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Albert Alschuler

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## THE TRIAL JUDGE'S ROLE IN PLEA BARGAINING, PART I\*

ALBERT W. ALSCHULER†

The general consensus seems to be that trial judges should not participate in the pretrial negotiations that currently lead the overwhelming majority of American criminal defendants to plead guilty rather than exercise the right to trial.<sup>1</sup> The American Bar Association's *Standards for Criminal Justice* declare, "The trial judge should not participate in plea discussions,"<sup>2</sup> and the ABA's Professional Ethics Committee has ruled, "A judge should not be a party to advance arrangements for the determination of sentence whether as a result of a guilty plea or a finding of guilty based on proof."<sup>3</sup> According to the President's Commission on Law Enforcement and Administration of Justice, "[t]he judge's role is not that of one of the parties to the negotiation, but that of an independent examiner to verify that the defendant's plea is the result of an intelligent and knowing choice and not based on misapprehension or the product of coercion."<sup>4</sup>

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† Visiting Fellow, National Institute of Law Enforcement and Criminal Justice, 1975-76; Professor of Law, University of Colorado. A.B. 1962, LL.B. 1965 Harvard University.

1. As I use the term, plea bargaining consists of the exchange of prosecutorial, judicial or other official concessions for pleas of guilty. Plea bargaining can, on this view, be either explicit or implicit, see text accompanying notes 62-93 *infra*, but the term does not include unilateral exercises of prosecutorial or judicial discretion such as the unqualified dismissal of charges. Similarly, plea bargaining as I conceive it does not include the exchange of official concessions for information, testimony, restitution or, indeed, any action by a criminal defendant other than the entry of a plea of guilty. It is commonly estimated that ninety percent of all criminal convictions are by pleas of guilty. D. NEWMAN, *CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL* 3 (1966).

2. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO PLEAS OF GUILTY* § 3.3(a) (1968); see ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE* § 4.1(a) (1972).

3. ABA COMM. ON PROFESSIONAL ETHICS, *INFORMAL OPINIONS*, No. 779, 51 A.B.A.J. 444 (1965).

4. PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 136 (1967).

Similarly, both the recently revised Federal Rules of Criminal Procedure<sup>5</sup> and the American Law Institute's *Model Code of Pre-Arrest Procedure*<sup>6</sup> proscribe judicial participation in plea negotiations, and although the National Advisory Commission on Criminal Justice Standards and Goals has recommended the eventual abolition of all forms of plea bargaining,<sup>7</sup> it has also proposed that, in the interim, "the trial judge should not participate in plea discussions."<sup>8</sup>

For observers who seek reform of the plea bargaining process while remaining "realistic," judicial divorcement from the business of bargaining seems an attractive objective. This Article contends, however, that the movement to prohibit judicial plea bargaining rests largely on optimistic self-delusion. Although the prohibition of judicial bargaining may tend to mask the coercive realities of the guilty-plea system, the benefits of this reform are no more than cosmetic. From my perspective, judicial bargaining, in an appropriately limited form, is no more coercive than prosecutorial bargaining, and I believe that the bargaining process can operate in a fairer, more straightforward manner when judges do take an active part.

In describing the operation of the guilty-plea system and in discussing proposals for reform, this Article draws on my informal interviews during the 1967-68 academic year with prosecutors, defense attorneys, trial judges and other participants in the criminal justice systems of ten major urban jurisdictions—Boston, Chicago, Cleveland, Houston, Los Angeles, Manhattan, Oakland, Philadelphia, Pittsburgh and San Francisco. In earlier studies of the prosecutor's and the defense attorney's roles in plea bargaining,<sup>9</sup> I have discussed the uses and limitations of my nonscientific research

5. FED. R. CRIM. P. 11(e)(1); see *United States v. Werker*, 535 F.2d 198 (2d Cir. 1976).

6. ALI, MODEL CODE OF PRE-ARREST PROCEDURE § 350.3(1) (Proposed Official Draft 1975).

7. NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE REPORT ON COURTS § 3.1 (1973).

8. *Id.* § 3.7. Most of the law review writers who have addressed the issue have also condemned judicial bargaining. See Chalker, *Judicial Myopia, Differential Sentencing and the Guilty Plea—A Constitutional Examination*, 6 AM. CRIM. L. REV. 187, 192 (1968); Davis, *No Place for the Judge*, TRIAL, May-June, 1973, at 22; Ferguson, *The Role of the Judge in Plea Bargaining*, 15 CRIM. L.Q. 26 (1972); Gallagher, *A Voluntary Trap*, TRIAL, May-June, 1973, at 23; Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. C.R.-C.L. L. REV. 29 (1974); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 452-53 (1971); Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082 (1967); Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 180-81 (1964); Note, *Pleas of Guilty*, 18 U. KANS. L. REV. 729, 751 (1970); Note, *Judicial Participation in Guilty Pleas—A Search for Standards*, 33 U. PITT. L. REV. 151 (1971); Wales, Book Review, 43 N. DAK. L. REV. 806, 808 (1967). But see N. MORRIS, THE FUTURE OF IMPRISONMENT 53-55 (1974); Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509 (1972); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286 (1972); Proceedings of the National Judicial Conference on Standards for the Administration of Criminal Justice, 57 F.R.D. 229, 363 (1972) (remarks of George W. Pugh). Judicial opinions on the propriety of the trial judge's participation in plea negotiations are cited in notes 139-42 *infra*.

9. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50 (1968) [hereinafter cited as *The Prosecutor's Role*]; Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179 (1975) [hereinafter cited as *The Defense Attorney's Role*]. See

methods, and to avoid burdening readers who are already familiar with my approach, I have, in this final component of the trilogy, relegated the necessary caveats and explanations to a footnote.<sup>10</sup>

This Article explores four types of plea bargaining systems, in each of which the trial judge assumes a different role: first, systems in which judges do not engage in plea bargaining and in which the task of bargaining belongs exclusively to prosecutors; second, systems in which neither judges nor prosecutors bargain explicitly with defense attorneys but in which judges encourage guilty pleas by regularly sentencing defendants who are convicted at trial more severely than those who plead guilty; third, systems in which judges participate actively in pretrial negotiations and offer specific benefits in exchange for guilty pleas; and fourth, systems in which judges participate in the negotiating process but avoid specific pre-trial promises. The Article also discusses the motives of actively bargaining judges and assesses the basic arguments for and against judicial bargaining. Although my own view is that the institution of plea bargaining can and should be abolished, the Article tentatively accepts the opposite view and examines how a system of plea bargaining should be structured. Finally, it considers some of the rationales commonly asserted for plea bargaining and their implications for the problem of judicial bargaining.<sup>11</sup>

## I. FOUR TYPES OF PLEA NEGOTIATION SYSTEMS

### A. *Systems of Prosecutorial Bargaining*

Although an effective system of plea negotiation can develop even when trial judges refuse to bargain with defense attorneys, judicial bargaining was uncommon in only one of the ten cities that I visited, Houston,

also Alschuler, *The Supreme Court, the Defense Attorney, and the Guilty Plea*, 47 U. COLO. L. REV. 1 (1975) [hereinafter cited as *The Supreme Court and the Guilty Plea*].

10. As I wrote in *The Defense Attorney's Role*, *supra* note 9, at 1181 & n.8:

My interviews did not follow a set format, and the resulting study is not a scientific survey. . . . [Instead] I have engaged in a kind of legal journalism.

The utility of this kind of study seems to me to lie primarily in its ability to guide analysis and to permit an evaluation of the inherency of the problems that it suggests. Most of what I report is hearsay, and individual stories and observations may therefore be suspect. Even unverified gossip may be valuable, however, when it "makes sense"—when reflection indicates that our current system of criminal justice would inevitably lead to behavior of the sort described in more than a few cases. Moreover, the hearsay tends to become credible when similar observations are reported by persons with different and opposing roles in the criminal justice system and by persons in independent jurisdictions across the nation. . . .

Statements that appear in the text in quotation marks are not always exact quotations. I have attempted to recreate in a concise, readable and accurate way what the persons I interviewed told me. My paraphrasing has rarely been extensive, and I hope and believe that it has retained both the substance and the style of the men and women with whom I talked. Whenever requests for anonymity did not preclude this course, I have indicated the sources of specific observations.

11. *The Trial Judge's Role in Plea Bargaining, Part II*, which will appear at a later date, will consider the procedures that trial judges employ in accepting guilty pleas and the relationship between judge-shopping practices and plea-negotiation practices.

Texas. Even in Houston, a defense attorney who had enjoyed a long and close relationship with a particular judge or who had contributed a substantial amount to the judge's most recent campaign for election to the bench<sup>12</sup> might visit the judge's chambers to "learn his thinking" about an unusually troublesome case.<sup>13</sup> Moreover, an attorney who believed that his client might be placed on probation if he elected to be sentenced by a jury<sup>14</sup> might sometimes obtain an indication from the judge that this election would be unnecessary if the client pleaded guilty. Judicial plea bargaining was, however, exceptional, and bargaining in Houston was mainly the prosecutor's task.

Although most observers would praise Houston for this judicial detachment,<sup>15</sup> the refusal of Houston trial judges to bargain produced a hypocritical system in which the judicial sentencing power was exercised by the prosecutor's office rather than the courts. The principal topic of discussion at most Houston bargaining sessions was the prosecutor's sentence recommendation—a recommendation which, of course, did not formally bind or limit the action of the trial judge. In theory, the judge remained free to impose a sentence either more severe or more lenient than the sentence recommended by the prosecutor,<sup>16</sup> and defendants bargained only for the chance that the prosecutor's recommendation would influence the judge as he himself carefully determined the sentence that each defendant deserved.

If Houston's practice had corresponded to this theory, it seems doubtful that a sentence recommendation by a prosecutor would ever have induced a waiver of the right to trial. In a system in which defendants were

12. One Houston defense attorney reported, "When a judge asks me for 300 dollars for his campaign, I give him 700 dollars. When he asks me for 700 dollars, I give him 1500." The attorney said that he had never asked a judge to do anything "improper" but added that he considered campaign contributions "good for public relations."

Another Texas defense attorney told Jackson B. Battle that the political support of criminal court judges was "damned important. Contributions are the ticket in this county. . . . [Although many lawyers reach for their checkbooks when asked for a contribution,] I was a justice of the peace once. I know what they like—cash." Battle, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys*, 50 TEX. L. REV. 60, 98 (1971).

The Code of Professional Responsibility provides, "A lawyer shall not give or lend any thing of value to a judge . . . ." ABA CODE OF PROFESSIONAL RESPONSIBILITY, D. R. 7-110(A). The predecessors of this provision were, however, interpreted not to forbid making campaign contributions to judges. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 226, 28 A.B.A.J. 156 (1942). The authors of the Code apparently did not intend to establish a more stringent rule. ABA CODE OF PROFESSIONAL RESPONSIBILITY at 42c n.58.

13. See Johnson, *Sentencing in the Criminal District Courts*, 9 HOUS. L. REV. 944, 992 (1972).

14. See TEX. CODE CRIM. PROC. ANN. art. 26.14 (Vernon 1966).

15. See authorities cited in notes 2-8 *supra*.

16. A few jurisdictions, however, have recently provided that a defendant may withdraw his guilty plea whenever a judge decides not to follow the recommendation that has induced it. See notes 42-45 and accompanying text *infra*. In Houston in 1970, three felony-court judges ordinarily allowed defendants to withdraw their guilty pleas when the judges decided to depart from prosecutorial sentence recommendations, and three other judges ordinarily refused to permit these withdrawals. Johnson, *supra* note 13, at 995.

sentenced solely "on the merits" and in which the prosecutor's opinion were accorded only the weight that it deserved, the recommendation of a partisan attorney a few years out of law school would have been unlikely to influence the action of an experienced judicial officer in a significant way. Moreover, the value of the prosecutor's opinion would have been limited by its uninformed character. At the time that most plea negotiation occurred in Houston (as, indeed, in virtually every other city), the prosecutor was aware of the defendant's prior criminal record, and he possessed a police offense report or other summary of the crime with which the defendant had been charged. Nevertheless, the prosecutor was invariably unaware of the information that even a routine presentence investigation would have uncovered.<sup>17</sup> The police offense report did not always reveal, for example, even such matters as the extent of an assault victim's injuries,<sup>18</sup> and apart from obtaining the defendant's "rap sheet," the police did not investigate his personal characteristics and background in any way.

Defendants would therefore have been foolish to trade their constitutional rights for the chance that an uninformed recommendation by a relatively inexperienced prosecutor might somehow have tipped the balance in an independent consideration of the treatment that they deserved. Defendants are vitally interested in one basic issue—what will happen to them when they leave the courtroom. An effective system of plea negotiation depends on its ability to provide substantial assurance that a plea of guilty will alter the resolution of this all-important question in a manner that benefits defendants.<sup>19</sup>

Houston's system of plea negotiation did provide this assurance, and 94% of the defendants convicted of crime in Houston's felony courts were convicted by pleas of guilty.<sup>20</sup> The system achieved its basic objective so well for only one reason: the task of sentencing in guilty-plea cases had been transferred from the courts to the District Attorney's office.

At the time of my study, there were six felony-court judges in Houston, and five of these six judges followed the prosecutor's sentence rec-

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17. Today, by contrast, presentence reports are occasionally prepared prior to the initiation of plea bargaining in Houston. See note 198 *infra*. This procedure, however, presents its own dangers. See notes 199-204 and accompanying text *infra*.

18. E. Tucker, *The Working Relationship Between the Harris County District Attorney's Office and the Houston Police Department* (1971) (unpublished paper on file at the University of Texas Law School Library). Tucker also noted that although the Houston Police Department prepared the case files that prosecutors used in the negotiation process, no effort had been made to establish uniform police reporting practices. Moreover, Houston prosecutors almost never conferred with investigating officers to obtain information not included in their written reports.

19. For a caveat to this generalization, see text accompanying notes 73-74 *infra* (uncertainty reduction as a motive for guilty pleas even in the absence of sentencing advantages).

20. Unpublished statistics supplied by R. J. Roman, Clerk's Office, Harris County District Courts. More recent statistics supplied by Mr. Roman reveal that the situation is no different today. In 1975, 95% of the convictions in the Houston felony courts were by plea of guilty. See McIntyre & Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A.J. 1154, 1156 (1970).

ommendation in almost every guilty-plea case that came before them. The sixth district judge, Sam W. Davis, was considered a maverick by prosecutors and defense attorneys alike. By his own estimation, Judge Davis followed the prosecutor's recommendation in only about 90% of the cases that he considered. Like Houston's other judges, Judge Davis observed that he tried to follow the prosecutor's recommendation whenever he could do so in good conscience, and he noted that the guilty-plea system would break down if he failed to do so.<sup>21</sup> James N. Johnson, in a more recent and more systematic investigation of the Houston courts, found that, of a sample of eighty-two felony guilty-plea cases in which prosecutors had offered sentence recommendations, the court had imposed exactly the recommended sentence in eighty. In the two remaining cases, the court had merely imposed somewhat longer terms of probation than the prosecutor had recommended.<sup>22</sup> Johnson also reported, on the basis of a second sample of 1000 cases, that three of the ten judges who then sat in felony cases followed the prosecutor's recommendation in 100% of the cases that came before them; one other judge followed the prosecutor's recommendation in 99% of his cases, two in 98%, one in 96%, one in 92%, and one—Judge Sam W. Davis—in 88%.<sup>23</sup>

All observers agreed that far fewer pleas of guilty were entered in Judge Davis' courtroom than in the courtrooms of the other district judges. Because Houston had a rigid system of case assignment that required each judge to consider approximately the same number of cases as every other judge, the result was that Judge Davis spent longer hours on the bench than any other jurist. He nevertheless confronted a greater backlog of cases than did the other judges. Despite the risks involved, a significant number of

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21. Of course, a trial judge may defer to a prosecutorial sentence recommendation for reasons other than his desire to maintain the overall effectiveness of the plea negotiation system. Justice Edmund Burke of the Alaska Supreme Court noted that, as a trial judge, he had rarely disapproved prosecutorial plea agreements. "Of course," he said, "some recommendations did seem too lenient, but I knew that the bargains in these cases might have reflected weak spots in the prosecutors' evidence. I felt that I had to defer to the prosecutors' assessment of their cases." Burke also commented, "Sentencing is a damned hard job, and whatever makes this job easier is likely to seem good. The tendency is to grasp at anything that goes by." Interview with Justice Edmund Burke, Supreme Court of Alaska (June 10, 1976).

22. Johnson, *supra* note 13, at 971. Johnson began with a sample of 100 felony convictions, 87 of which were by guilty plea. In five of these guilty-plea cases, the prosecutor's office did not offer sentence recommendations—a fact which may suggest, not the absence of plea agreements, but rather prosecutorial agreements "not to oppose" sentences that the prosecutors could not affirmatively recommend under an often subverted "office policy." *Id.* at 991-92.

23. *Id.* at 984, Table G. Judge Thomas D. Lambros has observed that when plea bargaining is exclusively the prosecutor's function, "the judge is only a satellite to the plea bargaining process orbiting in a detached manner from the main body." Lambros, *supra* note 8, at 509. Anthony Davis, an English barrister who has studied American criminal courts, has noted that American prosecutors "have assumed unto themselves certain discretions which in England are still carefully guarded by the judges" and that, "[b]y allowing so many discretions to slip away, [American courts] have lost the power to control effectively the processes of criminal justice." Davis, *Sentences for Sale: A New Look at Plea Bargaining in England and America*, (parts I & II), [1971] CRIM. L. REV. 150, at 156; 220.

defendants did plead guilty before Judge Davis. As one defense attorney observed, however, "We often leave madder than hell." Judge Davis' independence—and his insistence that the judicial function belonged to him—did not make him popular.

Judge Davis was not the only judge in Houston who exercised some control over the sentencing process. As one defense attorney explained, "A few judges put 'bottoms' on some pleas." There were, in other words, unwritten rules in some courtrooms that effectively established minimum sentences for certain offenses. The prosecutors assigned to these courtrooms did not attempt to recommend lighter sentences than the judges were willing to accept. If they had, the uniform pattern of judicial adherence to prosecutorial sentence recommendations would undoubtedly have been altered. Although there was therefore some interplay between judges and prosecutors in determining sentences in guilty-plea cases, within very broad limits this task belonged to prosecutors. One former prosecutor explained, "A district attorney is not limited a great deal by the judge. Ed Duggan will accept almost any state's recommendation. Judge Walker will accept almost anything after complaining a little, and Lee Duggan will accept almost anything after complaining a lot."<sup>24</sup> Houston's judges remained aloof from the unseemly business of bargaining, but the price of this restraint was the abdication of their judicial power. This power was transferred to people of less experience, who lacked the information that the court could have secured, whose temperament was shaped by their adversary duties, and who had not been charged by the electorate with the important responsibilities that they had assumed.

This abdication of judicial power was not exclusively a vice of Houston's system of plea negotiation, for the same pattern of judicial deference to prosecutors was duplicated to a considerable extent throughout the nation. In most cities, there were at least a few judges who adopted the same detached attitude toward plea bargaining as did judges in Houston, and even when judges were willing to bargain with defense attorneys, a defense attorney could choose to bargain with a prosecutor instead. When the defense attorney and the prosecutor had concluded a satisfactory plea agreement, they ordinarily had very little reason to fear that this agreement would be disregarded by the court. Students of the criminal courts of many American jurisdictions have noted that judges almost automatically ratify prosecutorial charge reductions and sentence recommendations,<sup>25</sup> and this

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24. Johnson, *supra* note 13 at 984-85.

25. Consider the following statements:

By and large prosecutors deal and judges accept the deal, and were it otherwise the backlog would become completely intolerable.

People v. Byrd, 12 Mich. App. 186, 196, 162 N.W.2d 777, 781 (1968) (Lenin, J., concurring).  
The court itself does no more than publicly affirm the informal arrangements that have been arrived at in camera.

A. BLUMBERG, CRIMINAL JUSTICE 181 (1967).



phenomenon has also attracted the attention of criminal defendants themselves. After interviewing seventy-one convicted offenders in Connecticut, Professor Jonathan D. Casper reported that most perceived the judge as "a puppet for the prosecutor-ventriloquist."<sup>26</sup> One convict said simply, "The prosecutor is the fellow that gives you the time," and another observed, "I feel that a judge really ain't shit, you know. He's just put up there—he's supposed to be the head of the show, but he ain't nothing. . . . The person who runs the show is the prosecutor."<sup>27</sup>

Several lawyers—some with very extensive experience in the criminal courts—noted that they had never seen a trial judge impose a more severe sentence than that recommended by the prosecutor following a guilty plea.<sup>28</sup> Most prosecutors and defense attorneys, however, could recall some occasions on which trial judges had imposed harsher sentences than those contemplated by prosecutorial plea agreements. These manifestations of judicial independence allowed the judges to maintain the theory that prosecutors lacked the power to bind the court, and so long as these assertions of judicial power were rare, they did not seriously disrupt the

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The judge is usually the D.A.'s man. He comes on stage only after the plea bargain is made, most often willing to accept his role as implementer of the deal.

Lobenthal, *Book Review*, 26 STAN. L. REV. 1209, 1217 (1974).

[I]n the overwhelming majority of incidents the judge will accept the recommendation because the judge knows as well as the prosecutor that the American criminal judiciary would cease to function if a larger percentage of those charged with crime were to demand the trial rights that are guaranteed to them.

Hallworth, *The Myth of Jury Trial*, 90 COMMONWEAL 161, 162 (1969).

Accord, BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, JUDICIAL CRIMINAL STATISTICS 1934, at 10-11 (1936); CITIZEN'S COMM. ON THE CONTROL OF CRIME, CRIME IN NEW YORK CITY IN 1940 (1941); MISSOURI ASS'N FOR CRIMINAL JUSTICE, THE MISSOURI CRIME SURVEY 182-83 (1926); N. MORRIS, *supra* note 8, at 46, 52-53; 2 NAT'L LEGAL AID AND DEFENDER ASS'N, CRIMINAL JUSTICE IN DADE COUNTY—A PRELIMINARY SURVEY 214 (1972); D. NEWMAN, *supra* note 1, at 94; Allen & Strickland, *Negotiating Pleas in Criminal Cases*, PRACT. LAW., January 1971, at 35, 41-42; Battle, *A Comparison of Public Defenders' and Private Attorneys' Relationship with the Prosecution in the City of Denver*, 50 DEN. L.J. 101, 115 (1973); Davis, *supra* note 23, at 157; McIntyre & Lippman, *supra* note 20, at 1157; Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780, 788 (1956); Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 62 (1967); White, *supra* note 8, at 443; Note, *Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 866 (1964); 71 W. VA. L. REV. 59, 60 (1968); 20 WAYNE L. REV. 1359, 1364 (1974).

26. J. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 137 (1972).

27. *Id.* at 135.

28. Sam W. Callan, a District Court Judge in El Paso, Texas, observed, "Ninety percent of all judges have never thought about sentencing except to do what the District Attorney says." Interview with Sam W. Callan, Judge, Texas District Court, in El Paso, Texas (June 8, 1976).

In *State v. Bonds*, 521 S.W.2d 18 (Mo. App. 1975), a trial court had sentenced the defendant to a three-year prison term although the prosecutor had recommended a sentence of only six months. The prosecutor testified that "his recommendations had never before been rejected in any of the many guilty pleas he had handled." *Id.* at 20. Both the prosecutor and the defense attorney had accordingly told the defendant that he "would get six months." The prosecutor also testified that the defendant had been so anxious for a trial that he had once rejected the prosecutor's offer of a suspended sentence. The prosecutor had, however, induced the defendant's uncle to "pressure him to plead guilty." Although the trial court denied the defendant's motion to withdraw his guilty plea after the unexpected sentence was imposed, the Court of Appeals set the guilty plea aside on the ground that the trial court should have advised the defendant that it would not be bound by the prosecutor's recommendation.

flow of guilty pleas. A number of judges therefore insisted that it was possible to have both judicial independence and effective prosecutorial plea bargaining, but they plainly were crowding between the horns of a dilemma. To the extent that judges yield to prosecutors in order to make the guilty-plea system work smoothly, they sacrifice their independence, and to the extent that they insist on performing their judicial duties, they sharply reduce the effectiveness of prosecutorial plea bargaining.<sup>29</sup>

Moreover, the judges' infrequent efforts to give substance to the largely fictional theory that prosecutors cannot bind the court may result in a special sort of unfairness. When judges do assert their power, they partially alleviate one vice of today's guilty-plea system—the strong prosecutorial dominance of the sentencing function in guilty-plea cases—but they do so only by disappointing reasonable expectations that the system has created.

For example, in a misdemeanor case that I observed in suburban Cook County, Illinois, a prosecutor had secured a defendant's guilty plea and his testimony against three alleged accomplices by promising a short sentence that the defendant could serve concurrently with another sentence that he had already received. The defendant performed his part of the bargain,<sup>30</sup> and the prosecutor described the defendant's cooperation in detail at the time that he made his recommendation to the court. Without a word of explanation, the judge sentenced the defendant to a substantial jail term, to begin after the expiration of his current sentence.<sup>31</sup>

In this case, the prosecutor had been so confident of his own sentencing power that he had not bothered to speak to the defendant in terms of a recommendation.<sup>32</sup> His unqualified promise of a short, concurrent sentence

29. One of the earliest reported decisions on plea bargaining that I have discovered emphasized this fact in condemning prosecutorial plea agreements as "corrupt":

An agreement of the character here in question, unsanctioned by the court in which the indictments are pending, between a public prosecutor and the attorney of the defendant . . . is an assumption of judicial function, a bargain for judicial action and judgment; hardly, if at all, distinguishable in principle from a direct sale of justice. Without the sanction of the court, it is difficult to understand how such an agreement could be kept. For while the court is not privy to the bargain, the fulfillment of it largely depends upon the court. Such a bargain, unsanctioned by the court, could not be kept by any proper exercise of proper professional function, in any court not willing largely to abdicate its proper functions in favor of its officers.

Wight v. Rindskopf, 43 Wis. 344, 354-55 (1877).

30. The prosecutor believed that the defendant's testimony would be more effective if he had not yet received the lenient sentence contemplated by the plea agreement, and the entry of the defendant's guilty plea was therefore delayed for several months until he had testified. The prosecutor later observed that if the defendant had been permitted to plead guilty at the time of the agreement, the court would almost certainly have imposed a concurrent sentence; the prosecutor concluded that his own strategic delay had led to the more severe treatment that the defendant in fact received.

31. The crime to which the defendant pleaded guilty, the burning of a lumber yard, was the closest thing to a "race riot" that the city of Evanston, Illinois, had experienced during the summer of 1967. The crime had received a significant amount of local publicity, and this publicity may have influenced the trial judge's decision to disregard the prosecutor's sentence recommendation.

32. Cf. D. NEWMAN, *supra* note 1, at 93 n.7 ("It is not an uncommon practice for the

was not kept, and the Supreme Court's decision in *Santobello v. New York*<sup>33</sup> would seem to entitle the defendant to relief.<sup>34</sup> Most observers would agree that, in the circumstances of this case, the defendant's expectations were unfairly disappointed. Nevertheless, the case may present an appropriate vehicle for examining in general terms the merits of the theory that a prosecutor's sentence recommendation cannot bind the trial court.

A scrupulous prosecutor might have informed the defendant of the limits of his authority, and a scrupulous trial judge might have emphasized that no representation by any other person could limit his power to determine the defendant's sentence. Before the guilty plea was accepted, the defendant might have been required to affirm that he understood. It is hard to believe that any of this care in phraseology would have affected the quality of the defendant's expectations in a significant way.<sup>35</sup>

Like any other observer of the criminal courts, a defendant can see

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prosecutor to promise probation to a defendant when, of course, he has no authority to actually place anyone on probation").

33. 404 U.S. 257 (1971). In *Santobello*, the Court held it a denial of due process for a prosecutor not to keep the promise that had induced a defendant's guilty plea. Although a party injured by a substantial or material breach of a private contract may elect the remedy of rescission or restitution whenever the parties can be restored to positions that they occupied before the contract was entered, 5 CORBIN, CONTRACTS §§ 1104-05 (1964), the Supreme Court refused to afford the same election to a defendant injured by a prosecutor's substantial breach of a plea agreement. Instead, the prosecutor's default could be remedied either by permitting the defendant to withdraw his guilty plea ("rescission") or by ordering the prosecutor to keep his promise ("specific performance"). This choice of remedies would be, not the defendant's, but the court's.

34. There is, however, a possible ground of distinction. In *Santobello*, the broken promise was one that the prosecutor had authority to fulfill—a promise not to make any recommendation concerning the defendant's sentence. In the Cook County case, by contrast, the prosecutor exceeded his formal authority by unqualifiedly promising a specific sentence. The New York Court of Appeals recently advanced this distinction in a case in which a prosecutor had agreed that the defendant would be allowed to withdraw his guilty plea if the court failed to follow a recommendation that no prison sentence be imposed. *People v. Selikoff*, 35 N.Y.2d 227, 241, 318 N.E.2d 784, 793, 360 N.Y.S.2d 623, 636 (1974), cert. denied, 419 U.S. 1122 (1975). Although the trial court imposed a prison sentence and refused to allow the defendant to withdraw his plea, the Court of Appeals held that the defendant was not entitled to relief. The court did not explain why a defendant should be expected to understand the plea-withdrawal procedures of the criminal courts better than the prosecutor, or why a prosecutor's misrepresentation should not provide as strong a basis for the withdrawal of a guilty plea as his breach of a valid plea agreement. In *Brady v. United States*, 397 U.S. 742, 755 (1970), the Supreme Court indicated that a guilty plea could be set aside if induced by "unfulfilled" or "unfulfillable" promises, and in an earlier opinion, *Machibroda v. United States*, 368 U.S. 487 (1962), the Court apparently held on constitutional grounds that breach of a prosecutorial promise of a specific sentence would render a guilty plea invalid. Most courts have unhesitatingly granted relief from guilty-plea convictions induced by unfulfilled promises that were beyond a prosecutor's (or a bargaining trial judge's) authority. See, e.g., *Walters v. Harris*, 460 F.2d 988 (4th Cir. 1972), cert. denied, 409 U.S. 1129 (1973); *Smith v. United States*, 321 F.2d 954 (9th Cir. 1963); *United States v. Lester*, 247 F.2d 496, 501 (2d Cir. 1957); *People v. Schwarz*, 201 Cal. 309, 314, 257 P. 71, 73 (1927) ("It is far better that one woman go unpunished than that it be said that the officers of the law in charge of the prosecution of crimes may play fast and loose with their promises to defendants under indictment."); *People v. Sigafus*, 39 Ill. 2d 68, 233 N.E.2d 386 (1968); *People v. Miller*, 38 App. Div. 2d 745, 329 N.Y.S.2d 762 (1972).

35. See Comment, *Plea Bargaining: The Judicial Merry-Go-Round*, 10 DUQ. L. REV. 253, 257 (1971): "The fact the judge makes a special point to inform the accused that he, as judge, is in no way bound by the recommendations is . . . of little importance. It appears to the defendant that this is done purely for the sake of judicial propriety." See also *Walters v. Harris*, 460 F.2d 988, 992 (4th Cir. 1972).

that the prosecutor does have the power to bind the court in the overwhelming majority of cases. The actions of judges and prosecutors speak louder than their words.<sup>36</sup> If, on rare occasion, a judge decides to demonstrate his authority, it may be reassuring to know that the defendant has been given fair warning: judges do sometimes assert themselves. The interests of the defendant extend beyond a formal warning, however, to the vindication of basic expectations that the system has created. It is not enough to warn each defendant that the court reserves the power to act unfairly and to defeat hopes that prosecutors have instilled in a calculated effort to induce a plea of guilty.<sup>37</sup>

For a system of criminal justice strongly to encourage a defendant to believe that a certain sentence will follow the abandonment of his constitutional rights and yet to impose an entirely different sentence seems manifestly unfair.<sup>38</sup> In Houston, for example, despite the courts' usual deference to prosecutorial sentence recommendations, a defendant who pleaded guilty in exchange for the recommendation of a ten-year sentence is cur-

36. See K. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 13 (1969) ("What counts is power, not authority.").

37. The United States Court of Appeals for the Fourth Circuit recognized this point in *United States v. Hammerman*, 528 F.2d 326 (4th Cir. 1975). In this case, the United States Attorney concluded that the defendant, whom the court described as a "bag man for [Spiro] Agnew," should not be sentenced more severely on his plea of guilty than the former Vice President himself. Following a conference with the members of a three-judge trial court.

one of the prosecutors stated to appellant's counsel his firm belief that the court had given the desired indication that it would accept the United States Attorney's recommendation [that no prison sentence be imposed,] . . . particularly by saying that it wanted to avoid the appearance of a "cut and dried" proceeding. He said he was sure that the court would not have talked in those terms if it were not planning to follow the United States Attorney's recommendation.

*Id.* at 329-30. The trial court later sentenced the defendant to a term of imprisonment of 18 months and a fine of \$5,000. In reversing the defendant's guilty-plea conviction, the Court of Appeals said, "It does not matter that the prediction or promise was made in good faith; what matters is it was probably relied upon, was not fulfilled and was unfulfillable." *Id.* at 331. *Accord*, *Griffin v. State*, 12 Ga. App. 615, 177 S.E. 1080 (1913); *State v. Hovis*, 353 Mo. 602, 183 S.W.2d 147 (1944); *see In re Valle*, 364 Mich. 471, 110 N.W.2d 673 (1961).

38. An apt analogy can be found in private contract law. In a number of private contract cases, one party has induced another to act by indicating that he would almost certainly provide a specified benefit in return. At the same time, the inducing party has formally reserved the power to withhold this benefit at will. Employers, for example, have persuaded employees to retain their positions by establishing retirement programs which they expressly reserved the power to cancel without liability. In this situation, several courts have recognized the unfairness of allowing a contracting party to keep his formal promise to the ear while breaking his more important promise to the heart. *See Tilbert v. Eagle Lock Co.*, 116 Conn. 357, 165 A. 205 (1933); *Cantor v. Berkshire Life Ins. Co.*, 171 Ohio St. 405, 171 N.E.2d 518 (1960); *Mabley & Carew Co. v. Borden*, 129 Ohio St. 375, 195 N.E. 697 (1935); *Scholfield v. Zion's Co-op Mercantile Institution*, 85 Utah 281, 39 P.2d 342 (1934); *cf.* 29 U.S.C.A. §§ 1053-54 (West 1975) (Employee Retirement Income Security Act of 1974). A number of other decisions have, however, given effect to the employers' escape clauses and have viewed their pension programs as "mere gratuities." *See Note, Contractual Aspects of Pension Plan Modification*, 56 COLUM. L. REV. 251 (1956).

Simply as a matter of contract law, it may indeed be defensible to hold an employee to a risk that he has expressly agreed to run, but few would deny that an employer has at least a moral obligation to fulfill the expectations that he has deliberately created to induce his employees' substantial reliance. When a prosecutor, a state officer, has induced a defendant to sacrifice his right to trial by creating the expectation of a lenient sentence, the state has a comparable moral obligation, and this obligation conflicts with the notion that a prosecutor's "prediction" or "recommendation" cannot limit the sentencing authority of a trial court.

rently serving a fifty-year term,<sup>39</sup> and in a federal court, a defendant who was induced to plead guilty by a promise to recommend his immediate release from custody was sentenced to two consecutive five-year terms.<sup>40</sup> Although the prosecutors in these cases did make the promised recommendations, the defendants probably concluded that the plea negotiation process had cheated them of years of their lives.<sup>41</sup>

A recent revision of the Federal Rules of Criminal Procedure has recognized that prosecutorial plea agreements ordinarily create strong expectations concerning sentencing outcomes and has provided a partial solution to the problem. Rule 11 now permits a defendant to withdraw his guilty plea whenever a judge decides not to impose the sentence upon which the prosecutor and the defendant have agreed.<sup>42</sup> This remedy plainly

39. Johnson, *supra* note 13, at 995.

40. United States v. McGahey, 449 F.2d 738 (9th Cir. 1971), *cert. denied*, 405 U.S. 977 (1972).

41. For the same reason, I suspect that no form of words could have eliminated the unfairness to the defendant in the Cook County case that I have described. When the unexpected sentence was imposed, this defendant undoubtedly believed that he had been duped, that he had sold out his friends and his chance for acquittal on the basis of a promise that was quickly snatched away, and that his plea agreement involved no meaningful reciprocity whatever. Had the agreement been phrased more carefully, the prosecutor and trial judge might have taken comfort in the thought, "We told him it might happen." The substitution of the word "recommendation" for the word "sentence" would not, however, have offered any meaningful comfort to the defendant.

The extent to which courts typically treat an incantation as justification for defeating important expectations is suggested by a form headed "Plea and Waiver" that is used by the Circuit Court of Garland County, Arkansas. In this form, a defendant

admits to the knowledge that the Court, in imposing and pronouncing sentence upon his plea of guilty herein, is not bound by any recommendations or statements made to or by anyone to the Court and that he is not to assume or rely upon any statement or representation by his attorney, the prosecuting attorney or *even the Court* as to the consequences of his plea of guilty herein made prior to actual imposition and pronouncement of sentence.

T. Healy, *Guilty Pleas With Plea Bargaining* 15 (Materials for the 1975 Graduate Session on Criminal Law, National College of the State Judiciary, Reno, Nevada) (emphasis added).

The Los Angeles Superior Court, apparently concerned that the sort of form used in Garland County is too rote and mechanical, has substituted a catechism on civics: "Who do you believe will decide what your sentence will be?" "Who do you think will decide whether or not you will get probation?" "Do you understand that at this time the court has not made any decision as to what sentence you will receive?" *Id.* at 17.

42. FED. R. CRIM. P. 11(e)(1)-(4). As revised by Congress following submission by the Supreme Court, this rule is remarkably confusing. Rule 11(e)(1) authorizes both bargaining for a sentence "recommendation . . . with the understanding that such recommendation . . . shall not be binding upon the court" and bargaining for an agreement "that a specific sentence is the appropriate disposition of the case." The Notes of the House Judiciary Committee which drafted the rule emphasize that these are "different types of plea agreements." 18 U.S.C.A. FED. R. CRIM. P. 11, Notes of Committee on the Judiciary (H.R. REP. NO. 247, 94th Cong., 1st Sess. (1975)), at 18 (West 1975), but in subsequent subdivisions of the Rule, the intended difference may effectively disappear. (The version of Rule 11 submitted by the Supreme Court had referred interchangeably to agreements to "recommend . . . the imposition of a particular sentence" and agreements which "contemplate entry of a plea of guilty . . . in the expectation that a specific sentence will be imposed.")

Rule 11(e)(2) provides that the court may "accept or reject the [plea] agreement." Rule 11(e)(3) declares that "if the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement," and Rule 11(e)(4) provides that if the court rejects the agreement, it shall "afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea . . . the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."

When a prosecutor and defense attorney have agreed "that a specific sentence is the

cannot be fully effective in all cases. In the Cook County case, for example, the defendant had already testified against his alleged accomplices at the time that his guilty plea was offered. It was too late to restore the defendant to the position that he occupied before the plea agreement was

appropriate disposition of the case," the procedures contemplated by the rule seem clear. Prosecutors and defense attorneys will ordinarily have every reason to cast their agreements in these definitive terms rather than simply in terms of "recommendations," and the potential difficulties of the Rule may therefore be minimized in practice. Nevertheless, the persistence of a separate "sentence recommendation" procedure is likely to lead to baffling litigation. For one thing, insofar as the two forms of plea agreement do have different consequences, it may often be unclear which form the parties have chosen. The parties may, for example, have spoken of a "sentence recommendation" without explicitly agreeing "that such recommendation . . . shall not be binding upon the court," or a defendant may have concluded that an agreement called for a "specific sentence" while a prosecutor believed that it called only for a "recommendation."

In addition, the procedures to be followed when the parties have reached a "sentence-recommendation agreement" are uncertain. Rule 11(e)(2) provides that the trial court must "accept or reject" all plea agreements—even those that call only for prosecutorial "recommendations." If, then, a court does "accept" a sentence-recommendation agreement, does it agree to follow the prosecutor's recommendation or merely to consider it? More importantly, if a court decides not to follow the prosecutor's recommendation, must it permit the defendant to withdraw his plea of guilty?

Rule 11(e)(3) declares that if the court accepts the agreement, it must "embody in the judgment and sentence the disposition provided for in the plea agreement." One might have thought that a "sentence-recommendation agreement" provided only for a "recommendation," not for a "disposition," but Rule 11(e)(3) was apparently written on the contrary assumption that every plea agreement provides for a "disposition." If that view is correct, the "disposition provided for" by a sentence-recommendation agreement can be only the sentence that has been recommended. Judicial acceptance of a sentence-recommendation agreement accordingly binds the court to impose a sentence no more severe than that recommended by the prosecutor, and rejection of the agreement under Rule 11(e)(4) requires that the defendant be allowed to withdraw his plea of guilty. (Indeed, on a literal reading, Rule 11 provides no mechanism by which a court can, after accepting a bargained guilty plea, impose a sentence less severe than that proposed in the plea agreement. This bizarre restriction of the trial judge's sentencing authority was apparently intended. See Hungate, *Changes in the Federal Rules of Criminal Procedure*, 61 A.B.A.J. 1203, 1204 (1975).)

Although the foregoing analysis fairly "tracks the Rule," it involves a significant difficulty, for it renders a "sentence-recommendation" agreement indistinguishable in effect from a "specific-sentence" agreement. The authors of Rule 11 apparently believed that it would make some difference whether the parties chose one form of agreement rather than the other, and the provision of Rule 11(e)(1) that a sentence recommendation "shall not be binding upon the court" was apparently designed to express the critical difference. In one sense, of course, no agreement of the parties ever binds a court under Rule 11, for the court may always reject an agreement under Rule 11(e)(2). Nevertheless, the authors of Rule 11 may have had in mind a procedure that would, in another sense, be even less "binding upon the court"—a procedure under which the defendant could be held to his guilty plea even if the court decided to depart from the prosecutor's sentence recommendation. Unfortunately, if Congress' objective was indeed to establish this procedure, the operative provisions of Rule 11 do not seem to do so.

Although the problem is therefore difficult, my own view is that it should not matter which of the two "different types of plea agreements" the parties have selected. At least in the early days of Rule 11's operation, a contrary position would be likely to create a trap for the unwary; parties who phrase their agreements in terms of "recommendations" will usually do so inadvertently, without recognizing their power under the Rule to limit the court's ability to defeat their expectations. Moreover, a ruling that the two types of plea agreements are functionally indistinguishable would avoid the potentially difficult question of which type the parties have selected in a particular case, and it would accord with the "least unnatural" reading of Rule 11's ill-considered language.

Like Rule 11, the American Law Institute's *Model Code of Pre-Arrestment Procedure* provides that a defendant may withdraw his guilty plea when a court decides not to impose the sentence upon which the parties have agreed. Fortunately, the Code avoids the unnecessary complexities of two distinct sentence-agreement procedures. ALI, MODEL CODE OF PRE-ARRESTMENT PROCEDURE §§ 350.5-350.6 (Proposed Official Draft 1975). *Accord*, ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1(c)(iii) (1972); White, *supra* note 8, at 462 ("The trial judge should be bound either to impose a sentence no greater than that recommended by the prosecutor or to permit the defendant to withdraw his plea.").

entered, and the court's only choice was to defeat the defendant's reasonable expectation of a lenient sentence or else to sacrifice its sentencing independence.<sup>43</sup> Although Rule 11 therefore does not eliminate the dilemma in every case, its basic recognition that a defendant should be able to rely on the authority of bargaining prosecutors seems sensible in the context of today's criminal justice system.<sup>44</sup> Unfortunately, however, most state courts have refused to permit defendants to withdraw their guilty pleas when prosecutorial recommendations have been disregarded,<sup>45</sup> and

43. *Accord*, *Jordan v. Commonwealth*, 225 S.E.2d 661, 664 (Va. 1976).

44. There are, however, some dangers in a plea-withdrawal procedure. Rule 11 of the Alaska Rules of Criminal Procedure established such a procedure several years before the Federal Rules did so, and Victor Carlson, a Judge of the Superior Court in Anchorage, reported that the principal practical effect of this provision was to "lull the defense attorney into a false sense of security." Carlson explained, "The defense attorney usually assumed without too much reflection that the judge would ratify whatever sentencing arrangement he had made with the prosecutor. If the judge did not, moreover, Rule 11 would permit the defendant to withdraw his guilty plea so that nothing would be lost. When a judge did reject a proposed plea agreement, however, the attorney suddenly realized that his assumption was not quite accurate. Withdrawing the defendant's guilty plea was not usually a realistic option. The cat was out of the bag." Interview with Victor Carlson, Judge, Superior Court of Alaska (June 10, 1976).

45. *E.g.*, *State v. Darling*, 109 Ariz. 148, 506 P.2d 1042 (1973); *People v. Baldrige*, 19 Ill. 2d 616, 622, 169 N.E.2d 353, 356 (1960); *People v. Goodman*, 2 Ill. App. 3d 584, 277 N.E.2d 136 (1971); *Commonwealth v. Stanton*, 317 N.E.2d 487 (Mass. App. 1974); *Brown v. State*, 485 S.W.2d 424, 429-30 (Mo. 1972); *Huffman v. State*, 499 S.W.2d 565 (Mo. App. 1973); *State v. Farris*, 320 A.2d 642 (N.H. 1974); *State v. Ramos*, 85 N.M. 438, 512 P.2d 1274 (Cl. App. 1973); *People v. Selikoff*, 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974), *cert. denied*, 419 U.S. 1122 (1975); *State v. Plum*, 14 Utah 2d 124, 378 P.2d 671 (1963); *see* *People v. Fratianno*, 6 Cal. App. 3d 211, 85 Cal. Rptr. 755 (1970). *Contra*, *Quintana v. Robinson*, 31 Conn. Supp. 22, 319 A.2d 515 (1973); *State v. Goodrich*, 19 CRIM. L. REP. (BNA) 2547 (N.H., Aug. 31, 1976); *King v. State*, 19 CRIM. L. REP. (BNA) 2523 (Okla. Crim. App., Apr. 30, 1976); *Commonwealth v. Wilson*, 234 Pa. Super. 7, 335 A.2d 777 (1975); *Commonwealth v. Barrett*, 223 Pa. Super. 163, 299 A.2d 30 (1972); ALASKA R. CRIM. P. 11e (Crim. Supp. 1974); PA. R. CRIM. P. 319(3) (Supp. 1976).

Some courts have permitted the withdrawal of a guilty plea when a trial judge's failure to follow the prosecutor's sentence recommendation was preceded by misleading assurances by the court, a prosecutor, or a defense attorney—or simply by a failure to warn the defendant of the court's sentencing autonomy. *Ward v. United States*, 116 F.2d 135 (9th Cir. 1940); *People v. Wright*, 21 Ill. App. 3d 301, 314 N.E.2d 733 (1974); *In re Valle*, 364 Mich. 471, 110 N.W.2d 673 (1961); *State v. Hovis*, 353 Mo. 602, 183 S.W.2d 147 (1944); *State v. Bonds*, 521 S.W.2d 18 (Mo. App. 1975); *Ritter v. State*, 475 P.2d 407 (Okla. Crim. App. 1970).

Most older cases, like most cases today, hold that a trial judge may disregard a prosecutor's sentence recommendation without permitting the defendant to withdraw his plea of guilty. *Beatty v. Roberts*, 125 Iowa 619, 101 N.W. 462 (1904); *State v. Wyckoff*, 107 N.W. 420 (Iowa 1906); *Curtis v. Commonwealth*, 110 Ky. 845, 62 S.W. 886 (1901). In *Griffin v. State*, 12 Ga. App. 615, 77 S.E. 1180 (1913), however, Judge James Robert Pottle offered a more sensitive view. The prosecutors in this case had conferred with the trial judge and had advised the defense attorneys "that in their opinion a misdemeanor punishment would be imposed." *Id.* at 626, 77 S.E. at 1085. The judge, however, told the attorneys that he "didn't know what [he] would do," and the attorneys disclaimed in open court any advance knowledge of the sentence. *Id.* at 629, 77 S.E. at 1087. Despite these disclaimers, the Court of Appeals held that the trial court's failure to impose the sentence that the defendants had been led to expect required that they be permitted to withdraw their guilty pleas. The Georgia court condemned all plea agreements as "illegal and void," but unlike many of the other courts that had adopted this position, the court recognized that these agreements could create significant expectations on the part of criminal defendants. "Of course," the court said, "in theory, the accused knew that [the judge would not be bound by any agreement]; but if they in fact honestly thought the agreement would be carried out, then they ought to have relief from the plea." The opinion concluded:

No harm can result to the State in allowing this to be done. If the accused are guilty, it must be assumed that a jury will find them so. If not, they ought not to be punished even by their own consent. The State does not seek a victim, and society is as much concerned in protecting the innocent as in punishing the guilty.

*Id.* at 630, 77 S.E. at 1087.

some have phrased their refusal in indignant terms. The Wisconsin Supreme Court once insisted, for example, that "in this state there is to be no courtroom counterpart of the fixed prize fight in which the participants waltz through a prearranged script to a predetermined outcome,"<sup>46</sup> and in a similar case, the Wisconsin court proclaimed that plea negotiation could not be permitted to "invade or affect" the sentencing process.<sup>47</sup>

Although most courts have, in a similar fashion, clung to the fiction of an unfettered judicial sentencing power, a few have gone beyond Rule 11 in recognizing the prosecutor's authority over sentencing. These courts have insisted, not merely that defendants should be allowed to withdraw their guilty pleas when prosecutorial recommendations are disregarded, but that judges should affirmatively defer to the prosecutors' sentencing decisions. In a recent Illinois case, for example, a trial judge concluded that the sentence proposed as part of a plea agreement (a fine of \$350 for aggravated assault) was unduly lenient. The judge indicated that he would be guided by a presentence report in determining the defendant's sentence and that he would at least insist upon imposing a term of probation in addition to the fine. Although the judge offered to permit the defendant to withdraw his guilty plea, the defendant declined this invitation, and the judge, after a hearing, sentenced him to a seven-month term of imprisonment.

Some of the trial judge's statements might have led the defendant to believe that his guilty plea would be followed by an award of probation,<sup>48</sup>

Before the 1975 revision of Rule 11 of the Federal Rules of Criminal Procedure, most federal courts had ruled—both in federal criminal prosecutions and in habeas corpus proceedings involving state prisoners—that a trial judge's failure to follow a prosecutor's sentence recommendation provided no basis for setting aside a guilty-plea conviction. *E.g.*, *Bouchillon v. Estelle*, 507 F.2d 622 (5th Cir. 1975); *United States v. McGahey*, 449 F.2d 738 (9th Cir. 1971); *United States v. Jackson*, 390 F.2d 131, 133 (7th Cir. 1968); *United States v. Croce*, 341 F. Supp. 795 (W.D. Ky. 1972), *aff'd*, 473 F.2d 912 (6th Cir. 1973); *Rigby v. Russell*, 287 F. Supp. 325, 331 (E.D. Tenn. 1968). Again, however, there was one significant exception. *United States ex rel. Culbreath v. Rundel*, 466 F.2d 730 (3d Cir. 1972), held that, in the absence of any prejudice to the prosecution, a state-court defendant had a constitutional right to withdraw his guilty plea when a trial judge disregarded the prosecutorial recommendation that had induced it. *See United States v. Gallington*, 488 F.2d 637, 640 (8th Cir. 1973) (*dictum*), *cert. denied*, 416 U.S. 907 (1974).

46. *Young v. State*, 49 Wis. 2d 361, 367, 182 N.W.2d 262, 265 (1971).

47. *Farrar v. State*, 52 Wis. 2d 651, 655, 191 N.W.2d 214, 217 (1971). Of course plea negotiation would serve no purpose if it did not "invade or affect" the sentencing process in a significant way.

Several trial judges in Alaska have expressed resentment of the plea-withdrawal procedure established by that state's criminal rules. *See* note 44 *supra*. Judge Gerald J. VanHoomissen observed, "Under our Rule 11, a judge goes through the whole rigamarole of accepting a guilty plea, and then the defendant says, 'I don't like the sentence that you're going to impose, so now I'm not guilty.'" Interview with Gerald J. VanHoomissen, Judge, Superior Court, Fairbanks, Alaska (June 16, 1976). Judge James R. Blair added, "The public cannot understand that kind of turnaround, and neither can I. A guilty plea should be a guilty plea." Interview with James R. Blair, Judge, Superior Court, Fairbanks, Alaska (June 15, 1976). Under today's plea bargaining system, however, a guilty plea cannot truly be viewed as a guilty plea; it is nothing more than a tactical waiver of the right to trial for the sake of obtaining a favorable sentence or other advantage. *Cf. North Carolina v. Alford*, 400 U.S. 25 (1970) (guilty plea upheld despite denial of guilt).

48. At one point, the judge said that he would award probation only if the presentence report were "favorable," but at another point he said, "I think that with what you told me



but the Illinois Appellate Court did not rest its reversal of the defendant's conviction on this fact. It held instead that the trial judge lacked the power to alter the plea agreement in any way.<sup>49</sup> Incredibly, the court based this decision on an Illinois Supreme Court Rule that said, "The trial judge shall not *initiate* plea discussions."<sup>50</sup>

The United States Court of Appeals for the District of Columbia Circuit made an analogous ruling in *United States v. Ammidown*.<sup>51</sup> In the District of Columbia, as in many other jurisdictions, prosecutors exercise their power over sentencing in an indirect fashion. Rather than bargain explicitly about the sentence that they will ask the court to impose, the prosecutors usually bargain about whether they will reduce the principal charge against the defendant to a less serious offense. From the defendant's perspective, the primary significance of the charge-reduction process plainly lies in its effect on the sentence that he will receive. The basic commodity that prosecutors offer defendants in exchange for their pleas remains the same in a system of charge-reduction bargaining as in a system of sentence recommendation bargaining.<sup>52</sup> In apparent recognition of this fact and in an apparent attempt to prevent prosecutorial circumvention of the trial judge's sentencing authority, the Federal Rules of Criminal Procedure require judicial approval of prosecutorial charge-reduction agreements.<sup>53</sup>

In *Ammidown*, a prosecutor had agreed to reduce the charge against the defendant from first- to second-degree murder in exchange for his plea of guilty and his testimony against an alleged accomplice. Judge John J. Sirica, however, refused to approve the agreement, and the defendant was convicted at trial of first-degree murder. The United States Court of Appeals reversed the conviction and ordered the trial court to accept the defendant's plea of guilty to murder in the second degree. Judge Harold Leventhal's opinion for the appellate court frequently reiterated the con-

concerning Mr. Bennett, I think he needs to be under probation for a while." *People v. Bennett*, 16 Ill. App. 3d 972, 973, 307 N.E.2d 176, 177 (1974).

49. *Id.*

50. ILL. REV. STAT., ch. 110A, § 402(d)(1) (1973).

51. 497 F.2d 615 (D.C. Cir. 1973). See *United States v. Martinez*, 486 F.2d 15 (5th Cir. 1973).

52. In *Ammidown*, the court observed, "[T]he most frequent motive behind [a plea agreement involving a plea to a lesser included offense] is to circumscribe the judge's discretion in pronouncing sentence." 497 F.2d at 621. See Davis, *supra* note 23, at 151: "The reduction or dismissal of charges as part of a plea agreement is merely a less direct way of affecting sentence. . . ."

Of course I do not mean to suggest that there are no practical differences between charge-reduction bargaining and sentence-recommendation bargaining or to deny that a greater residue of judicial authority ordinarily remains in judicial hands in a system of charge-reduction bargaining. For a discussion of the relative merits of charge-reduction and sentence-recommendation bargaining, see text accompanying notes 249-87 *infra*.

53. At the time of the *Ammidown* decision, Rule 11 of the Federal Rules of Criminal Procedure provided, "The court may refuse to accept a plea of guilty," and Rule 48(a) required leave of court for the dismissal of an indictment, information or complaint. Rule 11(e)(2) currently provides that a trial judge "may accept or reject" a plea agreement.

tradictory propositions that sentencing is exclusively a judicial function and that judges owe great deference to prosecutorial charge-reduction decisions.<sup>54</sup> Judge Leventhal observed that because a prosecutor "has no role beyond the advisory" in the sentencing process, the judge should have recourse "to forestall gross abuses of prosecutorial discretion."<sup>55</sup> In Judge Leventhal's view, the trial judge was "free to condemn the prosecutor's agreement as a trespass on judicial authority only in a blatant and extreme case,"<sup>56</sup> and although the judge should not "serve merely as a rubber stamp for the prosecutor's decision,"<sup>57</sup> he should "start with the presumption that the determination of the United States Attorney is to be followed in the overwhelming number of cases. He alone is in a position to evaluate the government's prosecution resources and the number of cases it is able to prosecute."<sup>58</sup> In *Ammidown* itself, although a defendant who was plainly guilty of first-degree murder would be sentenced only for a less serious crime, the Court of Appeals held that the trial judge could not properly find "undue interference with the sentencing domain of the judiciary."<sup>59</sup>

54. Cf. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1(c) (ii) (1972) (trial judge must give plea agreement "due consideration" but should also "reach an independent decision on whether to grant charge or sentence concessions").

55. 497 F.2d at 621.

56. *Id.* at 622.

57. *Id.*

58. *Id.* at 621.

59. *Id.* at 623. The court recognized that it might have been difficult to reach this conclusion at the time of Judge Sirica's decision, which occurred prior to the invalidation of the District of Columbia's death penalty for first-degree murder. See *Furman v. Georgia*, 408 U.S. 238 (1972). At the time of the Court of Appeals' decision, however, imposition of the death penalty was no longer a possibility, and convicting the defendant of second- rather than first-degree murder would not have affected the maximum term of incarceration (life) but would merely have made him eligible for parole five years earlier.

Although the language of the Court of Appeals' opinion is troublesome, the result that the court reached on the facts of the *Ammidown* case seems sound. As the court described the situation, the defendant had apparently hired an accomplice to rape and kill his wife, and although the evidence against the defendant was strong, his testimony was essential to the effective prosecution of the hired murderer. A trial judge is plainly in no position to evaluate the strength of the government's evidence in a pending case; and when a prosecutor has decided to forgo the first-degree conviction of one murderer so that both he and a second murderer can be imprisoned for life, rejection of that sensible decision might indeed be viewed as an abuse of judicial discretion. I would, in other words, be willing to tolerate some incursion upon a judge's sentencing autonomy for the sake of bringing a murderer to justice; I would not be willing to incur this cost (and the others involved in plea bargaining) simply to save the state the burden and expense of a trial. Judge Leventhal's language, however, was not confined to cases of bargaining for testimony or information but extended to garden-variety cases of plea bargaining as well. (On the distinction between plea bargaining and bargaining for information, testimony, or restitution, see note 1 *supra*.)

An English decision, *R. v. Soanes*, 32 Cr. App. R. 136 (1948), provides a contrast to the *Ammidown* ruling and illustrates how far plea negotiation practices have led American courts from traditional concepts of criminal procedure. The defendant in this case was charged with murder after killing her baby, and in accordance with an agreement that she had entered with the counsel for the Crown, she offered to plead guilty to infanticide. The trial judge disapproved this arrangement and insisted that the defendant stand trial for murder. Although the defendant was convicted only of infanticide at trial, the judge sought the opinion of the Court of Criminal Appeal on whether he should have accepted the defendant's guilty plea to the lesser offense. The court, per Lord Goddard, C.J., not only insisted that "it must always be in the discretion of the judge whether he will allow [a plea to a lesser offense]," but concluded that it was improper for counsel for the Crown himself to propose a charge-reduction

Cases like *Ammidown* may mark the beginning of a formal recognition of the prosecutor's authority over sentencing. In time, trial judges may be instructed that they should review prosecutorial sentence determinations with no greater vigor than they review, say, the rate determinations of regulatory agencies. Insofar as the prosecutor's judicial power becomes de jure rather than de facto, it plainly will become more difficult to argue that prosecutorial plea bargaining is significantly different from judicial plea bargaining. Nevertheless, whether 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 greater vigor than they review the rate determinations of administrative agencies. Effective plea negotiation plainly depends upon the authoritative exercise of an essentially judicial power—the power to grant sentence concessions<sup>60</sup>—and the choice between prosecutorial and judicial bargaining is therefore a choice between vesting this power in the prosecutor's office and vesting it in the courts.<sup>61</sup>

### B. *Systems of Implicit Bargaining*

In some systems of plea negotiation, trial judges neither participate actively in pretrial bargaining nor transfer their authority over sentencing to prosecutors. In these systems, express pretrial bargaining need not occur at all; the judges simply sentence defendants who are convicted at trial more severely than defendants who plead guilty. A number of federal courts in the cities that I visited had such systems of "implicit" plea negotiation. In all of the state courts I observed, "explicit" plea bargaining seemed much more important.<sup>62</sup>

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agreement "where nothing appears on the depositions which can be said to reduce the crime from the more serious offence." *Id.* at 136-37. For an interesting American contrast to *Ammidown*, see *United States v. Cowan*, 381 F. Supp. 214 (N.D. Tex. 1974), *rev'd*, 524 F.2d 504 (5th Cir. 1975) (trial judge's refusal to dismiss charges pursuant to prosecutorial agreement designed to secure the testimony of Jake Jacobsen in the prosecution of former Secretary of the Treasury John Connally).

60. The Supreme Court said in *Ex parte United States*, 242 U.S. 27, 41 (1916), "Indisputably under our constitutional system the right to try offenses against the criminal laws and upon conviction to impose the punishment provided by law is judicial. . . ."

61. Professor Thomas W. Church, Jr. recently investigated the changes that occurred in the criminal justice system of a large midwestern county when a newly elected prosecutor forbade charge-reduction plea bargaining (previously the most common form of plea bargaining) in certain sorts of cases. Although plea negotiation was not eliminated, one effect of the prosecutor's new policy was that trial judges began taking a more active role in the bargaining process. An assistant prosecutor explained, "The burden has shifted. . . . Under the old system we were functioning more like judges than prosecutors." Professor Church reported that the prosecutors' general reaction to this shift of power was "one almost of relief." Church, *Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment*, 10 LAW & SOC'Y REV. 377, 388 (1976).

62. A number of commentators have recognized that implicit and explicit plea bargaining are similar in effect:

It can be argued that every defendant who pleads guilty has entered into an implicit bargain in the form of a reasonable expectation of sentencing leniency. The quid pro quo of the bargain is no less substantial because it is unspoken.

22 ALA. L. REV. 76, 86 (1969).

This difference between the state and federal courts was far from uniform, however. In most state courts, an expectation that trial judges would reward the entry of a guilty plea was sometimes influential even in the absence of an express bargain,<sup>63</sup> and before the Federal Rules of Criminal Procedure forbade judicial participation in plea discussions,<sup>64</sup> some federal judges bargained with defense attorneys as actively as any state judges.<sup>65</sup> Nevertheless, most federal judges did not overtly bargain,

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The inducements offered by the trial court to plead guilty may vary. In some systems, an offender may be told the sentence he will receive if he pleads guilty, thus allowing him to decide in full possession of all the facts. . . . A less obvious way is the maintenance of a system where the common assumption of offenders is that a plea of guilty will result in sentencing concessions. And in this connection, many, if not most, judges make explicit their view that it is appropriate to reduce a sentence in return for a plea of guilty, because of the resultant contribution to the efficient and economical administration of the law.

Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495, 502-03 (1958).

In any waiver of trial even without overt negotiation there may be an implicit bargain in the form of a reasonable expectation of sentencing leniency on the part of the offender and an established practice by the court of showing differential leniency to defendants who plead guilty in contrast to those who demand trial.

D. NEWMAN, *supra* note 1, at 61.

63. See, e.g., D. NEWMAN, *supra* note 1, at 61; Ohlin & Remington, *supra* note 62, at 502-03; Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 207 n.17 (1956) (eight of nine Connecticut state-court judges who responded to a survey viewed the entry of a guilty plea as justification for imposing a less severe sentence); UNITED STATES DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S SURVEY OF RELEASE PROCEDURES 425-26 (1939) (91% of 176 state and federal judges reported that they commonly imposed a lighter sentence when a defendant pleaded guilty than when he stood trial).

64. FED. R. CRIM. P. 11(e)(1).

65. Los Angeles defense attorney Ned R. Nelson recalled a federal judge whose bargaining activities led defense attorneys to call him "old Santa Claus" and who seemed to delight in irritating Assistant United States Attorneys. This judge commonly responded to a prosecutor's sentence recommendation by declaring, "But that's not what the defendant *wants*."

J. W. Ehrlich of San Francisco spoke of a federal judge from the State of Washington who often heard cases in San Francisco during the hectic prohibition era. This judge managed to rid his docket of many burdensome liquor-violation cases by saying, "Is there anything special about these cases? If not, change all the pleas to guilty, and I'll let the defendants pay 500-dollar fines and go home."

Houston defense attorney Percy Foreman reported that Judge Sidney Mize of the Southern District of Mississippi required pretrial conferences in all of the criminal cases that came before him. When the attorneys had assembled in the judge's chambers, the judge would turn to the Assistant United States Attorney and ask, "Now what can you prove on this man, and who can you prove it by?" He would then turn to the defense attorney and inquire, "Can you disprove it?" After both questions had been answered to the judge's satisfaction, he would announce the sentence that he had decided to impose—provided the defendant pleaded guilty. Foreman referred to Judge Mize's bargaining technique as "the most intelligent solution to the problem of the log-jam that anyone has ever devised," and he added, "Of course Judge Mize had no more use for the adversary system than I do."

James V. Bennett, the former Director of the Federal Bureau of Prisons, wrote in 1964, "I gather that most [federal] judges will see in chambers the defense counsel in the presence of the United States Attorney and give some hint in broad and general terms how he views the severity of the offense and reserve any specific comment until he has in hand the presentence report." J. BENNETT, OF PRISONS AND JUSTICE 336 (1964). United States District Judge Thomas D. Lambros has advocated the use of pretrial conferences leading to "a judicial projection of possible intent as to sentence" and has described his own experiments with this bargaining procedure. Judge Lambros has apparently also concluded that many federal judges take a more active role in the bargaining process than they avow: "But, with all of the authorities to the contrary, how many judges can honestly say they have never actively engaged in plea bargaining?" "[In light of the fact that judicial bargaining continues,] is it not the time to shed the cloak of hypocrisy surrounding this subject. . . ?" Lambros, *supra* note 8, at 510, 514, 518. Deputy Attorney General Harold R. Tyler, Jr., has noted, "Judge Lambros has been on the federal bench since 1966 or 1967, and during all this time he has

and the situation was summarized by an Assistant United States Attorney in Chicago who said, "There may be one or two judges in the Northern District of Illinois who make sentence promises in advance of trial, but there may also be one or two judges who take bribes. Neither activity is really considered a suitable part of the judicial process."

In most of the federal courts in which judges did not bargain, prosecutorial bargaining was also restrained. Although federal prosecutors were usually willing to discuss plea agreements with defense attorneys, they commonly made available only insubstantial concessions. In some federal courts, pretrial bargaining focused on the prosecutors' sentence recommendations; but most federal prosecutors did not make sentence recommendations, and others made recommendations that were not subject to negotiation. (The 1975 revision of the Federal Rules of Criminal Procedure seems likely, however, to make sentence-recommendation bargaining more common in the federal courts.<sup>66</sup>) In most offense areas, moreover,

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conducted only one criminal trial. He is, in fact, embarrassed to admit that there was one case that he could not settle." While serving as a federal district judge himself, Tyler made sentence promises in exchange for guilty pleas on a few occasions but abandoned the practice because it made him "feel dirty." Remarks by Deputy Attorney General Tyler, Panel on Sentencing, Annual Meeting of the Association of American Law Schools, December, 1975.

In *United States v. Stockwell*, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973), a federal trial judge told a defendant that he would receive a three-year sentence if he pleaded guilty and a sentence of from five to seven years if he were convicted at trial. See also the federal cases described in note 100 *infra*.

66. Rule 11(e)(1) seems to authorize prosecutors and defense attorneys to bargain about specific sentencing outcomes:

The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will do any of the following:

- (A) move for a dismissal of other charges; or
- (B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or
- (C) agree that a specific sentence is the appropriate disposition of the case.

Rule 11(e)(2) then provides:

If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement. . . . Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

One natural interpretation of this language would be that the parties may select any of the various forms of plea agreement authorized by the Rule and that the court must then consider the merits of any agreement that the parties have proposed. The Rule plainly suggests no mechanism by which a trial judge can refuse even to hear a sentence recommendation upon which the parties have agreed: it provides that the parties "may" agree upon a specific sentence, and that the court "shall require" the disclosure of this agreement. Nevertheless, the Notes of the House Judiciary Committee that drafted the rule insist:

Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements.

18 U.S.C.A. FED. R. CRIM. P. 11, Notes of Committee on the Judiciary (H.R. REP. NO. 247, 94th Cong., 1st Sess. (1975)), at 18 (West 1975). Apparently the Committee intended, not only that trial judges could forbid plea negotiations, but that they could insist that the negotiations follow a specified form—for example, charge reduction or charge dismissal rather than sentence recommendation, or sentence "recommendation" rather than "specific-sentence agreement." Although Rule 11 expresses the Committee's intention inartfully if at all, it can

the Federal Criminal Code was not well adapted to the patterns of charge reduction that characterized bargaining in many state courts. Most pretrial negotiation therefore seemed to concern the dismissal of some of the charges in multiple-count indictments, and although the multiplication of charges frequently reached extreme proportions,<sup>67</sup> the elimination of some of the accusations against a defendant usually had a limited practical effect. Trial judges rarely imposed consecutive sentences even when the prosecutors' extensive charges were retained; they commonly possessed a broad sentencing discretion after many of these charges had been dismissed in exchange for pleas of guilty; and they were, in practice, able to consider the conduct alleged in the abandoned charges in making their sentencing decisions. Although prosecutorial plea agreements gave defendants a token in exchange for their pleas, they rarely offered substantial sentencing benefits.<sup>68</sup>

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probably bear the interpretation that the Committee desired, and most federal judges will undoubtedly be willing to carry out the Committee's intent that they, rather than the parties, should finally determine the permissible form of plea agreements in their courts. See *United States v. Werker*, 535 F.2d 198, 200 n.3 (2d Cir. 1976) ("The Rule was not . . . designed . . . to require a judge to pass on any agreement reached by the government and a defendant"). Nevertheless, the formal establishment of a sentence-agreement procedure is likely to create long-term pressure for its use. Judges who balk at a procedure "specifically authorized" by the Federal Rules are likely to incur the resentment of litigants who seek to employ that procedure, and for that reason among others, sentence agreements may become more common in the federal courts.

67. Federal District Judge Robert R. Merhige, Jr. once complained, "Many federal charges are multiplied for bargaining purposes. For instance, one bad social security check can lead to ten federal counts." *National College of Criminal Defense Lawyers Holds First Institute*, 14 CRIM. L. REP. (BNA) 2326 (1974). Similarly, Judge Charles R. Richey objected to the "rampant practice" among federal prosecutors of "overindicting to get plea bargaining leverage." *Privacy Issues, Overview of Criminal Justice System, Featured at Montreal*, 17 CRIM. L. REP. (BNA) 2435, 2438 (1975). Earl Silbert, the United States Attorney for the District of Columbia, reported, "The indictments prepared by our office typically include every possible charge—at least every possible charge of real seriousness." Class presentation, Seminar on the Prosecution Function, Georgetown University Law Center (Nov. 12, 1975). In the recent case of *United States v. Moore*, 423 U.S. 122 (1975), the defendant was indicted on 639 counts, but when he refused to plead guilty, the prosecutor took only 40 counts to trial. On prosecutorial "overcharging," see *The Prosecutor's Role*, *supra* note 9, at 85-105.

68. See *The Prosecutor's Role*, *supra* note 9, at 95:

John W. Miner, a Los Angeles prosecutor, observes: "The number of counts is far less significant in the bargaining session between the prosecutor and the defense attorney than it is in the bargaining session between the defense attorney and his client. Our office usually reduces the number of charges without serious negotiation, because we know that this action will not affect the amount of time the defendant has to serve. But a defense attorney can justify his fee by saying, 'Look, Mr. Defendant, there were four felony charges against you, and I persuaded the prosecutor to go all the way down to one. Now that I've gotten you this special break, please don't blow it.'"

Philadelphia's First Assistant Public Defender, Vincent J. Ziccardi, recalls a case in which a defendant was charged with fifty armed robberies and permitted to plead guilty to twelve. Because of this concession, which the prosecutor called "generous," the defendant was subject only to 240 years' imprisonment rather than one thousand. A reduction in the number of accusations need not leave a defendant subject to indefinite imprisonment of course, but even when the prosecutor's action seems to limit the court's sentencing power in a significant way, the practical effect is usually insubstantial. In most jurisdictions, consecutive sentences are rare. "They are reserved for the defendant who is going away forever anyway," observes Oakland defense attorney Stanley P. Golde. Moreover, when a judge sentences a defendant on a single count, he invariably knows whether other charges have been dismissed as part of a plea agreement. He is likely to consider the dismissed charges

The atmosphere in the federal courts was therefore one of quiet dignity, but the ratio of guilty pleas to trials was almost as high in these courts as in most overburdened state-court jurisdictions.<sup>69</sup> Federal prosecutors commonly attributed this phenomenon to effective police work by the Federal Bureau of Investigation and other federal law-enforcement agencies, and to careful case-selection and careful preparation for trial by Assistant United States Attorneys. According to the prosecutors, federal defendants pleaded guilty because "they had nowhere else to go."<sup>70</sup> Defense attorneys, however, told quite a different story.<sup>71</sup>

"The federal courts achieve the same results as the state courts in a more polite manner," observed San Francisco defense attorney Benjamin M. Davis. "The substance of the process is no different. For all of their decorum and dignity, the federal courts penalize a defendant for standing trial, and they do so more severely than the state courts. It is only because everyone knows the score that the river of guilty pleas stays at flood proportions."

Davis' statement suggests a major disadvantage that systems of "implicit" plea negotiation exhibit in a comparison with systems of "explicit" bargaining: for implicit bargaining to attract the same number of guilty pleas as explicit pretrial negotiation, the sentence differential—the difference in sentencing outcomes for defendants who plead guilty and those who are convicted at trial—must be unusually great.

One of the commodities that the representatives of the state "sell" during pretrial negotiations is certainty. During the period between arrest and trial, most defendants experience a great and understandable anxiety about what will happen to them. The promise that a prosecutor or trial

in sentencing, and they are likely to have almost the same effect as additional charges on which the defendant has been convicted. Robert J. Collins, the First Assistant United States Attorney in Chicago, notes that a dismissal of charges can only help a defendant; it can never hurt him. Nevertheless, as Oakland defense attorney John A. Pettis, Jr. observes, "When a prosecutor dismisses some of the charges in a multi-count indictment, he is giving the defendant the sleeves from his vest."

69. During fiscal 1974, 85% of all convictions in the federal district courts were by plea of guilty. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN UNITED STATES DISTRICT COURTS 1972, Table H-1 (1975). More generally, of the 944,046 defendants convicted of federal crimes during the past 30 years, 828,676 (88%) have pleaded guilty. See *id.*

70. Cf. Folberg, *The "Bargained For" Guilty Plea—An Evaluation*, 4 CRIM. L. BULL. 201, 210 n.59 (1968) ("Sydney I. Lezack, United States Attorney for the District of Oregon, attributes the current flow of guilty pleas in his district to his office's policy of thorough preparation of each case and full disclosure to defense counsel early in the process.").

71. My own impression, however, is that the prosecutors' explanation cannot be entirely discounted: federal defendants often do agree to plead guilty in exchange for insubstantial concessions simply because the likelihood of conviction at trial is so high. Contrary to the apparent assumption of a number of federal prosecutors, however, this fact does not necessarily reflect great credit upon them. Some United States Attorneys seem to think routine law enforcement beneath their dignity and, accordingly, "decline" more cases than they prosecute. In some federal districts, for example, a defendant charged with a \$250 postal theft is very unlikely to be prosecuted. The price of a small number of exceptionally well-prepared cases may therefore be an abandonment of effective law enforcement in areas that prosecutors do not find glamorous or appealing.

judge offers in a bargaining session usually provides the first authoritative answer to that question that a defendant can secure. A trial, by contrast, represents what Oakland Public Defender John D. Nunes called "a plunge from an unknown height."<sup>72</sup>

In systems of implicit plea negotiation, a guilty plea is as much a blindfolded plunge as a trial. To compensate for this disadvantage, either the system must make the benefits of a guilty plea more attractive, or it must make the dangers of a trial more severe.<sup>73</sup>

Logically, perhaps, it should not be so. If the sentence differential were the same in a system of explicit bargaining as in a system of implicit bargaining, a defendant in the first system would, in effect, purchase an item wrapped in cellophane by entering his guilty plea, and a defendant in the second would ordinarily secure the same benefit by pleading guilty and then drawing from the system's grab-bag of sentencing discounts. The chance that the defendant in the "implicit" system might gain less than his counterpart in the system of explicit bargaining could be offset by the chance that he might gain more, and one system might therefore be as effective as the other. Nevertheless, the reduction of anxiety—the minimization of grab-bag uncertainty—is itself a value to many defendants. Perhaps the advantage of a system of explicit bargaining can best be illustrated by supposing the absence of any sentence differential between defendants convicted by guilty plea and defendants convicted by trial. Even in the absence of a sentence differential, a defendant in a system of explicit bargaining might be told, "If you plead guilty, the prosecutor will recommend a sentence of *X* years, and the judge will almost certainly impose that sentence. If you are convicted at trial, your sentence will probably be the same, but there is a chance that it may be more severe and a chance that it may be more lenient." Some defendants—terrified of receiving a more severe sentence and anxious to end the uncertainty—would undoubtedly respond to this presentation by pleading guilty. Thus a system of explicit bargaining has at least some potential for inducing guilty pleas in the

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72. Nunes added that "defendants will often do anything just to know what will happen to them" and that their desire for certainty is "more emotional than rational." He said, "Many defendants eagerly jump at any offer that will let them get on their way, unfair though the offer may be."

73. Social scientists currently seem inclined to treat uncertainty reduction as a dominant motivation for individual and organizational behavior in a wide variety of contexts—so much so that Professor Charles Perrow has referred to this concept as "the phlogiston of organizational theory." Remarks of Professor Perrow, Conference on the Application of Organizational Theory to Trial Courts, Palo Alto, California (August, 1975). Although the concept of uncertainty reduction may indeed have been overused in analyzing routine behavior, a charge of crime is plainly more anxiety producing than most events in life, and the termination of this anxiety seems especially likely to become a significant objective when defendants are held in custody for prolonged periods while awaiting trial. Professor Martin Levin has written, "Most people have a low tolerance for uncertainty. Defense attorneys report that after a long delay, the defendant becomes anxious for any action to terminate his case and tends to become less concerned with the specific outcome or procedures involved." Levin, *Delay in Five Criminal Courts*, 4 J. LEGAL STUD. 83, 111 (1975); see *United States ex rel. Rosa v. Follette*, 395 F.2d 721, 726 (2d Cir.), cert. denied, 393 U.S. 892 (1968).



absence of any sentence differential, while a system of implicit bargaining depends entirely on the sentence differential for its effectiveness. A defendant told only that his sentence would probably be the same after a conviction by trial as after a conviction by plea and that neither sentence could be known in advance would sense very little incentive to plead guilty.<sup>74</sup> In the main, I believe, the more explicit the bargain that the state makes available, the more easily it can maintain a high level of guilty pleas without severely penalizing defendants who exercise the right to trial.

For a number of years, an annual report of the Administrative Office of the United States Courts indicated the extent of the sentence differential in the federal courts.<sup>75</sup> In this report, the Administrative Office used a somewhat arbitrary concept of "sentence weights" that enabled it to compare fines, probated sentences, and prison sentences in terms of severity. The Administrative Office's sentence-weight concept seemed, if anything, likely to understate the extent of the sentence differential between guilty-plea and trial dispositions. One might have supposed, for example, that a prison sentence which had been assigned the weight 10 would have involved twice as long a period of incarceration as a sentence which had been assigned the weight 5, but in fact it involved a period of imprisonment that was roughly three times as long.<sup>76</sup> Despite this conservatism in assigning sentence weights, the Administrative Office's analysis revealed an awesome sentence differential. During the most recent year for which figures were compiled (fiscal 1971), the average sentence weight for federal defendants who pleaded guilty was 5.3.<sup>77</sup> For defendants convicted at jury-

74. The advantage of explicitness is relevant, not only in comparing systems of express bargaining with systems that depend entirely on an unarticulated sentence differential, but in comparing some types of explicit bargaining with others. Not all explicit bargaining is equally explicit; bargaining that focuses directly on the sentence to be imposed, for example, ordinarily leaves fewer unanswered questions than bargaining that focuses on the dismissal or reduction of charges. Moreover, many judges who participate actively in guilty plea bargaining carefully avoid specific pretrial promises, and this indirection can be costly. Professor Thomas W. Church, Jr., recently studied a midwestern county in which, as a result of the election of a new prosecutor, explicit prosecutorial bargaining had declined in importance and an amorphous sort of judicial bargaining had become more significant. Professor Church noted this statement of a defense attorney:

The main thing a defendant wants to know from his attorney is what will happen to him after he pleads. . . . [W]hen you go back to your client he doesn't want generalities, he wants specifics. And often all you can tell him is "this is what the judge says he usually does in these kinds of cases." It is plea bargaining that is too general not to cause problems.

Church, *supra* note 61, at 394. Professor Church advanced the hypothesis that a lack of explicit bargaining places a high premium upon a defendant's willingness to trust his attorney's judgment and that, because defendants with assigned counsel are generally more mistrustful than defendants with retained attorneys, a lack of explicitness may work to the disadvantage of the indigent. *Id.* at 395.

75. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS (published in separate volumes for the years 1966 through 1971). The 1972 edition of this publication departs from the earlier format and does not examine the effect of a defendant's choice of plea on sentencing outcomes.

76. The content of the sentence-weight concept is described in ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 1966, Table 10, at 28.

77. See ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFEND-

waived trials, the average sentence weight was 6.3; and for defendants convicted at jury trials, it was 13.5.<sup>78</sup> Although these figures were based on all federal offenses, the sentence differential remained terrifying when separate offense categories were examined separately.<sup>79</sup>

ERS IN THE UNITED STATES DISTRICT COURTS 1971, Exhibit VII, at 13. To derive the overall sentence weight for defendants who pleaded guilty, it is necessary to combine two distinct disposition categories used by the Administrative Office—"plea of guilty at arraignment" and "plea of not guilty changed to guilty." The separate examination of these two categories is, however, instructive; for each fiscal year from 1964 through 1971, defendants who pleaded guilty initially received significantly lighter sentences than defendants who changed their pleas to guilty at later stages of the proceedings.

Of course a defendant may change his plea to guilty even during the closing stages of a jury trial, and the more severe sentences associated with "changed" pleas of guilty may reflect the fact that the defendants in this category have generally made greater demands on the resources of the courts than defendants who pleaded guilty at the outset. Indeed, although the sentence weight for defendants who changed their pleas to guilty has almost invariably been lighter than that for defendants convicted at jury-waived trials, during fiscal 1971 this pattern was reversed; a "changed" plea of guilty actually led to a more severe sentence than conviction at a jury-waived trial. *Id.* Of course, insofar as the overall guilty-plea category includes some defendants who have made substantial demands on the resources of federal trial courts, the figures presented in text may tend to understate the sentence differential; a defendant can apparently secure an even greater "break" than these figures suggest by pleading guilty before the commencement of his trial and before the adjudication of any pretrial motions.

78. *Id.*

79. The Administrative Office presented the following exhibit in ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL OFFENDERS IN THE UNITED STATES DISTRICT COURTS 1971, at 15:

Exhibit VIII

Offense	Average Sentence Weight	
	Plea of guilty at arraignment	Convicted after jury trial
Immigration laws .....	1.6	7.0
Federal regulatory statutes .....	1.8	7.0
Obscene mail .....	2.8	6.0
Miscellaneous general offenses .....	5.0	10.1
Burglary .....	8.1	20.9
Marihuana .....	5.3	16.4
Narcotics .....	9.2	26.8

Although the examples included in the foregoing exhibit were especially striking, there were no offense categories in which a significant sentence differential did not appear. *Id.*, Table 16, at 55.

Other studies of sentencing practices in the federal courts have confirmed the pattern suggested by the Administrative Office's analysis. Professor Beverly Blair Cook examined the 1,852 cases in which defendants were convicted of Selective Service Act violations during 1972. These cases seemed particularly instructive because, as Professor Cook noted, "[g]iven [their] isomorphism . . . differences in sentence cannot be explained by unique factors of the criminal act or, in most cases, the defendant." Cook, *Sentencing Behavior of Federal Judges: Draft Cases 1972*, 42 U. CIN. L. REV. 597, 599 (1973).

Professor Cook used a "mean severity index" to express the sentence differential between guilty plea and trial convictions. To make this index less abstract, I have indicated the prison-sentence equivalents of the index figures that appear in the following table. The final column of the table, in other words, sets forth one possible sentencing pattern that would have yielded the index figures reported by Professor Cook:

Method of Conviction	Percentage and Number of Defendants	Mean Severity Index	[Prison Sentence Corresponding to Severity Index for Each Method of Conviction]
Guilty Plea	64% (1183)	15.6	[3½ months]
Trial to Court	29% (545)	24.5	[8½ months]
Trial to Jury	7% (124)	29.1	[10½ months]

*Id.*, table 3, at 609.

The penalty that a federal defendant incurs for standing trial seems especially pronounced when he has chosen to be tried before a jury, and a recent study by Lawrence P. Tiffany, Yakov Avichai, and Geoffrey W. Peters set guilty plea convictions aside and focused entirely on the differing effects of conviction by jury and conviction at jury-waived trials. When offense and prior criminal record were held constant, conviction by a jury invariably led to a more severe sentence than conviction by the court.<sup>80</sup> The authors reported, in fact, that the method of conviction had a more significant impact on a defendant's sentence even than his prior criminal record.<sup>81</sup> In one part of their analysis, the authors considered thirty-six separate categories of bank robbery convictions reflecting various combinations of prior record, type of defense counsel, age, and race; they found that insistence upon a jury trial increased the sentence in all thirty-six categories.<sup>82</sup>

Some federal judges have reported that they do not consider a defendant's choice of plea in determining his sentence,<sup>83</sup> but others have made their implicit bargaining rather explicit.<sup>84</sup> Judge Randolph H. Weber once explained:

I believe it is a logical and fair conclusion for a Court to reach when the judge shows more leniency to one who confesses his crime and disposes of his case without cost or consumption of the time of the Court. However, I do not think the Court should ever bargain with defendants or counsel, nor should the United States Attorney be informed that any concession will be made to those who plead guilty. The Court's practice will soon be found out without the Court making a statement of policy . . . . Yet, it is not a "threat" . . . .<sup>85</sup>

Judge John W. Delehant said, "I put the person who pleads guilty in one

80. Tiffany, Avichai & Peters, *A Statistical Analysis of Sentencing in Federal Court: Defendants Convicted After Trial, 1967-1968*, 4 J. LEGAL STUD. 369, 380 (1975).

81. *Id.* Method of conviction also had a more significant impact than type of defense counsel, race or age.

82. *Id.* at 389. The authors noted that their findings had important doctrinal implications. Leniency for defendants who plead guilty is sometimes rationalized on the ground that a guilty plea manifests remorse or at least a willingness to accept responsibility for one's conduct, on the ground that a defendant deserves consideration for making conviction certain in a doubtful case, or on the ground that a judge naturally feels less sympathy for a defendant after hearing a lengthy exposition of his crime at trial. A defendant who has pleaded not guilty prior to his conviction at a jury-waived trial has not, however, exhibited remorse or a willingness to accept responsibility for his conduct; he has not made conviction certain in an otherwise doubtful case; and he has not prevented a full exposition of his crime from reaching the attention of the sentencing authority. The fact that this defendant is nevertheless substantially rewarded for waiving his right to jury trial reveals the sentence differential for what it is: basically, a device for saving money by discouraging the exercise of a constitutional right. *See id.* at 385-86.

83. *E.g.*, *National College of Criminal Defense Lawyers Holds First Institute*, 14 CRIM. L. REP. (BNA) 2326 (1974) (statement of Judge Robert R. Merhige, Jr.).

84. Two-thirds of the 140 federal district judges who responded to a *Yale Law Journal* questionnaire reported that they considered the entry of a guilty plea a relevant factor in sentencing. Note, *The Influence of the Defendant's Plea on Judicial Determination of Sentence*, 66 YALE L.J. 204, 206 (1956).

85. Proceedings of the Pilot Institute on Sentencing, 26 F.R.D. 231, 289 (1959).

category and the person who pleads not guilty in another category,"<sup>86</sup> and Judge William J. Campbell observed, "In a large metropolitan court it would be impossible to keep abreast of the large number of criminal cases if it were not generally known among the practicing bar that consideration is given to those who are willing to plead guilty."<sup>87</sup> In a similar vein, Judge James B. Parsons described his sentencing practices to a defendant who had been convicted of failing to report for induction into the military service. The judge said that "this year" he had decided to sentence violators of the draft laws to four years' imprisonment if they were convicted at jury-waived trials; the same defendants would be sentenced to two years' imprisonment if they pleaded guilty.<sup>88</sup>

Detailed analyses of state court sentencing practices are generally unavailable, and although I suspect that most state courts penalize defendants somewhat less severely than most federal courts for exercising the right to trial by jury, it is impossible to confirm that hypothesis empirically.<sup>89</sup> Nevertheless, many defense attorneys with experience in both state

86. *Id.* at 287.

87. *Id.* at 288. See *United States v. Wiley*, 267 F.2d 453, 458 (7th Cir. 1959) (Campbell, J., below: "Had there been a plea of guilty in this case probably probation might have been considered under certain terms, but you are all well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the Court."); *United States v. Wiley*, 278 F.2d 500 (7th Cir. 1960) (second appeal); *United States v. Wiley*, 184 F. Supp. 679 (N.D. Ill. 1960) (Judge Campbell's criticism of Court of Appeals after second remand).

88. *SDS Organizer Gets Four Years in Draft Case*, *Chicago Sun Times*, Nov. 1, 1966, at 17. Cf. *United States v. Stockwell*, 472 F.2d 1186 (9th Cir. 1973) (trial judge told defendant that he would receive a 3 year sentence if he pleaded guilty, but that he would receive a 5-7 year sentence if he stood trial).

89. The limited evidence available, however, does not offer much support for the thesis that the sentence differential may be smaller in the state than in the federal courts. A survey of 1,350 felony cases in the Cook County courts by the *Chicago Sun Times* revealed that 82% of the convicted murder defendants who had exercised the right to jury trial received sentences of thirty years or more; 50% of the defendants convicted at jury-waived trials received sentences of thirty years or more; and none of the murder defendants who had pleaded guilty received sentences of thirty years or more. In armed robbery cases, 59% of the defendants convicted at jury trials were sentenced to terms of imprisonment of ten years or more; 15% of the defendants convicted at jury-waived trials received sentences of ten years or more; and 12% of the defendants who had pleaded guilty were sentenced to terms of ten years or more. Oster & Simon, *Jury Trial a Sure Way to Increase the Rap*, *Chicago Sun Times*, Sept. 17, 1973, at 4.

Similarly, at the time of a recent study of homicide cases in Philadelphia by Franklin E. Zimring, Joel Eigen and Shelia O'Malley, the mandatory minimum penalty for first-degree murder was life imprisonment. With felony-murder cases set aside, 29% of the defendants who were convicted of homicide offenses by juries were adjudged guilty of this crime and sentenced either to life imprisonment or to death, but none of the homicide defendants who pleaded guilty or waived their right to jury trial were convicted of first-degree murder. (The median minimum sentence for defendants convicted of the next most serious homicide offense, second-degree murder, was two years' imprisonment, and most defendants did not, in fact, serve substantially longer periods than their minimum terms required.) In cases in which felony-murder, a form of first-degree murder, had been alleged, fewer than one in six of the convicted defendants who waived their right to jury trial were convicted of this crime, but more than eight in ten of the convicted defendants who exercised the right to jury trial were adjudged guilty of first-degree murder and sentenced to mandatory life terms. Zimring, Eigen and O'Malley concluded:

The strong relationship between the type of adjudication and subsequent punishment suggests that there are two styles of homicide in the Philadelphia system—"wholesale" and "retail." Most killings do not involve collateral felonies, high-status or particularly vulnerable members of the community, or more than one

and federal courts agreed with the conclusion of Luke McKissack of Los Angeles: "The 'stand-offish' attitude that the federal courts adopt toward

victim—these are the "wholesale" cases. The prosecutor has a strong incentive to dispose of the case quickly but no pressure to press for severe penalties.

. . . The result is that the prosecutor allows the defendant to plead guilty to a lesser offense or stipulate to a trial without jury, and a minimum prison sentence of two years or less is imposed.

An important minority of killings—the "retail" cases—receive more attention, more complete due process, and penalties close to an order of magnitude higher than the low-visibility wholesale cases.

Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227, 237-38 (1976).

John Rink studied the cases of 404 male felony defendants in Milwaukee in 1971 and 1972. He reported that, of the defendants who had pleaded guilty, slightly more than one-third were sentenced to terms of imprisonment and slightly less than two-thirds to fines or to terms of probation. These proportions were reversed for defendants who had exercised the right to trial. J. Rink, *Bargaining in Criminal Cases: A Test of the Applicability of a Political Exchange Model*, app. Table 5 (unpublished master's thesis, Department of Political Science, University of Wisconsin-Milwaukee) (1975). See also A. BLUMBERG, *supra* note 25, at 129 (in 1962 in a jurisdiction closely resembling Manhattan, all but three of the 1,125 convicted defendants placed on probation had pleaded guilty before trial).

A survey of more than 600 robbery and felonious assault cases in Manhattan revealed that the mean sentence for offenders who pleaded guilty was 3.2 years; the mean sentence for offenders convicted at trial was 6.0 years. Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes*, 1 J. CRIM. JUST. 27, 31 (1973). See also the discussion of charge-reduction plea bargaining in note 260 *infra*.

The foregoing studies seem to support an inference that the sentence differential in the state courts is shockingly great, but a recent study by Herbert Jacob and James Eisenstein casts doubt upon the accuracy of this inference. Jacob & Eisenstein, *Sentences and Other Sanctions in the Criminal Courts*, 90 POL. SCI. Q. 617 (1975-76). Jacob and Eisenstein examined the cases of 4500 felony defendants in Baltimore, Detroit and Chicago. They found that a "cross-tabulation of sentence with disposition mode" indicated "that jury trials command a penalty of sentences which are three to four times longer than bench trial or guilty plea," but they reported that this apparent difference could be almost entirely "explained" by factors other than the defendant's choice of guilty plea, bench trial or jury trial. Nevertheless, the authors' demonstration of this proposition was not entirely persuasive. Rather than examine the sentences imposed within specific offense categories, they treated the offense charged in each case as an independent variable that might affect sentencing outcome. Not surprisingly, this basic variable "explained" most of the variation that the authors were able to explain and made other variables seem relatively unimportant. Thus Jacob and Eisenstein reported that, like a defendant's choice of plea, his prior record, his bail status, his age, his race, the strength of the evidence against him, and the identity of the judge who determined his sentence were essentially insignificant in explaining the sentence that he received. Most observers of the criminal courts would, of course, find these conclusions suspect on their face.

Although the authors maintained that their surprising conclusions "nicely illustrate[d] the power of multivariate analysis," they also reported that their "regression analysis was stepwise with variables forced in the order listed"; "disposition mode" was, moreover, close to the bottom of their variable list. The danger of this analysis can be illustrated by considering a hypothetical jurisdiction that resolved only four felony cases during a particular year: a murder case in which a white defendant was convicted at trial and sentenced to 50 years, a second murder case in which a black defendant pleaded guilty and was sentenced to 25 years, a theft case in which a white defendant was convicted at trial and sentenced to one year, and a second theft case in which a black defendant pleaded guilty and was sentenced to six months. These data are plainly consistent with the hypothesis that a defendant's refusal to plead guilty ordinarily leads to a doubling of his sentence, but the sort of analysis that Jacob and Eisenstein employed would lead to the conclusion that the offense charged explained almost all of the variation in sentencing outcomes and that other variables were essentially unimportant. Moreover, the minor variation not explained by the offense charged would be entirely explained by race, and choice of plea would have no effect whatever.

In short, the Jacob-Eisenstein analysis is misleading in two respects: treating the offense charged as an independent variable minimizes the effect of other factors that may be of great importance to individual defendants; and forcing variables in a specific order is likely to distort their effect when these variables may, in fact, be interrelated. If, to offer an additional (and somewhat more realistic) illustration, a prosecutor responded to a weakness in the state's evidence by offering to recommend an unusually favorable sentence in exchange for a plea of guilty and if a defendant then accepted this offer, the Jacob-Eisenstein analysis—which

plea bargaining leads ultimately to a more coercive atmosphere." San Francisco's J. W. Ehrlich, for example, observed that many federal judges lived in "ivory towers." He said, "There are some who I never saw smile, nor did anyone ever tell me that they smiled. These judges always lower the boom on defendants who stand trial—and they lower it harder than state court judges who are always willing to give a defense attorney some idea of their thinking before a guilty plea is entered."

Similarly, defense attorney Clyde W. Woody reported that defendants in Houston were "socked harder" for standing trial in the federal than in the state courts. He, too, attributed this phenomenon to the fact that federal guilty-plea defendants lacked the assurance of a specific, limited sentence that bargaining in the state courts provided. In the same way, Chicago's J. Eugene Pincham maintained that "a general atmosphere of intimidation" had replaced explicit plea bargaining in that city's federal courts. The result, Pincham said, was "tyranny, tyranny, tyranny."

### C. *Systems of Forthright Judicial Bargaining*

This Article has described two types of plea-bargaining systems in which judges refuse to negotiate with defense attorneys. The opposite extreme was illustrated by the state courts in Chicago, where judicial plea negotiation was more formalized than in any other city that I studied. At almost any stage of the proceedings, a defense attorney could request a "conference" with the prosecutor and the trial judge. The attorney usually made his request in open court, and the judge informed the defendant that the conference would be held, that he and the attorneys would discuss the defendant's case in his absence, and that he would not entertain a motion for a transfer of the case to another judge after the conference had been held. The defendant then "consented" to the ground rules that the judge had announced.

The proceedings that followed in the judge's chambers were frequently almost adversary in character. The prosecutor usually opened the discus-

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considers "case characteristics" before considering "disposition mode"—would attribute the defendant's lenient sentence entirely to the weakness of the evidence against him and not at all to his choice of plea. In fact, however, the defendant would probably have been correct in concluding that his sentence would have been substantially more severe if he had been convicted at trial.

Even if careful analysis revealed that the sentence differential in the state courts was as great as or greater than that in the federal courts, this fact would not necessarily undercut the thesis that explicit bargaining usually tends to reduce the sentence differential. "A defendant ordinarily considers both the strength of the case against him and the concessions that he has been offered in deciding whether to plead guilty." *The Supreme Court and the Guilty Plea*, *supra* note 9, at 57 n.187. If federal prosecutors often select their cases more carefully and prepare them more thoroughly than state prosecutors, *see* note 71 *supra*, the evidentiary strength of the cases that they file could be expected to reduce the sentence differential in the federal courts. Federal practice may therefore be characterized by countervailing tendencies: a tendency to increase the sentence differential to compensate for the disadvantages of implicit bargaining and a tendency to decrease this differential in light of the evidentiary strength of the prosecutors' cases.

sion with a description of the case, based primarily on his reading of the police offense report or the grand jury minutes. He then recommended a specific sentence—usually a somewhat more severe sentence than he expected or desired the court to impose. The defense attorney usually responded with a counter-recommendation, which was almost invariably a request for probation. He, too, frequently offered an argument to the court, although the quality of defense advocacy at closed-door, off-the-record conferences was rarely impressive.<sup>90</sup> When both attorneys had concluded their presentations, the judge announced the sentence that he would impose if the defendant pleaded guilty.<sup>91</sup>

90. As noted in an earlier article, I attended one conference in which the defense attorney said simply, "I haven't been paid in this case, so I'm agreeable to whatever you want to do." *The Defense Attorney's Role*, *supra* note 9, at 1202. More commonly, a defense attorney might say something like, "This defendant isn't really a bad boy, your Honor. He has attended a Baptist Church on 67th Street, and the minister there thinks that he might be a good candidate for probation." Cf. Simon, *How to Deal Away a Man's Time in Prison*, Chicago Sun-Times, January 13, 1975, at 4 (statement of Cook County public defender Kent Brody: "In absolute desperation you tell the judge that the guy is a good dancer or something.>").

91. For example, in *People v. Bannister*, 18 Ill. App. 3d 154, 309 N.E.2d 279 (1974), after the prosecutor had indicated that he would recommend a sentence of twenty-to-forty years if the defendant were convicted at trial, the defense attorney requested a conference. At this conference, the prosecutor announced that his recommendation would be 7-to-25 years if the defendant pleaded guilty; the defense attorney proposed a term of one-to-five years; and the trial judge agreed that he would sentence the defendant to a term of one-to-ten years on a plea of guilty. The appellate court noted that "were a more severe sentence not potentially involved [when a defendant decided to stand trial], the so-called plea bargain would be illusory," and it held the defendant's guilty plea voluntary. *Id.* at 158, 309 N.E.2d at 283. See also *People v. Dennis*, 28 Ill. App. 3d 74, 328 N.E.2d 135 (1975); *People v. Robinson*, 17 Ill. App. 3d 310, 308 N.E.2d 88 (1974) (illustration of conference procedure—judicial participation does not render guilty plea invalid); *People v. Steele*, 20 Ill. App. 3d 879, 314 N.E.2d 531 (1974) (judge may participate in plea negotiations); *People v. Busch*, 15 Ill. App. 3d 905, 305 N.E.2d 372 (1973); *People v. Morgan*, 14 Ill. App. 3d 232, 302 N.E.2d 152 (1973), *aff'd*, 59 Ill. 2d 276, 319 N.E.2d 764 (1974); *People v. Jackson*, 9 Ill. App. 3d 1020, 293 N.E.2d 665 (1973) (permissible for judge to impose more severe sentence after trial than had been discussed during pretrial negotiations); *People v. Merchant*, 4 Ill. App. 3d 937, 283 N.E.2d 721 (1972) (guilty plea voluntary although trial judge advised defendant of "strong likelihood" that he would be sentenced more severely if convicted at trial); *People v. Gaston*, 85 Ill. App. 2d 403, 229 N.E.2d 404 (1967) (judge's remark after sentencing a defendant convicted at trial to a term of ten-years-to-life that the defendant "should have come in and pled guilty" was "no more than a natural reaction under the circumstances").

In *People v. Darrah*, 33 Ill. 2d 175, 210 N.E.2d 478, *cert. denied*, 383 U.S. 919 (1965), the Illinois Supreme Court upheld a guilty plea although the following dialogue had occurred when the plea was accepted:

THE COURT: I am satisfied you are a professional burglar.

THE DEFENDANT: Not too professional, your Honor.

THE COURT: Well, that is about what I was going to say. . . . As I indicated to your attorney, if you had been convicted by a jury, your sentence would have been considerably greater.

THE DEFENDANT: Ten to forty.

THE COURT: That's right. . . . Nevertheless, as long as you plead guilty with a sort of an understanding that your sentence would be seven to fifteen, I am inclined to adhere to the State's Attorney's recommendation.

*Id.* at 179, 210 N.E.2d at 480-81. The supreme court noted in *Darrah* that the trial judge's statement concerning the sentence that he would have imposed following a jury trial might have been made after the defendant had submitted his plea of guilty rather than before. In *People v. Capon*, 23 Ill. 2d 254, 178 N.E.2d 296, *cert. denied*, 369 U.S. 878 (1961), the court affirmed a sentence to the maximum permissible term following a trial despite the fact that the trial judge had said, "If he had come in and pleaded guilty, it might have been different. . . . You take your chance when you take a jury. . . ." The supreme court did, however, set aside a sentence that a Chicago trial judge had imposed by saying, "If you'd have come in here, as

In theory, this sentence was offered on a take-it-or-leave-it basis; no further haggling by the defense attorney was permitted. In practice, however, bargaining sometimes continued after the judge had spoken. An attorney might confer with his client and report that the client would not accept the judge's proposal. If the judge were in a favorable mood, he might respond, "All right. Would he go for one-to-two?"<sup>92</sup>

In theory, moreover, only the sentence on a plea of guilty was discussed; the fact that the defendant's sentence would be higher after conviction at trial was implicit, not explicit. Again, however, there were exceptions. Dallin Oaks, then a Professor of Law at the University of Chicago, once represented an indigent defendant charged with the sale of narcotics, an offense that carried a mandatory minimum sentence of ten years' imprisonment. The defendant's record included one prior felony conviction for the possession of narcotics. Shortly before the trial in the case was to begin, the prosecutor requested a conference. He offered to reduce the charge against the defendant to the possession of narcotics and to recommend a sentence of two to five years' imprisonment if the defendant would plead guilty.

The offer was tempting, but the defendant had consistently maintained his innocence. Purely for ethical reasons, Professor Oaks was reluctant to accept the prosecutor's offer. At this point, however, the trial judge intervened. He said, "I'm not going to tell you what to do, young man, but I can tell you what I'll do. If your client goes to trial and is convicted, the minimum term will not be just the ten years required by the statute. The minimum term will be twenty years in the penitentiary."<sup>93</sup>

Professor Oaks must have appeared startled, for the judge added a word of explanation: "He takes some of my time—I take some of his. That's the way it works."<sup>94</sup> This succinct summary of the guilty-plea

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you should have done in the first instance, to save the State the trouble of calling a jury, I would probably have sentenced you, as I indicated to you I would have sentenced you, to one to life in the penitentiary. It will cost you nine years additional, because the sentence now is ten to life in the penitentiary." *People v. Moriarity*, 25 Ill. 2d 565, 185 N.E.2d 688 (1962).

92. A few Chicago judges departed from the bargaining procedure described in text. One would permit a conference only if the defense attorney reported that he had tried without success to strike a plea agreement with the prosecutor, and another refused altogether to bargain with defense attorneys (although he did reveal in chambers whether he would accept a sentence recommendation upon which the prosecutor and the defendant had agreed). In every courtroom, defense attorneys might strike plea arguments with prosecutors rather than with judges. Some attorneys reported, in fact, that most of their plea agreements were concluded without judicial involvement, while others reported that very few were. For descriptions of judicial bargaining in Chicago, see McIntyre & Lippman, *supra* note 20 at 1157; H. Jacob & J. Eisenstein, *Trial Courts: The Conviction Process* 5 (unpublished chapter of forthcoming book on criminal justice in three urban jurisdictions); *Jury Trial Increase the Rap Here*, Chicago Sun Times (Special Section—Inside Justice), at 3 (1973).

93. For a similarly extreme case of judicial bargaining, see *John* 19:10: "Then saith Pilate unto him, speakest thou not unto me? Knowest thou not that I have power to crucify thee, and have power to release thee?"

94. Marshall Hartman, Director of Defender Services of the National Legal Aid and Defender Association, has reported a case that illustrates the extent to which one Chicago judge was guided by this principle. Prior to trial, Hartman's client was offered a sentence of one-to-ten years in exchange for a plea of guilty. He declined the offer but, after two days of



process had the desired effect, and the defendant pleaded guilty.<sup>95</sup>

Most Chicago defense attorneys recalled similar instances in which trial judges had "blasted" defendants into guilty pleas,<sup>96</sup> but many attorneys insisted that these occurrences were nothing to worry about. One explained, "Judges use dynamite only on the defendant who deserves it—the defendant who is not amenable to sound advice. A judge can often be very helpful, and I am grateful when he is."<sup>97</sup>

Direct and unequivocal judicial bargaining is not unique to Chicago. In Brooklyn, plea bargaining is the full-time task of a judge assigned to a specialized "Conference and Discussion Court,"<sup>98</sup> and observers of the criminal courts of many jurisdictions have noted that trial judges frequently strike plea agreements with defense attorneys.<sup>99</sup> Moreover, judicial threats

trial, expressed his willingness to plead guilty. The trial judge told Hartman that the sentence of one-to-ten years was no longer available but that the defendant could be sentenced to a term of three-to-ten years if he would then change his plea. When Hartman carried this message to his client, the client responded, "You mean that for two days of trial the judge added two years to the minimum sentence—one year for every day?" The defendant refused to plead guilty, was convicted at trial, and was sentenced to a term of seven-to-fifteen years. Kröll, *The Plea Circus*, STUDENT LAW., Jan., 1975, at 9, 52.

95. Oaks reported, in fact, that the defendant "giggled delightedly" when the offer of a two-to-five year sentence was communicated to him.

96. For example, the *Chicago Sun Times* reported the following statement of defense attorneys in *Jury Trials Increase the Rap Here*, *supra* note 92, at 3:

Elliot Samuels: "Some judges are blunt. They tell you, 'If this guy goes to trial, you know what's going to happen. I'm going to bang him.'"

Sam Adam: "You've got some 16 judges at 26th and California . . . all preoccupied with trying to get out of trying cases. They actually tell you to your face that your client will get one to three if he pleads guilty and three to ten if a jury convicts him."

Stanton Bloom: "The judges let you know that if your client pleads guilty, he'll get one to three years. If he goes before the bench, he'll get two to four years. And if he takes a jury, he'll get five to ten years if convicted."

97. *The Defense Attorney's Role*, *supra* note 9, develops the thesis that the personal interests of defense attorneys almost invariably favor the entry of pleas of guilty.

98. See McIntyre & Lippman, *supra* note 20, at 1157. In a recent telephone interview, Peter Wilson, Trial Supervisor of the Supreme Court Bureau of the Kings County District Attorney's Office, described the operation of this court. All felony cases are scheduled for conferences shortly after indictment; these conferences rarely take longer than five minutes each; and they typically end with the judge's statement of the sentence that the defendant will receive upon entering a plea of guilty. (The judge does, however, reserve the power to alter this sentence if a presentence report reveals that the facts of the case were not honestly presented to him at the conference.)

If no plea agreement is reached at the "conference part," the case is assigned to a "trial part", and the judge of this "trial part" is likely to conduct an additional conference and to communicate his own offer to the defense attorney. Wilson reported that more plea agreements were, in fact, concluded in the "trial parts" than in the "conference part." Experienced defense attorneys recognize that the offer of the judge of the conference part is recorded in the assistant district attorney's case file; that the defendant can, in practice, accept this offer even after the case has been assigned elsewhere; and that the offer may, in fact, be bettered by the judge of the trial part to which the case is ultimately assigned.

99. *Commonwealth v. Evans*, 434 Pa. 52, 57-58, 252 A.2d 689, 692 (1969) (Bell, C.J., dissenting) (Philadelphia—majority opinion holds judicial participation in plea negotiations improper); S. BING & S. ROSENFELD, *THE QUALITY OF JUSTICE IN LOWER CRIMINAL COURTS OF METROPOLITAN BOSTON* 59, 75, 86 (1971) (Boston); A. BLUMBERG, *supra* note 25, at xiii, 105 (unidentified jurisdiction closely resembling Manhattan); D. NEWMAN, *supra* note 1, at 85, 89 (Kansas and Wisconsin); SAN FRANCISCO COMM. ON CRIME, *REPORT ON THE CRIMINAL COURTS OF SAN FRANCISCO, PART I: THE SUPERIOR COURT BACKLOG—CONSEQUENCES AND REMEDIES* 24-27 (San Francisco); J. SKOLNICK, *JUSTICE WITHOUT TRIAL* 191-96 (1966) (unidentified jurisdiction closely resembling Oakland); Bongiovanni,

of severe treatment following conviction at trial have often led to reported litigation.<sup>100</sup>

In most of the cities that I visited, there were at least one or two judges who regularly offered specific sentence commitments in advance of trial. For example, Manhattan Supreme Court Justice Mitchell D. Schweitzer noted that his own plea bargaining practices had enabled him to dispose of more than 800 felony cases in a recent three-month period, and Justice Schweitzer described the basic reason for his activism. "In this job," he said, "one can do as much work as he wants to do. He can sit back and listen patiently to every matter that is brought before him. If he does that, he has done the job that a judge is paid to do. But if every judge took that attitude, the courts would be backed-up for twenty years. Some of us therefore take a more active part."<sup>101</sup>

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*Guilty Plea Negotiations*, 7 DUQ. L. REV. 542, 543, 547 (1969) (Philadelphia); Polstein, *How to "Settle" a Criminal Case*, PRAC. LAW., Jan., 1962, at 35, 39 (New York); White, *supra* note 8, at 448, 452 (Philadelphia and New York); 8 DUQ. L. REV. 461, 468 (1970) (Philadelphia); M. Heumann, *Adapting to Plea Bargaining: The Experiences of Prosecutors, Judges and Defense Attorneys* 226 (1976) (unpublished manuscript) ("most judges [in Connecticut] participate in plea discussions both pretrial and during trial on an ad hoc basis").

100. In one federal case, for example, a judge, addressing the defendants as "boys," said that "it was fair to say to them that in the event they stood trial and were found guilty the court would feel that they should have the maximum sentence provided by law." *Euziere v. United States*, 249 F.2d 293 (10th Cir. 1957). In another, a federal trial judge (who in fact lacked statutory authority to impose the sentence that he threatened) called a defense attorney into his chambers and announced, "I think I ought to tell you this. If you finish the trial and your clients are found guilty, I'm going to start off by imposing a life sentence on the kidnapping charge and then I'm going to add consecutive maximum sentences on the other counts on which they are found guilty." *United States v. Tateo*, 214 F. Supp. 560 (S.D.N.Y. 1963).

A trial judge in Colorado told a defendant that he would be "put away forever" if he refused to accept a prosecutorial offer and if he were then convicted at trial. *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973). A North Carolina trial judge, after expressing his "opinion that the jury was going to convict the defendant," said that, if they did, he "felt inclined to give him a long sentence." *State v. Benfield*, 264 N.C. 75, 140 S.E.2d 706 (1965). In Massachusetts, a judge called a conference in his chambers, announced that "the game is over," and said that he would sentence the defendant to three consecutive life terms if he were convicted at trial. *Letters v. Commonwealth*, 346 Mass. 403, 193 N.E.2d 578 (1963).

A trial judge in Mississippi spoke with a defendant's "kinfolks upwards of fifty times" about a pending murder prosecution and told them that, if he were in the defendant's position, he would plead guilty. The judge agreed that he would not impose a death sentence following a guilty plea and, in addition, that he would let the defendant's relatives "carry him to the penitentiary or let him catch a bus" without "waiting for the prison wagon." The judge also suggested that, if the defendant pleaded guilty, the District Attorney, County Attorney, sheriff's deputies, and victim's wife might agree to a manslaughter sentence. *Rogers v. State*, 243 Miss. 219, 136 So. 2d 331 (1962).

Professor Donald J. Newman reported this statement of a Wisconsin trial judge: "In these [pretrial] conferences I always make it clear to defense counsel that if his client goes to trial and is convicted, I will impose a sentence pretty close to the maximum permitted by statute and will not consider probation. Under such conditions, a guilty plea can usually be worked out." D. NEWMAN, *supra* note 1, at 89. Professor Thomas W. Church, Jr., noted that one judge in a midwestern county "served notice on attorneys before him in implicit, and sometimes explicit, terms that defendants who were found guilty after a trial ('when their peers have spoken') would be in considerably greater jeopardy than those who pleaded guilty in the first place." Church, *supra* note 61, at 392 n.20.

Although many appellate courts have refused to set aside guilty pleas simply because they were the products of judicial bargaining, *see* note 144 *infra*, the less-than-genteel ways of expressing the message of the guilty-plea system that have been illustrated in this footnote have generally led to the invalidation of guilty-plea convictions.

101. Justice Schweitzer reported that, if the prosecutor and defense attorney had failed to

#### D. *Systems of Judicial Bargaining by Hints, Indirection and Cajolery*

In most cities, judges who adhered to the "Chicago school" of plea bargaining—those who informed each defendant of the sentence that he could secure by pleading guilty—were in a minority, and so were judges who adhered to the "Houston school" of judicial detachment and who refused to bargain. Most judges instead seemed to combine the worst of both worlds. Some of these judges occasionally made definite commitments concerning a defendant's sentence, but only to experienced, "trustworthy" defense attorneys who could be counted on to observe a rule of silence.<sup>102</sup> In most cases, the judges spoke in hints, suggestions, euphemisms and predictions. They thereby communicated the advantages of pleading guilty in a manner almost as coercive as that of the Chicago judges, but they avoided any promise that would provide a firm, legally enforceable<sup>103</sup> basis for reliance in entering a plea of guilty.

Judges who refused to commit themselves in advance of trial commonly mentioned specific sentences during bargaining sessions; they simply did not "promise" to impose these sentences. One form of expression seemed more frequent than any other: "If the facts are as you have related them, I don't see why six months in the county jail would not be an appropriate disposition, but of course I am not going to tie my hands at this stage of the proceedings." A second form of expression was also popular: "I cannot tell you what I will do in this case, but in the past I have

reach a plea agreement, he would ask the prosecutor for his office's resume of the testimony before the grand jury. After examining this resume, he would mentally place the case in one of three categories. "The first category," Justice Schweitzer said, "is the open-and-shut ease. When a defendant has been caught in the middle of a robbery, he has really been caught." In this category of cases, Justice Schweitzer tried to "cut through the foliage as quickly as possible." He called for the defendant's "yellow sheet," a report of his prior criminal record, in an action that some defense attorneys claimed violated a rule of court against examining a defendant's criminal record prior to conviction. On the basis of the yellow sheet and the resume of the grand jury testimony, Justice Schweitzer decided how much to "give away" to secure a plea of guilty. "Ordinarily," he said, "a little something will do. The defense attorneys, both Legal Aid and retained, want to get rid of this sort of ease as quickly as I do." Justice Schweitzer estimated that his first category of cases accounted for approximately one-third of the cases that he considered.

The second category, somewhat larger than the first, consisted of cases in which the judge perceived a weakness in the state's evidence. These cases usually presented an issue of the identification of the defendant by the victim of the crime or by another eyewitness. "Here," said Justice Schweitzer, "is where I really give something away."

The third category of cases included "all serious cases, in which the defendant must be isolated from society for a substantial period." In these cases, perhaps one-fourth of the cases that Justice Schweitzer considered, he refused to make any sentence commitments in advance of trial. For a picture of Justice Schweitzer in action, see Mills, *I Have Nothing to Do With Justice*, LIFE, March 12, 1971, at 56, 60-65.

102. Some judges' bargaining policies, however, may be more complex. An Oregon prosecutor observed that the willingness of trial judges to participate in plea bargaining "[v]aries with the charge, the defense counsel, the prosecutor, the media interest, the mood of the judge, and the time of the moon." Klonoski, Mitchell & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 ORE. L. REV. 114, 129 (1971).

103. See *Santobello v. New York*, 404 U.S. 257 (1971), discussed in note 33 *supra*.

generally granted probation when defendants have shown remorse in cases of this sort."<sup>104</sup> Judge John C. Barnes of Los Angeles explained:

As far as what is to happen to a defendant if he pleads guilty, I make it abundantly clear that I am not tying myself down to anything. Sometimes I say what my general outlook on the type of offense is and indicate that over the years the certain types of cases received certain types of treatment. But it is always clear, I am sure, that no particular type of treatment is going to be given to a defendant.<sup>105</sup>

Many judges would tell defense attorneys of their "current inclinations" or their "willingness to consider" particular sentences that they would not promise to impose.<sup>106</sup> Others seemed to act on the theory that the slightest qualification of a judicial promise rendered it permissible, even if the qualification was only that a presentence report must confirm certain facts that the defense attorney had reported. Still other judges apparently believed that, although it was improper to promise a specific sentence to a guilty-plea defendant, they could properly promise that the sentence would fall within a specified range or that it would not exceed a specified figure.

Some judges never mentioned specific sentences at all. A few had a semi-official "schedule" of penalties for various types of offenses so that no pretrial conference needed to occur. Moreover, even a federal judge who insisted that he never bargained might call the prosecutor and defense attorney into his chambers and announce: "This defendant is young, has a family, and has never been in serious trouble before. I think that he would be entitled to the consideration of the court if he pleaded guilty." Knowl-

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104. Judges sometimes defended this form of bargaining by noting that experienced defense attorneys were familiar with their sentencing practices. There was no reason why inexperienced attorneys should not equally have the benefit of the general, historic information that the judges provided. The past, however, usually became prologue, and the effect of reciting history was usually little different from that of offering a specific sentence in exchange for a plea of guilty. Even an experienced defense attorney might therefore find it advantageous to "learn" how a judge had "treated this kind of case in the past."

105. Proceedings of the 1966 Sentencing Institute for Superior Court Judges, 52 Cal. Rptr. app. at 38.

Similarly, Judge Claude M. Owens once wrote:

[T]he most the court would be called upon to say, "I cannot tell you what your particular sentence will be, but I can say that in the usual case of drunk in public, absent any priors or aggravating circumstances such as fighting, damage to persons or property, etc., the sentence of the court is usually \$\_\_\_\_\_." It is submitted that this does not promise a particular sentence; that a plea made in reliance thereon is not rendered involuntary any more than a plea made in reliance on the statutory sentencing limit.

Owens, *Plea Bargaining . . . Agreeing . . . Recommending?*, 26 LEGAL AID BRIEFCASE 55 (1967). See Proceedings of the National Judicial Conference on Standards for the Administration of Criminal Justice, 57 F.R.D. 229, 365 (1972) (statement of Justice Walter F. Rogosheske).

106. This sort of bargaining can be extremely forceful. Cleveland prosecutor Joseph Donahue reported, for example, that although none of the judges of the Court of Common Pleas ever offered definite sentence promises as an inducement for pleas of guilty, a judge might tell a defense attorney in advance of trial, "If the defendant pleads guilty, I will seriously consider an award of probation; if he does not, my inclination is to impose consecutive sentences in the penitentiary."

edgeable defense attorneys regard the term "consideration of the court" as a euphemism for probation.

Indeed, in the minuet of plea negotiation, truly delicate movements by a trial judge may have a meaning of their own. Defense attorneys in Manhattan noted that some judges never initiated plea discussions unless they planned to impose suspended sentences. If one of these judges called the attorneys to the bench and asked whether the defendant had considered pleading guilty, nothing further needed to be said; for all practical purposes, the judge had already promised that the defendant would not be sent to jail. Similarly, a judge might intimate that a favorable sentence would follow a guilty plea by suggesting that the case might be resolved quickly<sup>107</sup> or by discussing the equities of the case in a sympathetic manner. The following description of a pretrial conference in an Alexandria, Virginia, motel room, attended by Federal District Judge Walter E. Hoffman, federal prosecutors, and the defense attorneys for Vice President Spiro T. Agnew is instructive:

[Judge Hoffman announced that] he was not going to tell the parties in advance what sentence he would impose. . . . He said that in tax-evasion cases he had given jail sentences sometimes, sometimes not. He was aware that Agnew was a lawyer and he said another judge had told him that it was part of life in Maryland that people in government enjoy the fruits of state contracts. He would also remember that Agnew already had gone through suffering in his dilemma and would go through more for years to come. Judge Hoffman seemed to be indicating strongly he would not send Agnew to jail. But he told [Agnew's chief counsel] specifically that under the circumstances he could only say now that he could not commit himself.<sup>108</sup>

The indirection that characterizes most judicial plea bargaining poses a substantial danger of misunderstanding,<sup>109</sup> but no matter how veiled, tentative and qualified a judge's expression of his "current thinking," defense attorneys need rarely fear that the judge will actually exercise the prerogative of changing his mind.<sup>110</sup> "The judges always insist that they are simply giving us a general idea of their approach and that nothing they say should be taken as a promise," reported Pittsburgh Public Defender George H. Ross, "but I have never been double-crossed yet." Philadelphia Public Defender Vincent J. Ziccardi noted, "There have been a few judges who

107. See S. BING & S. ROSENFELD, *supra* note 99, at 75.

108. R. COHEN & J. WITCOVER, *A HEARTBEAT AWAY* 308 (1974).

109. Cf. J. EHRLICH, *A LIFE IN MY HANDS* 135-36 (1965):

I was especially encouraged by what I regarded as my understanding with Judge Foley. . . . On the 18th of May, [drummer Gene] Krupa and I stood before Judge Foley. In my pocket were five \$100 bills for the payment of the fine that Judge Foley and I had discussed. Foley levied the fine and then double-crossed me when he went on to sentence Krupa to 90 days in the county jail. At the end of the 90 days, less the usual five days from each month for good behavior, Krupa would be tried on the felony charge.

110. See SAN FRANCISCO COMM. ON CRIME, *supra* note 99, at 25.

felt free to pull the rug out from under the defendant after a 'tentative' agreement. If we protested, they would sternly insist that they had never agreed to anything. Of course no one from the public defender's office ever entered a plea of guilty before any of those judges again."

Some judges, however, have occasionally decided to prove that they mean what they say when they insist on preserving their freedom of action. A defendant who has relied on a judge's customary practices rather than on his words may therefore find his expectations suddenly defeated, just as he may when a judge, departing from his customary role, decides to disregard a prosecutorial sentence recommendation. Roger Hurley, a public defender in Cleveland, observed:

When a defendant stands before the court at the time of sentencing, he has nothing whatever to hold onto. The court's refusal to provide any definite sentence commitment can then give rise to a painful and embarrassing moment for the defense attorney as well as for his client. Of course I explain to each defendant that no promises have been made, but I give each defendant my best estimate of what will happen. Naturally I base this estimate in part on what the judge has said. On occasion, some judges have imposed sentences that were much more severe than those I had reason to believe they were considering. All I could offer the defendant was a sympathetic shrug as he was led away to jail. I had no basis for any legal objection.

Some defense attorneys, however, have raised legal objections to the sort of judicial turnabout that Hurley described—always, so far as my research has revealed, without success. In *United States v. Frontero*,<sup>111</sup> for example, a federal trial judge had indicated that he would "probably" place the defendant on probation if he pleaded guilty and "if the representations as to [his] lack of prior criminal record were substantiated by the presentence investigation" (as in fact they were). The judge then imposed a three-year prison sentence and refused to allow the defendant to withdraw his guilty plea. The United States Court of Appeals for the Fifth Circuit, in an opinion by Judge John Minor Wisdom, affirmed the defendant's conviction and sentence. So long as a trial judge has used the word "probably"—so long as he has intimated rather than promised—he is apparently free to induce a waiver of the right to trial by creating false hopes and expectations of almost any description.<sup>112</sup>

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111. 452 F.2d 406 (5th Cir. 1971).

112. In *Blackman v. State*, 265 So. 2d 734 (Fla. Dist. Ct. App. 1972), cert. denied, 411 U.S. 972 (1973), a trial judge said, "But what I gather from what you proffer is, if it is true, I wouldn't be thinking in terms of less than about 50, and that's just off the top of my head, without hearing the facts." Later, in a less guarded moment, the judge told the defense attorney, "Then plead to 50 years." Although the judge in fact sentenced the defendant to a term of 101 years following his conviction at trial, the Court of Appeals denied relief in language that would have been equally applicable had the defendant been sentenced to the same term following a guilty plea: "[T]his court is convinced that the trial judge did not commit herself or make any deal for a sentence as defendant would have us believe."

Trial judges not only offer their own qualified promises and carefully phrased hints to defense attorneys; in addition, they often influence the concessions that prosecutors provide. The role of the trial judge in urging prosecutors to be more lenient may often, in fact, be more important than his direct role in bargaining with defense attorneys. Raymond J. Sinetar, a Los Angeles prosecutor, noted that many judges take an "active, initiating and pressurizing role in plea bargaining." These judges commonly "invite" the attorneys into their chambers and make "suggestions" concerning what the district attorney should do. "Any suggestion by a trial judge carries more weight than a suggestion should," Sinetar commented.<sup>113</sup>

Judicial suggestions sometimes fail, however, and a harsher form of cajolery may be substituted. A judge may turn to a prosecutor and say, "While the woods are full of bears, why have you rolled out massive armaments for this chipmunk?" Or he may say to a defense attorney, "The criminal courts are just barely surviving, but this greenhorn prosecutor won't bend to reality. Mr. Defense Attorney, what does your man want?"

If judicial derision of the prosecutor is not enough, there are still more drastic measures. A Cleveland public defender reported that trial judges in his city were reluctant to criticize prosecutors in the presence of defense attorneys. Instead, a judge usually endured a prosecutor's "unreasonable attitude" for a time. Then he telephoned the Prosecuting Attorney, who was usually a member of the same political party and often an old friend. "Get rid of this guy," the judge would demand, "and get someone up here with some authority, some common sense and some balls." This message invariably had the intended effect.<sup>114</sup>

There seem to be important political reasons for judges to urge le-

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In *People v. Fenton*, 141 Cal. App. 2d 357, 296 P.2d 829 (1956), a defense attorney testified that the trial judge had given the "impression" that "the court would be lenient in its sentence"—something that the trial judge denied. The court said, "[A] conference of all counsel and the court, duly reported, respecting the court's attitude toward accepting a plea of guilty . . . is of everyday occurrence and often a necessary step in the disposition of criminal cases." The court complained, however, that "inexperienced attorneys" sometimes "overstep the bounds of professional ethics and accepted court procedure by endeavoring to make a 'deal' with the court as to punishment." *Id.* at 865-66, 296 P.2d at 834. The court thus seemed to express the view that although it was proper for trial judges to induce pleas of guilty, it was unprofessional to ask them to assume any responsibility toward defendants in the process.

Decisions that permit trial judges to disregard their "tentative" expressions of opinion seem inconsistent with a few decisions that have set aside guilty-plea convictions simply because the predictions of well-intentioned prosecutors have proven false. *E.g.*, *United States v. Hammerman*, 528 F.2d 326 (4th Cir. 1975). A prediction by a trial judge or a statement of his "current thinking" seems even more likely to mislead the defendant than a similar statement by a prosecutor.

113. *Cf. NEWMAN, supra* note 1, at 70 ("There is little doubt that the opinion of the trial judge in pretrial consultation with the prosecutor is critical in influencing charge reduction."). Justice Bernard Botstein has noted that criminal court judges "are pressed to encourage the bargaining between prosecutors and defendants that avoid trials." *New York Times*, Feb. 5, 1966, at 58, col. 2. *See also* Miller, *The Compromise of Criminal Cases*, 1 S. CAL. L. REV. 1, 10 (1927).

114. *Cf. Skolnick, supra* note 25, at 55 (One judge says that he would talk to an overzealous prosecutor and try to "teach" him. If that didn't work, he would casually mention the man's shortcomings to the District Attorney at a social occasion.).

niency upon prosecutors rather than simply to grant leniency themselves. Judges seem to fear that if they were to depart too frequently from prosecutorial sentence recommendations, they would find their names in the newspapers. It is, in fact, almost as rare for judges to impose substantially more lenient sentences than prosecutors have recommended as it is for them to impose sentences that are more severe.<sup>115</sup> Los Angeles defense attorney Al Matthews observed, "A hostile prosecutor can always cut a defense attorney off from a favorable judge," and Boston's Monroe L. Inker said simply, "If the prosecutor says no, the thing won't be done."<sup>116</sup> In some reported cases, judges have deferred to prosecutors by expressly agreeing not to impose the sentences that they themselves thought appropriate.<sup>117</sup>

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115. See text accompanying notes 20-27 *supra*. Of course the principal reason for the judges' reluctance to impose more severe sentences than prosecutors have recommended is their desire to insure the effectiveness of prosecutorial plea bargaining, and the principal reason for their reluctance to impose more lenient sentences is the fear of political criticism. In addition, judges may sense that the imposition of a substantially lighter sentence than was contemplated by a plea agreement would indicate to the defendant that his attorney had struck a bad bargain.

Jurors seem unlikely to respond to the political and institutional considerations that commonly influence trial judges to follow prosecutorial sentence recommendations, and Houston defense attorney Percy Foreman recalled that, until the 1940's, jury sentencing was mandatory in Texas even in guilty-plea cases. "Usually," he said, "the jury would ratify the deal between the prosecution and the defense, but there were certainly exceptions." On one occasion during the Depression, for example, Foreman represented a notorious bank robber, Frank Elvis Smith. Smith agreed to plead guilty to armed robbery in exchange for the recommendation of a ten-year sentence, but the jury was so disenchanted with the bank that he had robbed that it imposed a lighter sentence. "It was truly an embarrassing moment for me," Foreman concluded.

On another occasion, Foreman represented a defendant who had raped an old woman, killed her, and then set fire to her body. The prosecutor had agreed to forgo the death penalty and to recommend a 99-year sentence, and the defendant had pleaded guilty. The arrangement seemed so routine that neither side conducted any voir dire examination of the prospective jurors. As the prosecutor explained the bargain, however, one of the jurors raised his hand. "I couldn't go along with that deal," he said. "You may want to know that the victim was my grandmother."

116. Another Boston defense attorney, Paul T. Smith, echoed these sentiments and offered an illustration. One of Smith's clients had jabbed a person in the eye with a pool cue and killed him after the victim had called the defendant a "nigger" and a "pool shark." Shortly before the defendant's trial for murder was to begin, the judge called both attorneys into his chambers. "Talk about manslaughter," he told them.

"I don't have the authority," the prosecutor replied.

"Go and get the authority," the judge directed.

The prosecutor left obediently, but during his absence, Smith observed that the judge's efforts would prove futile. "The prosecutor will agree to a manslaughter plea but will insist on recommending the maximum sentence," he said. "You know that I can't accept that."

Smith's prediction proved accurate, and he maintained that there was nothing further that the judge could do. As a practical matter, the judge could not "go out on a limb" by agreeing to impose the sentence that he thought the defendant deserved. Smith noted, however, that the judge's caution did not injure the defendant, for the jury returned a verdict of not guilty.

117. The pretrial conference in *People v. Griffith*, 43 App. Div. 2d 20, 349 N. Y. S. 2d 94 (1973), had seemed to go smoothly: the trial judge, assistant district attorney and defense attorney had agreed that the defendant would plead guilty to a reduced charge and that the court would impose a three-year sentence. After the defendant's guilty plea had been accepted, however, the assistant district attorney approached the trial judge and reported that another trial assistant had earlier refused to approve a three-year sentence, insisting on at least a four-year term. The trial judge replied, in effect, that he himself had made a promise and that he would keep it. Shortly thereafter, the District Attorney of Bronx County appeared in the courtroom, repudiated both the approval of a three-year sentence by one of his assistants and the approval of a four-year sentence by the other, and argued that the defendant should be sentenced to a seven-year term. The District Attorney did agree that the defendant should be



Prosecutorial sentence recommendations can serve as a political shield for judges, but only when they are followed.<sup>118</sup> The interplay between prosecutors and judges may therefore lead to a delicate balance of influence as each group tries to preserve an image of toughness while inducing the other to accept responsibility for the leniency necessary to induce pleas of guilty.<sup>119</sup> Houston defense attorney Richard Haynes observed that

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allowed to plead not guilty if he were unwilling to accept the sentence that the District Attorney's office had belatedly decided to recommend. In response to the District Attorney's presentation, the trial judge withdrew his promise, and after the defendant was convicted at trial, the judge sentenced him to ten years' imprisonment. The Appellate Division held that the trial judge lacked authority to set aside the defendant's guilty plea after he had validly accepted it.

In *United States ex rel. Elias v. McKendrick*, 439 F.2d 771 (2d Cir. 1971), a trial judge said initially, "[A]n appropriate sentence in your case would be 7½-to-10 years." Later, apparently after bargaining with a prosecutor who had been reluctant to reduce the charge against the defendant from murder to manslaughter, the judge announced that he would sentence the defendant to a term of ten-to-twelve years on a plea of guilty. The Second Circuit found no error.

118. Although most sentencing in Houston currently corresponds to prosecutorial "recommendations," defense attorney Percy Foreman reported that the situation was different in the past. Judges began demanding prosecutorial sentence recommendations only when a now-defunct newspaper, the *Houston Press*, criticized the courts' sentencing practices. Foreman maintained that the judges asked for and followed the prosecutors' recommendations "as a matter of necessity." "A judge has no security," Foreman observed. "By the time he has served a single term on the bench, his law practice has evaporated. If a judge wants to survive, he must put the prosecutor on the spot."

119. Cf. R. COHEN & J. WITCOVER, *supra* note 108, at 311 (During a pretrial conference concerning the prosecution of Vice President Agnew, Judge Walter E. Hoffman observed that "this was a case in which the government in his view ought to take a definite position, since it knew much more about the facts than he did.").

There are various mechanisms by which prosecutors and trial judges may implicitly agree to "share the heat." A prosecutor may agree "not to oppose" a sentence that he has refused to recommend affirmatively, or he may agree to permit the defendant to plead guilty "without a recommendation" in a situation in which his recommendation (if not so lenient as to embarrass the prosecutor himself) would place significant political pressure on the court. In addition, a "slow plea of guilty" may become a vehicle of accommodation between trial judge and prosecutor. In Los Angeles, for example, prosecutors once thought it impolitic to agree to misdemeanor sentences for marihuana users. In place of a plea agreement, the district attorney's office would charge each marihuana defendant with a "big beef" (a charge of possessing marihuana, a felony) and a "little beef" (a charge of frequenting a place where marihuana was used, a misdemeanor). The prosecutor and defense attorney would then "submit" the case on the basis of a transcript of the preliminary hearing for a "finding" by the court, and without actually reading the transcript, the trial judge would "find" the defendant guilty of the misdemeanor alone. The judge would thereby assume primary responsibility for the defendant's misdemeanor sentence. Los Angeles prosecutors recognized, however, that because the "little beef" was not a lesser included offense, they need not have afforded this "easy out" to trial judges (or even to have waived the state's right to jury trial by approving the "transcript submission"). In light of the prosecutors' failure to seek felony convictions more earnestly, they were in no position to criticize the judges' leniency. Cf. *The Prosecutor's Role*, *supra* note 9, at 89 n.91 (comparable New York practice of submitting guilty pleas to two closely related offenses with the tacit understanding that the court would sentence the defendant only for the lesser crime).

The Los Angeles "slow plea" or "transcript submission" procedure sometimes leads to misunderstandings. In *People v. Wheeler*, 260 Cal. App. 2d 522, 67 Cal. Rptr. 246 (1968), the following dialogue occurred in the trial court at the time that the case was submitted:

DEFENSE COUNSEL: The defense submits the matter, your Honor.

THE COURT: I find the defendant guilty of assault with a deadly weapon, a lesser and necessarily included offense than that charged in the Information, assault with a deadly weapon with intent to commit murder.

THE DEFENDANT: What!

DEFENSE COUNSEL: Your Honor, the defendant waives time for sentence and requests leave of court to file a written application for probation.

THE DEFENDANT: You mean I have just been tried?

judges sometimes complain, "Yes, I know that the defendant deserves probation, but damn it, the prosecutor should make that recommendation." Haynes has thus far resisted the temptation to reply, "No, your Honor. It is your duty to impose the sentence that you think warranted. That responsibility is something that comes when you put on the Batman suit."

A Manhattan defense attorney observed, "Most trial judges look for guilty pleas the way that salesmen look for orders," and in their efforts to minimize the number of trials, the judges do not confine their suggestions and cajolery to the prosecutors. An Oakland public defender reported that the Master Calendar Judge in that city regularly invited prosecutors and defense attorneys to his chambers for a general review of the court's statistics. "We must have more pleas," he urged, and in specific cases he "nudged everyone."<sup>120</sup> As I have reported elsewhere in greater detail, judges sometimes subject uncooperative defense attorneys to verbal abuse and sometimes seek the replacement of public defenders who strike them as unduly contentious.<sup>121</sup> Moreover, some defense attorneys routinely yield to judicial suggestions on the theory that "[t]he judges move the prosecutors to our advantage far more often than they move us to the prosecutors' advantage."<sup>122</sup>

## II. THE MOTIVES OF BARGAINING TRIAL JUDGES

Although a number of institutional, political and even social pressures may influence trial judges to participate in plea bargaining, the primary reason for the activism of most judges is the need to process large caseloads with seriously inadequate resources.<sup>123</sup> A Chicago trial judge

THE COURT: Certainly. You just got tried and were found guilty.

THE DEFENDANT: Wait a minute. I haven't said a word.

THE COURT: Take him out of here.

THE DEFENDANT: What is this?

The appellate court concluded that the record indicated a "serious breakdown of communications between defendant and his attorney" and reversed the defendant's conviction.

120. Cf. J. EHRlich, *supra* note 109, at 184-86 (within minutes of a defense attorney's refusal to meet with a prosecutor to discuss a plea agreement, the trial judge telephoned and encouraged him to do so; at the resulting conference, the judge described the prosecutor's offer as "very generous indeed, very generous" [emphasis in original]).

Judges may also convey a gentle message in official court publications. See *Instructions of the Arkansas Circuit Courts to Counsel Appointed to Represent Indigent Defendants* in 23 ARK. L. REV. 281, 285-86 n.26 (1969):

(a) Negotiated pleas are neither encouraged or discouraged by this court. They are, however, recognized as an indispensable process in the orderly and efficient transaction of business in the criminal courts.

(c) Appointed counsel (and retained counsel for that matter) should as soon as is practicable after the appointment, and in the proper case, contact the prosecuting attorney's office and negotiate in good faith for a plea agreement and settlement. The prosecuting attorney's office, by the same token, should prepare itself for such negotiations. . . .

121. *The Defense Attorney's Role*, *supra* note 9, at 1237-40.

122. *Id.* at 1238.

123. Cf. Proceedings of the First Sentencing Institute for Superior Court Judges, 45 Cal. Rptr. app. at 108 (1965) (statement of Judge Lewis E. Lercara: "I found out that I can dispose

recalled an Illinois Judicial Conference at which he was approached by a downstate judge. "Do you bargain for guilty pleas in your court?," the downstate judge inquired. "Yes I do," answered the Chicago jurist. "I've always considered bargaining by a trial judge thoroughly improper," said the downstate judge. "How do you justify it?" Without replying directly, the Chicago judge asked his downstate counterpart, "How many cases will you have on your docket when you return to the bench on Monday?" "Four or five," said the downstate judge. "How about you?" "One hundred seventy five," said the Chicago judge, "and that is the answer to your question."<sup>124</sup>

Tasks of production seem to become more enjoyable when they are converted into games. In frontier America there were quilting bees and cornhuskings, and in twentieth century America there is a game that might be called "disposition rate rivalry." A Chicago prosecutor observed, "Around here, a judge's worth is measured by the number of cases that he can move, and it does not seem to matter how he moves them."<sup>125</sup> Chicago defense attorneys reported that judges were so conscious of their statistical records that they commonly greeted each other with the inquiry, "How are your dispositions this month?" According to the defense attorneys, the current state of a judge's "dispositions" had a marked impact on his bargaining policies. A judge who had conducted a prolonged jury trial early in the month usually made favorable offers toward the end of the month in an effort to catch up.<sup>126</sup>

A Chicago prosecutor recalled that he had once been assigned to the courtroom of a newly elected judge. Before this judge took the bench for the first time, he called the prosecutor and public defender into his chambers. The scene was reminiscent of a locker-room conference before the first football game of a new season as the judge said earnestly, "I don't want to be first in dispositions, but for God's sake, don't let me be last!"

of an awful lot of litigation just by indicating that I was going to make some sentences concurrent. . . . It's amazing how much litigation can be disposed of and how much time and expense you can save your county this way.")

124. Cf. A. BLUMBERG, *supra* note 25, at 123: "A Metropolitan Court judge might well ask, 'Did John Marshall or Oliver Wendell Holmes ever have to clear a calendar like mine?'"

125. See *id.* at 50: "It is a basic fact of bureaucratic life that production and production figures are a fetish."

126. See *Bargaining Forced on Courts By the Crush of Defendants*, Chicago Sun Times, May 7, 1971, at 3, 32 ("David B. Selig, a former Assistant State's Attorney, refers to 'bargain day'—the period at month's end when some judges hand out light sentences to spruce-up their case-disposition records"); Simon, *How to Deal Away a Man's Time in Prison*, Chicago Sun Times, Jan. 13, 1975, at 4, 20 (statement of Kent Brody, a Cook County public defender: "When [Judge Richard J.] Fitzgerald was busy with the De Mau Mau case and with the Silas Fletcher case, I got good deals.")

On one occasion, a Chicago trial judge approached a law clerk of Justice Walter V. Schaefer of the Illinois Supreme Court. He quietly escorted the law clerk to the side of the room and said, "Tell me something off the record. Those old boys on the Supreme Court pay pretty close attention to our disposition rates, don't they?" The law clerk replied that he did not think so. To be sure, however, he later repeated the question to Justice Schaefer, who had never before heard the term "disposition rate."

Commentators have noted the "statistics consciousness" of criminal-court judges in many American jurisdictions,<sup>127</sup> and Judge Arthur L. Alarcon of Los Angeles, who reported that he was one of the few judges in that city who refused to participate actively in plea bargaining, observed that his fellow judges invariably subjected him to good-natured kidding on the regular occasions when statistics on the performance of each judge were circulated throughout the courthouse.<sup>128</sup> As Professor Herbert Jacob has noted, however, a judge who leads the others in "dispositions" is also sometimes chided by his colleagues—on the theory that he is a "rate-breaker."<sup>129</sup>

If a judge is not the sort of person who enjoys bragging about his ability to "move cases,"<sup>130</sup> he may suddenly find that judicial statistics have become more than a game. San Francisco defense attorney Benjamin M. Davis observed, "There have been judges who resisted a role in plea bargaining, but when they were confronted with a thousand jury demands, they fell into the pattern."<sup>131</sup> An Oakland public defender recalled a judge who refused to bargain with defense attorneys when he was first assigned to hear criminal cases. According to the defender, this judge was able, energetic and fair-minded, but within a short period of time he was "challenged" seventy-five times under a California procedure that permits a defendant to secure a single substitution of judges on a statement of prejudice on the judge's part without any show of proof.<sup>132</sup> Ultimately, the

127. A report of the Bronx County Bar Association noted that judges were under great pressure to "improve their personal records for quick disposition of cases." N.Y. Times, Mar. 10, 1965, at 51, col. 1. A judge of the New York Criminal Court complained of "pressure to set statistical records in disposing of cases." N.Y. Times, Nov. 4, 1965, at 49, col. 1. *Accord*, Church, *supra* note 61, at 16; Levin, *supra* note 73, at 90; Skolnick, *supra* note 25, at 55.

128. The statistical records of individual judges may also become the subject of newspaper stories. *See, e.g., Judges Keep Barely Ahead in Criminal Court*, Cleveland Plain Dealer, Aug. 8, 1967 ("Official figures for July credit the judges with criminal cases disposed of in this order: Talty, 72; Jackson, 36; Patton, 13; Celebrezze, 11; Whiting, 7; and Marshall, 3.").

129. Remarks of Professor Herbert Jacob, Conference on the Application of Organizational Theory to Trial Courts, Palo Alto, California, August, 1975. *Cf.* Levin, *supra* note 73, at 90-91 ("[J]udges tend to emphasize processing their caseload as an end in itself rather than as a means for achieving other goals. In a manner typical of actors in a complex organization, they seek to 'satisfice' rather than maximize their goals.").

130. *See Criminal Court Pace Quickens; Backlog Cut*, Cleveland Plain Dealer, Apr. 3, 1968:

[During the past three months, Criminal Court Judge Francis J. Talty has handled 527 felony cases in Room 1.] "I'm particularly pleased that we in Room 1 have disposed of more cases between January and March than did the 10 judges during the same term last year," Judge Talty said. . . . "With 10 days left in this term," he said, "it is possible that we could dispose of as many as 1,200 cases."

131. Judges who do not bargain may be confronted with an unusual number of jury demands either because individual defendants refuse to plead guilty before them or because defense attorneys, as a deliberate matter of strategy, seek to "tie up" the judges' courtrooms with lengthy trials in an effort to persuade them to adopt a more liberal approach toward bargaining (or, perhaps, to induce their reassignment to noncriminal cases or to insure that only a small number of defendants come before them). For a discussion of this sort of defense attorney "strike" and the ethical problems that it presents, see *The Defense Attorney's Role*, *supra* note 9, at 1249-53.

132. CAL. CIV. PROC. CODE § 170.6(3) (West Supp. 1976).

judge began to bargain as actively as any other judge on the bench. "I think he still hates himself," the defender commented.

In a tightly organized court, a judge who "falls behind" may be called to the chambers of the presiding judge, and the presiding judge may inform his colleague in forceful terms that he is not carrying his share of the load.<sup>133</sup> In other courts, a judge who fails to attract his share of guilty pleas may quietly be reassigned to hear forcible detainer actions or administer estates. In light of the various pressures that caseloads, litigants, judicial colleagues and judicial superiors are likely to exert, the guilty-plea system usually tends to reduce itself to a common denominator—the actively bargaining judge.

Judges, of course, want to be popular, and the route to courthouse popularity lies in becoming a lenient, bargaining judge.<sup>134</sup> Many of the prosecutors whom I interviewed, and a substantial majority of the defense attorneys, favored active judicial participation in plea bargaining.<sup>135</sup> Some defense attorneys, of course, favored judicial bargaining simply on tactical grounds. They noted that when a judge is willing to bargain, a defense attorney "has two shots at it." He can first negotiate with a prosecutor and then attempt to better the prosecutor's offer by appealing to the judge. Most defense attorneys, however, contended that judicial bargaining served not only the narrow interests of their clients but also the interests of society. "When judges refuse to commit themselves in advance of trial," said Joseph S. Oteri, a Boston defense attorney, "the result is more scheming and maneuvering, not any fundamental change in the nature of the process." Judicial bargaining has the advantages of simplicity and certainty. It provides a definite basis for reliance, and defense attorneys consider that little enough for a defendant to receive in exchange for his constitutional rights.

At a more personal level, lenient, actively bargaining judges are popular among defense attorneys for obvious reasons, and often they are the favorites of the prosecutors as well. The basic reason is that these judges induce a great many defendants to plead guilty and thereby relieve the administrative pressures that beset the prosecutors as forcefully as they beset the judges themselves.<sup>136</sup> Actively bargaining judges also offer prosecutors a different, more comfortable way of life than their more restrained counterparts. "Chamberizing" is a far more relaxed method of

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133. See Skolnick, *supra* note 25, at 55 ("Judges . . . typically exhibit a strong interest in calendar movement. The criminal court judge who allows his calendar to lag will in turn be cautioned by his presiding judge.")

134. Although there is no inherent correlation between a lenient approach toward sentencing and a willingness to participate in plea bargaining, in practice the judges who bargain most actively are usually among the most lenient.

135. See SAN FRANCISCO COMM. ON CRIME, *supra* note 99, at 25.

136. In their active participation in plea bargaining, moreover, the judges assume full responsibility for sentencing and thus relieve the prosecutors of a substantively difficult, emotionally troublesome and politically hazardous burden.

administering justice than its competitors. As Judge Arthur L. Alarcon of Los Angeles observed, "It is easier to sit in an overstuffed chair drinking coffee than to stand in the courtroom trying cases."<sup>137</sup>

### III. A SURVEY OF THE ARGUMENTS AGAINST JUDICIAL PARTICIPATION IN PLEA BARGAINING

#### A. *The Allegedly Coercive Character of Judicial Bargaining*

National study commissions have generally condemned judicial participation in pretrial bargaining;<sup>138</sup> practitioners seem generally to approve the practice; and the courts of review seem almost evenly divided. A large number of these courts have disapproved of judicial plea bargaining<sup>139</sup> while an equal number have refused to set aside guilty pleas induced by this activity.<sup>140</sup> Two leading decisions—*United States ex rel. McGrath v.*

137. Cf. 1 J. STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 442n. (1883) ("It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence."). Those who have objected to the expedient of pressuring a criminal suspect to incriminate himself in an out-of-court confession have often invoked Stephen's imagery to illustrate the laziness that sometimes lies behind this tactic, see e.g., *McNabb v. United States*, 318 U.S. 332, 344 n.8 (1943). Judge Alarcon's statement may deserve to be equally noted now that public officials typically take their shortcuts to conviction in the courthouse rather than the stationhouse.

138. See notes 2-8 *supra*.

139. E.g., *United States v. Gallington*, 488 F.2d 637, 640 (8th Cir. 1973) (dictum), cert. denied, 416 U.S. 907 (1974); *Scott v. United States*, 419 F.2d 264 (D.C. Cir. 1969) (dictum); *Brown v. Beto*, 377 F.2d 950, 957 (5th Cir. 1967) (dictum); *McClure v. Boles*, 233 F. Supp. 928, 931 (N.D. W. Va. 1964) (dictum); *People v. Clark*, 183 Colo. 201, 515 P.2d 1242 (1973); *State v. Byrd*, 203 Kan. 45, 50, 453 P.2d 22, 27 (1969) (dictum); *State v. Johnson*, 279 Minn. 209, 216, 156 N.W.2d 218, 223 (1968) (dictum); *Mesmer v. Raines*, 351 P.2d 1018 (Okla. Crim. App. 1960) (dictum); *Rose v. Gladden*, 248 Or. 520, 525, 433 P.2d 612, 614 (1967) (dictum); *Commonwealth v. Evans*, 434 Pa. 52, 252 A.2d 689 (1969); *State v. Wolfe*, 46 Wis. 2d 478, 487-89, 175 N.W.2d 216, 220-21 (1970) (dictum); N.J. RULES GOVERNING CRIM. PRACT. 3:9-3(a). See *R. v. Turner*, [1970] 2 W.L.R. 1093 (C.A.) (Judge should not indicate prior to trial the sentence that he intends to impose unless he makes clear that this sentence will remain the same whether or not the defendant pleads guilty); *R. v. Barnes*, [1971] Crim. L. R. 117.

Prohibitions of judicial plea bargaining are usually announced in dicta, and these prohibitions are sometimes narrowly construed. See *Commonwealth v. Rothman*, 222 Pa. Super. 385, 294 A.2d 783 (1972) (for trial judge to suggest a compromise between the sentence recommendation offered by the prosecutor and the sentence recommendation sought by the defense attorney does not constitute prohibited participation in plea bargaining).

140. E.g. *United States ex rel. Robinson v. Housewright*, 525 F.2d 988 (7th Cir. 1975); *Brown v. Peyton*, 435 F.2d 1352 (4th Cir. 1970), cert. denied, 406 U.S. 931 (1972); *United States ex rel. Bullock v. Warden*, 408 F.2d 1326 (2d Cir. 1969), cert. denied, 396 U.S. 1043 (1970); *United States ex rel. Rosa v. Follette*, 395 F.2d 721 (2d Cir.), cert. denied, 393 U.S. 892 (1968); *Maxwell v. State*, 106 Ariz. 527, 479 P.2d 412 (1971); *Orman v. Bishop*, 435 S.W.2d 440, 443 (Ark. 1968); *Barker v. State*, 259 So. 2d 200 (Fla. Dist. Ct. App. 1972); *People v. Robinson*, 17 Ill. App. 2d 310, 308 N.E.2d 88 (1974); *State v. Tyler*, 440 S.W.2d 470 (Mo. 1969); *People v. Selikoff*, 35 N.Y.2d 227, 318 N.E.2d 784, 360 N.Y.S.2d 623 (1974), cert. denied, 419 U.S. 1122 (1975); *People v. Montgomery*, 27 N.Y.2d 601, 603, 261 N.E.2d 409, 410, 313 N.Y.S.2d 411, 413 (1970).

Some of the opinions cited above have conceded that judicial plea bargaining is not "the best practice." E.g., *People v. Montgomery*, 27 N.Y.2d 601, 261 N.E.2d 409, 313 N.Y.S.2d 411 (1970). Others have vigorously defended judicial bargaining. E.g., *Orman v. Bishop*, 435 S.W.2d 440 (Ark. 1968) (not only was it proper for the trial judge to threaten a 105-year sentence if the defendant were convicted at trial and to offer a 21-year sentence in exchange for a plea of guilty but a failure by the judge to convey this information "might have been the basis of appropriate criticism").

*LaVallee*<sup>141</sup> and *United States ex rel. Elksnis v. Gilligan*<sup>142</sup>—illustrate the basic disagreement.

*McGrath* brought before the Second Circuit a situation in which the joint efforts of a state trial judge and a defense attorney had successfully induced a plea of guilty. A court reporter recorded what had transpired in the judge's chambers as the judge and the attorney addressed a defendant who had been unwilling—thus far—to sacrifice his right to trial.

Both the judge and the attorney urged the defendant to heed the wise counsel offered by the other. "You have a very able counsel here, one of the best," the judge declared.<sup>143</sup> "Judge, I have worked before your Honor on many occasions. I have been out here and I know the fairness of the Court," the defense attorney added.<sup>144</sup>

When the trial judge reported that he did not "like to give long, long sentences," the defense attorney interjected, "I have advised him, Judge."<sup>145</sup> When the judge referred to the defendant's "chances," the attorney said, "I know he hasn't any, Judge."<sup>146</sup> When the judge mentioned the mandatory minimum sentence for the offense with which the defendant was charged, the attorney quickly observed, "Your hands are tied. Your hands are tied at 15."<sup>147</sup>

In the course of this routine, the trial judge told the defendant that his chances of acquittal were "not too good,"<sup>148</sup> that the plea agreement offered by the prosecutor was a "very, very fair plea,"<sup>149</sup> that if the defendant were convicted by a jury he would be entitled to "no consideration of any kind,"<sup>150</sup> and that the court "might have to send you away for the rest of your life."<sup>151</sup> The judge also remarked that if the defendant were convicted at trial, "you are going to be away until you are an old man. But I emphasize that I am not telling you what to do, son."<sup>152</sup> The judge added that he was willing to give the defendant a fair trial and, of course, that no promises had been made.<sup>153</sup> The defendant, however, decided to plead guilty.

In the Court of Appeals, each of the three judges who considered the case filed a separate opinion. Only Judge Thurgood Marshall was willing to rule on the basis of the record before the court that the defendant's guilty plea had been unfairly obtained. He declared, "Our concept of due process

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141. 319 F.2d 308 (2d Cir. 1963).

142. 256 F. Supp. 244 (S.D.N.Y. 1966).

143. 319 F.2d at 323 (app. to dissenting opinion).

144. *Id.* at 324.

145. *Id.* at 323.

146. *Id.* at 324.

147. *Id.*

148. *Id.* at 323.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.* at 324.

153. *Id.* at 323.

must draw a distinct line between, on the one hand, advice from and 'bargaining' between defense and prosecuting attorneys and, on the other hand, discussions by judges who are ultimately to determine the length of sentence to be imposed."<sup>154</sup>

Neither Judge Irving R. Kaufman nor Judge Henry J. Friendly thought that the record before the court established unfairness of a constitutional dimension in the defendant's conviction.<sup>155</sup> Judge Kaufman seemed to express the basic reasoning of both judges when he said, "The mere explanation to the prisoner of the alternatives before him cannot be viewed as improper coercion on the part of the judge; any coercion sensed by the prisoner may well have emanated from the realities of the situation, wholly apart from what happened in chambers."<sup>156</sup> According to Judge Kaufman, the trial judge's remarks were "merely a fair description of the consequences attendant upon the prisoner's choice of plea, a description which was manifestly essential to an informed decision on the part of the prisoner."<sup>157</sup>

Judge Kaufman's reasoning in *McGrath* contrasts strongly with that of Judge Edward Weinfeld in *Elksnis*. Although *Elksnis* involved a judicial promise that was not honored, Judge Weinfeld's holding was not confined to that situation. His opinion declared, "A guilty plea predicated upon a judge's promise of a definite sentence by its very nature does not qualify as a free and voluntary act."<sup>158</sup> The principal reason for this conclusion was expressed in the following language:

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence.<sup>159</sup>

Judge Weinfeld was not prepared to condemn all plea negotiation. He said, "It may well be . . . that voluntary, as distinguished from coercive, bargaining between the prosecutor and the defendant has been sanctioned

154. *Id.* at 319 (Marshall, J., dissenting).

155. Judge Kaufman voted to afford the defendant an evidentiary hearing at which he would have an opportunity to establish claims that went beyond the record of the conference in the trial judge's chambers. Judge Friendly opposed an evidentiary hearing. *Id.*

156. 319 F.2d at 314.

157. *Id.* Cf. *United States ex rel. Rosa v. Follette*, 395 F.2d 721, 726 (2d Cir.), *cert. denied*, 393 U.S. 892 (1968) ("[The defendant's] real complaint . . . is that [the judge] took more seriously than some commentators feel appropriate the Supreme Court's admonition that a plea must be made only 'after proper advice and with full understanding of the consequences.'").

158. 256 F. Supp. at 254.

159. *Id.*



by propriety and practice—in some measure they deal at arm's length. But this is quite different from approbation of plea bargaining between the judge and the accused, where the disparity of positions is extremely marked."<sup>160</sup>

In Professor Paul Freund's wonderful phrase, the opinions in *McGrath* and *Elksnis* toot the opposite horns of a dilemma. Judge Kaufman's opinion emphasized the traditional requirement that a guilty plea must be understandingly entered; information that a trial judge provides concerning his sentencing practices is likely to be helpful in guiding a defendant's choice. Judge Kaufman's apparent position was that if a defendant is to be penalized for standing trial, at least he should know the score. The petitioner in *McGrath* did not, however, dispute that sensible proposition. He objected to the coercive reality that the trial judge communicated, not to the communication itself. The petitioner was probably grateful for accurate, if painful, information; if our system of criminal justice does in fact keep people in prison until they are "old" simply because they have exercised the right to trial, it is well that they should face this truth. The "realities of the situation" that the trial judge described were, however, largely within his control.<sup>161</sup> Judge Kaufman's conclusion that the defendant should have known the box that he was in plainly evaded the more basic question, whether he should have been there.

Judge Weinfeld's opinion, by contrast, emphasized the traditional requirement that a guilty plea must be entered voluntarily; because the position of the trial judge is so authoritative, information that he provides about his intentions and practices is likely to be coercive. Like Judge Kaufman, Judge Weinfeld did not suggest that the underlying reality of the guilty plea system should be altered. He objected to the communication of this reality in an authoritative—and therefore coercive—way. When defendants are left uninformed, they are in a better position to make a voluntary choice—or perhaps the term "voluntary guess" would be more appropriate.

Neither opinion explicitly recognized the difficult choice with which the guilty plea system has confronted today's judiciary. This system plainly depends for its effectiveness upon the fact that, in Judge Weinfeld's words, a defendant who "stands upon his right to trial and is convicted . . . faces a significantly longer sentence"<sup>162</sup> than a defendant who does not, and in a system with this characteristic, the requirements of voluntariness and un-

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160. *Id.* at 255.

161. The defendant would have faced a mandatory sentence as a recidivist if he had been convicted at trial of the offense initially charged, and to that limited extent, the judge did not control the sentencing alternatives that he described. Statements that the court might send the defendant away for the rest of his life or until he was an old man, that his chances of acquittal were not too good, that he had been offered a very, very fair plea, and that he would be entitled to no consideration of any kind if convicted at trial could not, however, fairly be regarded as descriptions of matters beyond the trial judge's control.

162. 256 F. Supp. at 254.

derstanding will inevitably be in conflict. As Judge Kaufman and Judge Weinfeld defined it, the issue was whether a defendant should be told the terrifying truth about our system of justice by the person in a position to know it best, the trial judge. Neither judge explicitly recognized the unhappy nature of this choice. Under the guilty plea system, the value of a defendant's decision can be limited because it is the product of coercion, or the value of this decision can be limited because it is made in the dark. There can be no escape from this dilemma until the courts are ready to cut through it by eliminating the penalty that defendants currently incur for exercising their constitutional rights.

The foregoing analysis did not dispute the central assumption of the *Elksnis* opinion that judicial bargaining is significantly more authoritative than prosecutorial bargaining; it merely considered whether this characteristic should be regarded as a virtue or a vice. In doing so, it may implicitly have overdramatized the choice between judicial and prosecutorial bargaining. One commentator defended the distinction between prosecutorial and judicial bargaining by saying, "The current immunity of prosecutor bargains from judicial consideration . . . seems well justified because the prosecutor's threat is highly diluted. Not only does he lack the power to sentence, but any influence that he has over sentencing is filtered through the jury and the judge . . ." <sup>163</sup> As a matter of legal theory, these assertions are of course sound. In the world of reality, however, they are nonsense. As this Article has indicated, <sup>164</sup> prosecutorial sentence recommendations are so universally followed that their effect is virtually indistinguishable from that of judicial promises of specific sentences. Moreover, when prosecutors are empowered to reduce and dismiss charges without judicial approval, their authority over the fate of criminal defendants is not "filtered" even in theory. <sup>165</sup>

In 1913, the Georgia Court of Appeals recognized the extent of the

163. Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 176 (1964).

164. See text accompanying notes 20-39 *supra*.

165. See Ferguson, *The Role of the Judge in Plea Bargaining*, 15 CRIM. L.Q. 26, 34-35 (1972); Note, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082, 1085-86 (1967); Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 305 (1972). See also Chalker, *Judicial Myopia, Differential Sentencing and the Guilty Plea—A Constitutional Examination*, 6 AM. CRIM. L. REV. 187, 192 (1968):

Although the prosecutor may not possess the power and prestige of the judge, from the vantage point of the defendant his influence may be more threatening. The prosecutor . . . has various means not available to the judge to exert pressure upon the defendant; *i.e.*, the power to press charges against the accused's family or friends, the power . . . to decide which counts to prosecute, and the power to recommend sentences (which, in those jurisdictions where the judge normally follows the prosecutor's recommendations, is equivalent to the power to fix sentences). Since the "disparity of position," in terms of coercive impact on the defendant, may in many instances be even greater between the prosecutor and the accused than between the judge and the accused, the validity of an absolute distinction between judge and prosecutor inducements on grounds of coercive effect and voluntariness is open to doubt.

prosecutor's power over sentencing in a decision that condemned all forms of plea bargaining:

Now what difference can it make if the hope of reward is engendered by the promise of the State's attorney rather than of the judge. The solicitor is the State's representative; his advice and recommendations are generally followed by the court. Ordinarily a motion to nol. pros. made by him is granted, and so is his advice generally accepted that a plea of guilty be received with a recommendation for a misdemeanor punishment. Prosecuting attorneys usually are able and conscientious public officers, having to a marked degree the confidence of the public and their professional associates. Well nigh any attorney representing one accused of crime would unhesitatingly accept an assurance from the solicitor-general that if a plea of guilty with a recommendation should be entered, the recommendation would be respected by the court.<sup>166</sup>

#### B. *The Danger That a Bargaining Trial Judge Could Not Conduct a Fair Trial After Negotiations Had Broken Down*

Some observers have maintained that when a trial judge participates in plea negotiations, he is likely to "prejudg[e] the case" and "negat[e] in his mind the presumption of innocence with which each criminal trial is supposed to begin."<sup>167</sup> This section will assess the strength of this objection to judicial plea bargaining and consider whether it might be remedied by

166. *Griffin v. State*, 12 Ga. App. 615, 624-25, 77 S.E. 1080, 1085 (1913). *Cf. Shupe v. Sigler*, 230 F. Supp. 601, 606 (D. Neb. 1964) ("Whether the court or the prosecutor makes the threats or promises seems immaterial.").

Although the coercive impact of a prosecutorial promise is not, in itself, significantly different from that of a judicial promise, there is a more limited sense in which a distinction between prosecutorial and judicial plea bargaining can be drawn. One of the factors that influences a defendant's choice of plea is his assessment of the likelihood of acquittal at trial, and a judge is in a better position than a prosecutor to persuade a defendant that this likelihood is small. Donald Conn, Chief of the Trials Division of the Massachusetts Attorney General's Office, commented:

Judicial intervention can be helpful in pretrial discussions simply because many defense attorneys do not know their business. I might tell one of these attorneys, "We are going to bury you at trial"—but the attorney is likely to conclude that I am bluffing. When the two of us go into a judge's lobby for a conference, the attorney may hear the same thing from the judge. Then he usually believes it.

A trial judge can—and should (*see* text accompanying note 216 *infra*)—avoid threatening a defendant with conviction at trial, but an opponent of judicial bargaining might argue that a judge could not participate at all in pretrial negotiations without implying, at least indirectly, a belief in the defendant's guilt. He could argue that even a veiled judicial threat of conviction at trial would have a coercive impact. Without entirely discounting this objection to judicial plea bargaining, one may wonder how forceful it would be in a system in which judges participated in plea negotiations only upon the request of defendants, in which judicial comment upon the probable outcome at trial was proscribed, in which a transcript of the proceedings could be used to test any claim of judicial overreaching, and in which a defendant's trial, if there was one, would occur before a judge other than the judge who conducted the pretrial conference. *See* text accompanying notes 213-23 *infra*; *cf. N. MORRIS, THE FUTURE OF IMPRISONMENT* 54 (1974) (judicial officer should call pretrial conference in every case and discussion should proceed on the assumption that defendant did the prohibited act).

167. Note, *Judicial Plea Bargaining*, *supra* note 165, at 1089; *see United States v. Werker*, 535 F.2d 198, 202 (1976); Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, *supra* note 163, at 180-81.

disqualifying a judge from trying any case in which he had earlier engaged in pretrial bargaining.

Most of the defense attorneys whom I interviewed reported that they did not know the extent to which a judge's participation in plea bargaining would be likely to influence his conduct of a trial, for they had never rejected a trial judge's offer. These attorneys said that when they approached a trial judge in an effort to secure a plea agreement, the decision to enter a plea of guilty had, in essence, been made. Judicial offers were rarely so unreasonable that the attorneys were encouraged to reevaluate their decisions. The experience of these attorneys may suggest that a substitution of judges would not often be necessary even if a defendant were automatically entitled to this remedy when judicial plea negotiations broke down.

A number of attorneys reported, however, that they had occasionally rejected the pretrial offers of bargaining trial judges. With only one exception,<sup>168</sup> they maintained that this action had not significantly affected the conduct of the trial that followed.<sup>169</sup> Chicago defense attorney Sherman Magidson expressed the general consensus when he said, "Of course, when a defense attorney rejects a trial judge's offer, he always demands a jury trial. The judge understands and is quite willing to follow the rules." Other attorneys noted that it was difficult for a judge to "charge out" a jury or to influence the jury's verdict through his legal rulings or his mannerisms even when he wished to do so.

A few attorneys suggested that a judge might fairly conduct even a jury-waived trial after his participation in pretrial bargaining. A Manhattan defense attorney commented, "The presumption of innocence requires only that a judge evaluate each case on the basis of the evidence presented by the prosecutor and that he acquit when this evidence does not establish guilt beyond a reasonable doubt. The ability of a judge to 'play the game' is not necessarily impaired because he has refused to approve an award of probation at a pretrial conference." A Chicago attorney observed, "It is sensible for any defendant, whether guilty or innocent, to find out what kind of bargain may be available. The fact that a defendant has engaged in plea bargaining says nothing at all about his guilt, and any judge with a good sense of reasonable doubt is likely to recognize this fact." In *United States v. Gallington*,<sup>170</sup> the Eighth Circuit ruled that a judge could properly

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168. San Francisco defense attorney Benjamin M. Davis recalled a case in which his client rejected a trial judge's offer and in which the judge then made remarks that "skirted the line of reversible error" throughout the jury trial that followed. Prior to trial, the judge had offered to place the defendant on probation on the condition that he serve three months of his term in the county jail. After the defendant's conviction at trial, the judge sentenced him to a three-year term of imprisonment. Davis contended, however, that this incident was exceptional and that a trial judge's participation in plea bargaining ordinarily does not affect his objectivity at trial.

169. See Madigan, *The Honest Way*, TRIAL, May-June 1973, at 18, 19 n.5.

170. 488 F.2d 637 (8th Cir. 1973), cert. denied, 416 U.S. 907 (1974).

conduct a jury trial after he had rejected a plea agreement approved by the defendant and the prosecutor.<sup>171</sup> Moreover, in *United States v. Walker*,<sup>172</sup> the District of Columbia Circuit upheld a guilty verdict reached by a judge in a jury-waived trial although a prosecutor had told the judge before trial of the defendant's offer to plead guilty.<sup>173</sup>

The effort of Alaska's Attorney General to eliminate prosecutorial plea bargaining in that state has led to increased judicial bargaining.<sup>174</sup> When I recently asked a number of Alaska judges to comment on the danger that this practice might lead to prejudice in the conduct of a trial, most responded that a fastidious concern with judicial objectivity was unrealistic. Said Judge Eban Lewis, "The idea that anyone is going to take a criminal case before a judge whose mind is untainted is absurd." Judge C. J. Occhippinti commented, "When a defendant has been talking about pleading guilty, I must assume that he is guilty, and for him then to plead not guilty indicates a lack of candor. I see no reason why this view should preclude me from presiding at a jury trial, however. Even in the absence of plea bargaining, I know that ninety-nine percent of all defendants are guilty, but I still give them fair trials." Not all observers would find these comments reassuring, but Justice Edmund Burke of the Alaska Supreme Court offered a related and possibly more persuasive argument: "Judges frequently rule on potentially prejudicial matters in advance of trial. They may even suppress evidence that would, if admitted, conclusively establish a defendant's guilt without disqualifying themselves from further participation. A judge's participation in plea bargaining need not be treated differently from other activities that could conceivably give rise to prejudice in the conduct of a trial but that usually do not pose significant problems."<sup>175</sup>

Although the comments of most defense attorneys and most judges suggested that a judge's participation in plea bargaining need not disable him from presiding fairly over a trial, the danger plainly cannot be dis-

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171. The court said that although it would not adopt a per se requirement that a judge disqualify himself from further participation in a case in which he had rejected a plea agreement as too lenient, the judge should "seriously consider" doing so.

172. 473 F.2d 136 (D.C. Cir. 1972).

173. The court observed, "[P]leas of guilty are often offered for reasons other than actual guilt." *Id.* at 138. The court did, however, suggest that it would be better practice in the future for a judge not to try a case without a jury after learning of the defendant's offer to plead guilty. See also *R. v. Chudy*, [1971] 1 W.W.R.(n.s.) 294 (B.C. Sup. Ct. Ch. 1970).

174. Attorney General Avrum M. Gross has recognized that his experiment in the abolition of plea bargaining will not be a success if it leads simply to a substitution of judicial for prosecutorial plea bargaining, and he has sought the assistance of the Alaska Supreme Court in bringing judicial bargaining to an end. Despite a significant increase in judicial bargaining following the Attorney General's reform, it would be far from accurate to conclude that the principal effect of this reform has been to substitute one form of bargaining for another. Moreover, since the time of my interviews in Alaska in June, 1976, the Alaska Supreme Court has apparently ruled that judicial participation in plea bargaining is improper. *State v. Carlson*, 20 CRIM. L. REP. (BNA) 2137 (Alaska, Oct. 15, 1976).

175. Interviews with C. J. Occhippinti, Judge, Superior Court, Anchorage, Alaska, and Edmund Burke, Justice of the Alaska Supreme Court (June 10, 1976); Interview with Eban Lewis, Judge, Superior Court, Anchorage, Alaska (June 14, 1976). See *Withrow v. Larkin*, 421 U.S. 35, 56 (1975).

counted in every case. Whatever the professionalism and objectivity of most judges, a particular judge may view a defendant's participation in plea discussions as an indication of guilt; he may resent a defendant's refusal of an offer that the judge considered generous;<sup>176</sup> and he may be exposed to evidence and allegations during a bargaining session that make it difficult for him to remain impartial. Moreover, defendants and other observers of the criminal courts may have less confidence in a judge's "trained and disciplined judicial intellect"<sup>177</sup> than the judge does himself. To dissipate the doubt about a judge's objectivity that would inevitably arise from his participation in pretrial bargaining, it seems desirable to assign a case to another judge for trial whenever a defendant rejects a judicial offer and enters a plea of not guilty.

Although a substitution of judges may provide a reasonably effective safeguard against the dangers of judicial prejudice, this remedy is not as simple and cost-free as a number of observers seem to assume.<sup>178</sup> The administrative burden involved in arranging a change of judges is likely to be significant in small and single-judge courts in which a substitute judge must usually come from outside the local jurisdiction.<sup>179</sup> More importantly, the reassignment mechanism may easily become a device for judge shopping. Chicago's bargaining trial judges have been alert to this danger and have, accordingly, refused to consider motions for a substitution of judges once a pretrial conference has been held. These judges have recognized that a defense attorney might request a conference in a case that he fully intended to take to trial and might then respond to a "tough" judge's bargaining offer by saying, "I'm sorry, but my client will not consider any offer other than an award of probation. Now, your Honor, in view of the fact that you have participated in plea bargaining, I move that you disqualify yourself and transfer the case to another judge."<sup>180</sup>

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176. See note 157 *supra*.

177. *United States v. Walker*, 473 F.2d 136, 138 (D.C. Cir. 1972).

178. See, e.g., Penegar, *Appraising the System of Criminal Law, Its Processes and Administration*, 47 N.C. L. REV. 69, 123 (1968); Underwood, *Let's Put Plea Discussions— and Agreements—On Record*, 1 LOY. CHI. L.J. 1, 4 (1970).

179. The force of this objection to a judge-substitution requirement should not, however, be overstated. When the judge of a single-judge court truly senses a conflict of interest in a case before him, it is usually not difficult to arrange a change of judges. Indeed, a remote financial interest in a civil case (such as ownership of one or two shares of stock in a corporate litigant) would unquestionably justify the administrative burden involved in securing the services of a substitute judge from an adjacent judicial district.

In *United States v. Werker*, 535 F.2d 198, 204 (2d Cir. 1976), the court noted the likelihood of delay and of inconvenience to numerous parties if a judge disqualified himself following plea negotiations with one of the several co-defendants.

180. In Illinois as in California, see note 132 *supra*, a defendant may secure a single substitution of judges without showing cause. ILL. REV. STAT. ch. 38, § 114-5 (1973). Thus, if a defendant's case were assigned to a relatively harsh judge initially, he might secure an automatic reassignment by invoking the statutory "challenge"; then, if the defendant were dissatisfied with the judge who appeared on the second roll of the dice, he could secure another reassignment by using the tactic described in the text. It might, of course, be simpler just to permit the defendant to select whomever he regarded as the most lenient judge on the court, at least in a three-judge court.

An automatic substitution of judges when judicial plea negotiations have broken down might lead not only to judge-shopping in cases plainly headed for trial but also to offer-shopping in guilty plea cases. In theory, of course, a defendant would not be permitted to bargain with more than one judge. Moreover, an effort would probably be made to prevent the defendant from circumventing the sentencing policies of the initially assigned judge by entering a guilty plea without an express bargain before a second judge. Specifically, the substitute judge would probably be expected to return the case to the judge who had conducted the initial conference if the defendant offered a guilty plea at a later stage of the proceedings.<sup>181</sup>

In practice, however, some judges might be reluctant to incur the delay and administrative burden incident to a reassignment to the initial judge when a case might be "wound up in two minutes right here." Moreover, at least a few judges might make "exceptions" to the policy against further bargaining after a change of judges. A defense attorney might, for example, approach a substitute judge informally and indicate that the defendant was not truly eager for a trial. The judge might respond, at least to himself, "I'm not going to spend three days trying this case simply because Judge Stiffneck refused to make a reasonable offer." When a defendant is willing to plead guilty before one judge but not another, the favored judge may easily conclude that the virtue of "saving the state a trial" exceeds that of controlling the defense attorney's shopping practices.

If serious efforts were made to prevent a substitute judge from accepting a plea of guilty, it might be necessary for the defense attorney to resort to a "slow plea"—a brief jury-waived trial in which guilt is not truly contested. Usually, however, the substitute judge would probably be able to accept an undisguised plea of guilty without criticism and without attracting attention. A number of the large urban courts that I visited had, on one or more occasions, designated a single judge to receive all pleas of guilty. This reform had usually been abandoned after it became apparent that as many guilty pleas were being entered in the "trial" courtrooms as in the "guilty plea" courtroom. Rather than limit the judge-shopping practices of defense attorneys, the designation of a single "guilty plea judge" had given the attorneys another option. In light of the apparent willingness of some judges to accept a guilty plea whenever and wherever it is offered, a right to a substitution of judges when judicial plea negotiations break down might lend itself to offer-shopping. If, however, one is seriously concerned about the danger of judicial prejudice, the risk is probably worth running.

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181. If this policy were effective, it might occasionally result in unnecessary trials. A defendant without a substantial defense might be willing to plead guilty before either Judge A or Judge B if he had no way of escaping the initial assignment. If, however, his case could be assigned to Judge B, a lenient judge, for trial but for no other purpose (that is, if the case would automatically be returned to Judge A should the defendant offer to plead guilty), he might well find it advantageous to insist upon a trial.

The efficacy of a substitution of judges has been questioned by the American Bar Association Project on Standards for Criminal Justice on the ground that the judge who ultimately tried the case would undoubtedly know that the defendant had declined a plea agreement tendered by another judge.<sup>182</sup> A trial judge, however, may transfer a case to another judge for a variety of reasons, and contrary to the ABA's assertion, a substitute judge need not know why a particular case has been assigned to him.<sup>183</sup> In light of the casual atmosphere that prevails in most courthouses, the substitute judge might, of course, learn the reason for his predecessor's disqualification informally. In the same way, a trial judge might learn informally that a defendant had engaged in pretrial bargaining with a prosecutor.<sup>184</sup> Extra-record communication of the fact that a defendant has engaged in plea bargaining may be prejudicial, but the danger is not posed exclusively by judicial plea bargaining.

The bargaining procedures proposed by the ABA Standards themselves present a similar problem. These Standards permit a defendant and a prosecutor to enter a "tentative plea agreement . . . which contemplates entry of a plea of guilty . . . in the expectation . . . that sentence concessions will be granted." They then authorize the trial judge to

permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. [The judge] may . . . indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him.<sup>185</sup>

The Standards do not provide that a trial judge must disqualify himself from presiding at a trial if he disapproves a plea agreement that the defendant and a prosecutor have submitted (or, indeed, if he rejects a guilty

182. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.3, comment at 74 (1968).

183. Perhaps it would be necessary to inform the substitute judge of the reason for the change of judges if he were expected to limit his actions in light of what had gone before (for example, if he were expected to return the case to the initially assigned judge should the defendant offer to plead guilty). See text accompanying note 181 *supra*. It is conceivable, however, that a judge might not be informed of unusual limitations on his authority at the time that a case is transferred. It might instead be the responsibility of the prosecutor and defense attorney to advise the judge of these limitations if and when they became applicable (for example, if the defendant did in fact abandon his demand for a trial and offer to plead guilty).

184. Indeed, a judge might well know that a defense attorney had bargained with a prosecutor because he had passed the defendant's case at a docket call to facilitate this bargaining, because he had granted a continuance for that very purpose, or because he had walked by the prosecutor and defense attorney as they were negotiating in a courthouse corridor. The American Bar Association's *Standards Relating to the Function of the Trial Judge* even permit the trial judge to "inquire of [the parties] whether the possibility of disposition without trial has been explored." ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1(a), comment at 53 (1972). In some courts, moreover, extra-record communication with trial judges is commonplace, and a judge may know, not only whether plea bargaining has occurred in a particular case, but the status of any negotiations at the time that they were discontinued. If judicial knowledge that a defendant has engaged in plea bargaining is prejudicial, the guilty plea system plainly requires more sweeping reform than the ABA Standards have proposed.

185. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(b) (1968).



plea for any of the various reasons that the Standards permit). Surely, however, if the fact that a defendant has engaged in tentative plea negotiations with a trial judge is prejudicial, the fact that he has offered unequivocally to plead guilty is even more so. At the very least, under the ABA's reasoning, a judge who disapproves a prosecutorial plea agreement should be required to transfer the case to another judge for trial. Then, however, the danger would arise that the substitute judge might learn why the case had been assigned to him. In short, the likelihood of judicial prejudice argues as much against the "ratification" procedure that the ABA approved as it does against more direct forms of judicial plea bargaining.

C. *The Danger That a Bargaining Trial Judge Could Not Fairly Rule on the Voluntariness of a Guilty Plea That He Had Helped to Induce*

In the *Elksnis* opinion, Judge Weinfeld condemned judicial plea bargaining not only on the ground that it was inherently coercive but also because

a bargain agreement between a judge and a defendant . . . . impairs the judge's objectivity in passing upon the voluntariness of the plea when offered. As a party to the arrangement upon which the plea is based, he is hardly in a position to discharge his function of deciding the validity of the plea—a function not satisfied by routine inquiry, but only, as the Supreme Court has stressed, by "a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered."<sup>186</sup>

So long as caseload pressures are substantial, however, and so long as "most trial judges look for guilty pleas the way that salesmen look for orders,"<sup>187</sup> it seems doubtful that many judges will in fact conduct the kind of "penetrating and comprehensive examination" that Judge Weinfeld contemplated.<sup>188</sup> Those who do, moreover, will find their ability to police the bargaining process substantially limited by the nonadversary character of post-plea inquiries. The pressures that lead a defendant to submit a plea of guilty also lead him to seek the court's acceptance of this plea, and the more extreme and coercive these pressures, the more anxious the defendant usually is to have his guilty plea upheld. As the *Yale Law Journal* has

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186. United States *ex rel.* *Elksnis v. Gilligan*, 256 F. Supp. 244, 255 (S.D.N.Y. 1966) (quoting *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (plurality opinion)).

187. See text accompanying note 120 *supra*.

188. Even judges who do take the plea acceptance process seriously and who question guilty plea defendants at length typically follow a set catechism in their examinations. A judge's ability to ask a standard set of questions and to determine whether a defendant has given "appropriate" answers need not be significantly reduced by his participation in pretrial bargaining.

observed, because the defendant and the prosecutor "have a joint commitment to the success of the plea bargain they have shaped," both "seek to present to the judge a facade of scrupulous regularity."<sup>189</sup> In light of these considerations, and in light of the fact that the guilty-plea decisions of the United States Supreme Court rarely authorize a finding of involuntariness in any event,<sup>190</sup> a trial court's inquiry into voluntariness almost invariably becomes an idle ritual.<sup>191</sup>

From my perspective, it would be wasteful to require a judge other than the judge who had conducted a pretrial conference to perform the rote ceremony that typically precedes the acceptance of a plea of guilty. Review by a judge not involved in the bargaining process should be required only if the defendant later moved to withdraw his guilty plea or if he challenged the plea's validity in a post-conviction proceeding, in which event a transcript of the pretrial conference should be available to facilitate an independent determination of voluntariness. To require a second judge to conduct the basic post-plea inquiry would be especially unnecessary if the initially assigned judge had not been left to his own devices in determining what pressures to exert during the pretrial conference but if, instead, his role had been defined and limited in the manner that this Article will suggest.<sup>192</sup> Guidelines that expressly prohibit certain forms of judicial bargaining<sup>193</sup> might do more to protect defendants from judicial overreaching than a formal post-plea inquiry by an "untainted" judge.

If, however, contrary to the view that I have advanced, one regards today's plea-acceptance procedures as an important safeguard, their effectiveness can be preserved without forbidding judicial plea bargaining. The transfer of a case to a second judge after a plea agreement had been entered would not present the dangers of offer-shopping that an earlier transfer might involve, and it would therefore be easy enough to require a judge who had not been involved in the bargaining process to conduct the necessary inquiry.<sup>194</sup>

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189. Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 307 n.68 (1972). *Accord*, Note, *Judicial Plea Bargaining*, *supra* note 165, at 1088.

190. Note, *Restructuring the Plea Bargain*, *supra* note 189, at 307. See especially *Brady v. United States*, 397 U.S. 742 (1970), and the discussion of this case in *The Supreme Court and the Guilty Plea*, *supra* note 9, at 48-71.

191. This thesis will be more fully developed in *The Trial Judge's Role in Plea Bargaining, Part II*. Of course plea-acceptance procedures are intended to serve functions other than that of determining the voluntariness of a guilty plea, but it has apparently not been suggested that a trial judge's participation in plea bargaining would disable him from performing such tasks as determining whether a defendant understands the elements of the crime to which he is pleading guilty and advising him that, by entering his guilty plea, he waives the right to jury trial and other associated rights.

192. See text accompanying notes 215-37 *infra*.

193. Coupled, of course, with the availability of an authoritative transcript and the prospect of enforcement in a judicial proceeding should the defendant seek to have his guilty plea set aside.

194. See Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387, 1392 (1970).

D. *The Tension Between Judicial Plea Bargaining and the Effective Use of a Presentence Report*

The American Bar Association Project on Standards for Criminal Justice has contended, “[J]udicial participation [in pretrial bargaining] to the extent of promising a certain sentence is inconsistent with the theory behind the use of the presentence investigation report.”<sup>195</sup> The ABA would, however, permit prosecutorial plea bargaining (which typically proceeds without the information that a presentence report would develop), and it would permit a judge to “indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him.”<sup>196</sup>

As the ABA sees it, the “theory behind the use of the presentence investigation report” is apparently quite limited. After ratifying a prosecutorial plea agreement, a judge is expected to use this report only to determine whether it is “consistent with the representations made to him.” The report, in other words, merely provides a check against the possibility that a prosecutor, defendant or defense attorney has not told the truth to the court.

A judge’s pretrial agreement, whatever its form, certainly should not be binding if induced by a defendant’s or an attorney’s misrepresentation. Even when a judge has gone “to the extent of promising a certain sentence,” he should be able to escape a bargain induced by deception. The need to qualify a judge’s pretrial commitment has no bearing whatever, however, on the choice between judicial plea bargaining and the “ratification” procedure that the ABA has endorsed. Were a judge to make a direct promise to a criminal defendant with the qualification that information in the presentence report must be “consistent with the representations made to him,” the report would serve the same function that it would serve under the ABA’s proposal. It would test whether the court had been told the truth and nothing more. In the same way, if a judge were to ratify a prosecutorial bargain without adding the expected qualification, his action would, under the ABA’s analysis, be “inconsistent with the theory behind the use of the presentence investigation report.”

Many bargaining trial judges apparently share the ABA’s narrow view of the presentence report and qualify their offers to defendants only by insisting that the presentence report must confirm certain facts that attorneys have reported. Other judges take a somewhat broader view and reserve the power to revise the sentences that they have tentatively ap-

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195. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.3, comment at 73 (1968).

196. *Id.* § 3.3(b).

proved if a presentence report indicates that these sentences are inappropriate for any reason. The judges who adopt this view seem to recognize, as the ABA apparently does not, that even when a presentence report does not call an attorney's factual representations into question, it may develop new information that bears on the determination of sentence. Under this slightly broader theory, the apparent function of the presentence report is to determine whether a judge's pretrial guess as to the appropriate sentence happened to fall within the bounds of reason.

There is of course still another view of the proper use of a presentence report. The purpose of this report might be to guide a judge in his careful determination of a defendant's sentence. The ability of a presentence report to perform this function is necessarily impaired by any bargaining that has occurred before the report has been filed, whether this bargaining has been conducted by prosecutors or by trial judges. An uninformed, tentative agreement has behind it, not only the force of inertia, but the force of important expectations that a sensitive jurist should be reluctant to disappoint. Pretrial bargaining biases the determination of a defendant's sentence before information relevant to this determination has been gathered, and all bargaining conducted in ignorance of the information that a presentence report would develop is therefore "inconsistent with the theory behind the use of the presentence investigation report."

Although plea negotiations usually tend to convert presentence investigations and sentencing hearings into "pious gestures designed to ratify foreordained results,"<sup>197</sup> a possible solution to the problem lies in ordering the preparation of a presentence report prior to the initiation of plea bargaining. A number of jurisdictions have, in fact, authorized trial judges to do so,<sup>198</sup> and in my view, this reform of the bargaining process is desirable. Nevertheless, the preparation of a presentence report prior to a determination of guilt does pose significant dangers,<sup>199</sup> and the contents of

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197. *The Defense Attorney's Role*, *supra* note 9, at 1216 n.108.

198. My interviews did not focus on this issue as specifically as they should have, and in an effort to remedy the defect, my research assistant, John McGraine, a student at the Georgetown University Law Center, telephoned prosecutors and adult probation officers in the cities where I had conducted my interviews. He reported that the preparation of a presentence report for use in the plea bargaining process was unusual in all of these jurisdictions but that this procedure was employed often enough to be noticeable in Manhattan, Chicago and Houston. The procedure was theoretically available, although essentially unused, in Philadelphia, Los Angeles, Oakland and San Francisco, and it was unheard of in Boston, Cleveland and Pittsburgh.

199. See FED. R. CRIM. P. 32(c)(1) (forbidding the disclosure of a presentence report to the court prior to a determination of guilt); *Gregg v. United States*, 394 U.S. 489, 492 (1969) (Rule 32 "must not be taken lightly. Presentence reports . . . may rest on hearsay and contain information bearing no relation whatever to the crime with which the defendant is charged."). In some federal districts, presentence investigations are undertaken before trial, but defendants in these districts are advised that information obtained during the investigations will not be released to anyone outside the probation department prior to a determination of guilt. Note, *The Presentence Report: An Empirical Study of Its Use in the Federal Correctional Process*, 58 GEO. L.J. 451, 468 (1970). Although Rule 32 merely forbids disclosure to the court, pretrial disclosure of the results of a presentence investigation to a prosecutor's office or to a police agency may also result in substantial prejudice. See *id.* at 469-70.

a pre-negotiation, presentence report should therefore be carefully circumscribed.

Specifically, although an interview with the defendant is typically part of a presentence investigation, this interview seems inappropriate when the defendant has not yet finally decided whether to stand trial. Indeed, absent rigorous safeguards to insure against even the indirect use of a defendant's statements at trial, it would violate the privilege against self-incrimination to require him to answer questions about his alleged crime at this early stage of the proceedings.<sup>200</sup>

To foreclose the customary presentence inquiries into a defendant's outlook and attitudes might, however, be a relatively minor cost; one suspects that these inquiries provide opportunities for theatrical manipulation by defendants as often as they serve their intended purpose. At the same time, investigation of the facts of an alleged crime would also be substantially impeded by precluding any questioning of the defendant. A person accused of crime cannot fairly be expected to reveal even factual circumstances that might establish a defense or that might favor a lenient sentence at a time when his statements, or those of his attorney, could aid the prosecutor to establish the state's case-in-chief. Evidence that supports a lenient sentence is very often incriminating. For example, proof that the victim of an assault had severely provoked the defendant seems to argue for leniency at the same time that it establishes a motive for the crime, and proof that a reluctant defendant was lured into a criminal act by a beguiling associate does seem to establish that he did it.<sup>201</sup> For this reason, informa-

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200. Of course a presentence report might be prepared before trial only upon the defendant's request, or the defendant might be permitted to refuse to answer specific questions posed by a probation officer. A defendant who did seek preparation of the presentence report and who did answer the probation officer's questions, however, would undoubtedly have done so only to obtain the benefits associated with a plea agreement. A significant fifth-amendment problem would therefore remain. Although its rulings on this issue may be inconsistent with the continued existence of plea bargaining itself, see *The Supreme Court and the Guilty Plea*, *supra* note 9, at 59-65, 68-69, the Supreme Court has indicated that the availability of a governmental benefit cannot ordinarily be conditioned upon a waiver of the privilege against self-incrimination. See *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Uniformed Sanitationmen v. Sanitation Comm'r*, 392 U.S. 280 (1968); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Garrity v. New Jersey*, 385 U.S. 493 (1967); *Spevack v. Klein*, 385 U.S. 511 (1967). *But cf.* *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

201. The risk of self-incrimination may be less apparent when a defendant is induced to disclose evidence that tends to establish a legal defense: if this evidence has the effect that the defendant desires, it will plainly be exculpatory rather than incriminating. Nevertheless, if a homicide defendant were to reveal the name of a witness who he believed would support his claim of self-defense, he would ordinarily also supply the name of a witness who could testify to his presence at the scene of the crime, to his commission of the homicidal act, and perhaps even to the existence of other eyewitnesses who would deny that he acted in self-defense. It is conceivable that this sort of disclosure by a defendant might enable a prosecutor to present a *prima facie* case when the defendant would otherwise be entitled to a directed verdict, and a disclosure that has this effect must certainly be regarded as incriminating.

As I read it, *Williams v. Florida*, 399 U.S. 78 (1970), is consistent with the view that a defendant cannot constitutionally be pressured or required to supply a prosecutor with information likely to aid him in establishing the state's case-in-chief. *Williams* upheld a Florida discovery rule that required a defendant to reveal before trial the names of any alibi witnesses whom he intended to call. The chance that a defendant's alibi witnesses would supply the

tion that can properly be elicited from a defendant after his conviction cannot properly be elicited from him earlier. The sensible procedure is the traditional one of requiring the prosecutor to establish guilt before confronting the problem of sentencing. That plea negotiation circumvents this straightforward procedure and collapses the adjudicative and sentencing functions into one is simply an unavoidable defect of the process.

Under our current system of criminal justice, if information relevant to sentencing is not gathered before plea negotiations begin, it is unlikely to be used effectively; if, however, this information is gathered from the defendant before trial, it may be used against him improperly.<sup>202</sup> Although a presentence report should indeed be made available prior to the initiation of plea bargaining, its contents should be severely limited. The determination of sentence on the basis of incomplete information is therefore a cost that even a substantially reformed system of plea bargaining would involve.

### E. *The Unseemliness of Judicial Plea Bargaining*

A commentator once argued:

A valid reason for distinguishing judicial from prosecutorial bargaining relates to the prestige and dignity of the judicial system. There is . . . a need both to protect the dignity of the judge per se—he should not be an advocate, but rather a symbol of even-handed justice—and to preserve respect for the entire legal process. Toleration of a procedure which leads defendants to think of the judge as just one more official to be “bought off” is clearly not conducive to respect for law.<sup>203</sup>

Underlying this argument is the unstated recognition that plea bargaining itself is unseemly. Some observers apparently find it less disturbing

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prosecutor with leads helpful in establishing his case-in-chief is more than a little remote, and the compelled pretrial disclosure of the identity of an alibi witness therefore seems very different from the compelled disclosure of a witness to the defendant's alleged criminal act. Moreover, *Williams* upheld a requirement of pretrial disclosure only when the defendant was virtually certain to present at trial the evidence that he was required to disclose; in the Supreme Court's view, only the timing of the defense disclosures was affected, not their content. A procedure that induced a defendant to reveal arguably exculpatory evidence before he knew the state's evidence and before he had an effective opportunity to determine his trial strategy would therefore present a different problem.

202. The plea bargaining process poses this dilemma even when a presentence report is not prepared before trial. A defendant or his attorney must decide whether to reveal mitigating but substantially incriminating circumstances during the plea negotiations themselves. The defendant and defense attorney are likely to understand (and indeed the law is likely to provide) that statements made during a bargaining session cannot be received in evidence. See, e.g., FED. R. CRIM. P. 11(e)(6). Nevertheless, the elaborate precautions often taken against use of the “fruit” of tainted evidence (for example, the conduct of a trial by a prosecutor who has not been exposed to this evidence and whose trial tactics could apparently not be influenced by it) seem very unlikely to be invoked. If a defendant who had engaged in pretrial bargaining were entitled to a hearing to determine whether statements made during the negotiations had led indirectly to evidence introduced at trial, his trial might become as complicated and prolonged as trials commonly are today when defendants have been the victims of unlawful electronic surveillance. In this situation at least, the plea negotiation process would not conserve resources.

203. Note, *Judicial Plea Bargaining*, *supra* note 165, at 1089. See *United States v. Werker*, 535 F.2d 198, 203 (2d Cir. 1976).

for a defendant to think of the prosecutor as "just one more official to be 'bought off'" than for him to think of the trial judge in the same unpleasant terms. Although this concern for judicial dignity is undoubtedly appropriate, it may be better for judges to administer our system of justice—however indecorous that system is—than for them to leave the task to prosecutors. As this Article has indicated,<sup>204</sup> a regime of prosecutorial plea bargaining cannot be successful unless judges substantially abdicate their power, and the institution of prosecutorial plea bargaining may therefore lead defendants to remark, "[A] judge really ain't shit, you know. . . . [H]e's supposed to be the head of the show but he ain't nothing."<sup>205</sup> A bargaining structure that has this effect plainly should not be defended on the ground that it conveys a reassuring picture of the judiciary.<sup>206</sup>

#### F. *Some Additional Thoughts on the ABA's "Ratification" Procedure*

Although, as this Article has noted, the American Bar Association's *Standards Relating to Pleas of Guilty* forbid judicial participation in plea negotiations,<sup>207</sup> they also authorize the judge to indicate his tentative approval of a prosecutorial plea agreement before the defendant has submitted a plea of guilty.<sup>208</sup> If the judge concludes that the sentence contemplated by the plea agreement is too lenient, of course the defendant may demand a trial; if, however, the judge approves the agreement, the defendant has effective assurance that specified concessions will in fact follow his plea.<sup>209</sup> A number of commentators—some of them emphasizing that a prosecutor and defense attorney may submit a series of plea agreements until one meets with judicial approval—have argued that the ABA's "ratification" procedure is essentially an exercise in indirection. They maintain that this procedure is indistinguishable in effect from direct pretrial bargaining between a trial judge and a defense attorney.<sup>210</sup>

204. See text accompanying notes 15-29 *supra*.

205. See text at note 27 *supra*.

206. In the words of Dean Norval Morris, "The judiciary seems more interested in protecting its trailing robes from the dirt of the marketplace than in overturning the tables or regulating the trade." N. MORRIS, *supra* note 166, at 51-52.

207. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) (1968).

208. *Id.* § 3.3(b).

209. Of course the judge may withdraw his ratification of the plea agreement if "the information in the presentence report is [in]consistent with the representations made to him." *Id.* When a judge exercises this option, the ABA Standards, as revised prior to their final approval by the ABA House of Delegates, require that the judge afford the defendant an opportunity to withdraw his plea of guilty. *Id.* See ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1(c)(iii) & comment at 56-57 (1972).

210. Some of the commentators advance this argument to show that, like judicial "ratification," judicial plea bargaining should be considered an acceptable practice. *Brown v. Peyton*, 435 F.2d 1352, 1356 (4th Cir. 1970), *cert. denied*, 406 U.S. 931 (1972); *People v. Robinson*, 17 Ill. App. 3d 310, 312, 308 N.E.2d 88, 90 (1974). Others advance the argument to show that, like direct judicial bargaining, judicial "ratification" should not be permitted. *Scott v. United States*, 419 F.2d 264, 280 (D.C. Cir. 1969) (Wright, J., concurring); *Ferguson, The Role of the Judge in Plea Bargaining*, 15 CRIM. L.Q. 26, 44-47 (1972); *Heberling, Judicial Review of the Guilty Plea*, 7 LINCOLN L. REV. 137, 197 (1972).

If one accepts the view that judicial inducements are inherently more coercive than prosecutorial inducements, however, a distinction between the two procedures seems clear. Under a "ratification" procedure, the trial judge takes no part in persuading the defendant that it will be to his advantage to plead guilty in exchange for specified concessions. Instead, the defendant must have decided that he wishes to plead guilty in exchange for these concessions (and the prosecutor must have agreed that the concessions should be granted) before either party may approach the trial judge. The judge's role is indeed to "ratify" a bargain already approved by the defendant rather than to "induce" his approval, and even if the parties were to submit a number of plea agreements before the trial judge found one to his liking, the defendant would have made an unequivocal decision about the merits of each agreement before calling upon the trial judge to make his own decision.<sup>211</sup>

Although, from the ABA's perspective, judicial "ratification" is less coercive than direct judicial "plea bargaining," from another perspective this procedure is plainly less advantageous to defendants. Under the procedure favored by the ABA, a defendant may not seek concessions from a trial judge until these concessions have been approved by a prosecutor, and a reluctant prosecutor can therefore prevent a judge from offering concessions that he might otherwise have been willing to provide (and can even prevent the judge from exerting a moderating influence on the prosecutor himself). Under a "ratification" procedure, the prosecutor retains the power to shape whatever plea agreement the defendant may ultimately enter, and although the judge may veto an agreement acceptable to the prosecutor, the prosecutor has an equal power to preclude an agreement acceptable to the judge. Under the ABA Standards, the more severe of two state officers—the prosecutor and the trial judge—can automatically prevail over the less severe in determining what benefits a defendant will be offered in exchange for his plea of guilty.

The ABA's "ratification" procedure is functionally similar to that of permitting a defendant to withdraw his plea of guilty when a trial judge

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211. Technically, because the defendant would not formally have submitted a plea of guilty at the time that he and the prosecutor sought the trial judge's "ratification," he might still demand a trial after he, the prosecutor and the trial judge had approved a particular plea agreement. For that reason, it might seem a bit more orderly for the judge to make his decision *after* the defendant had submitted his guilty plea and for him then to permit the defendant to withdraw his plea if the court failed to approve the plea agreement that he had entered.

Although either a "ratification" or a "plea withdrawal" procedure would serve the ABA's objectives, it seems doubtful that anyone would have criticized a "plea withdrawal" procedure on the ground that it is functionally indistinguishable from direct judicial plea bargaining. Only the fact that, under the ABA Standards, judicial ratification occurs before the formal submission of a guilty plea has led some observers to see in this practice a dubious form of judicial bargaining. A defendant, however, would have no apparent reason to express his approval of a plea agreement that was not in fact acceptable to him; realistically, under the ABA's proposal, the defendant will have made a decision that a particular plea agreement is acceptable before the trial judge takes part in the bargaining process.



refuses to follow a prosecutorial sentence recommendation.<sup>212</sup> Either procedure reduces the chance that a sudden assertion of judicial power will defeat reasonable expectations of leniency induced by a prosecutorial promise. For this reason, a "ratification" procedure seems preferable to a procedure that binds a defendant to his guilty plea while binding the trial judge not at all. However, as the following section of this Article will indicate, this procedure does not go far enough.

#### IV. TOWARD A LESS NONSENSICAL SYSTEM OF PLEA BARGAINING

From the perspective of a person who regards the practice of plea bargaining as deeply and inherently unjust, the question whether prosecutors or trial judges should control the bargaining process may have much the same flavor as the question whether, if our system of criminal justice were unalterably committed to use of the third degree, the necessary brutality should be inflicted by police chiefs or by patrolmen.<sup>213</sup> Discussion of "reform" of the plea bargaining process, of which discussion of the trial judge's role is typically a part, is likely to sound almost surrealistic to a person who considers plea bargaining itself corrupt—rather like discussion of whether a club should be cloaked in velvet and, if so, of what color.<sup>214</sup>

Plea negotiation will probably remain a central feature of the American criminal justice system for the foreseeable future, however, and some who have patiently examined my own criticisms of the guilty plea system and found them "interesting" have suggested that anyone who has spent as much time as I have in the study of this system ought to offer some proposals for "workable" reform. I have therefore decided to offer some thoughts on how an "ideal" system of plea bargaining might be structured—with the caveat that advice from a nonbeliever on questions of liturgy may not be worth very much.

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212. Under both procedures, the defendant makes a tentative offer to plead guilty, and the judge responds by approving or disapproving a plea agreement that the defendant and the prosecutor have entered. Labels aside, the only difference between the two procedures is that a defendant is technically free, under the ABA's "ratification" procedure, to plead not guilty even after the trial judge has approved the tentative plea agreement. See note 211 *supra*.

It should be emphasized that the ABA's *Standards Relating to Pleas of Guilty* merely authorize a trial judge to indicate whether he will approve or disapprove a particular plea agreement; they do not require him to employ this "ratification" procedure. *But cf.* ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1(c)(iii) (1972) (supplementing the "ratification" procedure of the *Guilty Plea Standards* by giving the defendant an unqualified right to withdraw his guilty plea when a trial judge "determines not to grant the charge or sentence concessions contemplated by" a plea agreement).

213. *Cf.* Haller, *Historical Roots of Police Behavior: Chicago, 1890-1925*, 10 LAW & SOC'Y REV. 303, 319 (1976) ("Representatives of the State's Attorney, to say nothing of the police chief or other high officers, were sometimes present while the third degree was being administered.").

214. Compare the statement of Mayor Carter H. Harrison, II, of Chicago: "I don't believe in closing saloons on Sunday. I do believe in lowering the blinds and closing the front doors." *Id.* at 314.

A. *Trial Judges Rather Than Prosecutors Should Assume the Dominant Role in Plea Bargaining; Judges Should Not, However, Initiate the Bargaining Process or Adopt an Adversary Posture Toward Defendants*

This Article has not, to this point, criticized the customary formulation of the central issue that it addresses—whether trial judges should “participate in plea bargaining.” The word “bargain,” however suggests the use of a broad range of persuasive techniques. One who “bargains” may strive to convince an opposing party to adopt a position advantageous to him by arguing, pleading, haggling, and cajoling; by asserting a position other than his true position for effect; and, of course, by revising his negotiating position at strategic moments while encouraging his opponent to revise his own position even more substantially. The closer the outcome of the bargaining process to the position that would best advance this party’s selfish interests, the better the bargain that he has struck. The connotations of the word “bargain” naturally suggest to some observers that a trial judge could not participate in plea bargaining without becoming a defendant’s adversary.<sup>215</sup>

In proposing that trial judges assume the dominant role in plea bargaining, however, I do not suggest that they should adopt an adversary posture toward defendants. I do not suggest that they should bargain in the same way that sellers of soybeans bargain or, indeed, that they should employ the bargaining techniques that prosecutors customarily employ today. It should not be a judge’s function to threaten a defendant with conviction at trial or to comment before trial on the strength or character of the evidence; it should not be his function to propose informal remedies not authorized by criminal statutes; and it certainly should not be his function to bluff, cajole or browbeat a defendant.<sup>216</sup> Just as a trial judge should not assume the role of an aggressive prosecutor, moreover, he should not assume the role of a defense attorney by offering paternalistic advice to a defendant, however well-intentioned. A guilty plea induced by activist judicial bargaining of this sort should indeed be set aside.

A trial judge also should not initiate the plea negotiation process.<sup>217</sup> For a judge to raise the prospect that a particular defendant might plead guilty would be likely to indicate a judicial preference that he do so—at least to a defendant willing to read between the lines. Even this possibly unintended persuasion would be inconsistent with a trial judge’s obligation of impartiality.

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215. *E.g.*, *United States v. Werker*, 535 F.2d 198, 202-03 (2d Cir. 1976); *Ferguson*, *supra* note 210, at 43.

216. *See* Proceedings of the National Judicial Conference on Standards for the Administration of Criminal Justice, 57 F.R.D. 229, 363 (1972) (statement of Professor George W. Pugh).

217. *Accord*, Ill. S. Ct. Rule 402(d)(1), ILL. REV. STAT. ch. 110A, § 402(d)(1) (1973).

What should be a judicial function, however, is sentencing. If we are truly committed to a bargaining system that can maintain the current level of guilty pleas, we are also committed to a system in which defendants convicted at trial will be sentenced more severely than defendants who plead guilty. Both the extent of the "sentence differential" and its application in particular cases should be controlled by judges rather than by prosecutors. In choosing a system of plea bargaining, we have apparently made the judgment that the assurance of a more lenient sentence following the entry of a guilty plea is an appropriate persuasive technique, a technique justified "on the merits" as a matter of sentencing policy. Having crossed this bridge, we should recognize that we have done so and should permit judges rather than prosecutors to implement the policy that we have chosen. In this way, we would allow judges to reassert their control of the shape of our criminal justice system. Within the confines of this system, defendants could then make their strategic choices without judicial advice or interference that might lead the courts away from their proper role of sentencing in accordance with an open and articulated policy that is apparently perceived to be just.

The *Yale Law Journal* once proposed a system of plea bargaining that would implement these principles and that seems far more rational than our current system.<sup>218</sup> A defendant would initiate the bargaining process by filing a motion for a "pre-plea conference," and this motion would trigger the preparation of a presentence report<sup>219</sup> as well as "pre-plea discovery" between the parties. The conference itself would be, in essence, a sentencing hearing. Both parties would submit proposals for disposition of the case and would argue in support of these proposals. The parties might also, with the court's approval, call witnesses to testify during the conference.

At the conclusion of the proceedings, the trial judge would first determine the sentence that would seem appropriate if the defendant were convicted following a trial. Then he would apply a "specific discount rate" to determine the sentence that the defendant would receive if he entered a plea of guilty. This "discount rate" would apparently be determined by all judges of the trial court acting collectively; it would be uniform throughout the local jurisdiction; and it would be set at a level that would induce an "administratively acceptable" volume of guilty pleas. (A scheme of "sentence weights" might permit the use of a "specific discount rate" to transform one kind of punishment into another, or the system might be built upon the principle that the entry of a guilty plea should never make the difference between one kind of punishment and another but should merely reduce the quantum of a particular type of punishment that a

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218. Note, *Restructuring the Plea Bargain*, 82 *YALE L.J.* 286 (1972).

219. The contents of this report would be limited to "biographical information and only such evidence of his alleged crime as would otherwise be discoverable." *Id.* at 309. See text accompanying notes 197-202 *supra*.

defendant should receive regardless of the method of conviction.<sup>220</sup> If a defendant chose to stand trial after being informed both of his prospective "post-trial sentence" and of the "discounted sentence" that would follow the entry of a guilty plea, his trial would be conducted by a judge other than the judge who had conducted the pre-plea conference. Although this judge would not be permitted to impose a more severe sentence after conviction than the "post-trial sentence" set by the conference judge, he could impose a less severe sentence. A record of the pre-plea conference would be made available to aid the trial judge in making his final determination of sentence, and a full post-trial sentencing hearing would ordinarily not be necessary.

The most striking aspect of the *Law Journal's* proposal is its use of a "specific discount rate," a reform that would plainly promote uniformity in the administration of justice. Trial judges would continue to individualize sentences to fit the circumstances of particular cases, and they could, of course, take account of an almost limitless range of factors—both relevant and irrelevant—in this process. One factor that strongly influences sentencing today, however, would be channelled and controlled. The "break" that follows the entry of a guilty plea would be uniform for all defendants; it would not be affected by a defense attorney's charm, by past favors that he had rendered, by the extent of his friendship with prosecutors or trial judges, by the race, wealth or bail status of the defendant, by the unusual weight that a particular judge might choose to give to a defendant's choice of plea, by a prosecutor's mood or his desire to finish work early on an especially busy day, by the publicity that a case had generated, or by any of a number of other factors, irrelevant to the goals of the criminal process, that commonly influence plea bargaining practices.<sup>221</sup>

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220. Although, as a theoretical matter, a very long term of probation may constitute a more severe punishment than a very short jail sentence, the certainty that a term of imprisonment would be transformed to a term of probation upon the entry of a guilty plea would ordinarily be likely to exert strong pressure upon a defendant. Perhaps a defendant's choice of plea should not be allowed to make this critical, qualitative difference even if it were permitted to have some effect upon his sentence. It might therefore be desirable for a judge to determine a particular type of punishment or combination of punishments that would be appropriate in a particular case regardless of the method of conviction. Application of a "specific discount rate" could then become a simple numerical process. A judge could order a reduction of a specified percentage in the amount of time to be served in prison, in the amount of time to be served on probation, or in the amount of money to be paid in fines. Only the death penalty would remain problematic; no one would seriously propose that a defendant who pleaded guilty should receive a quantitative reduction in this penalty by being allowed to live for a certain percentage of his expected life span before meeting the hangman.

The *Yale Law Journal* suggested that, in addition to determining a defendant's sentence in the customary way, a trial judge should be able to order a dismissal or reduction of charges at the conclusion of the pre-plea conference. *Id.* at 301. It is difficult (although perhaps not impossible) to see how a "specified discount rate" could be applied to the charge-reduction or charge-dismissal process. Although I agree that a judge should be permitted to adjust the charges against a defendant at the conclusion of a pretrial conference, this adjustment should not, in my view, be affected by the plea that the defendant might enter. *Cf.* note 251 *infra*. Instead, the defendant's choice of plea should, at most, affect the quantum of his punishment for a crime of which he ought to be convicted in any event.

221. The penologically irrelevant considerations listed in the text are not all alike, and use of a "specific discount rate" might limit the influence of some more than others. For

A defense attorney could not increase the concessions that a defendant might receive by threatening to consume an unusual amount of time in the adjudication of pretrial motions or at trial, and wasteful defense tactics would thereby be discouraged.<sup>222</sup> Even more importantly, the discount rate would be unaffected by the strength or weakness of the prosecutor's evidence.

Some observers defend the practice of plea bargaining on the ground that scarce trial resources should be used only when substantial issues are in dispute. Not only would it be wasteful to expend our limited resources on open-and-shut cases, but jurors and other participants in the criminal justice system might become jaded if confronted with a lengthy procession of these cases and might overlook an occasional case in which a meritorious defense was presented.<sup>223</sup> A major difficulty with this argument is that the guilty-plea system as it currently operates does not have the effect attributed to it. An overwhelming majority of prosecutors endorse the view that "half a loaf is better than none," and they respond to the prospect of defeat at trial by increasing the concessions available in exchange for a plea of guilty. The weaker the prosecutor's case, the more substantial the "break" that a defendant can secure by pleading guilty, and "the greatest pressures to plead guilty are therefore brought to bear on defendants who may be innocent."<sup>224</sup> As the bargaining process currently operates, cases involving substantial legal and factual disputes seem every bit as likely to be compromised as cases that present no genuine issues.

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example, a prosecutor who wished to "finish work early on an especially busy day" would naturally be inclined to offer unusual concessions in exchange for a plea of guilty, but he would have no apparent reason to agree to a lenient "post-trial sentence." The prosecutor's ability to keep a golf date or to go home early would depend on the extent to which he could manipulate the sentence differential, and a "specific discount rate" that established a fixed relationship between the "trial" and "guilty plea" sentences would limit his ability to subordinate public interests to his own.

A trial judge who wished to reward a defense attorney's past favors, by contrast, might agree to both a lenient "post-trial sentence" and a lenient "guilty-plea" sentence; although use of a "specific discount rate" would again restrict the impact of favoritism upon the sentence differential, it would not necessarily restrict the overall impact of favoritism on the sentencing process.

I believe, however, that for a trial judge to set a "post-trial sentence" and then to "discount" it would serve as a valuable discipline. As a psychological matter, it may be easier for a trial judge or prosecutor to grant an improper favor when he receives something in return and when the case in which he grants it immediately disappears from the court's docket than it would be for him to grant this favor when he might receive nothing in return and might, indeed, spend hours or days conducting a trial that he would prefer to avoid. For this reason, use of a "specific discount rate" might tend to limit the influence of many irrelevant factors upon the ultimate determination of sentence, even factors that are not inherently dependent upon the institution of plea bargaining for their effect. Setting a "post-trial sentence" might, in addition, tend to impress trial judges with the seriousness of their tasks; today prosecutors and trial judges may treat "guilty plea" and "trial" cases in substantially different ways without recognizing the extent of this difference in treatment.

222. Note, *Restructuring the Plea Bargain*, 82 YALE L. J. 286, 304 (1972); see *The Prosecutor's Role*, *supra* note 9, at 56-58.

223. E.g., A. ROSETT & D. CRESSEY, JUSTICE BY CONSENT: PLEA BARGAINS IN THE AMERICAN COURTHOUSE 165 (1976); Enker, *Perspectives on Plea Bargaining*, in PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 112 (1967).

224. *The Prosecutor's Role*, *supra* note 9, at 60.

Use of a uniform discount rate might, however, invest the guilty plea system with the virtue that has been erroneously ascribed to it today. Almost any "discount" would, of course, encourage the entry of a guilty plea by a defendant who seemed certain to be convicted at trial. A defendant whose prospects of acquittal were substantial, however, might well find it advantageous to insist upon a trial if the "customary" discount could not be expanded indefinitely for the specific purpose of discouraging his exercise of constitutional rights.

Despite the advantages of the *Yale Law Journal's* proposals over current plea bargaining practices, these proposals have not attracted significant attention, and I know of no jurisdiction that has taken any step toward implementing them. Insofar as the proposals have been deliberately rejected, several possible explanations for their rejection may warrant examination. The proposals may, for one thing, seem overly elaborate and "gimmicky" to criminal law practitioners, most of whom are not, in any event, deeply concerned about the informality of the plea bargaining process and the gamesmanship on the part of clever lawyers that it permits and encourages. In addition, some observers would undoubtedly object in principle to a uniform discount rate. They might argue that some guilty pleas manifest more "repentance" than others;<sup>225</sup> that it is entirely appropriate, in some situations at least, to respond to a likelihood of acquittal at trial by exerting increased pressure for a guilty plea;<sup>226</sup> and that, although plea

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225. See *People v. Darrah*, 33 Ill. 2d 175, 210 N.E.2d 478 (1965); ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, *supra* note 182, § 1.8(a), comment at 38-39, 44.

226. See, e.g., White, *supra* note 8, at 458-59. Professor White, noting my earlier criticism of the increased pressure that the guilty plea system exerts when the prosecutor's evidence is weak, responded by posing a hypothetical case: The defendant and an accomplice have been accused of breaking into a house, threatening a babysitter with a gun, and making off with some property. The accomplice has made a "full, substantiated confession" implicating the defendant and has then fled the jurisdiction. As a result, the prosecutor lacks sufficient evidence to take the case to trial.

Professor White quoted a Philadelphia prosecutor as saying that, in this situation, he would "take a plea to anything [he] could get." Professor White concluded, "This position is legitimate. The defendant is clearly guilty. It is preferable that he be given some rehabilitative treatment rather than released." Professor White contrasted this case with one in which the prosecutor's only evidence consisted of the babysitter's shaky eyewitness testimony. In this case, he maintained, it would be improper for the prosecutor to attempt to induce a plea of guilty.

Unlike Professor White, I would not trust a prosecutor to make the judgment that a defendant is "clearly guilty" when the state lacks a prima facie case; and if, in Professor White's "case of the vanished accomplice," the defendant is clearly guilty, it is only because the case was written that way. Accomplice testimony has traditionally been distrusted, and although Professor White reported that, in his case, this testimony was "substantiated," he did not say how. Evidence that would truly substantiate the accomplice's statement would ordinarily permit the prosecutor to proceed to trial even if the accomplice were unavailable as a witness.

If one could indeed be certain of the defendant's guilt in a case like Professor White's, that fact would seem to indicate a serious defect in our rules of evidence. The sensible solution would be to withdraw the defendant's right to confront the witnesses against him, to read the vanished accomplice's statement to the jury, and still to permit the jury to make the judgment of guilt or innocence. Presumably, however, Professor White would oppose repeal of the sixth amendment right of confrontation. He would apparently prefer to undercut this right through bluff and bargain. (Note that a prosecutor could not successfully negotiate a guilty plea in Professor White's hypothetical case without deceiving his opponent and concealing the fact that a key witness had disappeared.)

bargaining is ordinarily desirable, some serious offenders should be offered no concessions whatever in exchange for their pleas.<sup>227</sup>

These objections may indeed be influential, but I suspect that the principal objection to a fixed discount rate is simply that it would make the penalty that our criminal justice system imposes for exercise of the right to trial so painfully apparent. On its face, a frank exposure of this penalty might seem all to the good. This exposure would permit effective regulation of the extent of the penalty, facilitate a clearer evaluation of the costs that the guilty plea system imposes, and promote a truly knowing choice on the part of criminal defendants. Nevertheless, most defenders of plea bargaining apparently prefer to mask the policy that is essential to its effective operation in a confusing welter of charge reductions, charge dismissals and prosecutorial "recommendations." As a result, the "payoff" of the bargaining process is never entirely certain, and although this ambiguity does not make the system more gentle,<sup>228</sup> it does facilitate an almost ostrich-like self-delusion on the part of these defenders.

Because the *Law Journal's* reforms may be unpalatable to those who defend the propriety of a sentence differential in principle but who seem to tremble at the prospect of telling defendants about it explicitly, it may be

That Professor White could withhold all concessions when a defendant might truly be innocent suggests a further incongruity. The defendant in Professor White's "case of the hysterical babysitter" would not be given the opportunity to plead guilty in exchange for a lenient sentence that the defendant in the "case of the vanished accomplice" would apparently enjoy. This defendant would, in other words, be denied an equal opportunity to bargain simply because a prosecutor believed that he might be innocent. If a defendant's possible innocence "does not present a legitimate rationale for favoritism in bargaining, it even more clearly does not present grounds for exacting a penalty." *The Prosecutor's Role, supra* note 9, at 64 n.41.

Professor White, in a gracious letter responding to some of my recent writing (but not addressed to the issue discussed in this footnote), reported that he has recanted the position that he endorsed in his *University of Pennsylvania Law Review* article and that he now favors the abolition of plea bargaining. (In view of the fact that Professor White is among the most able and careful scholars to address the problems of the guilty plea system, his open-minded response represents as great a compliment as any of my writings have received. I cannot resist the temptation to make this compliment public.)

227. I am more sympathetic to this objection to a "specific discount rate" than I am to the others. In the face of a horrible crime that seems to call unequivocally for the maximum penalty permitted by statute, monetary considerations—the virtue of "saving the state a trial"—may pale into insignificance. This objection to the *Yale Law Journal's* proposals may, however, call for their modification rather than their abandonment. Perhaps a trial judge should have the option either to apply the proposed "specific discount rate" or to offer a defendant no concession whatever in exchange for a plea of guilty. At the conclusion of the "pre-plea conference," the judge might be permitted to announce the sentence that would follow the entry of a guilty plea and to declare that the "post-trial" sentence would be no different. This option would not only save the judge from the apparent incongruity of offering "ten percent off" to an Eichmann, a Speck, or a Manson; it would also permit a judge not to penalize a defendant's exercise of the right to trial if he were conscientiously opposed to doing so or if he thought that a particular case presented issues that should be resolved at trial. Permitting the judge to set a single "trial" and "guilty plea" sentence might, in this way, facilitate selective experimentation with the abolition of plea bargaining.

228. I have argued, in fact, that this lack of explicitness may ultimately lead to the imposition of a greater penalty for the exercise of constitutional rights. See text accompanying notes 71-89 *supra*. A system that routinely imposes more severe sentences when defendants are convicted at trial than when they are convicted by guilty plea but that does not clearly tell its "consumers" about this sentence differential may, indeed, be among the worst possible systems.

prudent to discuss a less extreme reform proposal. Trial judges can of course displace prosecutors as the principal source of concessions to guilty-plea defendants without employing a "specific discount rate"; indeed, judges have done so in a significant number of jurisdictions.<sup>229</sup> A pre-plea conference like that proposed by the *Law Journal* can simply end with a trial judge's announcement of the sentence that he intends to impose if the defendant enters a plea of guilty, and the extent to which the penalty imposed after a trial would be more severe (or, indeed, whether it would be more severe at all) can be left uncertain. An evaluation of this less explicit but probably more acceptable form of judicial plea bargaining may indicate the advantages of judicial control of the bargaining process.

The principal advantage of this reform seems entirely apparent: it would restore judicial power to the judges. The principles of separation of powers, accountability in government and impartiality in judicial administration are inconsistent with the extensive delegation of judicial power to prosecutors that today's guilty plea system has wrought. Moreover, judges—by virtue of their training, temperament and experience—seem likely to do a substantively better job of sentencing than prosecutors. Although an empirical demonstration of this proposition is plainly impossible, some indication of the superior qualification of the judiciary for the task of sentencing may be found in the fact that bargaining trial judges have often been able to propose sentencing alternatives of which bargaining prosecutors and defense attorneys have been wholly unaware.<sup>230</sup>

A second advantage of judicial plea bargaining lies in its directness. It would offer defendants a firm basis for reliance in entering their guilty pleas and could prevent the defeat of reasonable expectations without the complexities of a "ratification" or "plea withdrawal" procedure. Rather than allow a prosecutor to create expectations and then allow a judge to restore the status quo ante if he found the prosecutor's concessions too lenient, direct judicial plea bargaining would be a single-step procedure. Once a trial judge had clearly assumed exclusive responsibility for plea bargaining,

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229. See notes 90-101 and accompanying text *supra*.

230. *E.g.*, Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509, 515 (1972). Judge Lambros reported that many federal prosecutors and defense attorneys were unfamiliar with such basic sentencing provisions as the Federal Youth Corrections Act. Other judges have suggested that prosecutors and defense attorneys often lack knowledge of specific institutional placements and treatment programs that a judge may recommend. *But see* Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499, 503 (1972).

Some defense attorneys—particularly younger defense attorneys—disputed the view that judges are, in general, likely to do a better job of sentencing than prosecutors. They observed, among other things, that prosecutors are generally younger than judges, and they concluded that, despite the prosecutors' partisan role in the adversary system, these attorneys are commonly "more reasonable" and "easier to work with" than judges. Of course attitudes toward this issue were strongly influenced by the defense attorneys' perceptions of the caliber of the bench and of the prosecutors' offices in particular jurisdictions, and they were also influenced by the preference of some attorneys for the more casual style of bargaining that they found when they negotiated with prosecutors rather than with judges. See note 237 *infra*.



a defendant could not reasonably entertain expectations concerning the disposition of his case unless the trial judge himself had created them. One authoritative official would not seem to blow hot while another blew cold. The defendant's bargain would not be an iffy, on-again-off-again thing. Unlike a "ratification" or "plea withdrawal" procedure, moreover, this sort of judicial bargaining would not permit the more severe of two state officials to prevail over the less severe in determining the concessions that a defendant would receive. Equally, it would not permit the less severe officer to prevail. When both judges and prosecutors participate in plea bargaining, a defense attorney can often appeal to a trial judge to better a prosecutor's offer; at the same time, he can usually rely on the judge's reluctance to upset a prosecutorial bargain, even a bargain that the judge considers much too lenient. In a system of judicial bargaining, the authority to grant concessions could be vested unambiguously in a single individual; a prosecutor could not be given a similar authority unless judges were deprived of even their nominal jurisdiction over sentencing.

Changing the locus of the bargaining process from the prosecutor's office or the courthouse corridor to the trial judge's chambers might also affect the tone of this process, the procedures and techniques employed in arranging pretrial settlements, and the weight afforded various considerations that currently influence the outcome of criminal cases. A pre-plea conference would not, of course, involve the detailed testing and sifting of evidence to which one might reasonably believe a defendant entitled when his liberty is at stake. Its procedures would be far less careful and orderly than those of a trial. Nevertheless, both parties would be expected to make a coherent presentation of relevant facts and arguments to an impartial judicial officer previously unfamiliar with the case. The quasi-adversary nature of the conference might well induce the parties to think through the relevant issues more clearly and develop their arguments more rigorously than they would in a system of informal prosecutorial bargaining. It probably would not be enough for a defense attorney to say, "What do you think the Bobby Johnson case is worth? O.K., I'll see if he'll take it."

Use of a conference procedure might also permit the introduction of safeguards that are essentially strangers to the bargaining process today. To suggest that a transcript of all prosecutorial plea bargaining sessions should be made available might seem woefully unrealistic; it would be almost impossible to arrange the presence of a court reporter at all huddles during court recesses, telephone calls, and chance encounters at which a prosecutor and a defense attorney might discuss the disposition of a case. Similarly, it would be difficult to afford the defendant himself a right to be present at all prosecutorial plea discussions. The introduction of the trial judge as the exclusive source of concessions to guilty-plea defendants

would be likely to lead, however, to a regularized pretrial conference at which these safeguards might be implemented.<sup>231</sup>

Prosecutors, to a considerable extent, think of themselves as advocates. As a group, they seem more likely than trial judges to view the maximization of criminal convictions as a critically important objective. The fundamentally different outlook with which judges are expected to approach their tasks could lead to a different sort of plea bargaining. One would undoubtedly be more shocked to find that a trial judge had induced a guilty plea by bluffing or by misrepresenting critical facts than to find that a prosecutor had done so.<sup>232</sup> Indeed, prosecutors themselves would probably be less likely to bluff and dissemble in conferences before the court than in backroom negotiating sessions with their adversaries. Moreover, trial judges seem somewhat less inclined than prosecutors to view plea bargaining as a device for convicting otherwise unconvictable defendants; in the main, they seem to view the bargaining process primarily as an administrative and sentencing technique. Judges might therefore be less likely to respond to defects in the state's evidence by confronting possibly innocent defendants with scaled-down offers that no rational person could refuse. Even without the safeguard of a "specific discount rate," the importance of the strength or weakness of the prosecutor's evidence as a factor in plea bargaining might be reduced if judges assumed the dominant role in the process.<sup>233</sup>

This analysis has focused as much on the tendencies of judicial plea bargaining as on its invariable attributes. Some of the trial judges who currently participate in plea bargaining manage to conclude their pretrial bargaining sessions in felony cases in less than five minutes each,<sup>234</sup> and it would be difficult to argue that these judicially conducted conferences result in a more complete development of facts and arguments than do most negotiating sessions between prosecutors and defense attorneys. In addition, too much judicial plea bargaining currently occurs in Elks Clubs and courthouse cafeterias, and bargaining in these settings will inevitably

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231. See Enker, *supra* note 223, at 118.

232. See *The Prosecutor's Role*, *supra* note 9, at 65-67.

233. Ideally, a "pre-plea conference" might simply be conducted on the *assumption* that the defendant would be found guilty at trial of the criminal act with which he is charged; the strength or weakness of the evidence might not be regarded as a relevant bargaining consideration at all.

The District Court judges of El Paso, Texas have—local observers agree—fully and effectively abolished prosecutorial plea bargaining in felony cases. Judge Sam W. Callan said of this reform, "At the very least, two things have changed since we stopped listening to the prosecutors' sentence recommendations and stopped permitting charge reductions in exchange for pleas of guilty. The quality of the state's evidence and the quality of the defendant's lawyer no longer determine the sentence that the defendant will receive. One important reason for the change was our belief that the strength of the prosecutor's proof has nothing to do with what constitutes a just sentence and that serious questions should be litigated—tested in the courtroom—rather than shoved under the rug." Interview with Judge Sam W. Callan, El Paso, Texas (June 8, 1976).

234. See note 98 *supra*.

elude procedural safeguards such as the preparation of stenographic transcripts. Some bargaining trial judges, moreover, freely avow their practice of making unusually favorable offers when the prosecutor's evidence is weak.<sup>235</sup>

Even if trial judges assumed the central role in plea negotiations, bargaining would therefore remain, at least on occasion, a lawless and slovenly process, a process that could be bent as easily to illegitimate as to legitimate ends. Nevertheless, trial judges do seem likely to approach plea bargaining in a more judicious spirit than prosecutors; and a three-party procedure involving the prosecutor, the defense attorney and the trial judge is more likely to foster formality and regularity, the use of adversary techniques for marshalling relevant information, and the introduction of procedural safeguards than a two-party procedure by which adversaries are encouraged to reach a casual adjustment between themselves.<sup>236</sup> Restoring judicial power to the judges, although not a corrective for all of the many abuses fostered by plea bargaining, would point in the right direction. As Professor George W. Pugh has written, "I want an impartial arbiter more, not less, in this all-important aspect of the administration of criminal justice."<sup>237</sup>

A final advantage of judicial plea bargaining lies in the fact that it would, in a few situations, permit effective appellate review of the penalty that our criminal justice system imposes for exercise of the right to trial. In the absence of a "specific discount rate" or an explicit threat of more

235. See note 101 *supra*.

236. See Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 HARV. L. REV. 637, 655 (1976) (discussing two types of conflict resolution: negotiation, which is accommodation between adversaries, and adjudication, which introduces a stranger as arbiter; the proposal in the text incorporates elements from each).

237. Proceedings of the National Judicial Conference on Standards for the Administration of Criminal Justice, 57 F.R.D. 229, 363 (1972).

Some attorneys agree that judicial bargaining sessions tend to be more formal and regularized than prosecutorial bargaining sessions, but they maintain that this formality is more a disadvantage than an advantage. Bud Carpenetti, a public defender in Juneau, Alaska, complained that a conference in the judge's chambers "is over too quickly and is too final. We can't keep nagging until we are sure that we have really been heard. So much depends on the mood, the ability and the outlook of the particular judge. Judicial bargaining does not provide the same opportunity for reconsideration as prosecutorial plea bargaining. I am a strong believer in just talking things over." Interview with Bud Carpenetti, Public Defender, Juneau, Alaska (June 21, 1976).

Jim Gould, an assistant district attorney in Anchorage, contended, however, that the informality that characterizes most prosecutorial plea bargaining leads the parties away from intelligent decisionmaking:

Prior to the abolition of plea bargaining in this state, the bargaining process had become ridiculous. A defense attorney would come in, talk about his kids and his lake house, and then start begging at length for a lenient sentence recommendation. If we said no, he'd be back a week later to announce that the defendant had a job and to beg some more. If we still said no, he would be back in another week to tell us that the defendant's wife was pregnant and then, the week after that, to tell us that the defendant's bills were due. Sooner or later, we'd give in, more to be rid of the case than anything else. When the Attorney General directed us to end the practice of plea bargaining, most of us were ready for the change. We thought, "Thank God we won't have to make that awful sentencing decision, and thank God we won't have to waste our time hassling with defense attorneys."

Interview with James Gould, Assistant District Attorney, Anchorage, Alaska (June 10, 1976).

severe treatment following a trial, a defendant who accepted a trial judge's offer could, of course, never be entirely certain that his sentence would have been harsher had he been convicted at trial. Doubt about the extent to which any particular defendant has been rewarded for forgoing his right to trial may help to make the bargaining process palatable to those who are unwilling to face its implications frankly. A defendant who rejected a trial judge's offer and who was then convicted at trial, however, could compare the sentence that he received with the offer that a bargaining trial judge had made at a pretrial conference. Although one might sometimes explain an increased sentence in other ways (for example, by emphasizing some piece of evidence presented at trial of which the judge who conducted the pretrial conference was unaware<sup>238</sup>), the penalty that the defendant had incurred for standing trial would usually be reasonably apparent. In a system of prosecutorial bargaining, by contrast, the sentence differential is more easily obscured. Because prosecutorial recommendations are not invariably followed, one can always assert a lack of proof that any particular defendant has been penalized for exercising his constitutional rights.

That judicial plea bargaining would tend to force recognition of the sentence differential when rejection of a pretrial offer is followed by conviction at trial might lead some observers to condemn the practice all the more forcefully. The virtue of this explicitness, however, was illustrated by a recent decision of the Illinois Appellate Court, *People v. Dennis*.<sup>239</sup> A defense attorney testified in a post-conviction proceeding that a Chicago trial judge had offered to sentence his client to a term of two-to-four years if the client would plead guilty. The prosecutor recalled the pretrial conference somewhat differently and testified that the judge had proposed a sentence of two-to-six years in exchange for the defendant's plea. Whatever the trial judge's offer, however, the defendant declined it; and following his conviction by a jury, the judge sentenced him to a term of 40-to-80 years. The appellate court noted that, because the trial judge had been advised of the state's evidence and of the defendant's prior criminal record during the pretrial conference, the sentence that he imposed almost certainly did not reflect circumstances of which he had been unaware at the time of his offer. The court concluded that a "'reasonable inference' of constitutional deprivation may be drawn where a great disparity exists between the sentence offered at a pretrial conference to which the trial judge was a participant and one imposed at the conclusion of a jury trial."<sup>240</sup> Accordingly, it exercised its authority under Illinois Supreme Court Rules to reduce the defendant's sentence.<sup>241</sup> The court did not,

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238. See, e.g., *People v. Busch*, 15 Ill. App. 3d 905, 305 N.E.2d 372 (1973); *People v. Jackson*, 9 Ill. App. 3d 1020, 293 N.E.2d 665 (1973).

239. 28 Ill. App. 3d 74, 328 N.E.2d 135 (1975).

240. *Id.* at 78, 328 N.E.2d at 138.

241. See Ill. S. Ct. Rule 615(b)(4), ILL. REV. STAT. ch. 110A, § 615(b)(4) (1973).

however, reduce the sentence to the two-to-four or the two-to-six year term that the defendant would have served if he had pleaded guilty. Rather, it reduced the sentence to six-to-eighteen years "in the interests of justice." The court's rule thus seemed to be that a defendant may be penalized for exercising his right to trial by a sentence three times more severe than that he could have secured by pleading guilty, but not by a sentence twenty times more severe.

Disturbing though it is, the *Dennis* ruling probably afforded greater protection to the defendant than he would have enjoyed in a system of prosecutorial plea bargaining. In the same spirit as the trial judge in *Dennis*, a prosecutor might have increased his sentence recommendation twenty-fold when a defendant who had spurned a pretrial offer was convicted at trial. A trial judge might then have sentenced the defendant in accordance with the prosecutor's recommendation. If this defendant had alleged on appeal that he had been penalized for exercising his right to trial, it seems very doubtful that a court would have granted him relief. The court might have remarked that it could not know what sentence the trial judge would have imposed if the defendant had pleaded guilty, and whatever vindictiveness the prosecutor might have exhibited, it could not presume that the judge who was ultimately responsible for sentencing had imposed a penalty for the exercise of a constitutional right. Realistically, of course, a defendant in this situation might have been penalized as severely as the defendant in *Dennis* for pleading not guilty. In a regime of prosecutorial plea bargaining, however, the sentence differential retains a quality that might be termed "plausible deniability." This quality enables appellate courts and other criminal-justice policy makers to evade the troublesome and rather unbecoming question whether the sentence imposed after a trial should be ten percent higher or two thousand percent higher than the sentence imposed after a plea of guilty. It also precludes any significant regulation of the penalty that is imposed today on a helter-skelter basis. That the appellate court in *Dennis* ultimately imposed a sentence three times more severe than the sentence that would have followed the entry of a guilty plea may bring us face-to-face with a criminal justice system that we would rather not know, but the defendant plainly profited because the trial judge's participation in plea bargaining had cast the issue in a form that the appellate court could not easily evade.

B. *Defendants Should Be Permitted to Attend the Plea Bargaining Sessions That Determine Their Fate*

The Supreme Court wrote in 1892, "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner."<sup>242</sup> The Court has repeatedly

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242. *Lewis v. United States*, 146 U.S. 370, 372 (1892).

held that the sixth amendment affords a defendant the right to attend all phases of his trial,<sup>243</sup> and the principles that forbid trying a defendant *in absentia* should also, in my view, forbid his exclusion from a plea negotiation session that may very well constitute the most important part of the proceedings against him.<sup>244</sup>

A defendant who learns the outcome of a plea bargaining session second-hand can never be entirely certain that his attorney adequately represented him during the negotiations. Indeed, the defendant may sometimes suspect his attorney of deliberate betrayal, particularly when the attorney was appointed by the court rather than selected by the defendant.<sup>245</sup> The defendant may also suspect that the prosecutor or trial judge who negotiated the bargain was harsh, corrupt, incompetent or insensitive; he may suspect that racism or other forms of prejudice infected the proceedings; he may, in short, suspect that his interests were inadequately considered for a variety of reasons or—what may be worse—that his lawyer secured a favorable bargain improperly. The presence of defendants during plea bargaining sessions could help to allay their suspicions of laziness, incompetence or impropriety when these suspicions are in fact unfounded. Too often, moreover, secret bargaining sessions do facilitate the abuses that defendants fear, and the presence of defendants during the plea bargaining process might therefore affect both the tone and the substance of this process in a desirable way. Specifically, the presence of defendants might encourage more vigorous advocacy on the part of defense attorneys and discourage the deprecating banter, the invocation of improper considerations, and the granting of improper favors that may sometimes occur between friends.

Although defendants rarely attend plea bargaining sessions today, only two arguments have been advanced in support of their exclusion: first, that they would not understand the proceedings,<sup>246</sup> and second, that their presence might impair the frank interchange between prosecutors and defense attorneys that characterizes plea bargaining today, an interchange that usually works to the defendants' advantage. Phrased less generously, the

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243. *E.g., id.*; *Illinois v. Allen*, 397 U.S. 337 (1970).

244. Although the Supreme Court has found that a defendant's right to be present at his trial is implicit in his sixth amendment right "to be confronted with the witnesses against him," the right to be present extends beyond the stage of the trial at which the testimony of prosecution witnesses is presented. The Supreme Court has explained the importance of the defendant's presence at such other stages of the trial as jury selection and the argument of counsel by noting that "it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). See also *Faretta v. California*, 422 U.S. 806 (1975). A defendant's presence during the plea negotiation process would similarly enable him to offer suggestions to his attorney or even to discharge his attorney and to proceed pro se. The discussion in text, however, considers the benefits that would flow from a defendant's presence at a plea negotiation session even if he did not take any part in the negotiations themselves, even by whispering to his lawyer.

245. See *The Defense Attorney's Role*, *supra* note 9, at 1241-48.

246. See *State v. Tyler*, 440 S.W.2d 470, 474 (Mo. 1969).

first objection is apparently that defendants would see our criminal justice system as it is; and the second, that it is easier to disparage defendants and to violate their confidences behind their backs than to do so to their faces.<sup>247</sup> Depending on one's viewpoint, these defects might reasonably qualify as advantages.<sup>248</sup> Excluding defendants from plea bargaining sessions plainly cannot lead them to understand these sessions better, and to view the danger that a defendant might "misinterpret" the bargaining process as a justification for keeping him ignorant of it seems the height of paternalism. If, moreover, a defendant's presence might discourage an informal interchange that would ultimately be beneficial to him, that circumstance would at most suggest that he should be able to waive his right to attend a bargaining session at which lawyers and judges plot the resolution of his case. The choice of how best to advance his interests—whether by facilitating a casual accommodation behind his back or by promoting a slightly more traditional advocacy in his presence—should remain his to make.

*C. Plea Negotiations Should Focus Directly on the Sentence to Be Imposed Rather than on the Level or Number of Charges*

In 1974, District Attorney Joseph P. Busch of Los Angeles and Acting District Attorney Richard H. Kuh of Manhattan issued plea bargaining guidelines for their offices.<sup>249</sup> Both sets of guidelines forbade "sentence recommendation bargaining" but permitted assistant district attorneys to offer reductions in the level and the number of charges in exchange for pleas of guilty. More recently, California Attorney General Evelle J. Younger proposed legislative action to forbid "sentence bargaining" but not "charge bargaining";<sup>250</sup> and in a number of jurisdictions in which plea bargaining has traditionally focused on the level of the charge, prosecutors seem to believe that their refusal to engage in sentence-recommendation bargaining has invested their negotiating practices with a kind of moral

247. See *The Defense Attorney's Role*, *supra* note 9, at 1226.

248. In Anchorage, Alaska, it was once fairly common for both defendants and their attorneys to attend plea bargaining sessions in misdemeanor cases. Assistant District Attorney Jim Gould commented, "When the defendant was there, the procedure was somewhat different. There was less bullshit, and I didn't try to put the defense attorney down. The bargaining session was therefore a little more formal, but I don't think that the defendant's presence cramped my style or made me less candid."

249. Busch, *Guidelines Concerning Plea Bargaining*, CAL. ATTYS. FOR CRIM. JUST. FORUM, May-June 1975, supp.; Kuh, *Plea Bargaining: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 48 (1975).

250. E. Younger, Position Paper on Plea Bargaining (Dec. 5, 1975) (unpublished). See Senate Bill 1449, California Senate, Jan. 21, 1976. Although Attorney General Younger's position paper condemned "sentence-bargaining" by prosecutors, the bill that he endorsed does not seem to forbid this practice, at least when the benefit that a defendant receives in exchange for his guilty plea is cast only in terms of a "recommendation." The bill merely provides that "the court shall not discuss or consider the sentence to be imposed or the granting of probation prior to a determination of the guilt of the defendant" and that a plea of guilty "shall be rejected if it specifies the punishment to be imposed or limits the exercise by the court of any power regarding sentencing or of other powers legally available to it" (emphasis added).

superiority. I believe, however, that a prohibition of "sentence bargaining" accentuates rather than reduces the incongruities of the guilty plea system. A forthright system of plea bargaining should focus directly on the sentence to be imposed. "Charge bargaining," if employed at all, should be used only as an incident to "sentence bargaining" in situations in which the sentence that seems appropriate cannot be imposed without an adjustment of the charge.<sup>251</sup>

District Attorney Kuh explained his guidelines' prohibition of sentence-recommendation bargaining by asserting that plea bargaining and sentencing were distinct processes: "While plea negotiations is [sic] our role, sentencing is the court's role, and we are not to use plea negotiations in an effort to enforce our own concepts as to appropriate judicial action."<sup>252</sup> Attorney General Younger similarly maintained that "the concept of bargaining has no place in the sentencing phase of our criminal process."<sup>253</sup> He argued, however, that "an agreement between the parties settling what the facts are" is entirely appropriate.<sup>254</sup> These rationales for charge-reduction plea bargaining seem not only artificial but deliberately naive. As this Article has indicated,<sup>255</sup> a bona fide assessment of historical fact rarely determines the outcome of charge-reduction bargaining. To the contrary, one defect of this form of bargaining is that it commonly mislabels criminal conduct by convicting defendants of offenses less serious than those that they have apparently committed. The principal concern of the parties to a charge-reduction bargain is usually not the truth but the treatment that the defendant will receive. Some prosecutors simply consider it more decorous to approach this question indirectly than to tread upon a traditional judicial function in an open and obvious way.

Although a rigid dichotomy between plea negotiation and sentencing is plainly fictional, charge-reduction bargaining does offer one advantage over sentence-recommendation bargaining. (The artificial distinction advanced by the defenders of charge-reduction bargaining may, indeed, advert to this genuine advantage in an indirect and imprecise way.) In practice, charge-

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251. Although my own view is that it is improper to use plea bargaining to evade the mandatory minimum sentences that legislatures have prescribed for certain offenses, I see no reason to pursue this issue in the context of the present discussion of charge-reduction and sentence-recommendation bargaining. I therefore concede for purposes of this discussion that charge-reduction bargaining may be appropriate when sentence-recommendation bargaining cannot be entirely effective without it—that is, when penal statutes require a prosecutor to reduce the charges that his office has filed before he can recommend the sentence that he considers the proper reward for the defendant's plea.

I should emphasize that, in condemning charge-reduction plea bargaining, I do not suggest that prosecutors should be "locked into" whatever charges they have filed. A reassessment of the charges against a defendant should always be permitted so long as this reassessment is not contingent upon the defendant's waiver of his right to trial.

252. Kuh, *supra* note 249, at 51. See also Kuh, *Sentencing: Guidelines for the Manhattan District Attorney's Office*, 11 CRIM. L. BULL. 62 (1965).

253. Younger, *supra* note 250, at 6.

254. *Id.* at 7-8.

255. See note 52 and accompanying text *supra*.



reduction bargaining usually does leave a greater residue of judicial power in judicial hands than does sentence-recommendation bargaining.

When plea negotiations focus primarily on prosecutorial sentence recommendations, judges usually sense that slight departures from these recommendations would render the guilty plea system less effective. As a result, they commonly surrender all but a token of their sentencing authority in guilty plea cases to prosecutors. Even after a charge-reduction bargain has been fully effected, however, a trial judge is likely to retain a significant choice in the sentence to be imposed. He may exercise this choice without undercutting the credibility of the prosecutor who struck the bargain. Thus charge-reduction bargaining, although part of the sentencing process, does tend to divide this process into two phases and to leave one of these phases to the judiciary. Judges may exercise their judicial power in the interstices that prosecutors have left them.

The extent to which charge-reduction bargaining achieves this advantage in any particular case is, however, fortuitous. When, for example, a serious felony charge has been reduced to a misdemeanor (a common occurrence),<sup>256</sup> the sentencing discretion that a trial judge retains may not seem very meaningful. Moreover, even when a more ample discretion remains, it may defy intelligent exercise. For instance, as the result of a

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256. See Kuh, *Plea Copping* 24 BAR BULL. 160, 163-64 (1966-67). In this article, the future author of Manhattan's plea bargaining guidelines noted that only about one in three felony arrests in Manhattan led to felony indictments—a fact which suggested that, with only a few exceptions, these indictments were reasonably well founded. Nevertheless, almost one out of every five defendants indicted for robbery in the first degree, an offense for which the legislature had prescribed a penalty of at least ten years' imprisonment, pleaded guilty to a misdemeanor; more than half of the defendants indicted for grand larceny in the first degree pleaded guilty to misdemeanors; and more than three-quarters of the defendants indicted for felonious assault entered misdemeanor pleas. See also Shin, *Do Lesser Pleas Pay?: Accommodations in the Sentencing and Parole Processes*, 1 J. CRIM. JUST. 27, tables 3 & 8 at 32 & 35 (1973) (sample of 242 indictments for first-degree robbery in Manhattan of which 49 resulted in guilty pleas to misdemeanors). It is noteworthy that the figures presented by both Kuh and Shin excluded cases in which defendants charged with felonies agreed to plead guilty to misdemeanors in pre-indictment proceedings in the Criminal Court of New York City. Had those cases been included, the percentage of felony defendants in each category who were permitted to plead guilty to misdemeanors would probably have been significantly higher. See H. SUBIN, *CRIMINAL JUSTICE IN A METROPOLITAN COURT* 44 (1966) (sample of 64 felony cases in the District of Columbia, of which 9 were dismissed and 39 were reduced to misdemeanors as a result of pre-indictment bargaining); Kipnis, *Criminal Justice and the Negotiated Plea*, 86 ETHICS 93 (1976) ("In 1974 in New York City, 80 percent of all felony cases were settled as misdemeanors through plea bargaining."); R. Bonnie & W. Johnson, *Selective Justice: The Production and Processing of Drug Arrests in Six American Cities* (1975) (unpublished manuscript) (in Manhattan, 70% of all defendants charged with a single felony drug offense were convicted only of misdemeanors).

District Attorney Kuh's plea bargaining guidelines for Manhattan attempted to limit what his article had called "the crime-plea gap." They admonished assistant district attorneys not to reduce a charge routinely by more than one "class" (e.g., from a Class A to a Class B felony) in exchange for a plea of guilty. An assistant would have authority to reduce a charge two "classes," but he could do so only if the defendant consented to the preparation of a presentence report in advance of conviction and the assistant explained on the record at the time that the defendant's plea was entered why a "two-class" reduction was warranted. Although reductions of more than two "classes" were not entirely foreclosed, they required the advance approval of the assistant's Bureau Chief. In the main, District Attorney Kuh's guidelines reflected a thoughtful and sensitive effort to limit abuses of the plea bargaining process and to promote uniformity of treatment in a jurisdiction in which the pressures for plea bargaining are extraordinarily intense.

routine charge-reduction agreement, a judge may be required to sentence a defendant for unarmed robbery although the underlying offense was, beyond any doubt, committed with a loaded shotgun. An assessment of the defendant's background and character may provide no reason for leniency, and the judge may well be tempted to impose the maximum sentence available for unarmed robbery on the theory that the defendant's offense was even more serious than those which the unarmed robbery statute was apparently intended to encompass. Elementary concepts of due process, however, preclude a judge from sentencing a defendant on the theory that he is guilty of a crime more serious than the crime of which he has been convicted. A judge would seem to contravene this principle if he determined the sentence to be imposed on the basis of the undisputed historic facts of the case before him.

A judge might, in the alternative, try to hypothesize an unarmed robbery in the same circumstances in which the armed robbery was apparently committed, or he might assume that the defendant was guilty only of a "typical" unarmed robbery (whatever that crime might be). The first approach would plainly fail, however, if the offense or a reasonable facsimile could not in fact have been committed without a weapon, and the second approach seems even less consistent with the judge's obligation to evaluate the seriousness of the offense on the basis of the facts presented. A judge who determines the sentence to be imposed on the basis of an abstract stereotype rather than the circumstances of the case before him seems to undercut one basic reason for the legislature's grant of his sentencing discretion. That charge-reduction bargaining frequently confronts trial judges with insoluble conundrums of this sort is one of its disadvantages.

In practice, judges in systems of charge-reduction bargaining may not often be troubled by these difficulties, for they may fear to exercise the discretion that sentencing statutes give them for more mundane reasons. Charge-reduction bargaining seems to work best when "certain customary sentences [are] associated with every offense."<sup>257</sup> If a judge were not to impose a substantially more lenient sentence on a reduced charge than he would have imposed had the defendant been convicted of a greater offense, he would tend to reduce the effectiveness of the plea bargaining process. The available empirical evidence indicates that the extent to which judges "compensate" for prosecutorial charge reductions—the extent to which they impose sentences toward the upper range of those available when defendants have been charged initially with more serious crimes than those to which they have pleaded guilty—is extremely limited.<sup>258</sup> The sentencing

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257. *The Prosecutor's Role*, *supra* note 9, at 97.

258. Shin, *supra* note 256, at 34-35. *Accord*, *The Prosecutor's Role*, *supra* note 9, at 97. The Shin study, which was based on a sample of 415 robbery cases and 216 felonious assault

discretion that criminal statutes seem to afford even after charge-reduction agreements have been implemented may therefore tend to become illusory in practice. Although judges undoubtedly have a somewhat greater voice in the sentencing process when plea negotiations focus on charge reduction than when they focus on sentencing, prosecutorial plea bargaining nevertheless subjects the judges' apparent discretion to an important practical constraint.

The one advantage that charge-reduction bargaining exhibits over sentence-recommendation bargaining obviously arises only when prosecutors are the principal source of concessions to guilty-plea defendants. When trial judges dominate the bargaining process, there is no need to divide the sentencing decision artificially so that the judiciary can retain a limited role in making it; and even if one considers it unseemly for a prosecutor to speak directly about sentencing, it certainly does not intrude upon the judicial function for the judge himself to do so. Even in systems of prosecutorial bargaining, moreover, the disadvantages of charge-reduction bargaining seem to outweigh its single advantage in affording the judiciary a somewhat greater part in the sentencing process. I therefore turn to an assessment of these disadvantages.

First, charge-reduction bargaining presents the defects of inexplicitness that this Article has discussed in other contexts.<sup>259</sup> A defendant who is told that charge *A* will be reduced to charge *B* if he pleads guilty is plainly not informed of the "payoff" of the bargaining process in the terms that he would find most meaningful. The ultimate concern of most defendants is, of course, the sentences that they will receive rather than the conviction labels under which those sentences will be imposed. Defendants, aided by their attorneys, are apparently expected to translate the veiled messages of charge-reduction plea bargaining into the terms that matter to them, but the decoding process may be extremely difficult when the range of penalties authorized for the initial charge and that authorized for the reduced charge overlap substantially. For this reason, charge-reduction plea bargaining may sometimes have the baffling quality of a

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cases in Manhattan, found that fewer than ten percent of these cases resulted in conviction of the offenses initially charged. Because it would have been difficult to determine whether judges "compensated" for prosecutorial charge reductions by comparing the many cases in which charge reductions had occurred with the few cases in which they had not, Shin instead determined the magnitude of the charge reduction in each case. He then examined groups of defendants all of whom had been convicted of the same offenses and found that, within some conviction-offense categories, sentences became somewhat more severe as the magnitude of the preceding charge reductions became greater. In other words, defendants who had been charged initially with more serious offenses than other defendants ultimately convicted of the same crimes tended to receive sentences that were slightly more severe. Within other offense categories, however, the magnitude of preceding charge reductions made no difference whatever in sentencing outcomes. Shin concluded, "[T]he conviction charge appears the most important determinant of the sentence length." *Id.* at 35.

<sup>259</sup> See text accompanying notes 71-74 *supra*.

shell game, and the indirection that characterizes this bargaining may leave defendants puzzled as to the practical consequences of their choice of plea.

When defendants plead guilty in exchange for a reduction in the charges against them, they may often wonder whether they have been led to sacrifice their constitutional rights for an advantage more formal than substantial. More importantly, skeptical defendants may refuse to plead guilty until the charges against them have been reduced substantially—so substantially that the benefits of the charge-reduction process have become too apparent to deny. Defendants who would readily plead guilty in exchange for small but tangible concessions may demand greater concessions when the benefits that they will receive have been cast in an enigmatic form. The use of charge-reduction plea bargaining may therefore require the criminal justice system to offer greater concessions than it would be required to offer if it spoke directly. The price of protecting the sensibilities of people who wish to pretend that plea negotiation has nothing to do with sentencing may be the imposition of a greater penalty for the exercise of a constitutional right.

A second disadvantage of charge-reduction bargaining, one briefly noted above, is that it frequently mislabels the conduct that it punishes. Guns are “swallowed” as armed robberies become unarmed robberies; burglaries committed at night are transformed through prosecutorial wizardry to burglaries during the day; and defendants solemnly affirm that they have driven the wrong way on one-way streets in towns without one-way streets.<sup>260</sup>

Although the substantive results of criminal cases are undoubtedly more important than the labels that they bear, the mislabeling inherent in charge-reduction plea bargaining is sometimes an impediment to the effective operation of the criminal justice system.<sup>261</sup> When, for example, a criminal statute has been declared invalid on the ground that it reaches constitutionally protected behavior, it may be all but impossible to determine which defendants have in fact been punished for the conduct that the statute encompassed. Courts must apparently afford relief to defendants who have been charged with violating the unconstitutional statute and who have been convicted at trial or who have pleaded guilty to that charge; to defendants who have been charged with violating other, valid statutes and who have pleaded guilty to the crime created by the unconstitutional

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260. All of these illustrations are provided by D. NEWMAN, *supra* note 1, at 100-02.

261. That plea bargaining deprives conviction labels of their intended meaning also renders research on sentencing and other practices of the criminal courts extraordinarily difficult and confounds scholars who wish to measure recidivism and other behavior by particular sorts of offenders. See Eisenstein & Jacob, *Measuring Performance and Outputs of Urban Criminal Courts*, 54 Soc. Sci. Q. 713, 720 (1974); Newman, *Pleading Guilty for Considerations: A Study of Bargain Justice*, 46 J. CRIM. L.C. & P.S. 780 (1956).

statute; and to defendants who have been charged with violating the unconstitutional statute and who have pleaded guilty to lesser crimes. Some defendants in all three categories (although certainly not all) will in fact have been guilty only of the behavior that has been found constitutionally protected.<sup>262</sup>

The deliberate mislabeling of offenses through plea bargaining may also tempt correctional authorities to second-guess the courts. These authorities may conclude that they cannot safely rely on conviction labels in classifying and assigning prisoners and in determining the appropriate date for release on parole. Indeed, in reassessing the facts of criminal cases for their own purposes, correctional authorities may sometimes make substantial errors.<sup>263</sup> Finally, the mislabeling of offenses may encourage a belief in the hypocrisy of the guilty plea system on the part of defendants and other observers of the criminal courts.<sup>264</sup>

Because penal statutes ordinarily enable sentencing authorities to reward defendants who plead guilty without mislabeling their crimes, these incongruities of charge-reduction bargaining seem utterly needless. A more sensible procedure would plainly be to convict guilty-plea defendants of the offenses that they have committed (or at least of offenses that they *might* have committed) and then—if plea bargaining is truly necessary—to grant forthright discounts in their sentences.

Some courts permit defendants to plead guilty even to offenses whose commission would be legally impossible,<sup>265</sup> but others, in the spirit of

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262. The invalidation of the Federal Marihuana Tax Act in *Leary v. United States*, 395 U.S. 6 (1969), has required federal courts to confront some aspects of this troublesome problem. See *The Supreme Court and the Guilty Plea*, *supra* note 9, at 20-21 & n.68.

263. Cf. *The Prosecutor's Role*, *supra* note 9, at 96 (statement of defense attorney Benjamin M. Davis). The study by H. Joo Shin that is cited in note 256 *supra* indicated that when a defendant was charged initially with a more serious offense than other defendants convicted of the same crime, a parole board was likely to require him to serve a somewhat greater proportion of his potential sentence than the norm. Shin also found, however, that the apparent tendency of the parole board to second-guess the courts was not carried to the point that it significantly reduced the "payoff" of charge-reduction plea bargaining. Even after the board had apparently "compensated" to a limited extent for prosecutorial charge reductions, these reductions resulted in very substantial decreases in the amount of time that defendants were required to serve. Shin, *supra* note 256, at 37-38 & table 10.

Frank Lozito, Director of the West Texas Regional Adult Probation Department, observed, "Plea bargaining poses enormous problems for corrections. Bargaining often attaches an inaccurate label to the defendant's crime, and the way in which our office deals with an armed robber is very different from the way in which we deal with a thief." I asked Lozito how he would go about preparing a sentence recommendation in a case in which an armed robber had been permitted to plead guilty merely to theft. He replied, "I would treat the defendant as an assaultive personality and would not pay any attention to the legal technicalities." Interview with Frank Lozito, Director, West Texas Regional Adult Probation Dep't, El Paso, Texas (June 8, 1976).

264. See Folberg, *supra* note 70, at 202-03.

265. *People v. Foster*, 19 N.Y.2d 150, 225 N.E.2d 200, 278 N.Y.S.2d 603 (1967); *People v. Burgan*, 27 Mich. App. 216, 183 N.W.2d 413 (1970); cf. *People v. Clairborne*, 29 N.Y.2d 950, 280 N.E.2d 366, 329 N.Y.S.2d 580 (1972) ("A bargained guilty plea to a lesser crime [than the crime originally charged] makes unnecessary a factual basis for the particular [lesser] crime confessed." *Id.* at 951, 280 N.E.2d at 367, 329 N.Y.S.2d at 581.); *People v. Johnson*, 25 Mich. App. 258, 181 N.W.2d 425 (1970) (defendant may be convicted of an offense of which he is clearly innocent so long as he has voluntarily assented to this conviction and has also

moderation and adjustment that often characterizes their approach to plea bargaining, have proscribed certain forms of mislabeling. In *People v. West*,<sup>266</sup> for example, the California Supreme Court held that a trial court could accept a guilty plea to a reduced charge only when this charge was "reasonably related" to the charge initially filed. The defendant in *West* had stipulated—incorrectly—that the crime of maintaining a place for the selling, giving away or using of a narcotic was a lesser included offense of the crime of possessing marihuana. The court recognized that "no evidence in the record indicated [the] defendant's guilt" of this less serious offense and that the only reason for the defendant's plea of *nolo contendere* to this crime was "to afford the court the option of sentencing [him] as a misdemeanor."<sup>267</sup> The court nevertheless held that the reduced charge was "reasonably related" to the initial charge because both charges "involv[ed] restricted drugs."<sup>268</sup> From my perspective, the court might as sensibly have declared, "It is permissible to call a sheepdog a mongrel or even on occasion a mouse, but a sheepdog should never be called a toad or a rattlesnake. Because sheepdogs and mice are mammals, they seem reasonably related, but to call a sheepdog a rattlesnake would make our adjudicative processes ridiculous." To permit deliberate mislabeling and then to become fastidious about the kind of mislabeling seems to exhibit a highly refined sense of morality.

Charge-reduction plea bargaining cannot operate successfully unless the charge to which a defendant may plead guilty is different from the charge initially filed. It is therefore probable that one or the other of these charges will not accurately reflect the seriousness of the offense that the defendant has committed (assuming that he has committed some offense).<sup>269</sup> Of course the inaccuracy may sometimes lie, not in the offense to which the defendant pleads guilty, but in the charge that a prosecutor has initially filed against him. This fact suggests a third advantage of "sentence

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admitted his guilt of a more serious crime). *But compare* *People v. Williams*, 44 App. Div. 2d 216, 354 N.Y.S.2d 213 (1974) (holding that a 1973 revision of N.Y. CRIM. PROC. LAW § 220.10(5) (McKinney Supp. 1976) abolished the rule of *Foster*), *with* *People v. Castro*, 44 App. Div. 2d 808, 356 N.Y.S.2d 49 (1974), *aff'd*, 50 App. Div. 2d 725, 376 N.Y.S.2d 922 (1976) (continued reliance on *Foster*).

266. 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970).

267. *Id.* at 603, 477 P.2d at 413, 91 Cal. Rptr. at 389.

268. *Id.* at 613, 477 P.2d at 420, 91 Cal. Rptr. at 396.

269. Because the borderline between one offense and another is sometimes problematic, it may be extremely difficult to determine the offense of which a defendant ought to be convicted. There are certainly occasions when neither the offense initially charged nor the reduced charge to which the defendant pleads guilty can be condemned as clearly inappropriate. It would be idle to pretend, however, that the usual case of charge-reduction plea bargaining involves so ambiguous a situation. Moreover, the fact that it is not immediately apparent which of two charges more closely fits the facts of a case does not establish that the two charges fit equally. The phrase "six of one and half a dozen of the other" may sometimes be reasonably accurate, but it is far easier for the parties to a plea agreement to use this phrase than it is for them to examine the underlying circumstances of the case in detail. *Cf. The Prosecutor's Role*, *supra* note 9, at 76-77 (suggesting that it is often impossible to ascertain the "objective" facts of a criminal incident and assign it correctly to an offense in the penal code).

bargaining” over “charge bargaining”—that it removes an incentive that would otherwise exist for prosecutorial overcharging.

Prosecutors in systems of charge-reduction bargaining naturally wish to leave some room for a plea agreement in every case. When, for example, a defendant has apparently possessed a substantial amount of marihuana in a jurisdiction in which marihuana possession is a felony, a prosecutor may be reluctant to approve the sort of plea agreement illustrated by *People v. West*. The prosecutor may instead facilitate a plea agreement by charging the defendant with a more serious felony than simple possession, such as possession “for purposes of sale.” Although it might require an extraordinary construction of the facts of the case to support this charge, its filing would make it possible for the prosecutor to “go down to count two” if the defendant agreed to plead guilty.<sup>270</sup> The plea bargaining process surely operates in a more sensible fashion when prosecutors need not use or even consider this strategem—when they can charge defendants with the crimes that the evidence seems to support and then offer favorable sentence recommendations in exchange for pleas of guilty.

The final and most serious defect of charge-reduction bargaining arises from the fact that a penal code may not supply a large number of charges for a prosecutor to manipulate in striking a bargain in a particular sort of case. The charges that it does supply, moreover, may carry substantially different penalties. For this reason, the results of criminal cases often depend on accidents of “spacing” in the drafting of criminal codes.<sup>271</sup> Although sentence recommendation bargaining permits a precise adjustment of the concessions that a guilty-plea defendant will receive, charge-reduction bargaining must proceed by leaps from one charge to another, and the size of each leap depends upon how much less serious each “reasonably related” or otherwise available offense is than the offense that has been charged. In one case, “going down to count two” may result only in the substitution of a slightly less serious felony for the felony initially charged. In another case, although the offense charged is equally serious, “going down to count two” may result in a misdemeanor conviction. In still another case, there may simply be no lesser offense that seems “reasonably related” to the defendant’s conduct. Thus, although a prosecutor in a system of charge-reduction bargaining may be willing to grant a concession in exchange for a plea of guilty, he may sometimes find that penal code draftsmen have failed to provide a lesser offense that he can properly substitute for the offense that he has charged. On other occasions, when statutory draftsmen have indeed made lesser charges available, the prosecutor may be forced to choose between withholding any charge reduction and granting one that seems too generous. It is bad enough that the

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270. See *id.* at 103-04.

271. *Id.* at 104.

participants in charge-reduction plea bargaining must invert the classic objective of sentencing proceedings by seeking not only a punishment that fits the crime but a crime that fits the punishment. It is worse that they may not be able to find such a crime and may be led by the fortuities of penal code drafting to make sentencing decisions that they themselves consider unwarranted.

These incongruities led Los Angeles defense attorney Luke McKissack to suggest that a desirable reform of the guilty plea process would be to "permit a defense attorney to search the penal code from top to bottom and to propose a guilty plea to any offense that carries an acceptable punishment, regardless of whether this offense bears any relationship to what the defendant is supposed to have done." Although this reform would undoubtedly lead to even more serious mislabeling than charge-reduction bargaining produces today,<sup>272</sup> it might also increase the ability of this form of bargaining to yield rational sentences. The need for the sterile exercise that McKissack proposed would, however, be obviated if prosecutors or trial judges could bargain directly about sentencing outcomes.

Some penal codes do encourage more rational charge-reduction bargaining than others. When Richard Denzer, the Executive Director of the New York Temporary Commission on Revision of the Penal Code and Criminal Code, was asked whether the institution of plea bargaining had influenced the shape of the code that his Commission proposed, he replied, "Decidedly! We were very conscious of the negotiation process, and that's the reason for our extensive degree structure. . . . [I]t's very important that one can take the negotiating process right down the line through the degrees."<sup>273</sup> The Commission's approach yielded what is probably America's most prolix penal code. In New York, a defendant can be convicted of criminal mischief in the fourth degree,<sup>274</sup> of criminal tampering in the second degree,<sup>275</sup> of unlawfully using slugs in the second degree,<sup>276</sup> of criminal trespass in the third degree,<sup>277</sup> of perjury in the third degree,<sup>278</sup> of making an apparently sworn false statement in the second degree,<sup>279</sup> of hindering prosecution in the third degree,<sup>280</sup> of possessing a dangerous drug

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272. See D. NEWMAN, *supra* note 1, at 100-02 (charges "such as larceny or possession of narcotics are never arbitrarily used in place of murder unless these charges were part of the actual conduct involved," but "most reduced charges are inconsistent to some extent with the facts").

273. *Drafting a New Penal Law in New York: An Interview With Richard Denzer*, 18 BUFFALO L. REV. 251, 258 (1969).

274. N.Y. PENAL LAW § 145.00 (McKinney 1975).

275. *Id.* § 145.15.

276. *Id.* § 170.55.

277. *Id.* § 140.10. This offense is not the least serious of the various trespass offenses that the New York Penal Law has created; the least serious is called simply "trespass." *Id.* § 140.05.

278. *Id.* § 210.05.

279. *Id.* § 210.35.

280. *Id.* § 205.55.



in the fourth degree,<sup>281</sup> of promoting prison contraband in the second degree,<sup>282</sup> of forgery in the third degree,<sup>283</sup> of criminal possession of a forged instrument in the third degree,<sup>284</sup> and of a host of other well-stratified crimes. If the range of substantive offenses provided by the code does not itself offer the parties sufficient sentencing flexibility, a defendant can plead guilty to an attempt to commit any of the foregoing crimes.<sup>285</sup>

Penal code draftsmen commonly pay less attention to the practical requisites of the guilty plea system than did the authors of the New York Penal Law.<sup>286</sup> Acting just as draftsmen would in a rational system of justice, they seek to describe the sorts of conduct that should be punished and to prescribe appropriate penalties for the offenses that they define. In this process, the draftsmen are likely to overlook the possibility that they could promote a more rational form of charge-reduction bargaining by fractionating each offense into a number of degrees,<sup>287</sup> and, indeed, they rarely seem to consider the relationship that one offense may bear to another in the plea bargaining process. The vice of prolixity is undoubtedly a less serious vice than that of requiring the bargaining process to proceed by giant steps that may not fit the objectives of the parties. Both vices could, however, be avoided if plea bargaining focused directly on the sentence to be imposed rather than the level of the charge.

#### D. *A Summary of the Reforms That This Article Has Proposed*

At this point, it may be desirable to offer an overview of how a better regime of plea bargaining might be structured:

1. The decision whether to initiate the bargaining process should be left to the defendant and his attorney, and the trial judge should be forbidden from participating in or influencing this decision.<sup>288</sup> To enforce this limitation of the trial judge's role, a guilty plea induced by negotiations that the judge had initiated should be subject to later attack. When a defendant

281. *Id.* § 220.05.

282. *Id.* § 205.20.

283. *Id.* § 170.05.

284. *Id.* § 170.20.

285. *Id.* § 110.00. Under the predecessor of the current New York Penal Law, a defendant charged with robbery in the first degree might plead guilty to robbery in the second degree, to robbery in the third degree, to attempted robbery in the first degree, to assault in the first degree, to grand larceny in the first degree, to attempted robbery in the second degree, to attempted robbery in the third degree, to assault in the second degree, to grand larceny in the second degree, to attempted assault in the second degree, to attempted larceny in the second degree, or to any of a number of misdemeanors. Some armed robbery defendants apparently did find their way into each of these conviction categories. Shin, *supra* note 256, table 1 at 30.

286. See Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

287. Of course this approach also tends to undercut whatever advantages charge-reduction plea bargaining may present; if the philosophy that shaped the New York Penal Law were carried to the point that the number of potential charges in a particular case equalled the number of sentencing alternatives, there would be little functional difference between bargaining about charge-reduction and bargaining directly about sentencing.

288. See text accompanying note 217 *supra*.

does choose to initiate the bargaining process, he should do so by filing a motion for a pretrial conference.

2. Prior to the pretrial conference, a probation officer should conduct a limited presentence investigation and prepare a report of his findings. His investigation should not, however, include an interview with the defendant.<sup>289</sup>

3. The defendant should be permitted to attend the pretrial conference that he has sought,<sup>290</sup> and bargaining in advance of this conference (or, more specifically, bargaining when either the defendant, defense attorney, prosecutor or trial judge is absent) should be considered unethical.<sup>291</sup> At the conference, both the defendant and the prosecutor should have an opportunity to discuss the circumstances of the case, to present one or more proposals for disposition of the case, and to argue in support of these proposals.<sup>292</sup>

4. The trial judge's role during the proceedings should be essentially passive. He should not offer advice to the defendant or to the prosecutor concerning the decisions that each must make and should not comment on the strength of the evidence or on the likelihood of conviction at trial. Departures from this role—in the form of judicial threats, witticisms, off-hand comments, cajolery, misrepresentations, or even well-intentioned and sound advice—should invalidate any guilty plea conviction that they produce.<sup>293</sup>

5. At the conclusion of the pretrial conference, the judge should be permitted to order a reduction in the level or number of charges against the defendant so long as this reduction is not contingent upon the defendant's choice of plea.<sup>294</sup> The subject of the plea agreement that the judge should propose, however, should not be charge reduction but rather the defendant's sentence.<sup>295</sup> A charge reduction contingent upon a waiver of the right to trial should be permitted, if at all, only as an incident to the judge's "sentence bargaining"—only when the sentence that the judge wishes to offer in exchange for the defendant's plea cannot be imposed without a prior adjustment of the charge.<sup>296</sup>

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289. See text accompanying notes 197-202 *supra*.

290. See text accompanying notes 242-47 *supra*.

291. See N. MORRIS, *supra* note 166, at 54-55. The danger, of course, is that the prosecutor and defense attorney might enter a plea agreement on their own and that the trial judge might perfunctorily approve this agreement at the conference. The conference procedure would plainly have little value if it operated in this fashion, and although a prohibition of pre-conference bargaining might easily be evaded by lawyers who were determined to do so, I am sufficiently optimistic to believe that the great majority of prosecutors and defense attorneys would observe the prohibition in good faith.

Although a defendant should be allowed to waive his right to attend the conference, see text accompanying note 247 *supra*, a court should insist upon the same procedural formalities and should apply the same substantive standards in evaluating this waiver that it would employ if the defendant offered to proceed without counsel.

292. See text accompanying note 218 *supra*.

293. See text accompanying notes 214-16 *supra*.

294. See note 220 *supra*.

295. See text accompanying notes 249-87 *supra*.

296. See note 251 and accompanying text *supra*.

Whether or not he orders a reduction in the charge, the trial judge should announce at the conclusion of the conference the sentence that he intends to impose if the defendant pleads guilty.<sup>297</sup> It might be best for the judge to determine this sentence in two stages by first assessing the sentence that would be appropriate if the defendant were convicted at trial and by then applying a "specific discount rate" to arrive at the sentence that would follow a plea of guilty.<sup>298</sup> Judicial control of the plea bargaining process would have substantial value, however, even if the trial judge did not employ this procedure.<sup>299</sup>

6. If the defendant decided to plead not guilty after considering the judge's offer, his case should be assigned for trial to a judge other than the judge who had conducted the pretrial conference.<sup>300</sup>

7. If the defendant offered a plea of guilty, however, the judge who had presided at the pretrial conference should be permitted to conduct the necessary examination of the defendant and, if the examination revealed nothing amiss, to accept his guilty plea.<sup>301</sup> The defendant's case should be assigned to a judge who had not participated in the pretrial conference only if the defendant later sought to withdraw his plea or if he alleged in a post-conviction proceeding that the plea had been improperly obtained.<sup>302</sup>

8. Finally, a stenographic transcript of the pretrial conference should be made available.<sup>303</sup> Even if it never became necessary to use this record in a subsequent proceeding, its potential availability would be likely to deter judicial overreaching and other abuses that might occur during the conference.<sup>304</sup>

Part II of *The Trial Judge's Role in Plea Bargaining* will offer some additional thoughts on reform of the guilty plea system. Specifically, it will consider the virtue of placing plea agreements "on the record" and the vice of applying a rigorous concept of finality in guilty plea cases. Even with these additions, my list of reforms will not have addressed all of the issues potentially involved in structuring a system of plea bargaining. Considera-

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297. Of course the judge might adjourn the conference in order to afford time for reflection or consultation with his colleagues prior to the announcement of his decision. Moreover, because the presentence investigation conducted prior to the conference would not have included an interview with the defendant and because additional information might conceivably come to light before the formal imposition of sentence, the judge should not be required to make an unqualified sentencing commitment even after he had carefully considered the issue in light of the evidence available to him. Very little additional evidence would be likely to emerge, however, and the judge's offer could therefore be *almost* unqualified. If, following the submission of a guilty plea, the judge did decide to impose a sentence more severe than the one that he had announced, he should be required to specify the reasons for his change of heart and to afford the defendant an opportunity to withdraw his plea.

298. See text accompanying notes 218-28 *supra*.

299. See text accompanying notes 219-41 *supra*.

300. See text accompanying notes 167-85 *supra*.

301. See text accompanying notes 186-94 *supra*.

302. See *id.*

303. See text accompanying note 192 *supra*.

304. See Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 690-91 (1972).

tion of what role victims and police officers ought to play in plea negotiations should, for example, be coupled with an examination of the role that they currently play, and the necessary empirical discussion would carry this Article far from its central theme.<sup>305</sup> Nevertheless, the blueprint for a system of plea bargaining that this Article has advanced is reasonably complete, and although plea negotiation in even its least pernicious form is an inherently abusive process, I believe that adherence to this blueprint would permit the guilty plea system to work somewhat less capriciously.

V. SOME CONCLUDING THOUGHTS ON THE RELATIONSHIP BETWEEN THE JUSTIFICATIONS COMMONLY OFFERED FOR PLEA BARGAINING AND SOME POSSIBLE JUSTIFICATIONS FOR JUDICIAL PARTICIPATION IN THE BARGAINING PROCESS

Although this Article has advocated judicial control of the plea bargaining process, there are some arguments for judicial bargaining that it has not yet considered. Each of these arguments is parallel to one that commentators frequently advance in support of the practice of plea bargaining itself, and an examination of these arguments may suggest some contradictions in the position of those who would continue the practice of plea bargaining but exclude trial judges from this process.<sup>306</sup>

A. *The "Practical Necessity" for Judicial Participation in Plea Bargaining*

Most of the reformers who would prohibit judicial participation in plea bargaining seem unaware that they are condemning an everyday occurrence rather than a sporadic practice. The elimination of judicial bargaining would work a major change in the methods by which criminal defendants are induced to plead guilty in many urban jurisdictions,<sup>307</sup> and it is not entirely self-evident that today's high level of guilty pleas could be main-

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305. I do not mean to make a secret of my basic position, however. It is true that "victims of crime are treated extraordinarily shabbily by our criminal justice system," N. MORRIS, *supra* note 166, at 55, but in my view, they—and police officers as well—are often given too great a voice in determining the outcome of criminal cases through the guilty plea process. Contrary to the assumption of many prosecutors, the interests of victims and police officers do not necessarily correspond to the interests of society, and in striking plea agreements, prosecutors far too often subordinate the interests of society to particularistic claims. Because trial judges are usually somewhat more insulated than prosecutors from the political pressures that may be exerted in support of these claims, judicial control of the bargaining process would probably tend to reduce the influence of victims and police officers, if only slightly.

306. This Article is not the place to examine in detail the justifications offered for plea bargaining, but the discussion that follows may encourage some reflection about the merits of the guilty plea system. When the advocates of plea bargaining are unwilling to follow the implications of their arguments for the related problem of judicial bargaining, the force of these arguments may also seem questionable in the context in which they were initially advanced.

307. See, e.g., the authorities cited in note 99 *supra*; *Baker v. State*, 259 So. 2d 200, 204 (Fla. Dist. Ct. App. 1972); Gallagher, *A Voluntary Trap*, TRIAL, May-June, 1973, at 23.

tained without this practice. Of course one cannot consistently contend that the ratio of guilty pleas to trials must be maintained at approximately its current level and at the same time advocate a reform that may substantially alter this ratio.

Some of the commentators who have argued that trial judges should not participate in plea bargaining have asserted that prosecutorial bargaining could yield an adequate number of guilty pleas,<sup>308</sup> and despite the commentators' failure to offer any evidentiary support for this proposition, my own guess is that prosecutorial plea bargaining can indeed be as effective as judicial plea bargaining in avoiding the burdens of trial. This conclusion rests, however, on the view that prosecutorial plea bargaining is fully as coercive as judicial plea bargaining, and if one accepts this view, the principal reason for the commentators' condemnation of judicial bargaining seems to disappear. If one were to adopt the commentators' view that prosecutorial plea bargaining is substantially less coercive than judicial plea bargaining, there would be no reason to suppose that the two forms of bargaining would induce equal numbers of defendants to sacrifice their constitutional rights.

Judges and practitioners in jurisdictions in which judicial bargaining is routine do contend that the criminal justice system would virtually cease to function in the absence of this practice. They maintain that judicial bargaining is a practical necessity with the same fervor and the same disdain of "unrealistic" reform that the defenders of plea bargaining often seem to exhibit when someone ventures to suggest that our nation might be able to grant its criminal defendants their day in court. Justice Robert C. Underwood of the Illinois Supreme Court, who conceded that "as a theoretical proposition" judges should not participate in plea bargaining, nevertheless argued that this practice should be evaluated on a "realistic, pragmatic basis":

[Judicial participation in plea bargaining] is recognized, even by those trial judges who do not like it, as necessary if the flood-tide of criminal litigation is to be kept anywhere within manageable limits. I suspect . . . that an adamant attitude of non-participation in plea discussions by all judges in metropolitan areas would result in wholesale demands for jury trials with which our judicial system, now back-logged with civil cases, would be completely unable to cope.<sup>309</sup>

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308. *E.g.*, Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 187 (1964).

309. Underwood, *Let's Put Plea Discussions—and Agreements—on Record*, 1 LOY. CHI. L.J. 1, 4 (1970). See *Commonwealth v. Evans*, 434 Pa. 52, 58 n., 252 A.2d 689, 692 n. (1969) (Bell, J., dissenting) (danger that without judicial bargaining the "backlog . . . will be tremendous"); SAN FRANCISCO COMM. ON CRIME, *supra* note 99, at 27 (committee opposes judicial plea bargaining but announces that implementation of this recommendation "may be impractical" until the courts are afforded other ways "to dispose of cases fast enough to keep their calendars current"); Lambros, *supra* note 230, at 516.

This argument for judicial bargaining seems to reflect some narrowness of vision, for the American jurisdictions in which judges do not participate in plea bargaining to any significant extent seem no more inundated by a "flood-tide of criminal litigation" than those in which judges take an active part.<sup>310</sup> Nevertheless, a similar provincialism seems apparent when advocates of plea bargaining argue that this practice is indispensable despite the fact that most nations in the world manage to resolve their criminal cases without it.<sup>311</sup> Of course the claim that plea bargaining is a practical necessity in our own system of justice ought not to be dismissed lightly, and although I have elsewhere sketched some reasons for viewing this claim with skepticism,<sup>312</sup> the argument from necessity plainly merits more detailed treatment than I have provided. Even without a full evaluation of the problem, however, the claim that a locally dominant form of bargaining is indispensable suggests that the horizons of the participants in an existing system of criminal justice are likely to be constricted. Without much reflection, these participants are likely to condemn as impractical the proposition that things could be done differently. Justice Walter V. Schaefer of the Illinois Supreme Court once wrote, "What is familiar tends to become what is right,"<sup>313</sup> and he might have added that when what is familiar does not *quite* become right, it usually becomes necessary. The shortcuts that are familiar tend to become the shortcuts that are required.

#### B. *The "Inevitability" of Judicial Participation in Plea Bargaining*

Many observers contend that a prohibition of plea bargaining would be unenforceable and that it is better to "regularize the actual" than to drive the bargaining process underground,<sup>314</sup> yet the same observers commonly propose to forbid judicial plea bargaining without suggesting any mechanism for enforcing this prohibition.<sup>315</sup> These observers seem to assume that good faith will be enough to implement reforms that they desire but that no enforcement machinery can be adequate to implement reforms that they oppose.

The experience of jurisdictions like Houston suggests that, even when judicial plea bargaining is formally disapproved, it is difficult to prevent off-the-record agreements between trial judges and especially favored de-

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310. When, as in Houston, prosecutorial plea bargaining induces 94% of the defendants who are convicted of felonies to plead guilty, *see* note 20 and accompanying text *supra*, it seems highly doubtful that judicial bargaining could do much more to clear the dockets.

311. *See* A. ROSETT & D. CRESSEY, *supra* note 223, at 165.

312. Alschuler, Book Review, 12 CRIM. L. BULL. 629, 631-32 (1976).

313. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 7 (1956).

314. *E.g.*, 18 U.S.C.A. FED. R. CRIM. P. 11, Advisory Committee Note at 24 (West 1975).

315. *E.g.*, *id.* at 25.

fense attorneys.<sup>316</sup> Recognition of the propriety of judicial bargaining would permit less favored lawyers to seek judicially sanctioned bargains as well and might thereby promote equality in the administration of justice. Moreover, in jurisdictions in which judicial plea bargaining is clandestine, it is unusual for a judicial bargaining session to include the prosecutor. In jurisdictions in which judicial plea bargaining is an accepted feature of the criminal process, it is unusual for a conference between a trial judge and a defense attorney to take place in the absence of the prosecutor. Recognition of the propriety of judicial plea bargaining might therefore lead to a fairer, more balanced procedure than is followed when judicial bargaining is *sub rosa*.

C. *Is Everybody Happy?—Judicial Participation in Plea Bargaining and the Consent of the Parties*

Apologists for plea bargaining often contend that, when a plea agreement satisfies the parties, no one else can have legitimate reason for complaint. A bargain that a defendant, advised by able counsel, finds advantageous cannot properly be criticized on the ground that it is unfair to him, and if occasional cases of incompetence or corruption are set aside, the prosecutor's acquiescence in the bargain insures that it is fair to the state as well.<sup>317</sup> A jurisprudential assessment of this argument would require consideration of the concept of voluntariness, of the goals of criminal proceedings, of the mechanisms by which those goals can best be achieved, and, perhaps, of the reasons for prohibiting a variety of consensual arrangements in other legal contexts.<sup>318</sup> It is sufficient for present purposes to note that one who accepts this central argument for plea bargaining cannot consistently oppose judicial participation in the process, for judicial bargaining apparently meets with the approval of most defense attorneys and a great many prosecutors.<sup>319</sup> At the very least, if the consent of the parties is regarded as determinative, a trial judge should be permitted to negotiate with a defense attorney when both the prosecutor and the defendant acquiesce in this procedure. If the opponents of judicial bargaining are unwilling to create this exception to the prohibition that they propose, some of them must apparently reconsider the significance that the consent of the parties should have in criminal proceedings.

316. See text accompanying notes 12-13 *supra*; cf. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 62 (1967) ("Some defense attorneys are on close enough personal terms with some judges that they may speak to them 'off the cuff'").

317. For a suggestion that this argument overlooks the conflicts of interest that prosecutors experience in the guilty plea system, see *The Prosecutor's Role*, *supra* note 9, at 105-12.

318. For views on some of these jurisprudential issues that are close to my own, see Kipnis, *supra* note 256. See also *The Supreme Court and the Guilty Plea*, *supra* note 9, at 53-54 n.172 (assessment of the argument that it is no kindness to a defendant to disapprove a guilty plea that he "really wants" to enter).

319. See text accompanying notes 134-37 *supra*.

## CONCLUSION

It may seem surprising that a critic of plea bargaining would condemn the proposal that trial judges not take part in the bargaining process, a proposal which is designed to render the process less coercive. Although proponents of far-reaching change sometimes spurn minor reform on the theory that it is the enemy of major reform, I hope that the views expressed in this Article do not carry overtones of this philosophy. If I believed that excluding trial judges from the bargaining process would reduce the unfairness of this process in the slightest, I would (unless my psyche is substantially more perverse than I know) unhesitatingly endorse this proposal.<sup>320</sup>

At the same time, advocacy of judicial bargaining does offer opportunities to criticize the wishful thinking that characterizes much of today's defense of this system. Not only do the defenders of plea bargaining often seem unwilling to apply their rationales for plea bargaining to the subordinate problem of judicial bargaining, but—despite their declarations that plea bargaining is not unseemly and that we should happily spread the process “on the record”—many of them seem to favor the most round-about forms of bargaining that they can find in the range of current practices.

When trial judges participate in the bargaining process, they usually tend to speak in Delphic predictions and to avoid precise pretrial commitments. Even the studied indirection of most trial judges is apparently not circuitous enough, however, for the comfort of some contemporary defenders of plea bargaining. Although successful plea negotiation plainly depends upon the authoritative exercise of a judicial power to grant sentencing concessions, defenders of the practice usually insist that trial judges should not participate in the bargaining process. They sometimes also contend that the parties who do engage in plea bargaining should not speak directly of their ultimate concern, the sentence that will follow the entry of a guilty plea, but should talk obliquely of charge reduction instead. Through the indirection of prosecutorial charge reductions and sentence “recommendations,” the extent to which any particular defendant has been rewarded for forgoing his right to trial can usually be effectively obscured. Moreover, the defenders of the guilty plea system often seem to persuade themselves that, while prosecutorial bargaining can induce the overwhelming majority of criminal defendants to plead guilty, it need not affect the sentencing process or impair the independence of trial judges in

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320. Of course minor reform is one thing, and a pretence of reform is another. Even if excluding trial judges from the plea bargaining process would not be harmful—even if this change would not alter the basic operation of the guilty plea system in any way—one might properly be offended by the self-congratulatory attitude of some of the advocates of this “reform.”



any way. The efforts of these defenders at self-delusion seem to suggest that they lack the courage of their rationalizations. Indeed, their opposition to judicial bargaining may rest primarily on a desire to protect the trial bench from involvement in a practice that, despite their frequent disclaimers, they do recognize as more than a bit unseemly. A central goal of this Article has been to articulate logical and straightforward procedures for engaging in plea bargaining, and one who finds the suggested procedures offensive might fairly ask himself whether he truly favors the maintenance of any sort of plea negotiation system. A system that blushes at the articulation of its governing principle has little claim to respect or affection.

The indirection that characterizes the approach of most moderate reformers toward plea bargaining is not only hypocritical but harmful. I have suggested that this indirection may ultimately lead to the imposition of a greater penalty for the exercise of constitutional rights than would be required if the criminal justice system spoke forthrightly. Whether or not this thesis is sound, moreover, the use of cumbersome, obfuscating procedures makes it difficult for defendants to "know the score," just as it enables the defenders of the guilty plea system to avoid "knowing the score" themselves. Judicial control of the plea bargaining process would offer defendants a clear and tangible basis for reliance in entering their guilty pleas; it would, at least on occasion, permit effective regulation of the extent of the penalty that our criminal justice system imposes for exercise of the right to trial; it would facilitate the introduction of new procedural safeguards; it would be likely to affect the tone and substance of the bargaining process in a variety of useful ways; and, most importantly, it would restore judicial power to the judges.