Joy, 389 A.2d 874, 880 (Md. Ct. App. 1978) (prosecutor is "bound to recognize, in exercising his prosecutorial discretion, that in our present day society no prosecutor can meet his responsibilities to the public without the cooperation and support of private citizens."); Nat'l Judicial College, Conference on Victims, Statement of Recommended Judicial Practices *Introduction* ("The criminal justice system depends on the willing cooperation of victims and witnesses in order to perform its primary function of protecting all citizens in this country."); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L. J. 515 at 518-20 and 527-29 (1982); Herrington, *The Victim of Crime*, 26 S. TEX. L. J. 153, 156 (1985). *But see* Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPPERDINE L. REV. 117, 145-49 (1984). Gittler concludes that, "The available data . . . is not really sufficient to reach any definite conclusion about the casual links, if any, between victim non-cooperation in the prosecution of alleged offenders, victim dissatisfaction with the criminal justice system, and victim participation in criminal proceedings." *Id.* at 149.

31. Arguably other societal benefits besides the two discussed might result from victim participation. One is that the public, aware that plea bargains incorporated the victim's views, would feel more confident that justice was being done. Thus victim participation might help legitimize plea bargaining in the public's perception. This societal benefit has not been analyzed empirically and remains speculative.

Another societal benefit possibly flowing from victim participation is that the victim's participation would encourage the courthouse professionals, particularly the prosecutor, to act responsibly by not making too many concessions on sentences. *See* Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 91-92. Professor Gifford offers this

society.[32]

3. The Prosecution's Interests

No legitimate interests of the prosecutor would be significantly slighted by victim participation in plea bargains. The prosecutor's responsibility is to seek justice on behalf of society.[33] Exposing the prosecutor and/or court to information from the victim should only enhance the prosecutor's ability to meet this goal. As a practical matter, though, the prosecutor may have goals other than achieving justice for society. Specifically, one goal might be the quick summary disposition of a large volume of cases. Victim participation might hinder this goal in two ways. First, prosecutors may fear that victim participation would disrupt the plea bargain hearing and render it confrontational. But empirical evidence indicates that victim participation at plea bargain hearings is not disruptive or confrontational, nor does it slow the process.[34] Second, prosecutors might argue that victim participation will impair quick summary disposition. Prosecutors would reason that victim participation might render plea bargains more risky for and therefore less attractive to defendants. Consequently, fewer defendants would plead guilty and the system would founder under the increased demand for trials. Thus the prosecutor and even society would be disserved by victim participation.

There are several responses to this point. First, the argument assumes that victim participation renders plea bargains less attractive to the defendant. Victim participation may increase the risk to the defendant that the judge will reject the bargain, but the resolution of the case will still be fast and certain if the plea bargain is accepted. Thus plea bargains may be more risky to the defendant as a result of victim participation, but

as a reason to allow victim participation although the empirical evidence indicates that victim participation has little substantive impact on sentencing. *Id.* at 92 n.286.

32. Whether all of these interests would *actually* be served by victim participation in plea bargains is a question beyond the scope of this article. For empirical studies on the impact of victim participation on the system, *see* Davis, Kunreuther & Connick, *Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491 (1984); Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Experiment*, in PLEA BARGAINING 167 (W. McDonald & J. Cramer, eds. 1980). Other empirical studies on the impact of victim participation on the system are collected in Hagan, *Victim Before the Law: A Study of Victim Involvement in the Criminal Justice Process*, 73 J. CRIM. L. & CRIMINOLOGY 317, 318 n.2 (1982). As to the impact of victim participation on the victim rather than on the system, see generally *Id.* and Heinz & Kerstetter, *supra* at 173-74.

33. *See infra* notes 250-51.

34. *See* Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Experiment* at 170-72, in Plea Bargaining 167 (W. McDonald & J. Cramer, eds. 1980).

they will still retain other attractive qualities.[35] At any rate, in one study the empirical evidence indicated that victim participation did not decrease the number of plea bargains entered and did not disrupt speedy disposition.[36] Second, the evidence conflicts on whether reducing plea bargaining creates a corresponding decrease in the number of guilty pleas.[37] Third, as a policy matter, the need of administrative efficiency should not determine the structure of our criminal justice system. Rather, the search for justice should determine the system's structure.

4. The Defendant's Interests

None of the defendant's rights is impaired by victim participation at plea bargain hearings. The victim's participation at the plea bargain hearing would not implicate the defendant's constitutional right to confront and cross-examine witnesses for two reasons. First, a guilty plea constitutes a waiver of this right.[38] Second, the Supreme Court has held that a defendant has no confrontation or cross-examination rights at sentencing hearings.[39] By analogy, the defendant should be denied these rights at plea bargain hearings as well.[40]

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35. However, the addition of a victim's appellate right would make the plea bargain less attractive to the defendant. *See infra* note 269 and accompanying text.

36. *See* Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Study* at 174, in PLEA BARGAINING 167 (W. McDonald & J. Cramer eds. 1980). *See also* Hagan, *Victims Before the Law*, 73 J. CRIM. L. & CRIMINOLOGY 317, 329 (1982):

> Our point is that the full exposure of victims to the criminal justice process involves fewer risks than agents of the system may have misguidedly assumed. In sum, not only do victims have a right to be informed about, and involved in, the criminal justice process, but the consequences of such a policy seem in some important ways to be benign.

See also Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 90 n.280.

37. *Compare* N.A.C. Standards, The Courts §3.1 at 47 (1973) and Berger, *The Case Against Plea Bargaining*, 62 A.B.A. J. 621, 623-24 (1976) *with* Chief Justice Burger's comments to the ABA Annual Convention in 1970, *reprinted in* KAMISAR, LAFAVE & ISRAEL, MODERN CRIMINAL PROCEDURE 1222-23 (5th ed. 1980).

38. Pointer v. Texas, 380 U.S. 400, 406 (1965).

39. Williams v. N.Y., 337 U.S. 241 (1949). *See generally* Note, *The Constitutionality of the Victims' Restitution Provisions of the Victim and Witness Protection Act*, 70 U. VA. L. REV. 1059, 1068-71 (1984).

40. Of course, one of the defendant's peripheral interests is that the victim tell the truth. There should be two controls on the truthfulness of the victim's statement at the plea bargain hearing. First, the victim's statement, whether written or oral, would be made under oath so that if the victim misrepresents an item, there is the potential of perjury liability, just as there is with any witness who testifies falsely under oath. Second, the defendant will be present at the plea bargain hearing and may react to the accuracy of the victim's statement. The defendant, of course, is also under oath. At any rate, one empirical study on victim participation in plea bargains found that the victims "did not present widely divergent interpretations" of the offense as compared with the defendant's interpreta-

As with prosecutors, the defendant may have interests as a practical matter outside of the exercise of particular rights. Specifically, the defendant's interest is in getting the court to accept the plea bargain. Victim participation might increase the risk to the defendant that the court would reject the plea bargain.[41] Although acceptance of the plea bargain may be a practical interest of the defendant, the defendant has no right to have the court assess the plea bargain on less than the total amount of available information. Another interest of the defendant will be to minimize the sentence, and participation of the victim may be inimical to this interest.[42] Again, though, the defendant has no legitimate right to be sentenced based only on partial information. Victim participation would protect the interests of the victim and society without any corresponding disservice to the legitimate interests of prosecutors and defendants. Victim participation in plea bargains is therefore a good idea. The next section explores the structure of plea bargains in order to analyze how victim participation can be implemented.

II. THE CURRENT PLEA BARGAIN SYSTEM

A. Defining Plea Bargains

A plea bargain is "the granting of certain concessions to the defendant in the event he pleads guilty."[43] The concessions granted to the defendant commonly involve either the charges filed against him or the sentence he will receive.[44] If the defendant pleads guilty as part of a "charge bargain," the prosecutor moves to reduce the charges so they are either less serious,[45] less numerous[46] or both.[47] If the defendant pleads guilty as part of a "sentence bargain," either the prosecutor agrees to recommend

tion. *See* Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Experiment* at 171, in PLEA BARGAINING 167 (W. McDonald & J. Cramer, eds. 1980).

41. *But see infra* note 201.

42. *But see* Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Experiment* at 174, in PLEA BARGAINING 176 (W. McDonald & J. Cramer eds. 1980) (effect of victim participation on sentences was "toward a reduction in sentence severity and use of incarceration.").

43. Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509 (1971).

44. *See, e.g.*, NEB. REV. STAT. §29119(1) (1984 Cum. Supp.). Charge and sentence concessions are most common, but occasionally a plea bargain will include other types of concessions to the defendant, for example, a promise to grant immunity or not to prosecute others. *See* Note, 112 U. PA. L. REV. 865, 865 & n.7 (1964).

45. *See, e.g.*, Commonwealth v. Maroney, 223 A.2d 699 (Pa. 1966) (defendant charged with first degree murder pleads guilty to second degree murder); Christian v. State, 195 N.W.2d 470 (Wis. 1972) (same). *See generally* Commonwealth v. Maroney, 223 A.2d 699, 703 (Pa. 1966); LaFave, *The Prosecutor's Discretion in the U.S.*, 18 AM. L. COMP. LAW 532, 539-40 (1970); Note, 112 U. PA. L.

a particular sentence to the court,[48] or the court itself agrees to impose a particular sentence.[49] Often the bargain includes a combination of

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REV. 865 (1964); Comment, *Constitutional Constraints on Prosecutorial Discretion in Plea Bargaining*, 17 HOUSTON L. REV. 753, 754 (1980).

The ABA Standards Relating to Pleas of Guilty, Std. 14-3.1(b)(ii) provides that the prosecutor may agree to dismiss the charged offense if the defendant pleads to another offense "reasonably related." The commentary explains:

> Statutes dealing with pleas to lesser offenses typically mention only two situations: (1) a plea to an offense included in the offense charged and (2) a plea to a lesser degree of the offense charged. An offense is of the "lesser included" variety if all its elements would of necessity be established by proof of the greater offense. An offense of the "lower degree" variety may not be an included offense in that proof of different facts would be required, but it is an offense of lesser culpability. Occasionally, however, plea agreements are reached as to other offenses that neither are included within nor are a lesser degree of the offense charged. Subparagraph (b)(ii) permits such an agreement because instances may arise in which a charge concessions would be appropriate but no less included or lesser-degree offense is available. The language in subparagraph (b)(ii) merely requires that the reduction be to a charge that bears some categoric similarity to the original charge.

Id. (footnotes omitted).

46. *See, e.g.*, State v. McIntyre, 235 S.E.2d 920 (N.C. 1977) (defendant charged with 9 counts embezzlement and 1 count obtaining money by false pretenses pleads guilty to 1 count embezzlement, other charges dismissed); State v. Wolfe, 175 N.W.2d 216 (Wis. 1970) (defendant charged with 3 counts possession of drugs pleads guilty to 1 count possession of drugs, other charges dismissed). *See* FED. R. CRIM. P. 11(e)(1)(A) (as part of plea agreement, attorney for government may move for dismissal of other charges); ABA Standards Relating to Pleas of Guilty, Standard 14-3.1(b)(ii) (prosecutor may agree to dismiss other charges if defendant enters guilty plea). *See generally* Commonwealth v. Maroney, 223 A.2d 699, 703 (Pa. 1966); LaFave, *The Prosecutor's Discretion in the U.S.*, 18 AM. J. COMP. LAW 532, 541 (1970); Note, 112 U. PA. L. REV. 865 (1964); Comment, *Constitutional Constraints on Prosecutorial Discretion in Plea Bargaining*, 17 HOUSTON L. REV. 753, 754 (1980).

A subtype of this fewer-charges plea bargain arises when the defendant pleads guilty to a filed charge in exchange for the prosecutor's agreement to forego filing additional charges. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978) (prosecutor offered, *inter alia*, to forego filing habitual felon charge in exchange for guilty plea to uttering forged instrument, defendant refused offer). *See generally* Newman, *supra* note 10 at 97; Comment, *Constitutional Constraints on Prosecutorial Discretion in Plea Bargaining*, 17 HOUSTON L. REV. 753, 754 (1980).

47. *See, e.g.*, U.S. v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973) (defendant charged with first degree murder and conspiracy to murder pleads guilty to second degree murder).

48. *See* FED. R. CRIM. P. 11(e)(1)(B) (attorney for government may make a recommendation, or agree not to oppose the defendant's request, for a particular sentence); ABA Standards Relating to Pleas of Guilty, Std. 14-3.1(b)(i) (prosecutor may agree to make or not to oppose favorable recommendations as to the sentence if defendant enters a plea of guilty). *See, e.g., infra* People v. Ferguson, 361 N.E.2d 333 (Ill. App. 1977), discussed in text accompanying notes 151-57.

On sentence bargaining generally, *see* LaFave, *The Prosecutor's Discretion in the U.S.*, 18 AM. J. COMP. LAW. 532, 540-41 (1970); Comment, *Constitutional Constraints on Prosecutorial Discretion in Plea Bargaining*, 17 HOUSTON L. REV. 753, 754 (1980).

49. *See* FED. R. CRIM. P. 11(e)(1)(C) (prosecutor may agree that a specific sentence is the appropriate disposition of the case). If the court rejects the 11(e)(1)(C) agreement for a specific sentence, the defendant may withdraw his plea pursuant to FED. R. CRIM. P. 11(e)(4). But if the

charge and sentence concessions[50] in exchange for the guilty plea.[51]

B. Participants in the Plea Bargain

Identifying the participants to a plea bargain and defining their roles is necessary to analyze how the victim might be brought into the plea bargain decision.

1. Plea Negotiations

Plea negotiations[52] often begin as soon as the defendant is charged.[53] The prosecutor and the defendant generally handle the initial negotiating.[54] These early plea discussions typically assume no set structure; they are often conducted informally in the hallways of the courthouse.[55]

As plea negotiations continue, the judge may become involved. Judicial participation in plea negotiations is controversial.[56] Proponents

court accepts the FED. R. CRIM. P. 11(e)(1)(C) agreement, the court effectively binds itself to a specific sentence. *See also* People v. Killebrew, 330 N.W.2d 834, 838 (Mich. 1982).

50. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357 (1978) (in exchange for guilty plea to 1 count uttering a forged instrument, prosecutor offered to recommend sentence of 5 years and forego habitual felon charge; defendant rejected bargain); Stroud v. State, 450 N.E.2d 992 (Ind. 1983) (in exchange for guilty plea to battery, prosecutor offered to recommend 5 year sentence and dismiss 4 other counts; trial court rejected plea).

51. Usually the defendant's contribution to the plea bargain is his or her guilty plea. But just as the prosecutor may offer the defendant benefits aside from charge and sentence concessions, *see* supra note 14, so the defendant may offer the prosecutor benefits aside from a guilty plea. The benefits the defendant might offer include returning stolen property, making restitution to the victim, providing information to the police, or testifying against others. *See, e.g.*, U.S. v. Ammidown, 497 F.2d 615 (D.C. Cir. 1973) (as part of plea agreement, defendant agreed to testify against accomplice); Manning v. Engelkes, 281 N.W.2d 7 (Iowa 1979), discussed in text accompanying notes 101-03 *infra*.

52. Plea negotiations or discussions should be distinguished from the plea bargain. The court is always involved in approving the completed plea bargain; *see supra* text accompanying notes 45-56. In contrast, the plea negotiations or discussions which result in that bargain may or may not involve the court.

53. Plea negotiations may begin even before the defendant is charged. *See supra* note 52.

54. *See* Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Experiment*, at 167 in PLEA BARGAINING 167 (W. McDonald & J. Cramer eds. 1980) ("Typically plea negotiations begin with discussions between opposing counsel."); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972) (court generally enters only after bargain made).

55. McDonald, *Towards a Bicentennial Revolution in Criminal Justice*, 13 AM. CRIM. L. REV. 649 (1976).

56. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1103 (1976) ("National study commissions have generally condemned judicial participation in pretrial bargaining; practitioners seem generally to approve the practice; and the courts of review seem almost evenly divided.") (footnotes omitted); Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 760 (1981). *See also* Schlesinger & Malloy, *Plea Bargaining and the Judiciary: An Argument*

claim that judicial participation encourages an intelligent plea decision by the defendant and facilitates more appropriate sentencing.[57] Opponents, however, point out that judicial participation risks coercion and gives the defendant the impression that the judge is just another official whose demands must be placated or the defendant will be denied a fair trial.[58]

Generalizing about the extent to which judges participate in plea discussions is difficult for several reasons. First, the law on whether judges are allowed to participate in the negotiation process varies.[59] In the federal system, judges are explicitly denied participation by rule.[60] If a judge violates this rule and does participate, the plea may be deemed

for Reform, 30 DRAKE L. REV. 581, 587-93 (1980-81) (recounting arguments for and against judicial participation). Most oppose the idea of judges participating in plea negotiations. Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 287 & n.5 (1972) ("Judicial participation in the [plea bargaining] process . . . has been viewed with nearly universal distaste."). *See, e.g.*, People v. Killebrew, 330 N.W.2d 834 (Mich. 1982); Commonwealth v. Evans, 252 A.2d 689, 690 (Pa. 1969); State v. Wolfe, 175 N.W.2d 216, 221 (Wis. 1970); Advisory Committee, Notes to FED. R. CRIM. P. 11(e) (1974); ALI Model Code of Pre-Arraignment Procedure § 350.3(1)(POD 1975); President's Comm'n on Law Enforcement and the Administration of Justice: The Challenge of Crime in a Free Society 136 (1967); ABA Professional Ethics Committee, Informal Opinion No. 779 (judge should not be party to advance determination of sentence); Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 760 (1981); Note, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L.J. 241, 254-55 n.93 (1974). In contrast, some endorse judicial participation in plea negotiations. *See, e.g.*, ABA Standards Relating to Pleas of Guilty, §14-3.3(c) (2d ed. 1979) (judge can meet with parties on plea negotiations if they are deadlocked). This standard is a change from a previous ABA position. *Cf.* ABA Standards Relating to Pleas of Guilty §3.3(a) (approved draft 1968) (court should not participate in plea negotiations). This reversal in the ABA position was noted in People v. Killebrew, 330 N.W.2d 834, 844 n.12 (Mich. 1982). The current ABA position, which allows judicial participation if the parties are deadlocked, was adopted in Medlin v. State, 280 S.E.2d 648 (S.C. 1981).

57. *See* Schlesinger & Malloy, *Plea Bargaining and the Judiciary: An Argument for Reform*, 30 DRAKE L. REV. 581, 589-93 (1980). Participation enhances the intelligence of the defendant's plea because the defendant will be informed of the sentence the judge is contemplating. Participation facilitates better sentencing because the judge has more information after participating in the negotiations. Moreover, proponents argue that judicial participation restores the sentencing function to the court, the best arbiter of sentences, rather than leaving it to the prosecutor.

58. *See id.* at 587-89. The risk of coercion arises if the trial judge proposes a plea bargain which the defendant rejects. Trial judges like guilty pleas because guilty pleas minimize their workload and eliminate the risk of reversal on appeal. Thus a defendant who rejects a plea bargain offer endorsed by the judge and demands a trial may irritate the judge. The defendant then goes to trial, usually before the judge whose offer he has refused, and the defendant may risk a slanted trial or a disproportionately heavy sentence if convicted. Thus judicial participation in plea bargaining puts some pressure on the defendant to plead guilty. Judicial participation also creates an appearance of impropriety since it brings the judge down to the level of a negotiating litigant.

59. *See* Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1103 (1976) (courts of review "seem almost evenly divided" on allowing judicial participation).

60. FED. R. CRIM. P. 11(e)(1) ("The court shall not participate in any such [plea] discussions.")

involuntary.[61] Although judicial participation is not unconstitutional,[62] and it does not render a plea involuntary *per se*,[63] federal courts strongly condemn the practice.[64]

Because the federal prohibition on judicial participation in plea negotiations is not constitutional, states are free to permit participation.[65] Although some states agree with the federal approach prohibiting participation,[66] many states allow judges to participate in plea discussions.[67]

Aside from the variation in state and federal laws, generalizing about the extent of judicial participation in plea negotiations is difficult because judges' policies vary widely for reasons not necessarily related to the law. Evidence exists that judges do participate in plea negotiations.[68] Of

61. *See, e.g.*, U.S. *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966) (plea held involuntary due to judge's participation in negotiations).

62. U.S. v. Harris, 635 F.2d 526, 528 (6th Cir. 1980) (judicial participation is not *per se* unconstitutional, but FED. R. CRIM. P. 11 limits judge's role); Frank v. Blackburn, 646 F.2d 873 (5th Cir. 1980) (judicial participation in not violation of due process based on vindictiveness theory).

63. Flores v. Estelle, 578 F.2d 80, 85 (5th Cir. 1978); Brown v. Peyton, 435 F.2d 1352 (4th Cir. 1970); U.S. *ex rel.* Rosa v. Follette, 395 F.2d 721 (2d Cir. 1968).

64. *See, e.g.*, U.S. v. Adams, 634 F.2d 830 (5th Cir. 1981) (judge's participation in plea negotiations is so dangerous that appellate court may raise issue *sua sponte*).

65. Blackmon v. Wainwright, 608 F.2d 183 (5th Cir. 1979).

66. Some states have adopted a rule like F.R. CRIM. P. 11(e)(1) which prohibits judicial participation. *See, e.g.*, State v. Haner, 631 P.2d 381, 385 (Wash. 1982). Many states agree with the federal approach that judicial participation does not render the plea involuntary *per se*, but the plea in a particular case may be involuntary and courts endorse careful scrutiny. *See, e.g.*, Anderson v. State, 335 N.E.2d 225 (Ind. 1975); State v. Svoboda, 287 N.W.2d 41 (Neb. 1980); State v. Byrd, 407 N.E.2d 1384 (Ohio 1980). Some states go further and hold that judicial participation does render the plea involuntary *per se*. *See, e.g.*, People v. Killebrew, 330 N.W.2d 834 (Mich. 1982); *see also* Commonwealth v. Evans, 252 A.2d 689 (Pa. 1969) (if judge's promise induces the plea, it is involuntary *per se*).

67. *See, e.g.*, Medlin v. State, 280 S.E.2d 648 (S.C. 1981). *See generally* Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 760 (1981) (many states allow judges to participate).

Illinois is one state which allows judicial participation. ILL. SUP. CT. R. 402(d)(1) provides that the judge may not *initiate* plea negotiations. The implication is that the judge may participate once negotiations have begun, and the cases establish that guilty pleas achieved through judicial negotiation are voluntary. *See, e.g.*, People v. Brock, 259 N.E.2d 12 (Ill. 1970); People v. Fox, 345 N.E.2d 139 (Ill. App. 1985); People v. Steele, 314 N.E.2d 531 (Ill. App. 1974); People v. Robinson, 308 N.E.2d 88 (Ill. App. 1974). Another state which allows judicial participation is Florida: Fla.R.Cr.P. 3.171(c) does not prohibit judicial negotiation. *See* Schlesinger & Malloy, *Plea Bargaining and the Judiciary: An Argument for Reform*, 30 DRAKE L. REV. 581, 595 (1980).

68. *See* Commonwealth v. Evans, 252 A.2d 689, 692 (Pa. 1969) (Bell, C.J., dissenting) (trial judge's participation, a frequent practice in Pennsylvania for countless years, should not be prohibited); Newman, *supra* note 10 at 32-52, 78-104; Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509, 514-15 (1971) (unrealistic to say judicial involvement does not occur; well documented in case law); Note, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L.J. 241, 255 n.93 ("Empirical evidence indicates that judges do take part in plea negotiations in many jurisdic-

course, in states where the law sanctions judicial participation, judges may negotiate forthrightly.[69] However, even though the law in these states allows judges to participate, participation is not required. In contrast, in jurisdictions forbidding participation, evidence indicates that judges nevertheless do participate informally, through "hints, indirection and cajolery."[70] Some judges refuse to participate altogether.[71] This judicial participation in plea negotiations runs the gamut from none at all to extensive,[72] and generalizations are misleading.[73] In fact, generalizing about the practices of a particular judge is sometimes difficult.[74]

2. *The Final Plea Bargain*

a. The Parties

Regardless of whether the judge participates in the plea negotiations, once the parties have reached a proposed plea agreement, they tender the agreement to the court for approval. Both the defendant and the prosecution must have approved of the agreement; without their approval, the

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tions, at least in state proceedings."). *See generally* Ryan & Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC'Y REV. 479 (1979).

69. For a description of "forthright" judicial bargaining, *see* Alschuler, *The Trial Judge's Role in Plea Bargaining. Part I*, 76 COLUM. L. REV. 1059, 1087-91 (1976).

70. *See id.* at 1092-99 for a vivid description of judicial negotiation via "hints, indirection and cajolery."

71. *See id.* at 1061-76, where Professor Alschuler describes the practice of Houston, Texas judges in refusing to participate.

72. *See* Alschuler *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1087-91 (1976); *see also* McIntyre & Lipsman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1157 (1970) (description of extensive participation of judges in Chicago and Brooklyn).

73. Another reason it is difficult to identify the extent of judicial participation in plea negotiations is that no consensus exists on what constitutes participation. *Compare* Commonwealth v. Evans, 252 A.2d 689 (Pa. 1969) (judge clearly participated in negotiations by discussing probable sentences in two bench conferences) *with* State v. Wolfe, 175 N.W.2d at 220-21 (Wis. 1970) (judge did not participate in negotiations by convening pre-plea conference with parties where judge allegedly agreed to rely on particular report for sentencing). *See also* Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1076-87 (1976). Professor Alschuler characterizes the sentencing policies of a number of federal judges as "implicit" judicial participation in plea negotiations. He explains that some federal judges, who do not negotiate forthrightly or through hints and indirection, nevertheless can be said to participate in plea bargains when they impose disparate sentences in plea versus non-plea convictions. Whether this conduct qualifies as "participation" is arguable and further complicates the definition of participation.

74. *See* Klonoski, Mitchell & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 OR. L. REV. 114, 129 (1971) (trial judges' involvement in plea discussions varies depending on "the charge, the defense counsel, the prosecutor, the media interest, the mood of the judge, and the time of the moon").

plea bargain may not be presented to the court.[75]

b. The Court

Once the parties endorse the plea bargain and present it to the court, the court must approve it. The exact question before the court varies depending on the type of bargain. If the proposed bargain is a charge bargain, and if the charges are already on file, the plea bargain comes before the judge for approval on two distinct issues before sentencing. The first issue is dismissal or amendment of the charges. Leave of court is required for the prosecutor to dismiss or amend charges in the federal system[76] and in most states.[77] The second issue which comes up for court approval is entrance of the defendant's guilty plea.[78] The judge may reject the plea bargain by refusing to accept the guilty plea in the federal courts[79] and in many state courts.[80]

75. State v. Carlson, 555 P.2d 269 (Alaska 1976) (where prosecutor refuses to bargain to reduced charge, court cannot accept plea to reduced charge); Genesee County Prosecutor v. Genesee Circuit Judge, 215 N.W.2d 145 (Mich. 1974) (court and defendant cannot conclude plea bargain without prosecutor's endorsement).

76. *See* FED. R. CRIM. P. 48(a) ("United States attorney may by leave of court file a dismissal of an indictment, information or complaint . . ."); F.R. CRIM. P. 11(e)(1)(A) (as part of plea agreement, attorney for government may move for dismissal of other charges). The common law historically allowed the prosecutor to enter a *nolle prosequi* without court approval. This was the rule in the federal courts until 1944, when the law was changed to require a court order before charges were dismissed on the prosecutor's motion. The reason for the change was to protect the defendant from harassment. U.S. v. Ammidown, 497 F.2d 615 at 619-21 (D.C. Cir. 1973); *see also* U.S. v. N.V. Nederlandsche Combinatie Voor Chemische Industries, 75 F.R.D. 473 (S.D.N.Y. 1977).

As to amendments, *see* F.R. CRIM. P. 7(e) (court may allow amendment).

77. As to dismissals, *see* Note, *Restructuring the Plea Bargain*, 82 YALE L. J. 286, 307 n.73 (1976) ("In most jurisdictions, the prosecutor cannot *nolle prosequi* a charge without first obtaining judicial approval."). *See, e.g.*, State v. LeMatty, 263 N.W.2d 559, 561 (Iowa Ct. App. 1977) (statute requires court approval where prosecutor seeks dismissal of criminal case); State v. Stewart, 250 N.W.2d 849, 858 (Neb. 1977) (no abuse of discretion for trial court to deny prosecution motion to dismiss a charge); City of Akron v. Ragsdale, 399 N.E.2d 119 (Ohio Ct. App. 1978) (Ohio R.Cr. P. 48(A) requires court approval for *nolle prosequi*). Court approval is not universally required, however. *See* ABA Standards Relating to Pleas of Guilty, Std. 14-3.1 (1979) *History of Standard* ("[I]n some jurisdictions the prosecutor has discretion, regardless of court approval, to dismiss charges against the defendant.").

As to amendments, *see, e.g.*, KAN. STAT. ANN. §22-3201(4) (court may allow amendment).

78. These two issues, dismissal or amendment of charges and acceptance of the plea, are often resolved at the same hearing. But the issues are discrete and each is governed by distinct rules and caselaw. *See* discussion accompanying notes 159-167 *infra*.

79. F.R. CRIM. P. 11(e)(2) (court may accept or reject the plea agreement). *See also* Advisory Comm. Notes to F.R. CRIM. P. 11(e) (decision on accepting or rejecting plea agreement left to discretion of individual trial judge); U.S. v. Aguilera, 654 F.2d 352 (5th Cir. 1981) (defendant not entitled to rely on plea agreement until trial judge approved it); U.S. v. Moore, 637 F.2d 1194 (8th Cir. 1981) (district court under no duty to consider negotiated plea agreement and court need not

If the defendant is pleading guilty as part of a charge bargain wherein the charges have not been filed, *i.e.*, wherein the prosecutor agrees to forego prosecution on available charges in exchange for a guilty plea,[81] the case will not come before the court for dismissal or amendment of any charges.[82] In this situation the court is presented with only one issue before sentencing: acceptance of the guilty plea. However, the court's power to reject the plea bargain is not diminished with this type of bargain because the terms of any plea bargain must be disclosed when the plea is entered.[83] Consequently, the court, aware that the prosecutor has agreed to forego charges, may still reject the plea bargain by refusing to accept the plea.[84]

If the defendant is pleading guilty as part of a pure sentence bargain,[85] no dismissal or amendment of charges is required, and the plea bargain comes up for court approval only when the guilty plea is tendered. Again, the court may reject the bargain by refusing to accept the plea. Even if the judge formally accepts the plea, with a sentence bargain, the judge can sometimes effectively reject it by refusing to impose the bar-

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delineate its reasons for rejection). *See generally* Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 760 (1981); Note, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L. J. 241 (1974).

80. *See e.g.*, Howard v. State, 458 A.2d 1185 (Del. 1983) (citing Del. Crim. Rule 11, finding no abuse of discretion for trial court to reject offered plea); Stroud v. State, 450 N.E.2d 992, 995 (Ind. 1983) ("The defendant has no absolute right to have guilty plea accepted and trial court may reject a plea in the exercise of its sound discretion."); People v. Matulonis, 230 N.W.2d 347, 349 (Mich. Ct. App. 1975) (Michigan GCR 785.7 provides that plea is entered only with consent of court); City of Akron v. Ragsdale, 399 N.E.2d 119, 121 (Ohio Ct. App. 1978) ("[T]he final judgment on whether a plea bargain shall be accepted must rest with the trial judge."); State v. Haner, 631 P.2d 381, 384 (Wash. 1981) ("[J]udge has clear discretionary authority to refuse to accepte plea bargain under Cr.P. 4.2(e)."). *See also* Note, *Restructuring the Plea Bargain*, 82 YALE L. J. at 286, 307 n.72 (in almost all jurisdictions, the defendant cannot tender a plea to a lesser offense unless the court accepts it).

81. *See supra* note 16.

82. *See, eg.*, Bordenkircher v. Hayes, 434 U.S. 357 at 358-59 (1978) (prosecutor's offer was for defendant to plead guilty to uttering a forged instrument in exchange for, *inter alia*, prosecutor foregoing habitual felon charges; when defendant refused offer, prosecutor procured habitual felon indictment with no court action). *See* LaFave *The Prosecutor's Discretion in the U.S.*, 18 AM. J. COMP. L. 532, 540 (1970) ("When agreement is reached before any formal charge is filed, prosecutorial discretion in filing a lesser charge is not even in theory subject to any formal judicial control."). *But cf.* State *ex rel.* Forsythe v. Coate, 558 P.2d 647, 649 (Mont. 1976) (state statute requires court approval if prosecutor declines to file criminal charges after defendant has been held to answer during preliminary examination).

83. *See, e.g.*, F.R. CRIM. P. 11(e)(2) ("If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement . . . at the time the plea is offered.").

84. *See supra* notes 49 & 50.

85. *See supra* notes 18 & 19 and accompanying text.

gained sentence.[86]

Therefore, regardless of whether trial judges participate in the plea negotiations, they definitely participate in the plea bargain by deciding these issues. The original purpose for requiring court approval at these stages was to protect the defendant from prejudice.[87] Clearly, trial courts have broad discretion to withhold their approval of plea bargains for this purpose.[88] A different question, however, is whether courts may withhold approval of a plea bargain because it is too lenient and therefore does not adequately protect the public interest. Each of these plea bargain steps which require court approval—dismissal, amendment and acceptance of the plea—is examined in detail below to analyze the extent of the trial courts' power to reject the parties' proposed plea bargain when the bargain is too lenient to the defendant.

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86. This possibility of the trial judge rejecting the bargain in two ways depends on the type of sentence bargain. For example, there are two types of sentence bargain authorized by F.R. CRIM. P. 11(e). The first type, described in F.R. CRIM. P. 11(e)(1)(B), contemplates that the defendant plead guilty in exchange for the prosecutor recommending a particular sentence. This bargain is fulfilled when the prosecutor makes the recommendation, regardless of the court's response. The rule specifically requires the defendant to understand that the prosecutor's recommendation is not binding on the court. If the court refuses the recommended sentence, the defendant is not entitled to withdraw his plea. F.R. CRIM. P. 11(e)(2).

The second type of sentence bargain authorized in the federal system is described in F.R. CRIM. P. 11(e)(1)(C). Under this provision, the defendant pleads guilty in exchange for the prosecutor's agreement that a particular sentence is the appropriate disposition. If the court declines to impose that particular sentence, the defendant may withdraw his plea. F.R. CRIM. P. 11(e)(2); F.R. CRIM. P. 11(e)(4). Thus with this latter type of sentence bargain, the judge might accept the guilty plea but then frustrate the bargain by failing to impose the particular sentence, thereby giving the defendant the right to withdraw his plea. Although this is theoretically possible, it seems unlikely that a judge would accept a plea knowing that the plea agreement would be voided when the judge refused to impose the particular sentence.

For a description of the two types of federal sentence bargains, *see* Project, *Fourteenth Annual Review of Criminal Procedure*, 73 GEO. L. J. 249, 537 (1984). As to whether the defendant may withdraw his guilty plea if the judge rejects the prosecutor's sentence recommendation, *see* People v. Killebrew, 330 N.W.2d 834 (Mich. 1982); State v. Evans, 234 N.W.2d 199 (Neb. 1975); Commonwealth v. Maroney, 223 A.2d 699 (Pa. 1966); Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1071-72 (1976); Comment, *Constitutional Constraints on Prosecutorial Discretion in Plea Bargaining*, 17 HOUSTON L. REV. 753, 757 (1980).

87. Rinaldi v. U.S., 434 U.S. 22, 29 n.15 (1977) (per curiam); U.S. v. Hamm, 650 F.2d 624, 628 (5th Cir. 1981); U.S. v. Ammidown, 497 F.2d 615, 619-21 (D.C. Cir. 1973).

88. Most cases on rejection of pleas deal with situations where the defendant must be protected, in spite of his desire to plead guilty, because "a doubt exists about the defendant's actual guilt." U.S. v. Bean, 564 F.2d 700, 703 (5th Cir. 1977) (*citing* U.S. Brisco, 518 F.2d 95 (1st Cir. 1975) and U.S. v. Navedo, 516 F.2d 293 (2d Cir. 1974)). *See, e.g.*, F.R. CRIM. P. 11(f), which prohibits the court from entering judgment on a plea which does not have a factual basis.

1) Dismissal of the Charges

As noted above, in the federal system the prosecution can dismiss criminal charges only with "leave of court."[89] Although the Supreme Court has stated that this rule obviously vests some discretion in the court, it has declined to identify the purposes for which that discretion may be exercised.[90] The Court has stated that the principal object of the leave of court requirement is to protect the defendant from prosecutorial harassment.[91] The implication is that trial courts may deny government motions to dismiss criminal charges if necessary to protect the defendant. As to whether the trial court may deny the government motion because it is part of a plea bargain which is too lenient to the defendant, the Supreme Court merely noted that lower federal courts have held that trial courts do have the power to deny government motions to dismiss criminal charges for this reason.[92]

As the Court noted, the lower federal courts have recognized that the leniency of a plea bargain is a legitimate concern for the trial court.[93] However, the federal appellate courts have nonetheless severely limited trial courts' discretion to deny a government motion to dismiss criminal charges on that basis. In *U.S. v. Ammidown*,[94] the D.C. Circuit established a presumption that the government's motion to dismiss criminal charges should be allowed in the overwhelming number of cases.[95] The court held that the trial court can superimpose its judgment on the prosecutor's only when "the action of the prosecuting attorney is such a departure from sound prosecutorial principle as to mark it as an abuse of prosecutorial discretion."[96] *Ammidown* held that courts could not deny the motion to dismiss merely because their conception of the public inter-

89. F.R. CRIM. P. 48(a); *see* note 46 *supra*. *See generally* Annot., 48 A.L.R.Fed. 635 (1980).

90. Rinaldi v. U.S., 434 U.S. 22, 29 n.15 (1977) (per curiam).

91. *Id.*

92. *Id.* (*citing* U.S. v. Cowan, 524 F.2d 504 (5th Cir. 1975) and U.S. v. Ammidown, 497 F.2d 615, 620 (D.C. Cir. 1973)). However, the Supreme Court then concluded that a decision on the question of whether a court may exercise discretion for this latter purpose was unnecessary to the case before it and so declined to resolve it. The court stated, "It is unnecessary to decide whether the Court has discretion under these circumstances, since, even assuming it does, the result in this case remains the same." 434 U.S. at 29 n.15.

93. *See, e.g.*, U.S. v. Cowan, 524 F.2d 504 (5th Cir. 1975); U.S. v. Ammidown, 497 F.2d 615, 620 (D.C. Cir. 1973).

94. 497 F.2d 615 (D.C. Cir. 1973).

95. *Id.* at 621.

96. *Id.* at 622.

est differed from that of the prosecuting attorney.[97] The court concluded that the trial court erred in denying the government motion to dismiss the charges.[98]

Other federal courts have adopted the *Ammidown* position of granting the trial judge little discretion to deny a government motion to dismiss criminal charges. In *U.S. v. Cowan*,[99] the Fifth Circuit stated that the executive is presumptively the best judge of whether a prosecution should be terminated. Courts, therefore, should not disturb the executive's decision to dismiss criminal charges unless it is "clearly contrary to the manifest public interest."[100] Similarly, in *U.S. v. Hamm*,[101] the same court reiterated that the trial court may deny the government's motion to dismiss criminal charges only "in extremely limited circumstances in extraordinary cases . . . when the prosecutor's actions clearly indicate a betrayal of the public interest."[102] In both cases, the Fifth Circuit reversed the trial court's denial of the government motion to dismiss.

In *United States v. Perate*,[103] the Fourth Circuit also endorsed minimal trial court discretion on prosecution motions to dismiss charges. The court stated that trial courts have "little discretion" on such motions, and must sustain them "absent a finding of bad faith or disservice to the public interest."[104] After adopting this standard, the court nonetheless affirmed the trial court's denial of the motion to dismiss because of the irregular procedures used by the parties.[105]

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97. *Id.*

98. In *Ammidown*, the trial court rejected the plea bargain by rejecting the defendant's guilty plea under FED. R. CRIM. P. 11. 497 F.2d at 618. Thus, as the appellate court correctly noted, Rule 48(a) did "not apply as such to the case at bar . . ." *Id.* at 619-20. However, the court justified its extensive analysis of Rule 48(a) by stating that "[S]tudy of the judicial role in dismissals illuminates our course [in the present case]." *Id.* Arguably, this leading case on Rule 48(a) is all dicta. Because *Ammidown* has implications both for government motions to dismiss criminal charges under FED. R. CRIM. P. 48(a) and for trial court discretion to reject plea bargains under FED. R. CRIM. P. 11, the case is discussed in connection with both rules in this article. For a discussion of *Ammidown* as it relates to F.R. CRIM. P. 11, *see* text accompanying notes 123-39 *infra*.

99. 524 F.2d 504 (5th Cir. 1975), *cert. den. sub. nom.* Woodruff v. U.S., 425 U.S. 971 (1976).

100. 524 F.2d at 513.

101. 659 F.2d 624 (5th Cir. 1981).

102. *Id.* at 629.

103. 719 F.2d 706 (4th Cir. 1983).

104. *Id.* at 710.

105. The defendant was engaged in what is sometimes jocularly referred to as a "slow plea." Perate was charged with five counts. Perate and the government agreed that Perate would plead not guilty to Count II, but would demand only a bench trial and would stipulate to the evidence. In exchange, the government would move to dismiss counts I, III, IV, and V. The purpose of this strange procedure was to preserve Perate's right to appeal the earlier denial of his Fourth Amend-

In contrast with these cases, one court has suggested that trial judges may have wider discretion to deny government motions to dismiss. In *U.S. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie*,[106] the government moved to dismiss the indictment against certain defendants for antitrust violations. The government sought the dismissal against one individual defendant, Massaut, because of the expense and difficulty of trying him and because his corporate employer, another defendant, had agreed to plead guilty in exchange for the dismissal.[107] The trial court began its analysis of the government motion to dismiss the charges by noting that judicial review of government motions to dismiss was not merely a rubber stamp; it was necessary to protect the public interest.[108] Because the offenses involved were "of the most grave and serious nature," the court stated that it was constrained to examine the motion to dismiss with great care.[109] After considering the government's rationale, the court denied the motion to dismiss as against the public interest.[110]

On motion for reconsideration,[111] the court moved closer to the established federal standard. In response to the government's citation of the Fifth Circuit standard, the court stated that Fifth Circuit decisions were not controlling in the Southern District of New York.[112] Even if they were controlling, the court continued, dismissal was appropriately denied in this case because the seriousness of the crime indicated that the dismissal met the Fifth Circuit standard of being clearly contrary to the public interest.[113] Thus the court used the strict Fifth Circuit standard while

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ment motion to suppress, a right which the defendant would waive if he entered a regular guilty plea. *Id.* at 708. This procedure was dubbed a "slow plea" because the stipulated evidence and bench trial render conviction certain, but the procedure is slower than just entering a guilty plea. In this case, though, Perate's slow plea foundered when the district court refused the government's motion to dismiss count III. Perate appealed. The Fourth Circuit stated that the government's motion to dismiss "was not cloaked in the same authority as a usual Rule 48(a) motion to dismiss . . . ." *Id.* at 711. The court concluded, "Since the initial motion to dismiss was conditional [on the defendant waiving a jury and stipulating to evidence], we cannot say under the narrow facts presented by this case that the district court abused its discretion in denying the government's motion to dismiss Count III." *Id.* (Incidentally, "slow pleas" are now unnecessary; *see* FED. R. CRIM. P. 11(a)(2) ("Conditional Pleas").)

106. 428 F. Supp. 114 (S.D.N.Y. 1977).

107. *Id.* at 117.

108. *Id.* at 116.

109. *Id.*

110. *Id.* at 117.

111. U.S. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 75 F.R.D. 473 (S.D.N.Y. 1977).

112. *Id.* at 474.

113. *Id.*

denying its applicability. Nevertheless, on reconsideration the court reiterated its initial conclusion: the government motion for dismissal of the charges was denied.

In each of these cases, the question was whether the trial court had discretion to deny a government motion to dismiss criminal charges where dismissal was part of a plea bargain[114] that the parties endorsed but which the court felt was too lenient to the defendant to protect the public interest. The lower federal courts have agreed that protection of the public interest is a legitimate basis for denying the government motion.[115] Thus, even though the prosecutor endorses a plea bargain as serving the public interest, the trial judge may still reject the plea bargain by denying a motion to dismiss the charges. However, the trial judge may deny the motion to dismiss only in extreme cases, where the prosecutor has abused his discretion. Otherwise, the appellate courts emphasize, trial courts must defer to the prosecutor's determination of the public interest[116] and sustain the prosecutor's motion to dismiss the charges.

As noted above, most states also require leave of court for the government to dismiss criminal charges.[117] Some of these states have adopted a standard for denial of the government motion to dismiss that is similar to the federal standard in leaving the trial court with little discretion. For example, in *State v. Aubol*,[118] the Minnesota court held that the trial court was "limited in its function to a determination as to whether the prosecutor acted improperly." The court suggested that prosecutors act

114. In *Ammidown*, the bargain was that the first degree murder charge would be dismissed if the defendant pleaded guilty to second degree murder and testified against his accomplice. 497 F.2d at 618. In *Cowan*, the agreement was that a seven count Texas indictment would be dismissed if the defendant pleaded guilty to one count in the District of Columbia and cooperated in the Watergate prosecution. 524 F.2d at 506. In *Hamm*, the agreement was that two counts of the indictment would be dismissed and the sentence limited to two years if the defendant pleaded guilty to one count and cooperated in other prosecutions. 659 F.2d at 625-27. In *Perate*, the agreement was that four counts of the indictment would be dismissed if the defendant pleaded not guilty to Count II, waived a jury trial and stipulated to the evidence. Although the Court refused to consider this arrangement to be a plea bargain under FED. R. CRIM. P. 11(e)(2), both the parties considered it to be one. 719 F.2d at 618. In *N.V. Nederlandsche*, the agreement was that the indictment would be dismissed against an individual, Massaut, if his corporate employer pleaded guilty to three counts. 428 F. Supp. 117.

115. *See* notes 62 & 63, *supra*. *See also* U.S. v. Hamm, 659 F.2d 624 (5th Cir. 1981).

116. Only one court has attempted a specific definition of "the public interest." *See* U.S. v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973).

117. *See* note 47, *supra*.

118. 244 N.W.2d 636 (Minn. 1976).

improperly only when they abuse their discretion, or participate in fraud or collusion to interfere with the defendant's rights.[119] The court relied on federal cases, articulated the federal standard,[120] and concluded that the trial court erred in denying the government motion for dismissal.[121]

Aubol is distinguishable from the federal cases discussed above in that the prosecutor sought dismissal not as part of a plea bargain but because the evidence seemed insufficient to warrant prosecution.[122] Thus the dismissal here was even more lenient to the defendant than one that is part of a plea bargain because the defendant would not be convicted of anything, whereas with a plea bargain, the defendant would usually plead guilty to some crime.[123] Despite the fact that the dismissal was more lenient to the defendant, the appellete court still held it was error for the trial court to refuse the dismissal.[124] The strict standard articulated, therefore, would presumably apply if a dismissal was sought as part of a plea bargain.[125]

Other states allow trial judges more discretion in denying government motions to dismiss criminal charges. In *People v. District Court in and for the Tenth Judicial District*,[126] the Colorado Supreme Court relied for guidance on those federal cases that "substantially limit the court's power to deny a prosecutor's motion to dismiss."[127] However, the court then abruptly and inexplicably concluded that the trial judge's refusal to dismiss a child abuse charge as part of a plea bargain was not an abuse of discretion.[128] In *State v. Stewart*,[129] the prosecution moved to dismiss count II (shooting with intent to wound or kill victim A) in exchange for

119. *Id.* at 640.

120. *Id.* at 638 & 640 n.6.

121. *Id.*

122. *Id.* at 637.

123. *But see* note 21, *supra*.

124. *Id.* at 640.

125. *Cf.* Genesee County Prosecutor v. Genesee Circuit Judge, 215 N.W.2d 145 (Mich. 1974). In this case, the prosecutor wanted to keep the charges pending but the court dismissed them as part of a plea bargain which did not include the prosecutor. On appeal by the prosecutor, the Court stated that the trial judge could reverse the prosecutor's decision on whether to dismiss charges only if it appeared in the record that the prosecutor abused his power. *Id.* at 147. Thus, like *Aubol*, no traditional plea bargain was involved, but the court adopted a strict standard for when the trial court may overrule the prosecutor's decision on dismissal of the charges. Again, this standard on dismissals would probably apply as well if a plea bargain were involved.

126. 586 P.2d 1329 (Colo. 1978) (en banc).

127. *Id.*

128. *Id.* at 1330.

129. 250 N.W.2d 849 (Neb. 1977).

the defendant's plea to count I (first degree murder of victim B). The Nebraska Supreme Court equated the trial court's discretion to deny a government motion to dismiss with the trial court's broad discretion to reject a guilty plea,[130] and sustained the trial court's decision to overrule the motion to dismiss. In *Manning v. Engelkes*,[131] the defendant was charged with first degree robbery. The defendant testified for the government against a co-defendant, who was convicted, and the government moved to dismiss the robbery charge.[132] The trial judge denied the prosecutor's motion to dismiss. On appeal, the court declined to define the limits of a trial court's discretion but sustained the trial court's refusal to dismiss the charges in this particular case because nothing in the record justified dismissal aside from the "bare motion."[133]

In these latter three cases, the prosecutor, with the defendant's consent, moved for dismissal of the criminal charges as part of a plea bargain, and the trial court denied the motion to dismiss. Each appellate court sustained the trial court denial, and each expressed its approval by stating that the trial court had not abused its discretion.[134] These cases indicate that when a trial court denies the prosecutor's motion to dismiss no error results unless the denial qualifies as *judicial* abuse of discretion. This standard gives the trial court considerably more latitude than the federal standard, which allows the trial court to deny the prosecutor's motion to dismiss the criminal charges only if it finds that the *prosecutor* is abusing his discretion.

130. *Id.* at 858 (the "issues are interrelated and will be discussed together."). On the extent of trial courts' discretion to reject guilty pleas, *see* discussion in text accompanying notes 121-73, *infra*.

131. 281 N.W.2d 7 (Iowa 1979).

132. This motion to dismiss was not formally part of a plea bargain, and the defendant did not enter a guilty plea to any charges. Rather, according to the prosecution's allegations in the motion to dismiss, the state sought the dismissal because the defendant testified against co-defendant without any promises from the state, and based on the defendant's credibility as a witness, the co-defendant was convicted. Moreover, the defendant had a defense of compulsion to the pending charges. *Id.* at 8. Thus the state alleged mixed reasons for moving to dismiss the charges. Despite the absence of a formal plea agreement, however, it seems likely that the motion to dismiss was in large part a reward for the defendant's testimony which convicted the co-defendant, so arguably the case involved at least a tacit plea agreement.

133. *Id.* at 13.

134. In People v. District Court in and for the Tenth Judicial District, the Court held that "[T]he trial court neither exceeded its jurisdiction nor abused its discretion . . . ." 586 P.2d at 1330. In State v. Stewart, the Court stated that although it might not agree with all the reasons offered by the trial court for denying the motion, "[W]e cannot say that the trial court abused its discretion in so doing." 250 N.W.2d at 858. In Manning v. Engelkes, the Court stated, "We hold the district court acted within its discretion . . . in overruling the state's motion to dismiss the prosecution . . . ." 281 N.W.2d at 13.

2) Amendment of the Charges

As noted above,[135] court approval is also required for the prosecutor to amend criminal charges. In the federal system, the defendant has a constitutional right to indictment for felonies which precludes amendment,[136] but informations may be amended with court approval. The primary purpose of court approval is to protect the defendant.[137] When protecting the defendant is not an issue, the federal government is free to amend.[138] When the amendment is part of a plea bargain, the government is generally amending the charges to a lesser offense[139] to which the defendant will plead guilty.[140] One federal court has discouraged trial courts from becoming involved in this situation, stating, "In ordinary circumstances the change in grading of an offense presents no question of the kind of action that is reserved for the judiciary."[141]

The states' position on trial court denial of a government motion to amend charges is inconsistent. Some states hold that the trial judge has no power to deny a government motion to amend charges unless it is for the protection of the defendant. For example, in *State v. Pruett*[142] the defendant was charged with aggravated battery and escape from custody. The defendant planned to plead guilty to the escape charge, thinking it was a misdemeanor. When the judge ruled that the escape charge was a felony, the prosecutor moved to amend the charge to a lesser offense of misdemeanor escape.[143] The trial judge denied the motion to amend, and the defendant abandoned his guilty plea. He was subsequently convicted at trial on the two original felony charges.

The defendant appealed the trial court's denial of the prosecution motion to amend. On appeal, the court noted that the state statute on

135. *See* text accompanying notes 46-47, *supra*.

136. U.S. CONST. amend. V. The right to indictment means the charges cannot be amended; they must be resubmitted to the grand jury. *Ex Parte* Bain, 121 U.S. 1 (1887).

137. WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL §128. Amendment might prejudice the defendant in terms of double jeopardy or due process notice guarantees. U.S. v. Goldstein, 386 F. Supp. 833 (D. Del. 1973).

138. U.S. v. Goldstein, 386 F. Supp. 833 (D. Del. 1973). *See, e.g.*, Government of Canal Zone v. Burjan, 596 F.2d 690 (9th Cir. 1979).

139. Or the amendment may be to a related offense, *see* n. 15, *supra*.

140. *See, e.g.*, cases cited in note 15, *supra*.

141. U.S. v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973). The change in grading in *Ammidown* was from first degree murder to second degree murder.

142. 515 P.2d 1051 (Kan. 1973).

143. The opinion is not explicit on whether the prosecution's desire to pursue the escape charge as a misdemeanor was part of a plea bargain with the defendant, but it seems likely.

amendments[144] was essentially the same as Federal Rule 7(e). Federal courts, the court continued, had concluded that absent a right to indictment, the prosecutor is free to make the charge and should be equally free to change it.[145] The court stated that "[W]hen the prosecutor exercises his discretion as to . . . amendments of the information seeking to reduce the charges to lesser offenses, the trial judge has no right to substitute his judgment for that of the prosecutor absent some compelling reason to protect the rights of the defendant."[146] The court reversed the trial court's denial of the motion to amend.

In contrast, some states allow the trial judge more latitude to deny a prosecution motion to amend criminal charges that is part of a plea bargain. One example is *State v. Haner*.[147] The defendant was charged with second degree assault while armed with a deadly weapon. The prosecutor and defendant reached a plea agreement which provided, *inter alia*, for the defendant to plea guilty to third degree assault without a deadly weapon allegation. To implement this plea bargain, the state moved for leave to file an amended information charging the lesser assault. The trial court denied the motion because it felt that the plea bargain was too lenient in view of the defendant's record.[148] Both the state and the defendant appealed the denial. The Washington Supreme Court held that the court's authority to approve or deny plea bargains included the right to refuse amendment of the charges. The court found no abuse of discretion by the trial court in refusing amendment of the information.[149]

In *Haner*, as in *Pruett*, the provision governing amendments was substantially similar to the federal rule on amendments. But the courts reached very different conclusions in defining the power of the trial judge to deny motions to amend charges to lesser offenses as part of a plea bargain. The *Pruett* court concluded the trial court has no discretion to deny the motion to amend except to protect the defendant. The *Haner* court, in contrast, concluded that the trial court's discretion regarding amendments to lesser offenses was commensurate with its broad discretion to reject guilty pleas.[150]

144. KAN. STAT. ANN. §22-3201(4).

145. 515 P.2d at 1057.

146. *Id.*

147. 631 P.2d 381 (Wash. 1981).

148. *Id.* at 383.

149. *Id.* at 385.

150. *See infra* text accompanying notes 120-73.

3) Acceptance of the Guilty Plea

As noted above, Federal Rule 11 allows trial judges to reject a plea bargain by refusing to accept the guilty plea.[151] But Rule 11 does not define any criteria for the acceptance or rejection of the plea agreement;[152] the decision is left entirely to the individual trial judge. Nor does the rule impose any limits on the court's discretion.[153] To determine what limits, if any, exist on this discretion, it is necessary to examine the common law dealing with courts' rejections of plea bargains.[154] Generally, the cases indicate that the trial courts' discretion to reject plea bargains is very broad.

In *United States v. Bean*,[155] the defendant was indicted for theft and burglary of a habitation. The prosecutor and defendant reached a plea agreement which provided for Bean to plead guilty to the theft count and cooperate in the continuing investigation in exchange for the government moving to dismiss the burglary count.[156] The judge rejected the plea bargain because the burglary charge was a much more serious offense than the theft charge, and the bargain would have resulted in the defendant receiving a relatively light sentence. On appeal, the Fifth Circuit found that the trial court's rejection of the plea bargain was well within the scope of its discretion. In assessing the scope of the trial judge's discretion to reject plea bargains, the court stated that courts are governed by "the same broad standards that apply in sentencing."[157] These standards allow the trial court to exercise "broad discretion which is not subject to appellate review except when arbitrary or capricious action amounting to a gross abuse of discretion is involved."[158] The court noted that the trial judge's conclusion that the plea bargain would result in a sentence that was too light was a sound reason for refusing the agreement. The court declined to speculate on what unusual circumstances might result in the rejection of a plea bargain being an abuse of discretion, but concluded that there was no abuse here.

151. *See supra* note 49, and accompanying text.

152. Notes of Advisory Committee to 1974 amendments of FED. R. CRIM. P. 11(e)(2) ("The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement.").

153. U.S. v. Adams, 634 F.2d 830, 835 (5th Cir. 1981).

154. *See generally* Note, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L. J. 241, 1974).

155. 564 F.2d 700 (5th Cir. 1977).

156. *Id.* at 701.

157. *Id.* at 703.

158. *Id.*, *quoting* U.S. v. Weiner, 418 F.2d 849 (5th Cir. 1969).

Similarly, in *U.S. v. Adams*,[159] the defendant was charged with three counts of using a telephone in furtherance of a conspiracy to distribute heroin and one count of conspiracy to distribute heroin. The plea agreement required the defendant to plead guilty to one count of using a telephone in a conspiracy in exchange for dismissal of the other counts and a probated sentence. The trial court rejected this agreement because the probation officer did not recommend probation,[160] and the court felt probation was too lenient in view of the defendant's record.[161] On appeal, the Fifth Circuit reiterated the standards announced in *Bean* and concluded that the trial court acted within its discretion in rejecting the plea bargain.[162]

In contrast to these cases allowing the district judge broad discretion to reject plea bargains, the District of Columbia Circuit has stated that trial courts have minimal discretion to reject plea bargains as overly lenient to the defendant. In *U.S. v. Ammidown*,[163] the agreement called for the defendant to plead guilty to second degree murder and to testify against his accomplice in exchange for dismissal of the first degree murder charge. The trial court rejected the agreement by refusing to accept the plea because it found that "the crime was so heinous and the evidence of guilt so overwhelming that the public interest would be ill-served by a judgment of second degree murder . . . ."[164] On appeal, the court held the trial judge had erred in rejecting the plea. The opinion is emphatic; it states that the trial judge is free to condemn the prosecutor's plea agreement as a trespass on judicial authority only in "a blatant and extreme case."[165]

At one time *Ammidown* was a leading case on judicial discretion to

159. 634 F.2d 830 (5th Cir. 1981).

160. *Id.* at 833.

161. *Id.* at 835.

162. *Id. See also* U.S. v. LeFrere, 553 F. Supp. 133 (C.D. Ill. 1982). The defendant was charged with four counts of threatening the life of the President of the United States. The defendant reached an agreement with the prosecutor wherein he would plead guilty to one count. *Id.* at 134. The court was not specific but implied that in exchange, the prosecutor would dismiss the other three counts. But the court rejected the plea agreement, noting briefly that a district court has broad discretion to accept or reject guilty pleas. The court offered no explanation in its opinion for rejecting the agreement. The plea was initially taken under advisement and then rejected after the court saw the presentence report. *Id.* at 134. It might be that the court felt the bargain was too lenient to the defendant in view of information in the report.

163. 497 F.2d 615 (D.C. Cir. 1973).

164. *Id.* at 618.

165. *Id.* at 622.

reject negotiated pleas.[166] *Ammidown's* value as a precedent today, however, is suspect for two reasons. First, the issue on appeal was whether the trial judge's refusal to accept the negotiated guilty plea was error, but the court focuses most of its analysis on Rule 48(a) (the dismissal rule) instead of Rule 11 (the guilty plea acceptance rule).[167] Second, Federal Rule 11 was amended one year after the *Ammidown* decision to give judges more discretion in rejecting plea bargains. Several courts have noted that because of the amendment, *Ammidown* may not reflect current standards on that issue.[168] When *Ammidown* is discounted, the federal cases indicate that the trial judge's discretion to reject an overly lenient plea bargain is very broad.[169]

166. *See, e.g.*, Alschuler, *The Trial Judge's Role in Plea Bargaining, Part 1*, 76 COLUM. L. REV. 1059, 1076 (1976) (*Ammidown* may signify formal recognition of prosecutor's authority over sentencing); Note, *Judicial Discretion to Reject Negotiated Pleas* 63 GEO. L. J. 241, 245 (1974) (*Ammidown* "establishes important new guidelines for the exercise of judicial control over the plea bargaining process.").

167. The court noted that Rule 11 governed guilty pleas but stated, "[W]e would err were we to circumscribe our inquiry so narrowly." 497 F.2d at 619. The court found dismissals to be a "component stage" of a plea bargain and so considered Rule 48(a) even though that rule "does not apply as such to the case at bar . . . ." *Id.* at 619-20. It is unclear why the court preferred to base its decision on Rule 48(a) rather than Rule 11.

168. U.S. v. Moore, 637 F.2d 1194, 1196 n.3 (8th Cir. 1981) ("The precedential value of *Ammidown* has been considerably diminished since adoption of the 1974 amendments to Rule 11 that were intended to increase the discretionary authority of the district court in dealing with guilty pleas.") (citation omitted); U.S. v. Bean, 564 F.2d 700, 703 n.4 (5th Cir. 1977) ("Since [*Ammidown*] was decided before Rule 11 was amended specifically to cover plea bargains, this decision may not represent the standards for accepting plea bargains under the new rule.").

169. In each of these cases, the trial judge indicated that the plea agreement was being rejected because it was too lenient to the defendant. Other federal courts have confronted a slightly different but related issue: whether the trial court must justify its rejection of the plea agreement by providing a reason for the rejection. Federal courts have reached different conclusions on whether a reason must be provided. The Eighth Circuit has held that the trial judge need not provide reasons for rejecting the agreement. In United States v. Moore, 637 F.2d 1194 (8th Cir. 1981), the trial court rejected a plea bargain which provided for the defendant to plead guilty to one count of unlawful use of a telephone in exchange for dismissal of one count of distributing cocaine and one count of conspiring to distribute cocaine. The trial judge indicated no reasons for rejecting the plea bargain. The defendant appealed, arguing that the court erred in refusing to delineate its reasons for rejection. The appellate court concluded that Rule 11 does not require the trial judge to give reasons for rejecting the agreement, and the refusal here was not beyond the scope of the trial court's broad discretion. *Id.* at 1196. *Cf.* cases discussed in note 193, *infra* (state courts agree that trial judge must provide reason for rejecting plea bargain).

U.S. v. Moore reiterates that the trial judge has broad discretion to reject plea agreements and establishes that the judge need not even provide reasons for the rejection. In contrast, the Seventh Circuit has held that the trial court does have to articular a reason for rejecting the plea. In *U.S. v. Delegal*, 678 F.2d 47 (7th Cir. 1982), the defendant was charged with one count of bank robbery and one count of interstate transportation of a stolen motor vehicle. The parties reached a plea agreement wherein the defendant would plead guilty to count I (bank robbery) in exchange for which the

As in the federal system, most state courts accord the trial judge broad discretion to reject plea bargains because they are too lenient to the defendant. For example, in *City of Akron v. Ragsdale*,[170] the defendant was initially charged with felonious assault. This charge was then dismissed and a lesser offense, aggravated menacing, was filed. On the day of trial, the prosecutor and defense attorney reached a plea agreement which provided for the defendant to plead guilty to a third offense, disorderly conduct, a misdemeanor. The trial court rejected this plea bargain without explanation, and at trial, the defendant was convicted of aggravated menacing.[171]

The defendant appealed, claiming rejecting of the plea bargain was error. On appeal, the court held that the final judgment on whether a plea bargain shall be accepted is for the trial judge.[172] The court noted that the trial judge's discretion is not unlimited and may be exercised errone-

government would move to dismiss count II (interstate transportation of a stolen motor vehicle) and remain silent at sentencing. The trial court initially accepted the plea agreement but later rejected it because the court felt some confusion arose as to its terms. The defendant was eventually convicted at trial on both counts and he appealed, arguing that he was entitled to the plea agreement. The Seventh Circuit held that the district court abused its discretion in rejecting the plea agreement. The court stated that a defendant is entitled to plead guilty unless the trial judge can articulate a sound reason for rejecting the plea. *Id.* at 50. This conclusion contradicts the holding in *Moore*, which did not require the trial judge to articulate any reason.

Moreover, the Seventh Circuit's decision in *Delegal* established not only that the trial judge must provide a reason for rejection, but that it must be a "sound" reason. The Seventh Circuit characterized the district court's reason for rejecting the plea as a desire to avoid confusion by having the plea agreement embodied in a regular written agreement. *Id.* at 51. The appellate court found there was no confusion as to the terms of the agreement, and the lack of a revised written agreement was insignificant. Thus there was no sound basis for rejection of the plea, and rejection was an abuse of discretion. *Id.*

One final note on *Delegal*: The court hinted at one point that the district court's rejection of the plea was error also because a completed plea agreement existed at the court's initial acceptance of the plea, before any confusion arose. *Id.* at 51 (no question that defendant and government "had a deal," and plea was then accepted by court). This language suggests that the trial court's rejection of the plea bargain was error not because it failed to give reasons for the rejection, nor beecause the reason was insufficient, but because the rejection was void against a previously valid and fully-accepted agreement. If this rationale was one basis for the court's decision, the result is understandable. But if the question resolved by the court was whether confusion as to terms of the agreement was an adequate reason to reject the agreement, this case runs contrary not only to the *Moore* approach, which allowed the trial court broad discretion to reject the plea without providing a reason, but also to all the federal cases discussed above with the exception of *Ammidown*. Here the Seventh Circuit limited trial court discretion not only by requiring trial courts to give their reasons for rejecting the agreement, but also because the court seized on the trial court's reason, analyzed it and rejected it as spurious.

170. 399 N.E.2d 119 (Ohio Ct. App. 1978).

171. *Id.* at 120.

172. *Id.* at 121.

ously, but did not elaborate on this statement. The court further stated that the judge must provide reasons for rejecting a plea bargain unless the reason is obvious.[173] Here, the judge gave no reason, but the appellate court deemed it obvious that the judge rejected the bargain as too lenient to the defendant.[174] The court concluded that the trial judge was within the bounds of reasonable discretion and affirmed the rejection of the bargain.[175]

In *State v. Lematty*,[176] the defendant was charged with murder, and the parties reached a plea agreement wherein he would plead guilty to manslaughter and larceny of property in exchange for dismissal of the murder charge. The trial judge rejected the plea bargain, and the defendant was convicted of murder. The defendant appealed, arguing that rejecting the plea bargain was error. On appeal, the court did not recount the reason the trial judge rejected the plea bargain, although the opinion suggests that the trial judge had provided reasons.[177] The court relied on the A.B.A. Standards Relating to Pleas of Guilty[178] and concluded that when the considerations listed therein were applied to this case,[179] rejection of the plea bargain was not an abuse of discretion, and the conviction was affirmed.[180]

In *People v. Ferguson*,[181] the defendant was charged with armed robbery. The defendant negotiated a plea agreement wherein he would plead guilty to that charge in exchange for the prosecutor's sentence recommendation of eight to ten years imprisonment. The trial judge re-

173. *Id. Cf.* cases discussed in note 139, *supra*.

174. *Id.* The defendant had threatened a law enforcement officer with a shotgun, and the proposed plea was to disorderly conduct, a "minor misdemeanor" in the court's view. *Id.* The court felt there was "no cogent reason why such a serious act should be dealt with so lightly."

175. *Id.*

176. 263 N.W.2d 559 (Iowa Ct. App. 1977).

177. At one point in its opinion, the court reasoned that because the plea to manslaughter in this case would constitute a dismissal of the murder charge, the dismissal statute was relevant. That statute authorized the trial court to dismiss a prosecution in the furtherance of justice, with reasons for the dismissal being required. By analogy to this statute, the court declared that the trial court's rejection of the plea was "within its statutory authority . . ." 263 N.W.2d at 561. To satisfy this statute, therefore, the trial judge must have provided reasons for rejecting the plea bargain.

178. *Id.*, *quoting* §3.3 of the ABA Standards Relating to Pleas of Guilty: "When a plea of guilty . . . is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach independent decision on whether to grant charge or sentence concessions."

179. The court refers to the considerations listed in 1.8 of the ABA Standards Relating to Pleas of Guilty without specifying which considerations it relied on.

180. 263 N.W.2d at 562.

181. 361 N.E.2d 333 (Ill. Ct. App. 1977).

jected the plea bargain, and the defendant was convicted at trial and sentenced to ten to twenty years in prison. The defendant appealed, arguing that the trial court abused its discretion in rejecting the plea bargain.[182] On appeal, the court held that rejection of the plea bargain was not error. The court first characterized the issue as a question of the trial judge's sentencing discretion.[183] The court noted that, "Sentencing is a judicial function, and it remains so in plea negotiation cases."[184] The court then stated that "A plea agreement is merely a recommendation for the trial court to consider."[185] Therefore a trial court need not accept a particular plea agreement,[186] and the rejection here was affirmed.[187]

In contrast to these cases allowing the trial judge considerable power to reject overly lenient plea bargains, in *People v. Matulonis*[188] the appellate court concluded that trial courts have very limited discretion to reject a plea bargain. In *Matulonis*, the defendant was charged with assault with intent to commit great bodily harm less than murder. The prosecutor and defendant reached a plea bargain wherein the defendant would plead guilty to the lesser charge of attempted felonious assault and the greater charge would be dismissed. The trial judge rejected this plea bar-

182. *Id.* at 334.

183. The court's treatment of the rejection of this plea agreement as a question of sentencing discretion is curious because the type of plea agreement involved did not limit the court's sentencing powers. The prosecutor's recommendation as to sentence is only a recommendation which the court remains free to reject. Once the recommendation is made, regardless of sentence, the bargain is completed. Therefore the court could have accepted the plea bargain and still have sentenced the defendant to imprisonment for the 10 to 20 years it imposed after trial. *See* People v. Williams, 294 N.E.2d 98 (Ill. Ct. App. 1983). Although this analysis is curious, this general approach is consistent with the federal cases analyzed above which define the trial court's discretion on rejection of plea bargains *by analogy* to the trial court's broad discretion in sentencing. *See, e.g.*, U.S. v. Bean, 564 F.2d 700 (5th Cir. 1977), described in text accompanying notes 125-28, *supra*.

184. 361 N.E.2d at 334, *quoting* People v. Congleton, 308 N.E.2d 156, 158 (Ill. Ct. App. 1974).

185. *Id.* at 334, *citing* People v. Cheshier, 278 N.E.2d 93 (Ill. Ct. App. 1972).

186. 361 N.E.2d at 334 ("[T]he trial court is not required to accept a particular plea agrement ..."). As to the reason the plea agreement was rejected by the trial judge, the appellate court did not mention whether any reason for the rejection was given by the trial judge, nor did it decide whether reasons are required. It is likely that the trial judge rejected the plea bargain as too lenient to the defendant. This conclusion is suggested by two factors. First, the trial judge ultimately imposed a sentence considerably harsher than the one contemplated by the plea agreement. The plea agreement sentence was 8 to 10 years whereas the sentence finally imposed was 10 to 20 years. 361 N.E.2d at 334. Second, the trial judge rejected the agreement after being informed of the defendant's record, which revealed not only prior convictions for armed robbery and burglary but also that the defendant was on parole when the current offense was committed. *Id.* at 334-35.

187. *Ferguson* is discussed in Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1067-1107 (1976).

188. 230 N.W.2d 347 (Mich. Ct. App. 1975).

gain and the defendant was convicted at trial of the original assault charge.[189] The defendant appealed, claiming that rejection of the plea agreement was error.

The court started its analysis by noting that the trial judge did not reject the plea because of noncompliance with court rules, but rather based the rejection on "some inherent judicial authority to refuse to accept a guilty plea for reasons of the public interest."[190] The court stated that situations exist that justify such rejections, but only when the prosecuting attorney has abused his discretion.[191] The court emphasized that the trial court should find such abuse of discretion only in a "blatant and extreme case."[192] This case, the court concluded, was not one of those extreme cases involving prosecutorial abuse of discretion. The court reversed the trial judge and remanded for a new trial.[193]

Thus, states have reached varied conclusions on the extent of the trial court's power to reject plea bargains as too lenient. The *Ragsdale* approach, which accords the trial judge almost unlimited discretion, is the approach adopted in most states.[194] The *Matulonis* view, that the trial

189. *Id.* at 349.

190. *Id.* at 350.

191. *Id.* at 350-51. *Cf. supra* cases discussed in notes 64-86 (prosecutorial abuse of discretion required for trial court to deny prosecution motion to dismiss criminal charges).

192. *Id.* at 351, *quoting* U.S. v. Ammidown, 497 F.2d 615, 622 (D.C. Cir. 1973).

193. Regarding the reason the trial court rejected the plea, the appellate court stated that the trial court provided no reason. 230 N.W.2d at 351. Although no reason was provided, several factors indicate the judge rejected the bargain as too lenient to the defendant. First, the opinion notes that the trial judge rejected the bargain only after questioning the complaining witness and case officer and finding they both opposed the bargain. 230 N.W.2d at 349. Second, a concurring judge states that the record indicates that the trial court rejected the bargain because it agreed with the witness and officer that the defendant should be tried for the more serious offense. *Id.* at 352 (Bronson, J., concurring). Regardless of the trial court's true motivation, though, it gave no reason for rejecting the bargain, and the appellate court implies that this is another reason that rejection of the plea bargain was error. After recounting how the trial judge erred in rejecting the bargain because there was no prosecutorial abuse of discretion, the court stated, "In addition the trial court failed to provide a statement of the reasons for its decision to reject the plea bargain struck by the parties." *Id.* at 351. While this statement does not specifically condemn the failure to provide a reason as error, it certainly implies that it is.

In concluding that failure to provide a reason is error, the court reached the same conclusion as the court in City of Akron v. Ragsdale, 399 N.E.2d 119 (Ohio Ct. App. 1978). Thus the only two state courts which have specifically decided the issue of whether the trial judge must provide reasons for his or her rejection of the plea bargain have agreed that the judge must. *Cf.* cases discussed in note 139, *supra* (federal courts disagree on whether trial judge must provide reasons for rejection).

194. *See, e.g.*, State v. Lematty, 263 N.W.2d 559 (Iowa Ct. App. 1977) and People v. Ferguson, 361 N.E.2d 333 (Ill. Ct. App. 1977), discussed in text accompanying notes 146-50 and 151-57 respectively, *supra*. *See also* State v. Stewart, 250 N.W.2d 849, 858 (Neb. 1977) discussed in text accompa-

judge may reject the bargain as too lenient only if the prosecutor has abused his discretion, is an unusual approach. The conclusions of the state courts therefore parallel the conclusions of the federal courts: most courts accord the trial judge broad discretion to reject plea bargains if they are too lenient to the defendant, but some courts assert that the trial judge has little discretion and may reject a plea bargain only if the prosecutor has abused his discretion.

The above analysis of the trial judge's power over plea bargains indicates that despite disagreement over the extent of trial judges' discretion to deny government motions to dismiss or amend criminal charges, the courts generally agree that trial judges have significant discretion to reject overly lenient plea bargains by refusing to accept the guilty plea. This discrepancy in the extent of trial courts' discretion to thwart overly lenient plea bargains by denying a motion to dismiss the charges as opposed to rejecting the guilty plea itself is curious. The discrepancy is particularly pronounced in the federal cases.[195] In each of the federal cases on motions to dismiss the charges, the motion to dismiss was part of a plea bargain,[196] so the discrepancy in the standards is not attributable to the existence of a plea bargain. In each of the motion to dismiss cases, the trial judge could have effectively cancelled the plea bargain by rejecting the guilty plea instead of denying the prosecution motion to dismiss the charges.

If the trial judge has such power to reject the plea bargain by rejecting the guilty plea, why would appellate courts circumscribe so narrowly the trial courts' power to reject plea bargains by denying the prosecution motion to dismiss? No court has offered an explanation. The only feasible explanation is separation of powers concerns. Courts apparently feel that acceptance of a defendant's guilty plea is a more legitimate exercise of their discretion than the executive's decision on whether to dismiss or amend charges. Although the executive's decision to dismiss or amend criminal charges does require court approval,[197] courts feel they should

nying notes 99-100, *supra*; Frady v. People, 40 P.2d 606 (Colo. 1934) (no abuse of discretion to reject plea bargain).

195. *Compare* cases discussed in text accompanying notes 64-86, *supra* (trial court can deny prosecution motion to dismiss criminal charges only where prosecutor is abusing discretion) *with* cases discussed in text accompanying notes 121-39, *supra* (trial court may reject guilty plea if plea bargain is too lenient to defendant and rejection is error only if it amounts to gross abuse of judicial discretion).

196. *See supra* note 84.

197. *See supra* notes 46 & 47.

defer to the executive's decision on the charges except in the most extreme cases. In contrast, whether to accept guilty pleas is a question which has traditionally fallen within the courts' province.

One final note on the trial judge's role in a plea bargain deserves mention. Despite the courts' concurrence on the wide breadth of judicial discretion to reject plea bargains by rejecting the guilty plea, trial judges rarely do so.[198] The reason for the trial courts' deference to the parties' bargain, on a theoretical level, is a separation of powers doctrine: when a trial judge rejects the plea agreement endorsed by the prosecutor because it is too lenient, the judge may be impinging upon the executive's discretion.[199] On a more practical level, trial judges' reluctance to reject plea bargains results from pressure to process huge caseloads,[200] an urge to minimize work,[201] and a quest for courthouse popularity.[202] Whatever the reason, it is clear that trial judges rarely exercise their power to reject plea bargains.

Although trial judges may choose not to use their power, the law

198. *See* Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1065 n.25 (1976) ("Students of the criminal courts of many American jurisdictions have noted that judges almost automatically ratify prosecutorial charge reductions and sentence recommendations.") (citation omitted); *Id.* at 1076 ("[W]hether the prosecutor's power is formally recognized seems unimportant, for in fact American trial judges do not ordinarily review prosecutorial sentence determinations in guilty-plea cases with [great] vigor . . ." and *Id.* at 1107 ("[P]roscutorial sentence recommendations are so universally followed that their effect is virtually indistinguishable from that of judicial promises of specific sentences."); LaFave, *The Prosecutor's Discretion in the U.S.*, 18 AM. J. COMP. LAW 532, 541 (1970) (the fact that many defendants enter plea bargains based on prosecutor's sentence recommendation "attests to the fact that the risk is slight and that the judge will most likely act in conformance with the parties' expectations."); Note, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L. J. 241, 242 & n.8 (1974) ("Though not bound to accept the bargain reached by the parties, a court usually accedes to the recommendations of the prosecutor.") (citation omitted); *Id.* at 254 & n.91 ("Except in unusual cases, courts almost invariably concur in the agreement reached by the prosecutor, even in jurisdictions where the judge possesses relatively broad discretion to reject a negotiated plea.") (citation omitted); Note, *Restructuring the Plea Bargain*, 82 YALE L. J. 286, 297 (1972) ("[T]he judge will usually choose to ratify the bargain automatically.").

199. *See* U.S. v. Cowan, 524 F.2d 504, 507-12 (5th Cir. 1975); U.S. v. N.V. Nederlandsche Combinatie Voor Chemische Industrie, 75 F.R.D. 473, 475 (S.D.N.Y. 1977); Note, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L. J. 241, 251 (1974) ("[I]mportant separation of powers questions arise from judicial rejection of a negotiated plea.")

200. *See* Medlin v. State, 280 S.E.2d 648, 650 (S.C. 1981) (Littlejohn & Gregory, JJ., dissenting) (trial judges accept plea bargains in great majority of cases "to expedite . . . disposition"); Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1099, 1102 & 1138 (1976).

201. *Id.* at 1102-03. Moreover, in accepting a plea bargain, the trial judge not only avoids the work involved in trying the case but avoids as well the risk of being reversed on appeal. This may be another reason plea bargains are attractive to trial judges.

202. *Id.* at 1102.

clearly provides that trial judges have significant discretion to reject plea bargains if they use the method of rejecting the guilty plea rather than the method of overruling the government motion to dismiss or amend. Of course, both the litigants have veto power over the plea bargain as well, for a plea bargain cannot be concluded without the agreement of the prosecutor and the defendant.[203] But the existence of the judge's power is important because it establishes the existence of another person who has veto power over the plea bargain besides the litigants.

III. RECENT CHANGES IN THE LAW ON VICTIMS' RIGHTS IN PLEA BARGAINS

Victims traditionally had no formal or recognized rights[204] in regard to plea bargains.[205] But some states and the federal government have recently recognized that victims do have an interest in plea bargains and have begun to grant victims some privileges or rights in relation to plea bargains.[206]

A. The Common Law Approach

The states that have recognized victims' interests in plea bargains have approached the issue in one of two ways. South Carolina first recognized

203. *See* note 45, *supra*.

204. Of course, victims may be informed regarding the plea bargain or participate in the bargin *informally* whenever the prosecutor or court is so inclined. *See, e.g.*, People v. Matulonis, 230 N.W.2d 347 (Mich. Ct. App. 1977) (victim expressed view on plea bargain to court); Schlesinger & Malloy, *Plea Bargaining and the Judiciary: An Argument for Reform*, 30 DRAKE L. REV. 581, 596, (1980-81); McDonald, *Towards A Bicentennial Revolution in Criminal Justice*, 13 AM. CRIM. L. REV. 649, 663 n.76 (1976); DOWNS-ARNOLD, THE RIGHTS OF THE VICTIM IN THE CRIMINAL JUSTICE SYSTEM 13 (1985) (50% of Kentucky prosecutors "always" contact victim and 28% "generally" contact victim before plea bargain is struck). *But see* Davis, Kunreuther & Connick, *Expanding the Victim's Role in the Criminal Court Dispositional Process*, 75 J. CRIM. L. & CRIMINOLOGY 491, 492 (1984) (unusual for victim to be consulted informally regarding what action court should take); Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Experiment*, at 147, in PLEA BARGAINING 167 (W. McDonald & J. Cramer, eds. 1980) (negotiation process usually takes place with little or no information about preference or needs of the victim).

205. *See, e.g.*, W. VA. CODE 61-11A-1 (Supp. 1985) ("The legislature finds further that . . . the victim . . . is usually not notified when . . . a plea to a lesser charge is accepted . . . ."); Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPPERDINE L. REV. 117, 165 (1984) (victim rarely has formal role in plea negotiations); McDonald, *Towards a Bicentennial Revolution in Criminal Justice*, 13 AM. CRIM. L. REV. 649, 663 (1976) (victim is usually not involved in plea bargains—victim is seldom present, consulted or informed).

206. In contrast, at least one state has reacted to victims' concerns regarding plea bargains by eliminating or restricting plea bargaining for certain crimes. *See* CAL. PENAL CODE 1192.7 (West 1983); Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 977-82 (1985).

victims' interests in plea bargains in a decision by the state supreme court. In *Medlin v. State*,[207] the court adopted an ABA Standard on guilty pleas which provides that when the trial judge is considering a proposed plea agreement, "the court may require or allow any person, including . . . the alleged victim, . . . to appear or to testify."[208] Of course, this provision does not grant the victim any right to participate since it describes only what the court *may* do. Nevertheless, this decision is a formal recognition that the victim may have some interest in the plea bargain.

B. The Statutory Approach

1. Information

Many other states have granted victims some role in relation to plea bargains by statute. These statutes cover a spectrum on the extent of the role accorded the victim. Some statutes provide that the victim has a right to information about the plea bargain. For example, a Maine statute requires that victims be notified when the prosecutor recommends a plea agreement,[209] a Tennessee statute requires the prosecutor to inform the victim of the plea bargain as soon as the court approves it,[210] and an Illinois statute requires the prosecutor to explain the details of any plea to the victim.[211] These provisions obviously grant the victim no right to participate in the plea bargain but only a right to be informed.[212]

2. Presence

Beyond establishing a right for victims to be informed on the terms of the plea bargain, the Illinois statute further requires the prosecutor to inform the victim before any hearings at which a guilty plea will be entered.[213] This provision explicitly refers only to providing information to

207. 280 S.E.2d 648 (S.C. 1981).

208. *Id.* at 648-49, *quoting* ABA Standards Relating to Pleas of Guilty, Std. 14-3.3.

209. ME. REV. STAT. ANN. tit. 15 812(2).

210. TENN. CODE ANN. §8-7-108 (Supp. 1985).

211. ILL. REV. STAT. ch. 38 §1404 (5) (Smith-Hurd Supp. 1985).

212. The Tennessee statute requires that the information be provided to the victim only after the bargain is accepted. TENN. CODE ANN. §8-7-108 (Supp. 1985). The Illinois statute does not specify when the information must be provided. ILL. REV. STAT. ch. 38 §1404(5) (Smith-Hurd Supp. 1985).

213. *Id.* at §1404(6).

The federal VWPA of 1982 contains a similar provision. *See* §6(a)(4)(D) of the VWPA of 1982, 18 U.S.C. §1512 (prosecutor should provide victim with "prompt advance notification" of guilty plea hearings). *But cf.* Attorney General's Guidelines for Victim and Witness Assistance, part II.B.5, 48 Fed. Reg. No. 143, p.33776 (July 25, 1983) (prosecutor should provide victim with infor-

victims. The provision, however, also facilitates their presence at the plea bargain hearing because the notice is mandated "in advance" of the hearing and such hearings are generally open proceedings.[214] Another state has achieved the same result but has done so directly by granting the victim a right to be present at the hearing on entry of the plea. This Arkansas provision, included among the rules of evidence, states that in a criminal prosecution, the victim "shall have the right to be present during any hearing. . . ."[215]

3. Participation

Thus some states have granted victims a right to be informed regarding the plea bargain and/or a right to be present when it is tendered to the court. Other state statutes go further and authorize some form of victim participation in the plea bargain. In Ohio, for example, statutes require the prosecutor to notify the victim in advance of the date, time and place that a guilty plea will be entered.[216] Another statute provides that if the victim is present, the court must note it on the record and provide the victim with additional information.[217] The court may then permit the victim to make a statement.[218] This statute accords the victim a specific right to be informed and an implied right to be present at the plea bargain hearing, but does not establish any right to participate. The

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mation on acceptance of guilty plea in "timely manner"). The Attorney General's Guidelines, which were written to implement §6 of the VWPA, *see* Guidelines §I(A), provide that information on the plea bargain need only be "timely." This difference in language between "timely" and "advance" implies that the information could be provided after the plea was accepted. However, the Attorney General's Guidelines also provide that the victim should be consulted for his or her views on the proposed terms of any plea bargain. *See infra* note 224 and accompanying text. Obviously this provision has the effect of requiring that the victim be informed of the terms of the plea bargain in advance of the plea bargain hearing.

214. *See supra* note 180.

215. ARK. STAT. ANN. R. EVID. 616 (Supp. 1985).

Although several states have adopted laws implementing a victim's right to be present at the plea bargain hearing, *see* text accompanying notes 217-19 *supra*, and although the establishment of such a right is desirable, *see* text accompanying notes 180-85 *supra*, one empirical study indicated that victims actually attended the plea bargain conference in only one-third of the cases. *See* Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Experiment* at 168-69, in PLEA BARGAINING 167 (W. McDonald & J. Cramer eds. 1980). The authors conclude that this gap between provisions for victim attendance and attendance itself was due to inadequacies in the notification process and to the victims' conclusions regarding the utility of attending the conference. *Id.* at 169-70.

216. OHIO REV. CODE ANN. §2937.081 (Page Supp. 1984).

217. *Id.* at §2943-041.

218. *Id.*

statute ends up allowing the victim the same role as the *Medlin* decision: if the trial court chooses to hear the victim's views on the plea bargain, it is now formally authorized to do so.[219]

The current federal statutes go one step further in favor of victims. Federal law now provides that victims should be consulted for their views on the proposed terms of any negotiated plea.[220] These federal provisions are stronger for victims than the Ohio statute in that they are advisory rather than merely permissive: they describe what should happen instead of what may happen. Although the federal position is somewhat stronger for victims, it still stops short of providing the victim a right to participate.[221]

Other states have taken the final step and accorded victims a right to participate in the plea bargain decision. Some statutes have implemented the right to participate through the prosecutor, and some have implemented it through the court. The statutes that allow victims to participate via the prosecutor provide the victim a right to "consult" with the prosecutor regarding the plea negotiations[222] or a right to "discuss" the

219. A similar situation arises where a victim impact statement is included in the pre-sentence report on the defendant. Pre-sentence reports are prepared, usually by probation officers, for the court to read before sentencing the defendant. Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 545. Many jurisdictions now require that pre-sentence reports include victim impact statements. *See, e.g.*, FED. R. CRIM. P. 32(c)(2). *See generally* Abrahamson, *supra* at 545; Anderson & Woodard, *Victim and Witness Assistance: New State Laws and the System's Response*, 68 JUD. 221, 231 (1985); Budewitz, *State Legislation in Aid of Victims and Witnesses of Crime*, 10 J. OF LEGIS. 394, 402 (1983). Some jurisdictions authorize review of the pre-sentence report by the trial judge before the plea bargain is accepted. *See, e.g.*, FED. R. CRIM. P. 11(e)(2); *see* Nat'l Judicial College, Participants' Manual, Issue II.B.(7) *Legal Issues* (FED. R. CRIM. P. 11(e) contemplates consideration of a pre-sentence report before acceptance of the plea bargain). Thus the victim may participate in the plea bargain indirectly through inclusion of this victim impact statement in the pre-sentence report.

Court review of the pre-sentence report before acceptance of the plea bargain is optional. *See* FED. R. CRIM. P. 11(e)(2) (court "may" defer decision on plea bargain until consideration of presentence report). Thus victim participation in the plea bargain by this method is similar to the method adopted in the Ohio statute (described in text accompanying notes 184-85 *supra*) and the method proposed in the ABA Standard Relating to Pleas of Guilty and adopted in State v. Medlin (discussed in text accompanying notes 177-78 *supra*) in that victim participation in the plea bargain is formally authorized but not mandated: It is the trial judge's option.

220. *See* §(a)(5)(A) and (C) of the VWPA of 1982, 18 U.S.C. §1512; AG's Guidelines for Victim and Witness Assistance, part II.C(3) and (5), 48 Fed. Reg. No. 143, p. 33776 (July 25, 1983).

221. It is clear from the use of the word "should" in the VWPA that Congress intended this statute to be merely persuasive on victim consultation and not mandatory. *Cf.* §3 of the VWPA, which is an amendment to FED. R. CRIM. P. 32(c)(2) ("The presentence report *shall* contain . . . .")(emphasis added). Obviously, when Congress intended to mandate a result, it knew how to phrase it.

222. NEB. REV. STAT. §29-120 (Supp. 1984); W. VA. CODE §61-11A-6(a)(5)(C) (Supp. 1985).

case with the prosecutor.[223] One statute provides that when a plea bargain is submitted to the court, the prosecutor must certify that the victim was offered an opportunity to see the prosecutor's recommendations and to "present [an] opinion" of the recommendations to the prosecutor.[224] In these four jurisdictions, victims have a statutory right to express their view of the plea bargain to the prosecutor.[225] The prosecutor need not adopt the victim's position, of course; but the prosecutor is required to listen.

Other states have chosen to implement victim participation in the plea bargain through the court. Three states have taken this approach. These statutes often contemplate some role for the prosecutor in presenting the victim's view to the court, but the real impact of the statutes is that they expose the court to the victim's view. For example, a Minnesota statute provides that before a plea is entered, the prosecutor must inform the victim of the state's plea recommendations and the victim's right to be present at the hearing and express in writing any objections to the proposed plea bargain.[226] Moreover, if the victim is not present at the plea

223. S.C. CODE ANN. §16-3-1530(C)(10) and (12) (1985). Subsection (C)(10) provides the victim with a general right to discuss his or her case with the prosecutor. Subsection (C)(12) provides, "A victim has the right to discuss his case with the solicitor or other prosecutor and be informed of any offers to plea bargain with the defendant." While this latter subsection does not explicitly define a right to discuss proposed plea bargains, it clearly implies such a right. A victim has the right to be informed of offers to plea bargain and the right to discuss the case with the prosecutor; surely discussion of "the case" would include discussion of proposed plea bargains.

After these statutes were adopted in 1984, victims in South Carolina were covered both by the common law, *see* Medlin v. State, 280 S.E.2d 648 (S.C. 1981), discussed in text accompanying notes 211-12 *supra*, and statutory law.

224. IND. CODE §35-335-3.5 (Supp. 1984). *See generally* Budewitz, *State Legislation in Aid of Victims and Witnesses of Crime*, 10 J. OF LEGIS. 394, 398 (1983).

225. Unlike the Indiana statute, the West Virginia and South Carolina statutes do not specify that the consultation with the prosecutor must occur before the bargain is entered by the court. However, this is implied by the statutes because a right to consult with the prosecutor which does not arise until after the bargain is executed is really only a right to information. Such a construction of the timing of the consultation would defeat any legislative intent that victims be allowed to participate in the decision-making process.

226. MINN. STAT. ANN. §611A.03(a) (West Supp. 1985). The statutes provides in relevant part:

> 611A.03. Plea agreements; notification
>
> Subdivision 1. Plea agreements; notification of victim.
>
> Prior to the entry of the factual basis for a plea pursuant to a plea agreement recommendation, a prosecuting attorney shall make a reasonable and good faith effort to inform the victim of:
>
> (a) The contents of the plea agreement recommendation; and
>
> (b) His right to be present at the sentencing hearing and to express in writing any objection he has to the agreement or to the proposed disposition. If the victim is not present when the court considers the recommendation, but has communicated his objections to

hearing but the prosecuting attorney is aware of the victim's objections, the prosecutor must communicate these objections to the court.[227] The Rhode Island statute allows the victim to address the court in two ways: the victim has the right to make a written statement on the impact of the crime which the prosecutor must maintain on file and present to the court before a plea bargain is accepted,[228] and the victim also has the right to address the court on the crime's impact before any plea bargain is accepted.[229] Finally, a Florida statute provides that if the defendant pleaded guilty, the victim has the right to appear at the sentencing hearing and make an oral or written statement before sentence is imposed.[230] This language relates only to sentencing, but the next section of the statute provides, "The court may refuse to accept a negotiated plea and order the defendant to stand trial."[231] This last section, which was tacked on in 1984, implies that the court may reject the plea bargain as a result of the victim's statement.

In each of these seven states that grant victims a right to participate in

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the prosecuting attorney, the prosecuting attorney shall make these objections known to the court.

227. *Id.* at §611A.03(1)(b).

228. R.I. GEN. LAWS §12-28-3(14) (Supp. 1985). This statute provides:

Each victim of a felony offense who makes a timely report of the crime and who cooperates with law enforcement authorities in the investigation and prosecution thereof shall have the following rights:

. . . .

(14) To be afforded the opportunity to make a statement, in writing and signed, regarding the impace [sic] which the defendant's criminal conduct had upon the victim. Said statement shall be inserted into the case file maintained by the attorney general and shall be presented to the court for its review prior to the acceptance of any plea negotiation.

229. *Id.* at §12-28-4.1 (supp. 1985). This statute provides in relevant part:

Prior to acceptance [sic] by the court of a plea negotiation and imposition of sentence upon a defendant who has pleaded nolo contendere or guilty to a felony, or has pleaded nolo contendere or guilty to a charge that has been reduced to a misdemeanor from an information or indictment charging a felony, the victim of said criminal offense shall upon request be afforded the opportunity to address the court regarding the impact which the defendant's criminal conduct has had upon the victim. The victim shall be permitted to speak prior to counsel for the state and defendant making their sentencing recommendations to the court and prior to the defendant's exercise of his right to address the court.

230. FLA. STAT. ANN. §921.143(1) (West 1985). This statute provides:

(1) At the sentencing hearing, and prior to the imposition of sentence upon any defendant who has been convicted of any felony or who has pleaded guilty or nolo contendere to any crime, the sentencing court shall permit the victim of the crime for which the defendant is being sentenced, or the next of kin of the victim if the victim has died from causes related to the crime, to:

(a) Appear before the sentencing court for the purpose of making a statement under oath for the record; or

(b) Submit a written statement under oath to the office of the state attorney, which statement shall be filed with the sentencing court.

231. *Id.* at §921.143(3).

the plea bargain decision, the right adopted has drawbacks. Implementing victim participation through consultation with the prosecutor is unwise for reasons which are discussed below.[232] Implementing victim participation through consultation with the court is a sound approach, but the three statutes using this method have other individual defects. The weakest approach is the Florida statute.[233]

The Florida statute is confusing. First, the statute explicitly provides the victim with only a right to be heard at sentencing. The next section, which states that the court may reject the plea bargain and order the defendant to go to trial, is a non-sequitur unless it is construed to mean that the court may reject the plea bargain after hearing from the victim. Consequently, the provision may mean that victims have an implied right to participate at the plea bargain hearing, but the language of the statute is not explicit and its meaning is far from clear. Second, the statute provides that the court may reject the plea bargain and order the defendant to stand trial. The law is fairly clear that trial courts have this power.[234] Thus this section is redundant unless it is construed to mean that the court may reject the plea bargain whenever the victim appears at the sentencing hearing. Even with that construction, the statute arguably remains unnecessary, because the victim's statement would not be construed to limit the trial court's otherwise established power to reject plea bargains. Nevertheless, that construction renders the statute somewhat more meaningful.

The Minnesota statute[235] is also flawed. The statute is ambiguous in several ways. The first confusing factor is that the statute does not explicitly create a victim's right to object to the plea bargain. Instead, it merely provides that the prosecutor must inform the victim of his right to object. Of course, such a right must exist if the prosecutor has a duty to inform the victim of it, but the language of the statute is unclear. Second, the statute refers to the victim's right to object to the plea agreement at the *sentencing* hearing. By the time the sentencing hearing occurs, the plea conceivably could already have been accepted and entered, so the victim's objection to it would be poorly timed. Finally, the statute provides that the victim may "express in writing any objection" to the plea bargain. The statute does not say the victim may *file* this objection or

232. *See* text accompanying notes 249-55, *infra*.

233. *See* notes 234-35, *supra*.

234. *See* text accompanying notes 121-73, *supra*.

235. *See* note 226 *supra*.

distribute this objection, but only that the victim may *express* it in writing. Of course, the legislature probably meant for the victim to have a right to file the written statement, but the statute does not say that.

The Rhode Island statute[236] has only one shortcoming. The statute allows the victim to communicate with the court both by filing a written statement and by addressing the court orally before the plea bargain is accepted. It is unnecessary for the victim to address the court in both forms. The victim who addresses the court both ways absorbs more time without achieving any additional purpose.[237]

Thus each of the statutes granting victims a right to participate in the plea bargain decision through the court has drawbacks. Although the drawbacks vary in significance, each is serious enough to make the particular statute an undesirable approach to victim participation in plea bargains.

One final problem with all the participation statutes exists. These seven states which allow victims to participate in plea bargains via guaranteed access to one of the decisionmakers define this access as a right: the prosecutor "shall" consult the victim or the victim has "the right" to address the court.[238] But the remedy for the victim if this right is not honored is either non-existent or unclear. Two of these states have adopted statutes which provide that the victims' rights legislation shall not be construed as creating any new causes of actioin.[239] Thus, the statutory "rights" accorded to victims to participate in plea bargains in these two states are of dubious value without some enforcement mechanism. The other five statutes are silent on the remedy for denial of the participation right, so whether a remedy exists and how it might be defined is unclear.

IV. A PROPOSAL FOR VICTIM PARTICIPATION IN PLEA BARGAINS

The question arises how a victim's right to participate in plea bargains might be structured to take advantage of the benefits of victim participation while minimizing the costs and avoiding the defects of the current

236. *See* notes 228-229, *supra*.

237. *See* note 258, *infra*.

238. *See* NEB. REV. STAT. §29-120 (Supp. 1984); R.I. GEN. LAWS §12-28-4.1 (Supp. 1985).

239. *See* S.C. CODE ANN. §16-3-1540 (1985); W. VA. CODE §61-11A-6(b) (Supp. 1985). *See also* §6(b) of the VWPA, 18 U.S.C. §1512 ("Nothing in this title shall be construed as creating a cause of action against the U.S."). *Cf.* Budewitz, *State Legislation in Aid of Victims and Witnesses of Crime*, 10 J. OF LEGIS. 394, 405 (1983) (describing related victims' rights where eneforcement is "discretionary").

participation statutes. Professor Goldstein has suggested that the victim could be made a party to the prosecution for limited purposes.[240] This approach is one possibility, but the benefits of victim participation might be achieved with less drastic alterations. Specifically, the victim could participate in the plea bargain decision through consultation with one of the plea bargain decision makers.[241] The victim would be given a right[242] to communicate with one of the decision makers before the plea bargain is accepted by the court. In the case of plea bargains, there are two decision makers (aside from the defendant) who must agree on the plea bargain for it to be accepted: the prosecutor and the trial judge.[243] Therefore, the victim could participate in the plea bargain via consultation with either the prosecutor or the judge.[244]

Presented with the alternative of implementing victim participation in plea bargains through the prosecutor or through the court,[245] participation through the court is preferable for three reasons. First, the prosecutor's role, in the plea bargain as well as throughout the prosecution, is to represent society.[246] In contrast, the victim represents only himself. The

240. Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L. J. 515 (1982). *See also* Gittler, *Expanding the Role of the Victim*, 11 PEPPERDINE L. REV. 117, 176-78 (1984).

241. *See, e.g.*, statutes discussed in notes 226-35 and accompanying text, *supra*.

242. As noted *supra* in text accompanying notes 220-25, several jurisdictions have changed their laws to authorize or advise victim participation in plea bargains. This approach is rejected in this article in favor of according victims a right to participate because empirical evidence indicates that such a mandatory approach is necessary to effect change. *See* Davis, Kenreuther & Connick, *Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 505 (1984):

> VIP's experience also suggests that because the disincentives for officials to consider victims' interests are strong, programmatic action may not bring about change unless it is accompanied by legislative action mandating that victims be given the chance to express their opinions orally or in writing.
>
> . . . .
>
> Confering upon victims some measure of legal standing in court, . . . , would seem to be a precondition to serious consideration of their interests by officials.

243. *See* text accompanying notes 45-56 *supra*.

244. The existence of this alternative—to inject the victim either through the court or through the prosecutor—is reflected by the statutes discussed in the text accompanying notes 226-35, *supra*. Of the seven statutes according victims a right to participate, four did so via the prosecutor and three did so via the court.

245. Victim participation through both the prosecutor and the court is rejected here as redundant. Furthermore, participation through the prosecutor is unwise, *see* text accompanying notes 249-55, *infra*.

246. *See* ABA Standards Relating to Pleas of Guilty, Standard 14-3.1(d) *Commentary* ("The duty of the prosecutor is to act in the best interests of society at large. . . ."); Abrahamson, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 537; Budewitz, *State Legislation*

interests of society and of the victim are not always identical, and it is unwise to confuse the prosecutor's function by obliging him or her to consider the victim's interests.[247] Unlike the prosecutor, the court has already assumed the role of adjudicating competing interests to achieve justice, and simply injecting one additional interest for consideration would not conflict with the court's previously defined role.[248] Second, victim participation through the court is preferable to participation through the prosecutor because recent empirical evidence indicates that institutional disincentives exist for prosecutors to consider victim's interests. One disincentive is that victim participation diminishes the prosecutor's power. Thus, consultation through the prosecutor may be ineffective as a practical matter.[249] Third, victim participation through the court is better than through the prosecutor because one of the interests that participation protects is the victim's feeling of importance. This feeling is more effectively fostered when the victim addresses the court directly rather than merely addressing one of the litigants.[250] For these

in Aid of Victims and Witnesses of Crime, 10 J. OF LEGIS. 394, 395-96 (1983)("In our modern criminal justice system, the prosecutor represents society and not the victim under the theory that crime, as opposed to civil wrongs, offend the peace and security of the people as a whole and not just that of the individual."); Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 980-81 (1985) (prosecutor represents state rather than individual victim).

247. *See* Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPPERDINE L. REV. 117, 144-45 (1984) (if conflict arises between society's interests and the victim's interests, the prosecutor must give priority to society's interests).

Although the prosecutor represents society, *see* note 250 *supra*, he or she also has a duty to achieve justice. Berger v. U.S., 295 U.S. 78 (1935); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-13 (1979) (prosecutor's duty is to seek justice, not merely to convict). If the prosecutor's duty to achieve justice and not merely convictions is interpreted to include consideration of the victim's interests, then implementing victim participation through the prosecutor is theoretically consistent with the prosecutor's current role. However, on a practical level, the prosecutor's interests are often inconsistent with the victim's interests. *See* Davis, Kunreuther & Connick, *Expanding the Victim's Role in the Criminal Court Dispositional Process: The Results of an Experiment*, 75 J. CRIM. L. & CRIMINOLOGY 491, 497 & 501-05 (1984).

248. *See id.* at 504-05 ("Judges, as arbiters of different viewpoints, might be more receptive to a 'second opinion' on what the community's interests are."(footnote omitted).

249. *Id.* at 504 ("One thing that VIP's experience did suggest is that prosecutors are particularly likely to resist consideration of the victim's point of view because it is prosecutors' control that would be most eroded if the victim were given a greater voice. Because of this, it probably would be far more effective to present victims' interests directly to judges rather than to rely on prosecutors to do so.")

250. The author discovered no empirical evidence to support or refute this theory. Whereas the issue of the impact of victim participation on the system has been explored in various studies, *see, e.g., id.* and *see* studies listed in Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process*, 73 J. CRIM. L. & CRIMINOLOGY 317, 318 n.2 (1982), the impact of victim participation on victims has not been explored in depth. *Id.* at 317-18. *Accord*, Henderson,

reasons, victim participation through the court is preferable to victim participation through the prosecutor.[251]

The victim's right to address the court could be defined as follows.[252] After the prosecutor and defendant reach a proposed plea agreement, the prosecutor would be required to inform the victim of (1) the terms of the proposed agreement, (2) the time and place of the hearing at which the proposed bargain will be presented to the court, and (3) the victim's right to address the court on the propriety of the proposed bargain,[253] either orally at the hearing or by filing a written statement.[254] This information should be provided to the victim at least ten days before the hearing to give the victim a chance to react.[255]

Once the victim has been given this right to be heard and has been informed of the right, the victim may respond in one of two ways. First, the victim may choose not to file a statement or appear at the hearing. This inaction would be construed as a waiver of the victim's right to be heard. Alternatively, the victim may seek to exercise his or her right to

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The Wrongs of Victims' Rights, 37 STAN. L. REV. 937, 954 (1985) ("Thus, while we may *assume* many things about crime victims, few of us *know* much about the experience and its effects."). One study which does examine the impact of victim participation in plea bargains on the victim is reported in Heinz & Kerstetter, *Victim Participation in Plea Bargaining: A Field Experiment* at 173-74, in PLEA BARGAINING 167 (W. McDonald & J. Cramer, eds. 1980). The authors' conclusions on the impact of victim participation on victims were very cautious, but the authors were able to state that, "The degree to which victims felt involved in the disposition of their cases was tied closely to their level of satisfaction." *Id.* at 174.

251. *But cf.* President's Task Force on Victims of Crime, Final Report (1982), Prosecutors Recommendation 2 *Comment* ("[Victims] must be allowed to convey the information that they possess to those making the decisions that will determine the outcome of the case. The prosecutor not only has direct victim contact, but he is also in the best position to see that the victim is accorded a proper role in the criminal justice system.").

252. In Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 90-95, the author endorses a right of victim participation in plea bargain hearings but does not explore the specifics of implementing the right.

253. *Cf.* MINN. STAT. ANN. §611A.03(1), quoted *supra* note 230 (prosecutor must inform victim of state's plea recommendation and victim's right to be present and express objections to proposed plea bargain). *See* note 184, *supra*.

254. The statement could be oral or written at the victim's option. Gittler, *Expanding the Role of the Victim*, 11 PEPPERDINE L. REV. 117, 167 (1984). The victim should not be allowed to be heard both orally and in writing as this is unnecessary and time consuming. *Cf.* the Rhode Island statutes, discussed in notes 240-41 and accompanying text *supra* (victim may participate through both written and oral statements). Regardless of whether the statement is written or oral, the statement should be made under oath, *see* note 205 *supra*.

255. *See* note 182, *supra*, on statutes currently in force which require the provision of information to victims in advance of the plea bargain hearing. These statutes do not mandate how far in advance, but it would be a simple matter to insert such specifics.

be heard on the plea bargain, either by tendering a written statement or by appearing at the hearing to address the judge.

If the trial judge denies the victim this right to be heard, the victim must be accorded some remedy.[256] The remedy should not be a cause of action.[257] Granting the victim a cause of action would be unwise for several reasons. A cause of action against the trial judge for damages would certainly enter immunity obstacles.[258] A cause of action not for damages but to set aside the plea bargain after it had been entered would run afoul of the double jeopardy clause.[259] Instead of giving rise to a cause of action, the trial court's denial of the victim's right to be heard should be deemed a violation of the code of judicial conduct, and the victim could file a grievance against the trial judge with the appropriate commission.[260]

Although it is possible that the trial judge would deny the victim his or her right to be heard, the more common situation would be for trial judges to honor this right. Once this right is honored and the victim has been given an opportunity to be heard, the victim may oppose the plea bargain or support it.[261] If the victim opposes the plea bargain, and if the plea bargain is accepted by the judge over the victim's opposition,[262] the victim should have no right to appeal on the basis that the acceptance of the bargain was error. The victim's participation right would be limited

256. If the victim is denied the opportunity to be heard but the judge ultimately does what the victim wants regarding the plea bargain, as a practical matter the victim will probably not complain. But the victim should have a remedy for denial of this right to be heard regardless of the outcome on the plea bargain because part of the rationale for establishing the right is to encourage the victim to feel like a critical participant regardless of the final decision. *See* text accompanying notes 194-97, *supra*.

257. *Cf.* statutes cited *supra* note 243.

258. *See* Butz v. Economou, 438 U.S. 478 (1978); Stump v. Sparkman, 435 U.S. 349 (1978); Dykes v. Hoseman, 776 F.2d 942 (11th Cir. 1985); Krempp v. Dobbs, 775 F.2d 1319 (5th Cir. 1985); Cameron v. I.R.S., 773 F.2d 126 (7th Cir. 1985).

259. U.S. CONST. amend. V.

260. *See, e.g.*, ILL. ANN. STAT. ch. 110A ¶¶61, 62 (Smith-Hurd 1985); ME. REV. STAT. ANN. 4 § 9-B (Supp. 1985).

261. Of course, the victim may choose not to take a specific position supporting or opposing the plea bargain but may rather just seek a forum in which to be heard on the impact of the crime.

262. This will probably be the most common situation. Empirical evidence indicates victims usually feel the sentence imposed on the defendant is too easy. *See* Hagan, *Victims Before the Law: A Study of Victim Involvement in the Criminal Justice Process*, 73 J. CRIM. L. & CRIMINOLOGY 317, 321 (1982) (63% of victims thought sentences were too easy). At the same time, courts usually accept the plea bargain proposed by the parties, *see* text accompanying notes 168-72 *supra*. Therefore, the usual situation will be that the judge accepts the plea bargain proposed by the parties and the victim will find the accompanying sentence too lenient.

to a right to be heard by the trial court; the court would not be bound to act in accordance with the victim's views but only to listen to them. This result is constitutionally required because once the plea is entered by the trial judge, the double jeopardy clause[263] would prohibit any subsequent rejection of the conviction against the defendant's wishes.

Even in absence of the double jeopardy limitation, the victim's right to participate in plea bargains is best limited to a right to be heard with no right to appeal for other reasons.[264] First, from the defendant's perspective, giving a victim a right to appeal a plea bargain would make plea bargains less attractive in that appeals would delay the final disposition and the risk of reversal would create uncertainty. Speed and certainty are among the benefits of plea bargain disposition and removing them might render plea bargains so similar to trials that a significant number of defendants would abandon plea bargains for trial.[265] Thus the number of trials might increase and burden the system.[266]

Second, the victim's right in regard to the plea bargain should be limited to a right to be heard by the trial judge for more theoretical reasons. The four interests identified above which are served by victim participation in plea bargains are adequately served by the victim communicating with the trial judge. Society's interests (better-informed decisions; minimization of victim alienation) are both thoroughly protected by a right to communicate with the trial judge. Once the victim has been heard by the trial judge, the judge will be better informed and the victim will feel like a critical participant. Neither of these interests would be significantly better served by allowing the victim a right to appeal the plea bargain.[267]

263. U.S. CONST. amend. V.

264. It can be argued that although the *guilty plea* could not be rejected on appeal against the defendant's will due to the Double Jeopardy clause, the defendant's *sentence* could still be reviewed and rejected as too lenient without violating the Double Jeopardy clause. *See* Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 92 n.291. Therefore, it is prudent to explore the wisdom of granting victims any appellate rights in plea bargains without relying on the Double Jeopardy prohibition.

265. In contrast, a victim participation right with no right to appeal may increase the risk the plea bargain will be rejected by the trial judge, but once the plea bargain is accepted or rejected, the result is still speedy and certain. Thus an appellate right might render plea bargains incrementally less attractive to defendants than a mere participation right.

266. *But cf.* note 202 (conflicting theories on whether reduction in plea bargains result in reduction of guilty pleas).

267. Victims, who feel some sense of participation as a result of expressing themselves to the court, arguably would feel an even greater sense of participation if they were allowed to appeal and challenge the plea bargain. However, for victims to feel alienated because they are denied appellate rights requires the victims to be legally sophisticated, a presumably rare condition among victims.

The victim's interests (promotion of restitution and retribution) are given some but not complete protection by a right to be heard by the trial judge. The victim will have an opportunity to convince the trial judge on the merits of restitution and retribution. This is sufficient protection for these interests because they are dubious interests for the criminal justice system to be protecting anyway. The victim's financial concerns would be better advanced in actions designed for that purpose; either a tort action[268] or an administrative proceeding for victims' compensation.[269] The victim's interest in retribution is understandable, but it is a primitive and not particularly useful goal for a criminal justice system.[270] The victim's revenge interest should not be encouraged[271] by restructuring the system to give this interest complete protection. This interest is sufficiently protected when the victim expresses his or her views to the trial judge. Therefore all the interests advanced by victim participation in plea bargains are sufficiently protected by a right to communicate with the trial judge, and no persuasive reason exists to allow victims the right to challenge the terms of a plea bargain on appeal.

Third, on a practical level, victims should be denied the right to appeal plea bargain decisions because they are rarely lenient enough to constitute error on appeal. Weighed against this rare outcome is the potentially enormous administrative burden on the system if victims were allowed to appeal and challenge the terms of plea bargains.[272] When the

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In any case, the sense of participation victims would derive from expressing their views to the trial court seems sufficient to banish alienation.

268. *See generally* Carrington, *Victims' Rights Litigatiotn: A Wave of the Future?*, 11 U. RICH. L. REV. 447, 454 *et seq.* (1977).

269. *See, e.g.*, FLA. STAT. ANN. §960.01-.28 (West 1985); MO. ANN. STAT. §595.010 *et seq.* (Vernon 1984). Almost every state and the federal system now provide compensation for victims. Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 1017 & n.357 (1985). *See generally* Carrington, *Victims' Rights Litigation: A Wave of the Future?*, 11 U. RICH. L. REV. 447, 452-54 (1977); Goldstein, *Defining the Role of the Victim in Criminal Prosecution*, 52 MISS. L. J. 515, 523-24 (1982).

270. *See* Henderson, *The Wrongs of Victims' Rights*, 37 STAN. L. REV. 937, 990-99 (1985). Deterrence is the goal most based on a utilitarian foundation. *Id.* at 987-89.

271. *Accord*, remarks of Professor Yale Kamisar, quoted in Lawscope, 70 A.B.A.J. 25, 26 (Jan. 1984) ("I know that there is vengeance out there, but I don't see why the criminal justice system should do anything to encourage it or enhance it.") *But see* remarks of then Chief Justice Warren Burger, quoted at *Id.*:

> There was a time when I shared the view that retribution, which some people call revenge, society's revenge, was totally wrong. I'm not so sure. . . . Retribution has got to be a factor. If the person isn't apprehended, convicted and sent away, there's a terrible neurosis, a community mass neurosis builds up. That must have some outlet. And whether we like it or not, one of the outlets is that this person is found, tried, convicted, sent to prison.

272. The vast majority of cases are resolved by plea bargains. *See* notes 10-12, *supra*.

potential benefits of according the victim a right to appeal are compared to the costs, the costs predominate. Therefore, even if the double jeopardy clause were interpreted to allow plea bargain appeals by victims, other good reasons exist to deny victims the right to appeal the trial court's acceptance or rejection of a plea bargain.[273]

Thus the first problematic possibility is that the victim opposes the plea bargain and the court decides to accept the plea bargain anyway. In this case, the victim has no appeal for the reasons described above. But assume that the victim opposes the bargain, and as a result the trial judge is inclined to reject the plea bargain. Information provided by the victim might cause the judge to conclude that the plea bargain is overly lenient to the defendant and does not serve the public interest. In this situation, the cases discussed above indicate that trial judges already possess sufficient discretion regarding plea bargains to allow them to act on the victim's information and reject a plea agreement as too lenient to the defendant even though the prosecutor endorses the agreement.[274] Thus under current law, trial judges have sufficient power to act on the information provided by the victim. All that remains is to make the information available to the judges. No further adjustments to the law are necessary to allow trial judges to act on the information they have received from the victim by rejecting the plea bargain.[275]

Therefore, if the victim opposes the plea bargain, the court may either accept it, which creates no right of appeal for the victim, or the court may exercise its existing discretion to reject the plea bargain as too lenient to the defendant. On the other hand, the victim may support the plea

273. One commentator has endorsed victim participation in plea bargain hearings and has further advocated that although victims should have no veto power over proposed plea bargains, victims should be given a right to appeal the defendant's sentence. *See* Gifford, *Meaningful Reform of Plea Bargaining: The Control of Prosecutorial Discretion*, 1983 U. ILL. L. REV. 37, 90-95. Professor Gifford first states that prosecutors should be allowed to appeal sentences and concludes that while Double Jeopardy questions arise, caselaw indicates it is likely that the United States Supreme Court would approve such a scheme. He then proposes that victims also be given a right to appeal the defendant's sentence. He does not analyze whether this would create Double Jeopardy problems, so presumably the victims' appeal would be treated the same for Double Jeopardy purposes as the state appeal. He does note, though, that establishing such a victims' appeal right would be "revolutionary" and might constitute a Due Process violation. *Id.* at 94 & n.292. Finally, Professor Gifford notes that to combat the probable increase in appeals, appeals of the defendant's sentence should be discretionary with the appellate court. *Id.* at 95.

274. *See* text accompanying notes 125-67, *supra*

275. *Cf.* FLA. STAT. ANN. §921.143(3), which provides that "The court may refuse to accept a negotiated plea and order the defendant to stand trial." In view of the law on trial court discretion to reject plea bargains, this statute seems unnecessary. *See* text accompanying note 238, *supra*.

bargain and urge the court to accept.[276] In this situation, if the judge agrees with the victim and accepts the bargain, the victim would have no complaint. But if the court rejects the victim's position, and rejects the plea bargain, again this decision would generate no right to appeal for the victim for the reasons discussed above. Properly limited in this way, it is beneficial for victims to have a right to participate in plea bargains.[277]

CONCLUSION

Victims of crime are currently being accorded many new rights. This is a largely conservative movement endorsed by crime control advocates.[278] One specific manifestation of this "victimological revolution"[279] is that victims are being given the right to participate in the criminal prosecution process itself. For example, many jurisdictions now allow victims of crime to participate at the defendant's sentencing.[280] This arti-

276. For example, the victim might urge acceptance of the plea bargain so as to avoid testifying at a trial. Testifying in public can be traumatic for the victim. *See* Morris v. Slappy, 461 U.S. 1, 14 (1982), quoted *supra* note 2; President's Task Force on Victims of Crime, Final Report at 7, 9-10 (1982), discussed in Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 981 & n.212 (1985).

277. One of the most original and thoughtful articles on victims' rights is Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937 (1985). Henderson's thesis is that the changes in the criminal process proposed by the victims' rights movement are the same changes that have long been advocated by conservatives endorsing a crime control model of criminal procedure, and that the reforms being made in the name of victims' rights are not helpful to victims, may actually be destructive to victims, and are otherwise undesirable. *Id.* at 952-55. Henderson reviews a series of victims' rights proposals for changes to the system and analyzes whether the proposals really benefit victims. *Id.* at 967-1020. One of the proposed changes analyzed relates to plea bargaining. *Id.* at 977-82. When Henderson first lists the typical victims' rights proposals, she characterizes the one related to plea bargaining as "that plea bargaining either be eliminated or be victim-determined. . . ." *Id.* at 967 (footnote omitted). The proposal that plea bargaining be "victim-determined" is not mentioned again and it is unclear what Henderson means by that. As to proposals that plea bargaining be eliminated, Henderson analyzes a provision in the California Victim's Bill of Rights which abolishes plea bargaining in certain cases, and concludes that this provision does not serve victims and is otherwise ill-advised. *Id.* at 982. Henderson does not address the approach, which has now been implemented in seven states. *See* text accompanying notes 226-35, *supra*, that victims be given a right to participate in plea bargaining by expressing their views to the trial judge or the prosecutor. It is curious that Henderson focuses her entire plea bargaining analysis on the abolition or restriction of plea bargaining while not mentioning this alternative of participation. It would be interesting to know her reaction to this approach, because she is one of the few authors writing today who does not advocate more rights for victims.

278. *Id.* at 952-55.

279. Sebba, *The Victim's Role in the Penal Process: A Theoretical Orientation*, 30 AM. J. COMP. L. 217, 218 (1982).

280. Victims have a right to participate in sentencing hearings in many jurisdictions by making a statement to the court. *See, e.g.*, R.I. GEN. LAWS § 12-28-4 (Supp. 1984); *see generally* Abraham-

cle has analyzed the wisdom of establishing victim participation at a different but equally critical stage of the prosecution: the plea bargain.[281]

son, *Redefining Roles: The Victims' Rights Movement*, 1985 UTAH L. REV. 517, 546; Gittler, *Expanding the Role of the Victim in a Criminal Action*, 11 PEPPERDINE L. REV. 117, 173 (1984). This right is comparatively widely recognized. Henderson, *The Wrongs of Victim's Rights*, 37 STAN. L. REV. 937, 987 & n.233 (1985).

281. On a practical level, it has been noted that the whole point of a plea bargain is to affect the sentence. *See* U.S. v. Bean, 564 F.2d 700, 703 (1977); U.S. v. Ammidown, 497 F.2d 615 (D.C. Cir. 1974); People v. Killebrew, 330 N.W.2d 834, 838-39 (Mich. 1982); State v. Haner, 631 P.2d 381, 386 (Wash. 1981) (Utter, J., dissenting); Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1074, 1137 (1976); Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 753 (1981); Note, *Restructuring the Plea Bargain*, 82 YALE L. J. 286, 289 (1972); Nat'l Judicial College, Conference on Victims, Participants' Manual, Issue II.B.(7) *Comment*; ABA Standards Relating to Pleas of Guilty, Standard 14-3.1(b) *Comment* ("Regardless of the exact form, all such plea agreements are aimed at affecting the sentence the defendant receives. A prosecutor's agreement to make or not to oppose a favorable sentence seeks this objective by attempting to influence the judge's sentencing decision. When charges against a defendant are dismissed in return for a guilty plea, the court's sentencing options are narrowed.") So it might be argued that victim participation at sentencing renders victim participation at the plea bargain hearing unnecessary. But victim participation at sentencing does not obviate the need for victim participation at the plea bargain hearing at all. Actually, depending on the type of plea bargain involved, the right to participate at the plea bargain hearing is either necessary or at least helpful to give the victim's right to participate at sentencing any substance. Where the plea bargain involved is the type which commits the court to a particular sentence, *see* note 19 *supra*, the plea bargain hearing is in effect the sentencing hearing. With this type of plea bargain, the right to participate at the plea bargain hearing is critical in order for the right to participate at sentencing to have any meaning. If the acceptance of the plea bargain and the actual sentencing are accomplished at the same hearing, presumably the victim is present for the sentencing and could express a view on the plea bargain as well. But if the hearings are separate in time, the victim who appears at the sentencing hearing is too late because the sentence was effectively determined at the plea bargain hearing. Thus for this particular type of plea bargain, participation at sentencing but not at acceptance of the plea bargain may be an empty right.

Most types of plea bargain, however, operate only to affect the sentence rather than to determine the sentence. For example, with a charge bargain, the prosecutor effectively limits the court's sentencing options, and with a sentence bargain based on a prosecution recommendation, the prosecutor attempts to affect the court's sentencing decision with a recommendation. With these types of plea bargains, the sentencing hearing is distinct from the plea bargain hearing in purpose, and is likely distinct in time as well. Here, the fact that the victim has a right to participate at sentencing is not equal to or commensurate with the right to participate at the plea bargain hearing. For example, it may be that an accepted charge bargain already limits the judge's sentencing options so that even if the victim appeared at sentencing and persuaded the judge that incarceration was warranted, the judge would no longer have that sentencing option. Thus with these types of plea bargains, participation at the plea hearing is helpful to give the right to participate at sentencing substance.

Finally, some jurisdictions provide for victims to participate in sentence hearings not by making a statement to the court but instead by providing information to a court official which is then incorporated as a victim impact statement in a pre-sentence investigative report. *See* note 223, *supra*. Some jurisdictions then authorize the court to consider the pre-sentence investigative report before accepting any plea bargain. *See* note 223 *supra*. The goals served by victim participation in plea bargains via the victim statement proposed in this article are not adequately served by this indirect participation in the plea bargain via the pre-sentence investigative report. Specifically, neither of

This article concludes that victim participation in plea bargains would advance various interests of the victim and of society without any significant detrimental impact to the interests of prosecutors and defendants. Considering the interests to be served, the victim's participation right is best defined as a right to be heard by the trial judge before the plea bargain is accepted. The trial judge is one of the participants in the plea bargain whose approval is necessary for the plea bargain to be finalized. Exposing the trial judge to the victim's views is an effective approach because trial judges currently have sufficient discretion in accepting plea bargains to take the victim's information into account and reject the plea bargain if the bargain is overly lenient to the defendant. Another participant whose approval is necessary is the prosecutor, but the trial judge is a better target for the victim's statement than the prosecutor for several reasons.

The victim's right to participate in plea bargains, however, should be limited in two ways. First, this participation right is only a right to be heard by the trial court; the victim would have no right to appeal and challenge the trial court's decision on acceptance of the plea bargain. Second, the right would also be limited in that if the trial judge denied the victim the right to be heard, no cause of action would be generated for the victim. Instead, the victim would have the option of filing a complaint against the judge with the appropriate judicial review commission. Within these limits, victims would have a right to participate but would not be able to control the plea bargain; nor would the existence of this right generate additional litigation to burden the system.

Three states have adopted a participation right similar to the right described herein in that victims are allowed to express themselves to the trial judge regarding the plea bargain before it is accepted.[282] However, the consultation rights in those three states are flawed for the various

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society's interests in victim participation in the plea bargain are furthered by such indirect participation. First, consideration of the report by the court before accepting the plea bargain is optional, so the court may choose to accept the plea without reading the victim impact statement and thereby make a decision on the plea bargain with less than complete information. Second, even if the court does opt to read the report before accepting the plea, the victim's feeling of being a critical participant in the process is not furthered by this indirect method of participation.

282. *See* text accompanying notes 226-35, *supra*. Each state implemented the right by statute, but other methods are available. One option is a constitutional amendment. On the federal level, President Reagan's Task Force on Victims of Crime has proposed an addition to the Sixth Amendment which provides: "Likewise, the victim, in every criminal prosecution shall have the right to be present and to be heard at all critical stages of judicial proceedings." This proposed amendment is extremely broad, but even with more narrow drafting, a constitutional amendment is not the best

reasons described above. The participation right endorsed in this article attempts to react to and cure the defects of those statutes. The right advocated in this article can be summarized into four main components:

1. The victim has a right to participate at the plea bargain hearing by expressing his or her views on the plea bargain to the trial court before the bargain is accepted. The victim may make his or her statement either orally by appearing at the plea bargain hearing, or in writing by filing a sworn statement with the court.

2. The prosecutor must notify the victim at least ten days before the plea bargain hearing of the following: the proposed terms of the plea bargain, the schedule and place of the plea bargain hearing, and the existence of the victim's right to participate at the hearing, either by making an appearance at the hearing or by filing a sworn statement.

3. If the victim is denied the right to be heard on the plea bargain, the victim has no cause of action but may report the judge to the appropriate judicial commission.

4. The victim would have no right to appeal the trial judge's acceptance or rejection of the plea bargain.

A right to participate as defined and limited in these terms is an efficient method of allowing victims a voice in plea bargains without undue stress on the other participants in the plea bargain or on the judicial system.

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way to change the law because it is overkill. The law can be effectively changed by other methods, and the Constitution should not be unnecessarily amended.

A second option is to change the law by enacting a statute which confers on victims a right to be heard by the court at the plea bargain hearing. As described above, three states have done this, *see* text accompanying notes 230-35 *supra*.

A third option is to change the law by court action—either by decision or by amending the rules of criminal procedure. Either of these latter two options (changing the law by statute or court action) would be an effective and desirable method of changing the law to implement the victim's right to participate in plea bargains.