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A PLEA FOR GREATER JUDICIAL CONTROL OVER SENTENCING AND ABOLITION OF THE PRESENT PLEA BARGAINING SYSTEM

George W. Pugh and Dallis W. Rademaker***

Viewed functionally, our criminal justice system gives a person accused of crime a choice. He can elect to go to trial and run the risk of harsh penalties, or accept a negotiated settlement with a consequent reduction in possible punishment. For an overwhelming majority of those ultimately convicted of crime,¹ the choice is clear: a non-trial settlement with its more lenient punishment is an alternative the accused cannot refuse, and so he "cops a plea." Thus, for most of those convicted of crime, the plea bargaining model, not the trial model with all its prized safeguards, represents the American way. Phrased differently, what the system too often presents to a defendant is a game of truth or Draconian² consequences which he must play, despite the privilege against self-incrimination.

Centered in the executive branch of government, plea bargaining is an administrative process, albeit informal and generally unstructured. Although, of course, any settlement reached through this administrative route is subject to some judicial review,³ the federal courts have adopted a hands-off attitude towards the negoti-

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1. Of the 32,913 defendants convicted in federal district courts in 1979, 27,295, or 83 percent, pleaded guilty, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 197 (1980). See also Burger, *The State of the Judiciary—1970*, 56 A.B.A.J. 929, 931 (1970) (approximately 90 percent); D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 1 (1966) (roughly 90 percent).

2. According to the Encyclopedia Britannica, Draco, an Athenian lawgiver of the seventh century B.C., promulgated a harsh code which punished both trivial and serious crimes in Athens with death. III ENCYCLOPEDIA BRITANNICA 651 (1974). The Encyclopedia Americana notes that Draco's code was the first to place responsibility for punishing murders with the state rather than the victim's family. IX ENCYCLOPEDIA AMERICANA 324 (1975).

3. See Heberling, *Judicial Review of the Guilty Plea*, 7 LINCOLN L. REV. 137, 141 (1972); Comment, *Judicial Discretion to Reject Negotiated Pleas*, 63 GEO. L.J. 241, 242 (1974).

ating process itself—lamentably so, the writers feel. Despite our system's heavy reliance on plea bargaining and the accolades accorded it by the United States Supreme Court,⁴ this part of the criminal justice system remains ill defined, unstructured, and uncontrolled by rule. Plea bargaining is an area which judges, hesitating to enter, leave largely to the prosecutor and defense lawyer.

It is the thesis of this article that:

(1) any process of adjudication of criminal culpability and determination of sentence, whether after trial or non-trial, should be within the firm control and supervision of the judiciary, and should not be dominated by the prosecutor, the representative of the executive department;

(2) the recent legislative tread towards lengthy mandatory minimum sentences, instead of eliminating or controlling discretion in sentencing, has the undesirable effect of shifting discretion in sentencing from judge to prosecutor and thus promoting plea bargaining; and

(3) rather than adopt measures that insulate the plea bargaining process from active judicial supervision and control, our society should strive to abolish plea bargaining as it now exists and replace it with a system that permits a defendant to elect a judicially administered, non-adversary, expeditious alternative to the traditional Anglo-Saxon trial.

That plea bargaining developed in the United States is not difficult to understand; the disturbing thing is that our society has permitted it so long to persist without either imposing pervasive judicial control, or outlawing it and substituting for it a more satisfactory procedure. For many of those accused of crime, evidence of guilt is overwhelming—but in our system this does not mean that the accused is defenseless. In part because of our history and tradition, our fear of abuse of authority, our great concern about the individual and the oppressed, the American criminal justice system long ago developed great protection for the criminally accused. As a result, even the clearly guilty are often able to prolong the adjudicative process and make it very time-consuming and expensive for the prosecution. With the increase in crime that accompanied the country's urbanization, dockets became very crowded: the benefits to the prosecution in time and expense from a defendant's pleading guilty were obvious. Since the system generally accorded the prosecutor wide discretion in selecting the charge to levy

4. See *Santobello v. New York*, 404 U.S. 257 (1971).

against the defendant,⁵ since the substantive law frequently provided the prosecution with a panoply of possible offenses to charge, and since cooperative judges usually honored sentence recommendations made by the prosecutor,⁶ the power in the prosecution to offer a defendant an attractive "bargain" was great indeed. The fact that the American system authorized the imposition of comparatively harsh sentences⁷ further strengthened the prosecutorial power. Given American ingenuity and our pragmatic approach, the institution of plea bargaining quite naturally evolved. In fact, it is at least conceivable that penalties were escalated precisely to give the prosecution power to force recalcitrant defendants to plead guilty. Because approximately 85 to 95 percent⁸ of convictions were obtained by guilty plea with a consequent discount in sentence, the maximum penalty authorized in the book needed to be abnormally high if the sentence actually awarded or "agreed to" under the plea bargain would be one the society would regard as reasonably appropriate.

Plea bargaining as an institution has had a shadowy, dubious past. Recent scholarship appears to demonstrate that plea bargaining as we know it is largely a twentieth century development.⁹ Prior to 1970, when it came out of the shadows,¹⁰ the process was generally *sub rosa*,¹¹ and many thought that the rules governing the admissibility of confessions applied with equal force to the validity of guilty pleas.¹² It was so held by a prestigious panel of the United States

5. See Arnold, *Law Enforcement—An Attempt At Social Dissections*, 42 YALE L.J. 1, 7 (1932); LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMP. L. 532 (1970). For a comparison between American and foreign procedures see Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974).

6. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 105 (1968).

7. "The average sentence imposed by American courts appears to be longer than the average anywhere else in the democratic world. In addition a greater proportion of our population is confined to jail than in any other nation for which reliable data are available." Rubin, *How We Can Improve Judicial Treatment of Individual Cases Without Sacrificing Individual Rights: The Problems of Criminal Law*, 70 F.R.D. 176, 196 (1976) (footnotes omitted).

8. See note 1, *supra*.

9. See Alschuler, *Plea Bargaining and Its History*, 13 LAW & SOC. REV. 211, 235-40 (1979). See also Langbein, *Understanding the Short History of Plea Bargaining*, 13 LAW & SOC. REV. 261 (1979).

10. See *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

11. See *Blackledge v. Allison*, 431 U.S. 63, 76 (1977) and authorities cited therein; Pugh, *Standards Relating to Pleas of Guilty*, 57 F.R.D. 229, 357 (1972).

12. See *Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, 394 U.S. 459 (1969); *Machibroda v. United States*, 368 U.S. 487 (1962); *Kercheval v. United States*, 274 U.S. 220 (1927); *Bram v. United States*, 168 U.S. 532 (1897); *United States*

Fifth Circuit Court of Appeals in 1957 in the important case of *Shelton v. United States*.¹³ On rehearing, the Fifth Circuit, by a divided court sitting *en banc*, overturned the original decision and gave a limited approval to the institution.¹⁴ Thereafter, noting that the Solicitor General of the United States had made a "confession of error . . . that the plea of guilty may have been improperly obtained," the Supreme Court in a *per curiam* opinion dismissed the appeal, leaving the question somewhat in limbo.¹⁵

When in 1969 in *Boykin v. Alabama*¹⁶ the United States Supreme Court made certain safeguards¹⁷ previously adopted for federal courts applicable to the acceptance of guilty pleas in state courts, it seemed that plea bargaining itself might shortly be outlawed by the Court. The following year, perhaps because of a growing conservatism on the part of the Court and an increased concern about docket congestion,¹⁸ a very different tack was taken. In 1970, instead of outlawing plea bargaining, the high court held it constitutional,¹⁹ and in 1971 broadly blessed it.²⁰ In *Santobello v. New York*,²¹ Chief Justice Burger announced that plea bargaining "is an essential component of the administration of criminal justice," and "[p]roperly administered it is to be encouraged."²² It might be surmised that the majority of the Court, having concluded that it was impractical at that time to outlaw plea bargaining, decided instead to regulate it. Some hoped that now that plea bargaining was out in the open, its abuses would be controlled by aggressive judicial involvement.²³ In the opinion of these writers, for this judicial control to be effective,

ex rel. McGrath v. LaVallee, 319 F.2d 308, 319 (2d Cir. 1963) (Marshall, J., dissenting); *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966); Gentile, *Fair Bargains and Accurate Pleas*, 49 B.U.L. REV. 514 (1969); Pugh, *supra* note 11, at 358.

13. 242 F.2d 101 (5th Cir. 1957). The case is discussed in detail in Gentile, *supra* note 12.

14. 246 F.2d 571 (5th Cir. 1957).

15. 356 U.S. 26 (1958).

16. 395 U.S. 238 (1969).

17. *Boykin* held that a trial judge, in taking a guilty plea, should question that accused "to make sure he has a full understanding of what the plea connotes and of its consequence." *Id.* at 244.

18. See Burger, *supra* note 1.

19. See *North Carolina v. Alford*, 400 U.S. 25 (1970); *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970).

20. See *Santobello v. New York*, 404 U.S. 257 (1971).

21. 404 U.S. 257 (1971).

22. *Id.* at 280.

23. See Enker, *Perspectives on Plea Bargaining*, THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND THE ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 108, 117 (1967) [hereinafter cited as PRESIDENT'S COMM'N]; Lambros, *Plea Bargaining*

it had to embrace not merely the taking of guilty pleas but the negotiating process itself.²⁴

What is much to be desired, as we see it, is judicial control over sentencing. Most unfortunately, the following recent developments militate in quite the opposite direction: (1) the 1975 amendment of Federal Rule of Criminal Procedure 11(e) to prohibit federal judicial participation in plea bargaining;²⁵ (2) *Bordenkircher v. Hayes*,²⁶ which embraces a judicial hands-off policy towards the plea bargaining process; (3) the current movement towards legislatively prescribed mandatory minimum sentences;²⁷ and (4) *Rummel v. Estelle*,²⁸ which reflects Supreme Court disinclination to void exceedingly long mandatory prison terms. These four aspects will hereafter be discussed separately. Rather than consider any particular state jurisdiction, the effort will be to analyze developments from a national standpoint.²⁹

The problems thus created have been increasingly recognized, as reflected in growing dissatisfaction with the present heavy reliance on the plea bargaining system.³⁰ Little agreement exists, however, as to what process should replace it. Those opposed to the existing system can be generally grouped into two broad categories: those who would retain prosecutorial-defense counsel plea bargaining but modify it,³¹ and those who would abolish plea bargaining and

and the Sentencing Process, 53 F.R.D. 509 (1971); Pugh, *supra* note 11, at 357. Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 289-291, 299 (1972).

24. See Alschuler, *The Trial Judge's Role in Plea Bargaining*, 76 COL. L. REV. 1059 (1976); Pugh, *Ruminations Re Reform of American Criminal Justice (Especially our Guilty Plea System): Reflections Derived From a Study of the French System*, 36 LA. L. REV. 947, 966 (1976).

Although the ABA Standards on Guilty Pleas were, in our judgment, a very significant step forward, they called for judicial non-involvement in the negotiating process itself. See ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft, 1968) § 3.3 at 11 [hereinafter cited as ABA STANDARDS], *discussed in* Pugh, *supra* note 11.

25. FED. R. CRIM. P. 11(e) as amended by Pub. L. No. 94-64 § 3 (6)-(10), 89 Stat. 370 (1970). Rule 11(e)(1) provides that "[t]he court shall not participate in any such [plea] discussions." For a discussion of Rule 11(e) see note 34, *infra*, and the following text.

26. 434 U.S. 357 (1978), *discussed in* note 82, *infra*, and the following text.

27. See the discussion at note 108, *infra*, and the following text.

28. 445 U.S. 263 (1980), *discussed in* note 134, *infra*, and the following text.

29. In Louisiana, however, a sentence may be reviewed on appeal for excessive length. See LA. CONST. art I, § 20; *State v. Sepulvado*, 367 So. 2d 762 (La. 1979).

30. See NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS: TASK FORCE REPORT ON COURTS 42 (1973) [hereinafter cited as NATIONAL ADVISORY COMM'N]; Alschuler, *supra* note 24; Rubin, *supra* note 7.

31. See ABA STANDARDS, *supra* note 24, at 1; PRESIDENT'S COMM'N, *supra* note 23, at 12; Church, *In Defense of "Bargain Justice,"* 13 LAW & SOC. REV. 509 (1979).

amend and expedite existing trial procedures to the point that the trial system could handle the increased load.³² In the authors' view, neither of these alternatives is satisfactory. The first alternative continues the principal defect of the present plea bargaining system in that the power to control events remains with the prosecutor, undermining fundamentally what may be called the judiciousness of the criminal justice system. The second alternative poses a threat to the improvements and safeguards which have become a valued part of the trial process as a product of the so-called due process revolution. What the writers have in mind is a third possibility: abolish plea bargaining and substitute a proceeding under the control and supervision of a trial judge—one other than the judge who would try the case if the defendant elects to go to trial. The non-trial judicial procedure envisioned would be somewhat akin to the usual European continental model and the proposal will be discussed briefly at the conclusion of this article.³³

PROHIBITION AGAINST FEDERAL JUDGE PARTICIPATION IN PLEA BARGAINING

When in 1970 the United States Supreme Court recognized the institution of plea bargaining,³⁴ the extent to which the judge should, or could, properly participate, supervise or regulate the plea bargaining process itself was not clear. At least three pre-1970 decisions in this regard, all involving federal habeas corpus applications from state prisoners, bear discussion and contrast.

In the 1963 United States Second Circuit Court of Appeals opinion in *United States ex rel. McGrath v. La Vallee*,³⁵ petitioner complained of the trial judge's alleged coercive conduct at a pre-plea conference in the judge's chambers. There was much dispute as to exactly what had transpired at the conference, attended by the trial judge, prosecuting attorney, defense attorney, petitioner, court stenographer, and at least one court attendant. A contested official transcript disclosed that the trial judge, *inter alia*, had told the defendant that if he were convicted as charged, "I might have to send you away for the rest of your life," and "you will be entitled to no consideration of any kind from me." The judge went on to say, "I make you no promises as to your sentence, but I will give you every

32. See Alschuler, *supra* note 6; Alschuler, *supra* note 24; NATIONAL ADVISORY COMM'N, *supra* note 30, at 46; Noe, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

33. See Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); Pugh, *supra* note 24.

34. See cases cited in note 19, *supra*.

35. 319 F.2d 308 (2d Cir. 1963).

consideration if you are truthful and there is an indication that you want to start a new life for yourself."³⁶ The defendant maintained that the trial judge had actually gone much further to motivate him to plead guilty. A majority of the Court of Appeals took the position that if the trial judge had gone no further than shown by the contested official transcript, the defendant's federal constitutional rights would not have been violated and he would not be entitled to a new trial. The Court of Appeals remanded the case to ascertain the accuracy of the transcript.³⁷ Judge Friendly in a concurring and dissenting opinion observed, "[p]erhaps, in order to avoid a later claim of coercion . . . a judge would be wiser to abstain from any conversations about a guilty plea with a criminal defendant," even when "the result of abstention is likely to be a heavier sentence. . . ."³⁸ In a vigorous dissenting opinion,³⁹ Judge (now Justice) Thurgood Marshall ably argued that even if the facts were as represented in the contested transcript (a copy of which he appended), defendant's plea had been coerced and he was entitled to a new trial. In the writers' opinion, the tone, at least, of the conference was certainly coercive, and if judicial participation in plea bargaining is to exist, it should be very different from that set forth in the *McGrath* transcript—official or unofficial version.

Three years later, in *United States ex rel. Elksnis v. Gilligan*,⁴⁰ an influential federal district court decision by Judge Weinfeld of the Southern District of New York (a jurisdiction embraced by the Second Circuit), the court, emphasizing the voluntariness requirement for a valid plea, held that because the sentencing power lies with the judge, participation by him in the plea negotiation process would necessarily intimidate the defendant and render a resulting plea involuntary. In strong language, Judge Weinfeld stated:

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 sen-

36. *Id.* at 323.

37. Thereafter, when the case was again before the court, after the fact finding hearing had been held, the court "accepted as trustworthy" the stenographic transcript of the *in camera* conference and held that the "mere explanation of the alternatives facing the defendant" did not support the petitioner's allegations that the judge had "tricked and coerced" him into pleading guilty. 348 F.2d 373, 374-77 (2d Cir. 1965).

38. 319 F.2d at 315.

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

40. 256 F. Supp. 244 (S.D.N.Y. 1966).

tence in excess of that proposed is present whether referred to or not. . . . 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. The plea is so interlaced with the promise that the one cannot be separated from the other; remove the promise and the basis for the plea falls. . . .

The judge stands as the symbol of even-handed justice, and none can seriously question that if this central figure in the administration of justice promises an accused that upon a plea of guilty a fixed sentence will follow, his commitment has an all-pervasive and compelling influence in inducing the accused to yield his right to trial. A plea entered upon a bargain agreement between a judge and an accused cannot be squared with due process requirements of the Fourteenth Amendment.⁴¹

In 1968 in *United States ex rel. Rosa v. Follette*,⁴² the Second Circuit Court of Appeals again considered the problem. The court stated that in federal court consideration of such state prisoner habeas applications, the issue is not who participated in the plea discussion, but whether the plea was voluntary. Although not sanctioning judicial participation in plea bargaining, the court, distinguishing *Elksnis*,⁴³ stated that the defendant was "fortunate in being given the security of the Judge's beneficence by learning immediately what most defendants are tortured over, can only hope for and anticipate—that the trial judge will follow the prosecutor's recommendation."⁴⁴

41. *Id.* at 254. Judge Weinfeld went on to say:

Finally, a bargain agreement between a judge and a defendant, however free from any calculated purpose to induce a plea, has no place in a system of justice. It 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."

Id. at 255.

42. 395 F.2d 721 (2d Cir. 1968).

43. In a footnote the court stated:

While some of the dicta in *Elksnis* lends support to Rosa's position, that case was correctly decided on its facts. Two essential elements present in *Elksnis* are missing here: the trial court conferred informally with *Elksnis* and promised a specific term if he would change his plea from not guilty of murder in the second degree to guilty of manslaughter in the first degree; and, the court imposed a longer imprisonment than had been promised because after the plea was changed the court learned that *Elksnis* was a second felony offender.

Id. at 725 n.5.

44. *Id.* at 726.

When the American Bar Association gave its imprimatur to the controversial institution of plea bargaining in 1968,⁴⁵ the Association adopted a provision⁴⁶ specifically prohibiting the trial judge's participation in plea discussions.⁴⁷ The Standards expressly stated that once an agreement had been reached, the parties could request that the judge, in advance of a formal tender of the plea, indicate whether he would concur in the agreement if the pre-sentence report accorded with representations. If the judge did not approve the tentative agreement, presumably the negotiation process between defense and prosecution could be repeated and the judge again consulted, a procedure which might result in considerable judicial involvement.⁴⁸ Despite criticism, it appears that judicial participation in plea bargaining in the state system, in one form or another, was then,⁴⁹ and is now,⁵⁰ a common practice.⁵¹

45. ABA STANDARDS, *supra* note 24.

46. *Id.* § 3.3 states:

Responsibilities of the trial judge.

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefore in advance of the time for tender of the plea. He may then 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. If the trial judge concurs but the final disposition does not include the charge or sentence concessions contemplated in the plea agreement, he shall state for the record what information in the presentence report contributed to his decision not to grant these concessions. . . .

(c) When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8.

47. Instead of using the somewhat odious phrase of "plea bargaining," the Standards used the mere neutral phrases of "plea discussion" and "plea agreement."

48. See Alschuler, *supra* note 24, at 1120-22; Heberling, *supra* note 3, at 197.

49. See Newman, *supra* note 1, at 32-52, 78-104; Alschuler, *supra* note 24, at 1090-91 and authorities collected therein in footnote 99; Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 865, 891, 905 (1964).

50. See Alschuler, *supra* note 24, at 1090-92, 1149-50; Ryan & Alfini, *Trial Judges' Participation in Plea Bargaining: An Empirical Perspective*, 13 LAW & SOC. REV. 479 (1979); Uviller, *Pleading Guilty: A Critique of Four Models*, 41 LAW & CONTEMP. PROB. 102, 116 (1977).

51. For a discussion of its constitutionality, see notes 71-81, *infra*, and the accompanying text.

Five years after recognizing the constitutionality of plea negotiations, the Supreme Court in 1975 addressed the problem, amending Rule 11(e) of the Federal Rules of Criminal Procedure to prohibit federal judges from participating in plea discussions.⁵² The exact meaning of the prohibition, however, was not clear. Did it preclude a

52. As amended in 1975, Rule 11(e) of the Federal Rules of Criminal Procedure provides:

(1) *In General.* 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 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. *The court shall not participate in any such discussions.* [Emphasis added].

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. 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.

(3) *Acceptance of a Plea Agreement.* 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.

(4) *Rejection of a Plea Agreement.* If the court rejects the plea agreement, the court shall, on the record, inform the parties of this fact, advise the defendant personally in open court or, on a showing of good cause, in camera, that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.

(5) *Time of Plea Agreement Procedure.* Except for good cause shown, notification to the court of the existence of a plea agreement shall be given at the arraignment or at such other time, prior to trial, as may be fixed by the court.

(6) *Inadmissibility of Pleas, Offers of Pleas, and Related Statements.* Except as otherwise provided in this paragraph, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with, and relevant to, any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer. However, evidence of a statement made in connection with, and relevant to a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime, is admissible in a criminal proceedings for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

federal trial judge from indicating what the defendant's probable sentence would be if he pleaded guilty, and would its interdiction be extended to state courts as a matter of constitutional due process? While several very important lower court decisions cast light on the subject,⁵³ these questions remain unaddressed by the United States Supreme Court.

There are good arguments that can and have been advanced for⁵⁴ and against⁵⁵ judicial participation in the plea bargaining process. Clearly, unless strong safeguards and protective practices are established, substantial danger exists that judicial participation would tarnish the judiciary's image of impartiality and neutrality, and that the defendant might feel intimidated.

It must be remembered, however, that approximately 90 percent of convictions in criminal cases result from guilty pleas, which in the main are preceded by plea bargaining, explicit or implicit. Elaborate rules such as those contained in Federal Rule 11 for taking of guilty

53. See note 63, *infra*, and the accompanying text.

54. See Alschuler, *supra* note 24, at 1154:

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.

See also Heinz & Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC. REV. 349, 350 (1979) and authorities collected therein; Uviller, *supra* note 50; Note, *supra* note 23.

55. The disadvantages to judicial participation noted by the commentators are summarized by Professor Alschuler under the following headings:

- A. The Allegedly Coercive Character of Judicial Bargaining;
- B. The Danger That a Bargaining Trial Judge Could Not Conduct a Fair Trial After Negotiations Had Broken Down;
- 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;
- D. The Tension Between Judicial Plea Bargaining and the Effective Use of a Presentence Report; and
- E. The Unseemliness of Judicial Plea Bargaining.

Alschuler, *supra* note 24, at 1103-20. See also ABA STANDARDS, *supra* note 24, Commentary § 3.3 (2), quoted with approval in the majority *en banc* opinion in *Frank v. Blackburn*, 646 F.2d 873, 886 (5th Cir. 1980); Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. C.R.-C.L. L. REV. 29, 38-48 (1974); White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 452-53 (1971); Note, *supra* note 32, at 1392; Note, *Judicial Participation in Guilty Pleas—A Search for Standards*, 33 U. PITT. L. REV. 151, 156 (1971).

pleas and ascertaining the parameters of the bargain do not reach the process by which the bargain was struck. Unless the court exercises strong contemporaneous supervision of the process itself, there is great risk prosecutorial overreaching will occur. The unregulated market place may achieve eminently satisfactory results in determining a fair market price for material goods and services, but even Adam Smith did not urge the market place as a device to determine what is a fair sentence. As the accused's adversary, the prosecutor may often be tempted in the bargaining process to extract from the defendant all the prison time, etc., that the strength of the prosecutor's bargaining position might "justify." And defense counsel is generally obligated to do the converse. The judge, on the other hand, is by tradition charged with imposing the sentence "justice" dictates—not that "justified" by bargaining power.⁵⁶ The judge represents society—not an adversary. Once a bargain is struck between adversaries without the supervision and control of the court, the authors feel that it is difficult indeed, and usually ineffectual, for the court then to retrace the bargaining process and satisfy itself that the result was fairly come by.⁵⁷ Once a bargain has been made, all parties are interested in persuading the court to accept it and are likely to omit or minimize the importance of details of the negotiating history which might provoke the judge to reject the plea as involuntary.⁵⁸

The problems, however, of judicial participation in the present plea bargaining process are grave indeed, as perceptively set forth by Judge Weinfeld in the passage previously quoted from *Elksnis*⁵⁹—so much so that the writers are quite unable wholeheartedly to embrace judicial participation in adversarial plea bargaining as it now exists. As noted above, it is clear that the practice is very prevalent, at least in state court proceedings.⁶⁰ Prohibiting judicial participation in plea bargaining, as the writers see it, tends to cover up the underlying problem. Instead of simply prohibiting judicial participation, the writers regret that the Court did not go further and establish an adequate substitute. Absent providing such an alternative, the writers feel that it would have been preferable for the Court to permit and encourage experimentation with some form of

56. This is especially so when the prosecutorial bargaining power is weighted by unconscionably long prison terms or capital punishment. See the discussion *infra* concerning *Bordenkircher*, *Rummel*, and mandatory sentences.

57. See Note, *supra* 23, at 296-97.

58. *Id.* at 307 n.68; Note, *supra* note 49, at 886.

59. See note 41, *supra*, and the accompanying text.

60. See note 50, *supra*.

structured, highly regulated judicial participation.) Because of the obvious danger of intimidation, etc., any experimental plan for a structured judicially supervised plea negotiation procedure should provide that a record be made of all the negotiation proceedings, and that if in a particular case the negotiations prove abortive, a different judge should try the case. Although some clear risk exists in judicial participation, the writers feel that such a system would be preferable to unsupervised adversarial plea bargaining between prosecution and defense. The core of the American criminal justice system today is adversarial plea bargaining, and although judicial robes might be stained⁶² by participation in the process, the writers feel that some effective, contemporaneous, modifying influence is much needed.

Federal courts of appeal have interpreted the Rule 11(e) prohibition against judicial participation in plea negotiation broadly. *United States v. Werker*⁶³ is the foundation case. In *Werker* the prosecution had offered to reduce the charges against a defendant accused of several felonies in exchange for a guilty plea. The accused sought assurances from the prosecutor that a ten-year sentence would be recommended to the court rather than the twenty-five year statutory maximum. The prosecutor declined to give any indication what sentence he would recommend. Rather than surrender all his trial rights in return for a prosecutorial concession that could well have no effect whatever on the sanction which would ultimately be imposed on him, the defendant, through counsel, asked the judge to indicate what sentence he would impose following a guilty plea. The judge ordered that a pre-sentence report be prepared, obtained the defendant's permission to view it, and promised to advise the defendant of his probable sentence after the judge had seen the report. While the report was being prepared, the prosecutor petitioned for a writ of mandamus from the Second Circuit Court of Appeals, requesting that it order the trial judge not to tell the defendant what sentence would be imposed until after a guilty plea had been entered. The writ was granted on the basis of the then recently amended Rule 11(e), which the court of appeals interpreted to mean that the sentencing judge "should take no part whatever in any discussion or communication regarding the sentence to be imposed prior to the

61. For an example of such a system of plea bargaining under judicial supervision see Alschuler, *supra* note 24, at 1122-49. See also Note, *supra* note 23, at 299-312.

62. See Judge Rubin, dissenting in *Frank v. Blackburn*, 646 F.2d 873, 901 (5th Cir. 1980).

63. 535 F.2d 198 (2d Cir. 1976).

entry of a plea of guilty or conviction, or submission to him of a plea agreement."⁶⁴

In 1980 the Sixth Circuit carried the interpretation of the provisions of the Rule yet further. In *United States v. Harris*,⁶⁵ that court held that since a federal probation officer is an arm of the court, Rule 11(e) was violated when the federal prosecutor informed defense counsel that the probation officer would recommend three years for the defendant if he pleaded guilty, and five years if he were convicted after a trial. The court of appeals said:

The trial court must not penalize the defendant for exercising his constitutional right to plead not guilty and go to trial; whether or not the defendant exercises his right to trial must have no bearing on the sentence he receives. . . . By having the probation officer recommend one sentence for pleading guilty and another sentence for going to trial, the court will be seen as considering whether or not the defendant exercises his right to trial in determining the sentence and the defendant may well feel pressured to plead guilty.⁶⁶

The appellate court went on to say that the defendant had pleaded not guilty and gone to trial, and "[a]s there is no evidence in the record that the District Court was influenced by the pretrial recommendation of the probation officer when it sentenced appellant, this Court has no reason to set aside appellant's sentence."⁶⁷ The appellate court stressed, however, that the conduct in question should not be repeated in the future.

In 1981 in *United States v. Adams*,⁶⁸ the Fifth Circuit, further strengthening the prohibition of Rule 11(e), *sua sponte* noticed that the trial court had participated in the plea bargaining by telling the defendant what he would receive if he pleaded guilty, and held that the defendant should be resentenced by a different judge.⁶⁹ Promisingly, however, the court in *Adams* stated that once the parties have reached a plea agreement and disclosed it in open court, the trial judge is to play "an active role."⁷⁰

64. *Id.* at 201 (emphasis added).

65. 635 F.2d 526 (6th Cir. 1980).

66. *Id.* at 529.

67. *Id.*

68. 634 F.2d 830 (5th Cir. 1981).

69. Having another judge for the trial would, as several commentators have noted, obviate much of the criticism of judicial participation in plea bargaining. See Aischuler, *supra* note 24, at 1148; Note, *supra* note 32, at 1392-93; Note, *supra* note 23, at 306. See also Gallagher, *supra* note 55, proposing that an "impartial hearing examiner" should preside over the pre-plea conference in place of a judge.

70. 634 F.2d at 835.

In contrast with the non-participation in the plea bargaining process enjoined upon federal judges by Rule 11(e), as noted previously judicial participation in state court proceedings appears to be a frequent practice.⁷¹ Such participation is generally informal, unstructured, off-the-record and unreviewed.⁷² As the writers see it, although perhaps preferable to unsupervised adversary bargaining, this practice cannot but give concern.

In *Frank v. Blackburn*⁷³ the Fifth Circuit grappled with the disturbing problem on three separate occasions. A Louisiana trial judge had twice told the defendant that he would get twenty years if he pleaded guilty. Following the conviction after trial, the same judge awarded the defendant thirty-three years imprisonment. The record was bare of any particularly significant circumstances to explain the sentence differential, other than the fact that the defendant pleaded not guilty and went to trial. The original panel decision concluded unanimously that the defendant's constitutional rights had been violated, stating:

[A] court cannot sentence a defendant more severely *simply* because he exercised his right to stand trial. *United States v. Underwood*, 588 F.2d 1073, 1078 (5th Cir. 1979), *Baker v. United States*, 412 F.2d 1069, 1073 (5th Cir. 1979). [T]he imposition of such a punishment, "penalizing those who choose to exercise" constitutional rights "[is] patently unconstitutional." *North Carolina v. Pearce*, 395 U.S. 711, 724, 89 S.Ct. 2072, 2080, 23 L.Ed.2d 656, 668 (1969), quoting *United States v. Jackson*, 390 U.S. 570, 581, 88 S.Ct. 1209, 1216, 20 L.3d. 138, 147 (1968).⁷⁴

Rehearing *en banc* was granted because of the "potentially devastating impact upon the plea bargaining process."⁷⁵ The majority *en banc* noted that "[w]e agree wholeheartedly with Frank's assertion that a defendant cannot be punished *simply* for exercising his constitutional right to stand trial."⁷⁶ The majority recognized that Federal Rule 11(e) prohibits federal judges from doing what the state judge had done, but held that this prohibition was not applicable to the states as a matter of constitutional law. The court concluded that, although it did not look favorably upon the judicial participation that had taken place in this case, Frank's constitutional

71. See note 50, *supra*.

72. See Alschuler, *supra* note 24; Ryan & Alfani, *supra* note 50.

73. 605 F.2d 910 (5th Cir. 1979) (original panel opinion), *reversed en banc*, 646 F.2d 873 (5th Cir. 1980), *corrected*, 646 F.2d 902 (5th Cir. 1981).

74. 605 F.2d at 915.

75. 646 F.2d at 875.

76. *Id.* at 882.

rights⁷⁷ had not been violated. It hence reversed the earlier panel decision. In its analysis of the facts of this case, the court found no "realistic likelihood of 'vindictiveness,'"⁷⁸ stating in a very controversial sentence, which the dissent regarded as the basis for the majority *en banc* decision:

Even if the trial provided no additional evidence of character, the mere fact that Jimmy Frank refused to acknowledge his guilt and showed no willingness to assume responsibility for his conduct may have led the judge to conclude that this defendant lacked potential for rehabilitation thus justifying the imposition of a greater sentence than that offered in exchange for a guilty plea.⁷⁹

In reaching its conclusion, the court relied heavily upon the United States Supreme Court decision in *Bordenkircher v. Hayes*,⁸⁰ and distinguished *North Carolina v. Pearce*,⁸¹ which had been relied upon by the panel decision. On further consideration of the case, the majority of the court *en banc* granted in part petitioner's application for rehearing, deleting the quoted very controversial sentence, and reaffirmed its previous denial of petitioner's prayer for relief.

By Rule 11(e), the Supreme Court has required federal district judges not to participate in plea bargaining, and if *Frank v. Blackburn* is to be followed, federal courts are to take a general hands-off attitude as to state court participation in the process. As the writers feel the following discussion will demonstrate, this attitude, coupled with other developments, strongly insulates the plea bargaining process from federal inquiry—insulation not accorded the approximately ten percent of convictions obtained through the trial route.

BORDENKIRCHER V. HAYES AND A JUDICIAL HANDS-OFF POLICY *re* THE PLEA BARGAINING PROCESS

In the absence of an effective system of judicial supervision of plea bargaining, what guidelines have the courts provided to prosecutors to control the power thus given to them? Prior to the 1978

77. See also *Blackmon v. Wainwright*, 608 F.2d 183 (5th Cir. 1979).

78. *Frank v. Blackburn*, 646 F.2d 873, 885 (5th Cir. 1980) (citing and quoting from *Blackledge v. Perry*, 417 U.S. 21 (1974), discussed at note 84 *infra*, and the accompanying text).

79. 646 F.2d at 885.

80. 434 U.S. 357 (1978), discussed at note 82, *infra*, and the accompanying text.

81. 395 U.S. 711 (1969), discussed at note 83, *infra*, and the accompanying text.

decision of the United States Supreme Court in *Bordenkircher v. Hayes*⁸² a persuasive argument could have been made that prosecutors were subject to strict constraints in negotiations with accused persons. That case, however, went far to free the exercise of prosecutorial discretion from federal judicial control. In order to appreciate the significance of *Bordenkircher* it is helpful briefly to review the state of the law just prior to that decision.

In *North Carolina v. Pearce*,⁸³ the Supreme Court had ordered a state prisoner's sentence reduced where the petitioner had successfully appealed his first conviction, was re-tried, re-convicted, and re-sentenced by the same judge, who imposed a heavier sentence than he had pronounced on the earlier conviction for the same crime. The Supreme Court held that the added rigor of the second sentence was an unconstitutional burden on the convicted man's right to appeal.

Pearce was followed by *Blackledge v. Perry*,⁸⁴ which directly involved a prosecutor's charging discretion. In *Blackledge* an inmate convicted in a North Carolina inferior trial court of a misdemeanor assault on another inmate took a *de novo* appeal. After the notice of appeal was filed, the prosecutor brought a felony charge against Perry based on the same incident as had led to the misdemeanor conviction. The Supreme Court ordered this charge dismissed because there was a "realistic likelihood of vindictiveness"⁸⁵ on the part of the prosecutor. The Court held that under the circumstances it was a violation of due process of law for the prosecutor to "respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo*."⁸⁶

It was against this background of case law that the Sixth Circuit confronted the facts presented by Hayes' habeas corpus petition.⁸⁷ Hayes had been indicted in 1973 by a Kentucky grand jury for forging a check for \$88.30, a felony under Kentucky law carrying a penalty of imprisonment of from two to ten years. During a pre-trial conference, the state prosecutor urged Hayes to plead guilty to the offense and "save the court the inconvenience and necessity of a

82. 434 U.S. 357 (1978).

83. 395 U.S. 711 (1969).

84. 417 U.S. 21 (1974).

85. *Id.* at 27.

86. *Id.* at 28-29.

87. *Hayes v. Cowan*, 547 F.2d 42 (6th Cir. 1976). *Bordenkircher*, Penitentiary Superintendent, was later substituted for Warden Cowan.

trial,"⁸⁸ promising to recommend a sentence of five years. The prosecutor threatened that should Hayes refuse to plead guilty, he would return to the grand jury and obtain an indictment against Hayes under Kentucky's Habitual Offender Law,⁸⁹ which at that time provided a mandatory sentence of life imprisonment for anyone convicted of three felonies. In spite of this threat, Hayes refused to plead guilty. The prosecutor thereupon did return to the grand jury and obtained the threatened habitual offender indictment. Hayes was tried, convicted, and sentenced to life imprisonment.

In his application for a writ of habeas corpus Hayes maintained that it was a violation of due process of law for the prosecutor to respond to Hayes' invocation of his statutory right to plead not guilty by bringing a more serious charge against him prior to the trial. The court of appeals agreed with Hayes. It noted that eleven years earlier the President's Commission on Law Enforcement and Administration of Criminal Justice, in its report *The Challenge of Crime in a Free Society*, had foreseen the danger that "prosecutors will threaten to seek a harsh sentence if the defendant does not plead guilty,"⁹⁰ and had condemned such practices as placing "unacceptable burdens on the defendant who legitimately insists upon his right to trial."⁹¹ The court further noted that while plea bargaining was upheld in the 1970 case of *Brady v. United States*,⁹² the Supreme Court had reserved the question of the appropriate judicial response "where the prosecutor . . . deliberately employ[ed] his charging . . . powers to induce a particular defendant to tender a plea of guilty."⁹³ Distinguishing Hayes' case from the case in which a

88. *Id.* at 43 n.2.

89. KY. REV. STAT. ANN. § 431.190 (1973) (repealed 1975) (Baldwin), provided:

Any person convicted a second time of felony shall be confined in the penitentiary not less than double the time of the sentence under the first conviction; if convicted a third time of felony, he shall be confined in the penitentiary during his life. Judgment in such cases shall not be given for the increased penalty unless the jury finds, from the record and other competent evidence, the fact of former convictions for felony committed by the prisoner, in or out of this state.

This statute had already been repealed at the time the case was under consideration in the court of appeals. Kentucky replaced it with a law providing enhanced punishment for repeat offenders under which Hayes would have received a much milder punishment than life imprisonment. KY. REV. STAT. ANN. § 532.080 (Supp. 1977) (Baldwin). See note 186, *infra*, and the accompanying text.

90. PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 135 (1967).

91. *Id.*

92. 397 U.S. 742 (1970).

93. *Id.* at 751 n.8.

prosecutor properly offers to drop a charge from an existing indictment in return for a guilty plea, the court of appeals stated:

[W]hen a prosecutor obtains an indictment less severe than the facts known to him at the time might permit, he makes a discretionary determination that the interests of the state are served by not seeking more serious charges. . . . Accordingly, if after plea negotiations fail, he then procures an indictment charging a more serious crime, a strong inference is created that the only reason for the more serious charge is vindictiveness.⁹⁴

On application of the state of Kentucky, the Supreme Court granted certiorari and the case at once attracted national attention. In an amicus brief filed in the Supreme Court by the Staff Counsel for Inmates of the Texas Department of Corrections, the names of forty-nine Texas prisoners were listed, all of whom were asserted to have been charged and convicted as multiple offenders after refusing to plead guilty to a lesser charge. Eleven sworn statements from Texas attorneys set out that the common practice in Harris and Dallas counties was to use the Texas habitual offender law in that way. An amicus brief filed on behalf of several California groups marshalled cases in support of the propositions that the court decisions upholding the constitutionality of plea bargaining "presuppose fairness in securing agreement between an accused and a prosecutor"⁹⁵ and that "judicial supervision of the process" is necessary to guarantee that fairness.⁹⁶

The Supreme Court, in a five-to-four decision written by Justice Stewart, held that the mandatory life sentence meted out to Hayes had not been unconstitutionally imposed, and that the due process clause of the fourteenth amendment is not violated "when a state prosecutor carries out a threat made during plea negotiations to reindict the accused on more serious charges if he does not plead guilty to the offense with which he was originally charged."⁹⁷ The majority recognized no constitutionally significant difference between the situation in which a prosecutor's initial charge is reduced as an incentive to plead guilty and the situation in which the initial charge is increased as a punishment for refusing to plead guilty.

94. 547 F.2d at 44-45 (citations omitted).

95. Brief of the Office of the California State Public Defender, The California Public Defender's Assoc. and the California Attorneys for Criminal Justice as Amici Curiae in Support of the Respondent in the Supreme Court of the United States at 7.

96. *Id.* at 8, 10.

97. 434 U.S. at 358.

Although the court said that "there are undoubtedly constitutional limits"⁹⁸ upon the wide discretion accorded the prosecution, it found that a prosecutor does not commit a violation of due process whenever "his charging decision is influenced by what he hopes to gain in the course of plea bargaining negotiations."⁹⁹ A tantalizing footnote seems to approve of the development of administrative controls on prosecutorial discretion.¹⁰⁰ The Court said that it is patently unconstitutional "for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights . . . [b]ut in the 'give-and-take' of plea bargaining there is no such element of punishment or retaliation so long as the accused is free to accept or reject the prosecution's offer."¹⁰¹

Four dissenting justices would have affirmed the court of appeals; Justice Blackmun, in an opinion joined by Justices Brennan and Marshall, relied strongly on the *Pearce* and *Blackledge* cases as precedents, while Justice Powell, dissenting separately, would have found prosecutorial vindictiveness on narrower grounds focusing sharply on what he perceived to be the "unique severity" of the punishment involved in this case.¹⁰²

The *Bordenkircher* case is an exceptionally strong "hands-off" statement on plea bargaining. As the majority opinion itself noted, "the breadth of discretion that our country's legal system vests in

98. *Id.* at 365.

99. *Id.* at 361.

100. The footnote in *Bordenkircher* states that the potential for prosecutorial abuse "has led to many recommendations that the prosecutor's discretion should be controlled by means of either internal or external guidelines." 434 U.S. at 365 n.9. See in this connection, two recent decisions by the Supreme Court of Washington relative to the use of discretionary and mandatory "guidelines" in the exercise of prosecutorial charging power. In *State v. Rowe*, 93 Wash. 2d 277, 609 P.2d 1348 (1980), the constitutionality of the standards developed by the prosecutor's office were attacked on the ground that they destroyed the discretion accorded the prosecutor under the law by requiring prosecution under an habitual offender indictment if the case had certain enumerated characteristics. The state supreme court opinion stated that if such were the case, the regulations could not stand, but found that, as written, the regulations made a reasonable discrimination among the various classes of habitual offenders, and never in any case positively required the prosecutor to seek an habitual offender indictment. In *State v. Pettit*, 93 Wash. 2d 288, 609 P.2d 1364 (1980), the standards employed by a district attorney in another Washington county were struck down because, according to the opinion of the court, they provided a "fixed formula which requires a particular action in every case upon the happening of a specific series of events" and thus improperly constituted "an abuse of the discretionary power lodged in the prosecuting attorney." 93 Wash. 2d at 296, 609 P.2d at 1368.

101. 434 U.S. at 363.

102. *Id.* at 373 (Powell, J., dissenting).

prosecuting attorneys carries with it the potential for both individual and institutional abuse."¹⁰³ It seems to these writers that *Bordenkircher* goes far—much too far—in upholding and strengthening the existing plea bargaining system and at the same time insulating it from judicial scrutiny and control. The case affords a stark, chilling example of how the plea bargaining system at times functions in practice. It bears repeating that in *Bordenkircher* the prosecution was willing to recommend that Hayes be given five years imprisonment if he accepted a guilty plea. Because Hayes insisted on going to trial and the prosecutor carried through on his threat, the trial judge had no choice under the statute but to sentence Hayes to a life term in the penitentiary. In *Bordenkircher*, the majority had stated, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort."¹⁰⁴ Thus the Court appears to say that it is clearly unconstitutional for a judge to sentence a person to a longer sentence because he pleads not guilty. Not so, however, if the same result is reached via prosecutorial reprisal for a defendant's rejecting a plea bargaining offer under the circumstances of *Bordenkircher*. Much of the support for this anomaly is based on the theory that it results from the choices made by adversaries freely bargaining in a market place. But, as the writers see it, the choice is not one freely made by equally strong adversaries; it is too often one coerced by the threat of an unduly harsh penalty. For our society through its agent, the prosecutor, to say that an accused must choose either life imprisonment upon conviction after trial, or five years if he foregoes trial and pleads guilty, is for the society, in a very real sense, to try to coerce a guilty plea. Society ought to be able to allocate its resources in such a way that it is able to ascertain guilt or innocence and fix punishment without this kind of coercion.

Despite what the Supreme Court has called the unique character of capital punishment, the United States Fifth Circuit Court of Appeals in *Spinkellink v. Wainwright*¹⁰⁵ held that the rule of *Bordenkircher* applies¹⁰⁶ even though a threat of capital punishment is syste-

103. *Id.* at 365.

104. *Id.* at 363.

105. 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

106. For a discussion of the circumstances prerequisite to the application of the *Bordenkircher* rule, see Smaltz, *Due Process Limitations on Prosecutorial Discretion in Re-Charging Defendants: Pearce to Blackledge to Bordenkircher*, 36 WASH. & LEE L. REV. 347, 366 (1979).

atically used by the prosecution to induce guilty pleas to offenses carrying non-capital punishment. In this connection, the Fifth Circuit stated: "[t]he fact that the prosecutor's plea bargaining tool in *Bordenkircher* was life imprisonment and in this case it allegedly is the death penalty is a distinction without a difference."¹⁰⁷

LEGISLATIVE NARROWING OF JUDICIAL SENTENCING DISCRETION

An important movement, which has the effect of decreasing judicial power over sentencing and increasing prosecutorial power over the entire criminal justice system,¹⁰⁸ is the recent trend towards legislatively imposed mandatory sentences within fixed narrow limits.¹⁰⁹ This type of legislation has been much lauded as a device to decrease "lawlessness in sentencing" and reduce "unbridled judicial discretion."¹¹⁰ Unquestionably, irrational disparity in sentencing for similar criminal conduct is a grave problem calling for solution. But instead of eliminating discretion in sentencing, the legislation has the effect in the real world (*i.e.*, the world of plea bargaining) of *shifting* discretion¹¹¹ from the judge to the prosecutor. The writers fully agree that devices to regulate judicial sentencing discretion (as with discretion in other branches of government) are greatly needed,¹¹² but other more desirable devices are available to achieve this result.¹¹³ Little good is to be gained (and much to be

107. 578 F.2d at 608.

108. See Alschuler, *Sentencing Reform and the Prosecutorial Power: A Critique of Recent Proposals for "Fixed" and "Presumptive" Sentencing*, 126 U. PA. L. REV. 550 (1978); Crump, *Determinate Sentencing: The Promises and Perils of Sentence Guidelines*, 68 KY. L.J. 3 (1979); Newman, *A Better Way to Sentence Criminals*, 63 A.B.A.J. 1563 (1977); Perlman & Stekkins, *Implementing An Equitable Sentencing System: The Uniform Law Commissioners' Model Sentencing and Corrections Act*, 65 VA. L. REV. 1175, 1259 (1979); Simon, *Needed: A New Look at Punishments*, 62 A.B.A. J. 1296, 1299 (1976).

109. See Flynn, *Turning Judges Into Robots?*, TRIAL, March 1976, p. 17; Pavnas & Salerno, *The Influence Behind, Substance and Impact of the New Determinate Sentencing Law in California*, 11 U. CAL. D.L. REV. 29 (1978); Petersilia & Greenwood, *Mandatory Prison Sentences: Their Projected Effects on Crime and Prison Populations*, 69 J. CRIM. L. & CRIMINOLOGY 604 (1978); Vorenberg, *Narrowing the Discretion of Criminal Justice Officials*, 1976 DUKE L.J. 651; *Symposium on Sentencing*, 7 HOFSTRA L. REV. (1978); Note, *Proposal for Determinate Sentencing in New York: The Effect on an Offender's Due Process Rights*, 8 FORDHAM URB. L.J. 629, 657 (1980).

110. The phrase "lawlessness in sentencing" was popularized in the work of Judge Marvin E. Frankel. See M. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* (1973); Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1 (1972).

111. See authorities cited in note 108, *supra*.

112. See Pugh & Carver, *Due Process and Sentencing: From Mapp to Mempa to McGautha*, 49 TEX. L. REV. 25 (1970).

113. See the discussion in Crump, *supra* note 108.

lost) by transferring discretion from the trial judge to the prosecutor, where its exercise is far less visible and far less subject to effective control and review on a system-wide basis.

Prosecutorial power is further augmented when, as under the recently enacted California statute,¹¹⁴ the term of imprisonment available to a judge for a particular felony is any of three stipulated terms within a relatively narrow range and the judge is required to award the middle term, absent claimed mitigating or aggravating circumstances. Thus, under this statutory scheme, the prosecution by selecting the crime and aggravating or mitigating factors can often dictate within fairly precise limits the number of years that a defendant pleading guilty is to receive.¹¹⁵ Traditionally, serious crimes carried a wide range of possible prison terms,¹¹⁶ and therefore a bargain struck with the prosecution as to the crime for which the defendant would be charged, and to which he would then plead guilty, left the court wide discretion as to the possible penalty. Admittedly, in many jurisdictions, a plea bargain would go further and involve a prosecutorial recommendation of sentence, which thereafter would customarily be followed by the court.¹¹⁷ But the court was not obliged thus to give up its prerogative to sentence within the broad limits fixed by the legislature.

Providing factual context may facilitate the discussion and help the reader see the implications of the movement toward mandatory narrowly fixed penalties. Assume that during the course of a burglary of a home, the home owner was severely beaten by a burglar armed with a dangerous weapon, that the evidence against the defendant is weak, and that the defendant's lawyer is known for his legal ability and his propensity endlessly to fight his client's cause on every conceivable point. Assume further that the incident has not received much publicity in the press and does not involve politically sensitive individuals. Under the traditional plea bargaining system, instead of a defendant's being indicted for attempted murder, a prosecutor and a defense counsel could agree on the defendant's pleading guilty to an indictment for burglary, a crime traditionally carrying a wide range of possible penalties. Then the trial court would be legally free to impose, within a fairly wide

114. CAL. PENAL CODE § 1170 (Supp. 1980) (West).

115. Surprisingly, perhaps, the statute does not remove the judge's authority to grant probation. CAL. PENAL CODE § 1170.3 (Supp. 1980) (West). See the discussion in Alschuler, *supra* note 108, at 559-60, 571.

116. See Crump, *supra* note 108, at 9.

117. See Alschuler, *supra* note 24, at 1065.

range, the penalty it deemed appropriate under the circumstances. Unless the established practice was for the court to accept prosecutorial recommendation as to sentence,¹¹⁸ the prosecutor would be unable to assure the defendant that he would receive a sentence the defendant would be willing to accept. Under the recently adopted California determinate sentencing statute, as Professor Alschuler has perceptively pointed out, the prosecutor is much more able effectively to threaten the defendant with a long prison sentence and thereby force a "bargain" to an assured lesser sentence.¹¹⁹ By means of the plea bargain, because of the narrow mandatory sentence range stipulated in the statute, the trial judge is effectively "boxed in" as to sentence.¹²⁰ If under a hypothetical legislative scheme, the penalty provided for a more egregious category of a crime is sufficiently harsh, the consequences of a non-bargain to the defendant are very serious. If no "bargain" is reached and the defendant is charged with the more serious crime, the judge is forced to impose the harsh penalty provided by the legislature; the prosecutor can thus, via his charging power, call the sentence that must be imposed—unless, of course, the defendant is found not guilty. Since the defense counsel knows that in the absence of a plea bargain the district attorney can thus force the judge, upon defendant's conviction, to award a particularly harsh penalty, his position is commensurately weakened. Where capital punishment¹²¹ or mandatory life imprisonment¹²² is the authorized penalty for the most serious manifestation of the type of criminal conduct at issue, the power of the prosecutor, and what seems to these writers the pernicious character of the present plea bargaining system, is particularly acute. Much of the impetus for such legislation comes from the strong public support for "getting tough with criminals," but little does the public realize that an individual pleading guilty to theft may have been arrested for attempted murder occurring during the course of a burglary and that the prosecutor has "bargained down" the crime because of his crowded docket, the weakness of the case against the defendant, the questionable constitutionality of methods used by the police to obtain evidence, etc. In the opinion of the writers, far more felicitous proposals for controlling judicial discretion have been

118. *Id.*

119. See Alschuler, *supra* note 108, at 570-71.

120. *But see* text and statute at note 115, *supra*, where the judge may have no power to vary the prison term, but complete power to grant probation.

121. See *Spinkellink v. Wainwright*, 578 F.2d 582 (1978), *cert. denied*, 440 U.S. 976 (1979), discussed at note 105, *supra*.

122. See *Bordenkircher v. Hayes*, discussed at note 82, *supra* and the following text, and *Rummel v. Estelle*, discussed at note 134, *infra*, and the following text.

made—for example, those requiring a judge to assign written reasons for his choice of sentence¹²³ and those calling for appellate review of sentences.¹²⁴ Further, there seems to be much merit in reforms requiring a judge, within broad discretionary limits, to impose “presumptive” sentences unless written reasons are given as to why a variance up or down is deemed justified.¹²⁵

In their articles on the recent movement towards narrow mandatory sentences, Professor Albert Alschuler¹²⁶ and Judge Jon O. Newman¹²⁷ have explored many of the foregoing problems, demonstrating that if the legislature wishes to eliminate wide disparity in sentencing for similar criminal conduct, it must abolish plea bargaining as it now exists.

The movement toward legislatively fixed narrow-discretion sentences presumably aims at remedying the great sentence disparity that presently pervades our system. The writers share concern about treating equally culpable persons unequally¹²⁸ and agree that reduction in excessively broad discretion is certainly warranted.¹²⁹ Further, we enthusiastically embrace other methods of controlling judicial discretion.¹³⁰ But as the writers see it, and as has been persuasively argued by Professor Alschuler and Judge Newman, if this very desirable objective is to be achieved, plea bargaining as it exists today must be abolished.

Despite laudable objectives of the new movement, without the abolition of plea bargaining its adoption has the effect of unduly strengthening the bargaining hand of the prosecutor and *de facto* shifting sentencing power from the judge to the prosecutor. This pernicious impact could be minimized were the courts willing to undertake the task of actively supervising the plea bargaining process itself, or at least determining whether under the facts presented a particular sentence is excessive. However, as seen above in the discussion of Federal Rule 11(e)¹³¹ and *Bordenkircher v. Hayes*,¹³² and as

123. See LA. CODE CRIM. P. art. 894.1; Crump, *supra* note 108, at 15; Pugh & Carver, *supra* note 112, at 42.

124. See ABA STANDARDS, *supra* note 24, at § 3.80 (Tentative Draft 1976) and authorities cited in note 123, *supra*.

125. See Alschuler, *supra* note 108, at 562.

126. *Id.* at 686.

127. See Newman, *supra* note 108.

128. See Pugh & Carver, *supra* note 112.

129. *Id.*

130. See footnotes 123-125, *supra*, and the accompanying text.

131. See text at note 34, *supra*.

132. See text at note 82, *supra*.

will now be seen in the consideration of *Rummel v. Estelle*,¹³³ a majority of the United States Supreme Court has been unwilling for the federal courts to undertake this role.

Rummel v. Estelle AND THE CONSTITUTIONALITY OF THE
EXCESSIVELY LONG MANDATORY SENTENCE

By its terms, the eighth amendment protects against the "imposition" of "excessive fines" and the "infliction" of "cruel and unusual punishment."¹³⁴ It is clear that the standard to be used in determining whether a particular punishment is "cruel and unusual" is an evolving one¹³⁵ and that the cruel and unusual prohibition is applicable to the states.¹³⁶ Not clear are the implications of the clause with respect to the length *vel non* of a prison sentence. Under the amendment, does the judiciary have the duty to protect a defendant against the imposition of sentences authorized by the legislature where the length of the sentence is determined to be grossly disproportionate to the severity of the crime? If so, federal courts should set aside such sentences.

Language in the 1910 United States Supreme Court decision of *Weems v. United States*,¹³⁷ interpreted broadly, indicated that a proportionality principle is applicable to the length of prison sentences, as well as to other aspects of punishment.¹³⁸ That decision noted, however, that considerable deference is to be accorded legislative determination.¹³⁹ The *Weems* case involved, in addition to a long

133. See text at note 134, *infra*.

134. U.S. CONST. amend. VIII:

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

135. See *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

136. *Robinson v. California*, 370 U.S. 660, 666 (1962).

137. 217 U.S. 349 (1910).

138. The majority cited, with seeming approbation, Justice Field's dissenting opinion in *O'Neal v. Vermont* that

The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.

144 U.S. 323, 339-40 (1892) (Field, J., dissenting). The *Weems* court stated that
Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to offense.
217 U.S. at 366-67.

139. In this connection, the Court stated:

However, there is a certain subordination of the judiciary to the legislature. The

prison term, egregious "accessory" punishment.¹⁴⁰ Drawing *inter alia* upon *Weems*, the Court in several recent capital punishment cases again set forth a broad proportionality principle.¹⁴¹ No Supreme Court holding, however, clearly established whether a grossly long prison sentence, because of that fact alone, violated the cruel and unusual prohibition.¹⁴² As the writers see it, there is still no such holding.

In 1980, *Rummel v. Estelle*¹⁴³ presented the question to the Court. In an opinion authored by Justice Rehnquist, five members of the Court held that the prison term in question did not violate the cruel and unusual prohibition, and, as the writers read the opinion, carefully avoided holding whether the disproportionality principle is applicable to the length of prison terms. As will be seen, however, the meaning of the opinion is not free from doubt.

The facts presented in Rummel's federal habeas corpus petition seemed to these writers to cry out for eighth amendment relief. Rummel, an inmate in a Texas penitentiary, challenged a mandatory life sentence imposed upon him in 1973 under Texas law providing that one having twice served prison time for felony convictions should, on the third felony conviction, be sentenced to imprisonment for life.¹⁴⁴ Prior to the instant conviction, Rummel had in 1964, pur-

function of the legislature is primary, its exercises fortified by presumptions of right and legality, and is not to be interfered with lightly, nor by any judicial conception of their wisdom or propriety. They have no limitation, we repeat, but constitutional ones, and what those are the judiciary must judge. We have expressed these elementary truths to avoid the misapprehension that we do not recognize to the fullest the wide range of power that the legislature possesses to adapt its penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency.

217 U.S. at 379.

140. In addition to a fifteen year prison sentence, the accessory penalties imposed were, *inter alia*, deprivation of parental authority, of marital authority, of the right to vote or to be elected to public office, and subjection to surveillance by the authorities during life. *Id.* at 364.

141. See *Coker v. Georgia*, 433 U.S. 584 (1977); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

142. See Gardner, *The Determinate Sentencing Movement and the Eighth Amendment: Excessive Punishment Before and After Rummel v. Estelle*, 1980 DUKE L.J. 1103, and Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972) for discussions of case development on this point.

143. 445 U.S. 263 (1980).

144. TEX. PENAL CODE ANN. art. 63 (amended and recodified as TEX. PENAL CODE ANN. tit. 3, § 12.42(d) (Vernon 1974).

Although the Texas recidivist statute might appear more inclusive, the Supreme

suant to a guilty plea, been convicted of fraudulent use of a credit card to obtain \$80.00 worth of good or services¹⁴⁵ and was sentenced to serve three years in the state penitentiary. In 1969, having been charged with passing a forged \$28.36 check,¹⁴⁶ Rummel again pleaded guilty and was sentenced to four years imprisonment. In 1973 he was charged with obtaining \$120.75 by false pretenses, a crime usually carrying a prison term from two to ten years.¹⁴⁷ Although not required to do so,¹⁴⁸ the prosecutor invoked the Texas recidivist statute, and after Rummel's conviction by a jury, the trial judge sentenced Rummel to life imprisonment,¹⁴⁹ *as he was required to do by the statute*. Thus, the crimes that formed the basis of Rummel's mandatory life sentence were three non-violent property crimes involving a total monetary sum of \$229.11.

A divided panel of the United States Fifth Circuit Court of Appeals¹⁵⁰ sustained Rummel's eighth amendment attack upon his conviction, holding that the life sentence was so grossly disproportionate to the offense that it constituted cruel and unusual punishment. On rehearing *en banc*, the Fifth Circuit Court of Appeals (dividing eight to six) reversed the panel decision, emphasizing that under Texas law, Rummel would be eligible for parole after serving twelve years of his life sentence.¹⁵¹ The majority panel decision, and both the majority and dissenting *en banc* decisions of the Fifth Cir-

Court stated (citing *Cromenas v. State*, 160 Tex. Crim. 135, 138, 268 S.W.2d 133, 135 (1954)) that Texas courts had interpreted it to mean that the defendant must not only have been sentenced to imprisonment for the prior offenses, but also must actually have served time for each felony conviction. 445 U.S. at 278 n.15.

Rummel did not contest the validity of the Texas habitual offender statute (which had been upheld in *Spencer v. Texas*, 385 U.S. 554 (1967)), but instead contended that under the facts of his case, its application was unconstitutional. See note 166, *infra*.

145. Under the Texas penal code applicable in 1964, because the amount involved was more than \$50.00, the offense was a felony punishable by two to ten years in the Texas Department of Corrections. TEX. PENAL CODE ANN. art. 1555b(4)(d) (Vernon); TEX. PENAL CODE ANN. app. 713 (Vernon 1974) (superseded by TEX. PENAL CODE ANN. tit. 7, § 32.31 (Vernon 1974)).

146. In 1969 this offense was a felony punishable by two to five years imprisonment. TEX. PENAL CODE ANN. art. 996 (Vernon); TEX. PENAL CODE ANN. app. 597 (Vernon 1974) (superseded by TEX. PENAL CODE ANN. tit. 7 § 32.31 (Vernon 1974)).

147. TEX. PENAL CODE ANN. arts. 1410, 1413, 1421 (Vernon); TEX. PENAL CODE ANN. app. 688-90 (Vernon 1974) (superseded by TEX. PENAL CODE ANN. tit. 7 § 31.03(d)(9) (Vernon 1981)).

148. The Supreme Court recognized that the prosecutor chose to proceed under the Texas recidivist statute. 445 U.S. at 266. See also text at note 164, *infra*.

149. Rummel exhausted his avenues for direct appeal and collateral attack in the Texas state courts before filing a petition for a writ of habeas corpus in federal court.

150. *Rummel v. Estelle*, 568 F.2d 1193 (5th Cir. 1978).

151. *Rummel v. Estelle*, 587 F.2d 651, 659 (5th Cir. 1978).

cuit, accepted the principle that a prison sentence may be so long that it is grossly disproportionate to the seriousness of the offense committed, and that it violates the cruel and unusual clause.¹⁵² The majority of the Fifth Circuit *en banc* applied a three-prong objective standard¹⁵³ to make such a determination—a standard very similar to a four-prong test earlier applied by the Fourth Circuit.¹⁵⁴ Granting writs, the Supreme Court, in a five-to-four decision,¹⁵⁵ affirmed the Fifth Circuit *en banc* rejection of Rummel's claim that his life sentence violated the cruel and unusual prohibition.

The Supreme Court majority did not state whether a disproportionately long prison term, for that fact alone, violates the cruel and unusual clause. However, in a very significant passage the majority stated:

Given the unique nature of the punishments considered in *Weems* and in the death penalty cases, one could argue without fear of contradiction by any decision of this Court that for crimes concededly classified and classifiable as felonies, that is, as punishable by significant terms of imprisonment in a state penitentiary, the length of the sentence actually imposed is purely a matter of legislative prerogative.¹⁵⁶

As the writers interpret this language, and the interpretation is not free from doubt, the majority is simply noting the fact set forth above, that no Supreme Court decision has employed the cruel and

152. See 568 F.2d at 1200; 587 F.2d at 655, 670.

153. The majority *en banc* considered (1) the nature of the offense, stating that "every inference is to be made in favor of the selected punishment;" (2) the punishment the defendant would have received in another jurisdiction, finding the evidence "inconclusive" on this point; and (3) the punishment for other offenses in Texas, concluding that the comparison between the penalty for a single act and the sentence for a habitual offender was "inappropriate." The majority rejected any consideration of the purposes for which the punishment was selected, absent a demonstration that "the legislative choice has no rational basis and is totally and utterly rejected in modern thought." 587 F.2d at 659-61.

154. In *Hart v. Coiner*, 483 F.2d 136, 140-42 (4th Cir. 1973), *cert. denied*, 415 U.S. 983 (1974), the Fourth Circuit considered four factors when applying the cruel and unusual clause: (1) the nature of the offense, (2) the legislative reason for imposing the punishment, (3) the punishment that the defendant would have received in other jurisdictions, and (4) the punishment meted out for other offenses in the same jurisdiction. See also Justice Powell's discussion of the Fourth Circuit decisions on this point, 445 U.S. at 304-06 (Powell, J., dissenting).

155. Burger, C.J., Stewart, White and Blackmun, JJ., joined in Justice Rehnquist's majority opinion. Justice Stewart also filed a concurring opinion. Brennan, Marshall, and Stevens, JJ., joined in Justice Powell's dissenting opinion.

156. 445 U.S. 274.

unusual clause to set aside a prison sentence solely on the ground that its length caused it to be unconstitutional. However, the overtones of the quoted language and the opinion as a whole, coupled with the majority's narrow reading of *Weems*¹⁵⁷ and the capital punishment cases,¹⁵⁸ seem to these writers to signal an unwillingness to hold a prison term unconstitutional simply because of length.

The majority, in a footnote reply to arguments made by Justice Powell on behalf of four dissenting Justices relative to the constitutionality of a hypothetical imposition of a life sentence for overparking, laconically stated "This is not to say that a proportionality principle would not come into play in the extreme example mentioned by the dissent. . . ."¹⁵⁹ Perhaps the majority is suggesting that it would find such a life sentence violative of the proportionality principle, not because of the length of the prison sentence, but because the majority would conclude that parking violations are not offenses sufficiently grave to be constitutionally punishable by "significant terms of imprisonment."¹⁶⁰ In the opinion of the writers, the footnote implies that the majority would deem the eighth amendment applicable to prevent lifetime imprisonment for a trivial offense, but does not state whether the majority would invoke the amendment to void a disproportionately long prison term for a non-trivial offense worthy of punishment by a "significant" term in prison.

The majority stressed that for the disproportionality principle to be operative, objective standards must be applicable; its discussion then seemed to imply a belief in the virtual impossibility of establishing meaningful objective standards in this area. In its discussion of recidivist statutes, the majority stated that the Supreme Court "must ultimately decide the meaning of the Eighth Amendment"¹⁶¹ as to whether such sentences are subject to review as to proportionality, but as the writers read the opinion, it put off this decision until another day—holding merely that the instant sentence was not unconstitutional, not that the proportionality principle is here inoperative.

Instead of renouncing authority to strike down excessively long prison terms, the majority found that Rummel's recidivist sentence was not beyond the pale—without telling the reader where that pale might be, or whether a pale exists at all. Although the majority's

157. See text at notes 137-140, *supra*.

158. See text at note 141, *supra*.

159. 445 U.S. at 274 n.11.

160. *Id.* at 274.

161. *Id.* at 279.

decision denying that the instant life sentence violated the cruel and unusual clause afforded only a narrow holding, the tenor of the opinion seems to these writers to signal a general unwillingness to vitiate a prison sentence because of length. If so, courts will be unable to utilize the cruel and unusual clause as an effective check upon legislatively mandated disproportionate prison terms. The language clearly implies that what is an appropriate length for a prison term is so subjective that except perhaps in most extraordinary circumstances, its determination should be left to the legislature. The majority emphasized the state's interest in punishing repeat offenders for whom prior incarceration had proved ineffective and the difficulty in comparing the Texas recidivist statute with those of other states.¹⁶² In this connection, the majority said in light of the fact that in Texas "parole is 'an established variation on imprisonment of convicted criminals' . . . a proper assessment" of the sentence "could hardly ignore"¹⁶³ the possibility of parole. Further in this context, and of great importance to the thesis of this article, the Court noted, "[i]t is a matter of common knowledge that prosecutors often exercise their discretion in invoking recidivist statutes or in plea bargaining so as to screen out truly 'petty' offenders who fall within the literal terms of such statutes."¹⁶⁴ Here the Court cited *Oyler v. Boles*¹⁶⁵ as having rejected the claim that the West Virginia recidivist statute there involved placed unconstitutional discretion in the hands of the prosecutor.¹⁶⁶ This passing reference to the use of habitual offender statutes in plea bargaining clearly seems to indicate majority awareness and approbation of prosecutorial use of habitual offender statutes as leverage to obtain guilty pleas to lesser crimes. Thus *Rummel v. Estelle*, especially when taken together with *Bordenkircher v. Hayes*, indicates that a majority of the Supreme Court is willing to accord the legislature, the prosecutor and the plea bargaining process a very wide berth indeed, a position the writers feel is especially regrettable in light of the current trend towards legislatively prescribed, narrowly defined man-

162. *Id.* at 279-82.

163. *Id.* at 280-81.

164. *Id.* at 281.

165. 368 U.S. 448 (1962).

166. 445 U.S. at 281. The majority in *Rummel* also noted that in *Spencer v. Texas*, 385 U.S. 554, 560 (1967), the Texas recidivist statute was upheld and that in *Spencer* the Court said "similar statutes had been sustained against contentions that they violated 'constitutional strictures dealing with double jeopardy, *ex post facto* laws, cruel and unusual punishment, due process, equal protection, and privileges and immunities.'" 445 U.S. at 268.

datory sentences.¹⁶⁷ From a functional standpoint, this position means that unless the present plea bargaining system is radically altered, the prosecutor's power to call the tune will be yet augmented. The *Rummel* majority talks in terms of legislative prerogative to prescribe sentencing,¹⁶⁸ but in the current plea bargaining context, this means merely legislative prescription of sentence for defendants who, like Hayes, are unwilling to accept the "deal" offered by the prosecutor.

Four Justices dissented, taking the position that *Rummel's* life sentence was grossly disproportionate and that grossly excessive imprisonment is unconstitutional as violative of the cruel and unusual clause made applicable to the states through the due process clause of the fourteenth amendment.¹⁶⁹ Speaking for the dissenters, Justice Powell said that in discharging its responsibility under the cruel and unusual clause, the Court should "minimize the risk of constitutionalizing the personal predilections of federal judges"¹⁷⁰ but felt that by applying traditional principles the Court could isolate objective factors.¹⁷¹ Reviewing the experience of the Fourth Circuit in applying standards similar to those embraced by the dissenters, Justice Powell found that the application of the standards by the Fourth Circuit constituted "impressive empirical evidence that the federal courts are capable of applying the Eighth Amendment to disproportionate noncapital sentences with a high degree of sensitivity to principles of federalism and state autonomy."¹⁷² Although recognizing the difficulty in drawing lines, the dissenters found that the instant sentence clearly transgressed bounds established by the eighth amendment. Said Justice Powell most persuasively, "[t]he sentence imposed upon the petitioner would be viewed as grossly unjust by virtually every layman and lawyer."¹⁷³

167. See discussion at note 108, *supra*, and the accompanying text.

168. 445 U.S. at 274.

169. See *Robinson v. California*, 370 U.S. 660 (1962).

170. 445 U.S. at 295 (Powell, J., dissenting).

171. *Id.* Justice Powell delineated three factors to consider: (1) "the nature of the offense;" (2) "the sentence imposed for commission of the same crime in other jurisdictions;" and (3) "the sentence imposed upon other criminals in the same jurisdiction." See notes 153 & 154, *supra*, and the accompanying text, *supra*.

172. *Id.* at 306 (Powell, J., dissenting).

173. *Id.* at 307. This view is strongly supported by the subsequent history of the case. Despite the Supreme Court's unwillingness to declare imprisonment for life an unconstitutionally harsh penalty under the circumstances, such harshness was regarded by the national press as sensational news, and presumably proved an embarrassment to the state of Texas, See the *Los Angeles Times*, Nov. 15, 1980, at 1, "Texan Held for \$229 in Thefts"; *New York Times*, March 19, 1980 at A-24, "Life Term is

The Federal Court of Appeals decisions interpreting *Rummel v. Estelle* reflect very different views as to its meaning. *Davis v. Davis*¹⁷⁴ concerned a petition for habeas corpus filed in federal court by a Virginia prisoner who had been convicted in 1974 of possession of marijuana with intent to distribute and distribution of same. The petitioner had been sentenced to consecutive terms of twenty years for each of the two crimes and fined \$10,000 as to each. Although the total amount of marijuana aggregated less than nine ounces, there were serious aggravating circumstances.¹⁷⁵ Prior to *Rummel v. Estelle*, an *en banc* decision of the Fourth Circuit Court of Appeals¹⁷⁶ had affirmed a decision by a federal trial court¹⁷⁷ granting the petition for habeas corpus, holding that the sentence in question violated the constitutional prohibition against cruel and unusual punishment. In so holding, the *en banc* decision reversed an earlier panel decision.¹⁷⁸ Shortly after *Rummel v. Estelle* was decided,¹⁷⁹ the United States Supreme Court granted writs in *Davis*, and at the same time vacated the judgment and remanded the case to the Fourth Circuit "for further consideration in light of" *Rummel*.¹⁸⁰ From this action, especially in view of its timing, one might infer that the majority of the Supreme Court was dissatisfied with the result

Upheld in Theft of \$120.75"; Times Picayune, March 19, 1980 at 1, "\$120.75 Life Term is Upheld"; The Washington Post, March 19, 1980 at A-16, "Court Upholds Life for \$229 Swindler." See also "The Bitch," an article on Rummel's case in *Houston City Magazine*, April 1980, at 44 and "Making a Difference," a follow-up article in the same magazine's January 1981 issue, at 8, highly critical of Rummel's extreme punishment and laudatory of the ultimately successful efforts to free him.

Rummel's release came about when Federal District Judge Dorwin Suttle, of the Western District of Texas, granted a writ of habeas corpus which Rummel had sought on grounds of incompetent assistance of counsel at his trial under the habitual offender indictment. *Rummel v. Estelle*, 498 F. Supp. 793 (W.D. Tex. 1980). Scott Atlas, the Houston attorney who had represented Rummel on his earlier unsuccessful efforts in the United States Supreme Court (but not at the original trial of the case) prevailed here. Atlas further succeeded in "working out a deal" with Texas prosecutors, presumably eager to put an end to the matter, whereby Rummel was immediately released in return for his guilty plea to an unenhanced bad-check charge, for which he was sentenced to imprisonment for the time he had already served.

174. 646 F.2d 123 (4th Cir. 1981).

175. See the facts set forth in the original panel decisions, and the dissent from the decision *en banc*, 585 F.2d 1226, 1233 (4th Cir. 1978); 601 F.2d 153, 154-155 (4th Cir. 1979).

176. 601 F.2d 153 (4th Cir. 1979).

177. *Davis v. Zahradnick*, 432 F. Supp. 444 (W.D. Va. 1977).

178. 585 F.2d 1226 (4th Cir. 1978).

179. *Rummel* was decided March 18, 1980 and writs were granted in *Davis* on March 31, 1980.

180. 445 U.S. 947 (1980).

reached by the *en banc* decision, its reasoning, or both. Apparently, the light shed by *Rummel* provided insufficient illumination that he who runs may read,¹⁸¹ for on remand, the judges of the Fourth Circuit, again sitting *en banc*, were equally divided¹⁸² as to the impact of *Rummel*. Because of its inability to achieve a majority, the Fourth Circuit, in an abbreviated *per curiam* opinion, affirmed the federal district court's original decision granting petitioner's application for relief.¹⁸³

Soon after the Supreme Court decision in *Rummel*, a sequel to *Bordenkircher v. Hayes* was again before the Sixth Circuit.¹⁸⁴ As noted previously, in the earlier *Bordenkircher*¹⁸⁵ case, the Supreme Court had rejected Hayes' claim that his fourteenth amendment due process rights had been violated when, because of Hayes' refusal to plead guilty to forgery of a check in the amount of \$88.30 in return for the prosecutor's recommendation of a five-year sentence, the prosecutor had carried through on his threat to have Hayes reindicted as an habitual offender. In consequence, upon conviction, Hayes had been sentenced to mandatory life imprisonment under Kentucky's recidivist statute. Hayes' instant claim was that his sentence constituted cruel and unusual punishment. The harsh Kentucky statute under which Hayes had been sentenced had since been repealed and replaced by one more indulgent. Under the new statute, Hayes would not have been subject to mandatory life imprisonment.¹⁸⁶ Although manifesting its sympathy with Hayes' plight, the Sixth Circuit concluded that in light of *Rummel*, it must reject Hayes' claim. The court read the majority opinion in *Rummel* to mean that "American citizens do not have an Eighth Amendment constitutional right to have punishment proportionate to the severity of the crime,"¹⁸⁷—that "excluding capital punishment cases and

181. See Frankfurter, J., in *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 229 (1957); *Book of Habakkuk*, ch. 2, v. 2; HOLT, PHRASE AND WORD ORIGINS 215 (1961).

182. The judges divided five to five.

183. Three judges dissented, arguing that *Rummel* required a reversal.

184. *Hayes v. Bordenkircher*, 621 F.2d 846 (6th Cir. 1980).

185. See note 82, *supra*, and the accompanying text.

186. KY. REV. STAT. ANN. § 532.080 (West).

Under the new statute, the enhanced sentence "may be imposed only if, for each of the two previous felony convictions, the sentence was at least one year; defendant was imprisoned under each such sentence before commission of the instant felony; and the offender was over eighteen years of age at the time he committed each offense." 621 F.2d 848 n.1. Because Hayes was given probation following one of his earlier convictions he would, under the new statute, be regarded as a second, rather than a third offender. *Id.* at 849.

187. *Id.* at 848.

the 'unique nature of punishments considered in *Weems*,'"¹⁸⁸ the majority decision in *Rummel* had concluded that "'without fear of contradiction by any decision of this Court', . . . the classification of crimes and the length of stay in a state penitentiary is 'purely a matter of legislative prerogative.'"¹⁸⁹ As noted above, the writers do not believe the majority in *Rummel* goes this far. Of extreme importance is that the Sixth Circuit in the above quoted language gave no effect to the *Rummel* Court's prefatory qualifying phrase "one could argue."¹⁹⁰ In the opinion of the writers, this omission changes the meaning of the *Rummel* majority's statement.¹⁹¹

Subsequent to the Supreme Court decision in *Rummel*, (which, it will be remembered, had earlier been considered by the Fifth Circuit sitting *en banc* *Terrebonne v. Blackburn*¹⁹² presented the cruel and unusual issue again to the Fifth Circuit. *Terrebonne* concerned a federal habeas corpus petition by an inmate in a Louisiana penitentiary serving a life sentence for distribution of heroin. At the time of the offense, Terrebonne was a 21-year-old heroin addict who, with \$175.00 furnished by a government agent, secured about 22 packets of heroin. He turned over 19 to the government agent and retained two or three packets for himself. Although the statute under which Terrebonne was sentenced by its terms made the imposition of a life sentence mandatory for such conduct, at the time of Terrebonne's conviction other provisions of Louisiana law authorized the trial judge to suspend such a sentence, and to place the defendant on probation without imprisonment, or with imprisonment in the parish jail up to a maximum of one year.¹⁹³ There is perhaps some indication that the trial judge may not have been aware of this possibility,

188. *Id.* at 849. The court stated:

Rummel appears to preclude invoking the disproportionality principle as violative of the Eighth Amendment except in capital punishment and 'unique factual circumstances.' According to the majority, sentencing falls peculiarly within the province of the legislature and a state is largely free to determine the 'necessary propensities and the amount of time that the recidivist will be isolated from society.' This result is dictated by our federal system.

Id.

189. *Id.*

190. For the original language from the Supreme Court decision in *Rummel* see note 156, *supra*, and the accompanying text.

191. See *Terrebonne v. Blackburn*, discussed at note 192, *infra*, and the accompanying text.

192. 624 F.2d 1363 (5th Cir. 1980).

193. See the analysis of the Louisiana statutory scheme made by Judge Rubin in the plurality decision in *en banc* hearing, discussing *State v. Whitehurst*, 319 So. 2d 907 (La. 1975), and LA. CODE CRIM. P. arts. 894 & 895. 646 F.2d at 997, 999. As to the current availability of suspended sentence and probation, see note 207, *infra*.

for in sentencing Terrebonne, he had stated, "This Court has no choice in what it may do. The Legislature has prescribed the punishment that is mandatory."¹⁹⁴ Thereafter, the Louisiana legislature adopted a law precluding the possibility of a suspended sentence or probation in future cases.¹⁹⁵

Treating Terrebonne's habeas corpus petition as an attack upon the life sentence as applied, rather than an attack upon the statute on its face, a panel of the Fifth Circuit granted his petition, holding his sentence violative of protections against the imposition of cruel and unusual punishment.¹⁹⁶

Analyzing *Rummel v. Estelle*, a majority of the panel¹⁹⁷ stated that "[a] few isolated sentences in the Supreme Court's opinion might lead one to conclude that a sentence cannot be disproportionate to the severity of the punished offense solely because of the sentence's length . . .,"¹⁹⁸ but that the totality of the opinion "beliefs] this conclusion."¹⁹⁹ The panel majority concluded that the Supreme Court had "again endorsed the continued viability of the proportionality principle as applied to sentence length."²⁰⁰ The opinion stressed that in *Rummel v. Estelle* the United States Supreme Court had affirmed the earlier Fifth Circuit *en banc* opinion, and that that opinion had enumerated a three-prong objective test for determining whether a particular sentence is so disproportionately long as to violate the cruel and unusual clause. The majority of the panel in *Terrebonne* concluded that the Supreme Court had left intact the method employed in the Fifth Circuit *en banc* *Rummel* decision and that it was controlled by the test. The panel majority then emphasized that under this analysis the particular circumstances of each case are to be considered, taking into account the "gradations of culpability that may exist within the range of conduct proscribed by the statute."²⁰¹ The panel majority concluded that the case should be remanded to the federal district court to consider the moral turpitude of Terrebonne's particular crime and to take evidence as to the length of time he probably would actually serve in prison (in

194. 646 F.2d 997, 999. See also note 209, *infra*, and the accompanying text. As to possible implications of this decision see note 215, *infra*, and the accompanying text.

195. LA. R.S. 40:966 (Supp. 1981).

196. In so holding, it reversed the decision of the federal trial judge which had denied petitioner's application.

197. Judge Goldberg wrote the lead opinion and was joined by Judge Hatchett. Judge Johnson filed a specially concurring opinion. 624 F.2d at 1371.

198. *Id.* at 1366.

199. *Id.* at 1367.

200. *Id.*

201. *Id.* at 1370.

view of the possibility of parole, and past experience as to the length of incarceration of drug offenders similarly situated).

In a special concurring opinion, Justice Frank M. Johnson, Jr. expressed disagreement as to the proper interpretation to be given the Supreme Court decision in *Rummel*, but believing that "[o]n its face" Terrebonne's petition presented "in many ways a much more compelling case for application of proportionality analysis than did *Rummel*,"²⁰² he agreed that a remand of the case was required.

On reconsideration of the case *en banc*, the Fifth Circuit vacated the panel decision and reinstated the federal district judge's denial of petitioner's application for habeas corpus relief.²⁰³ None of the five separate pronouncements by the members of the court commanded majority adherence. Ten of the twenty-three members of the court sitting on the case²⁰⁴ fully concurred in a plurality decision authored by Judge Rubin, and an eleventh member²⁰⁵ concurred in most aspects of the opinion. Judge Rubin reasoned that in view of the sentence alternatives available to the trial judge (suspension and probation),²⁰⁶ and in view of pardon, commutation and parole possibilities, the statute was not unconstitutional on its face in authorizing a life sentence as an available alternate penalty.²⁰⁷ In a special concurring opinion authored by Judge Reavley, three members of the court stated, "Terrebonne was given his sentence because he sold heroin. That ends the Eighth Amendment inquiry for me."²⁰⁸ Nine judges joined in a dissenting opinion authored by Judge Johnson expressing the view that the suspension and probation alternative relied upon in Judge Rubin's opinion were not, in context, meaningful possibilities for an elected trial judge,²⁰⁹ and that the statute should be held unconstitutional on its face.

202. *Id.* at 1371-72.

203. *Terrebonne v. Blackburn*, 646 F.2d 997 (5th Cir. 1981).

204. Judges Coleman and Tate did not participate.

205. Judge Brown in a concurring opinion expressed agreement with all of Judge Rubin's opinion, except that portion (the last three paragraphs) which, with respect to the constitutionality of the sentence as applied in a particular case, relied heavily upon Terrebonne's past criminal record and evidence of "other probable criminal behavior." 646 F.2d at 1003. As to that issue, he concurred in the views expressed thereon in Judge Reavley's special concurrence.

206. See note 193, *supra*, and the accompanying text.

207. Since *Rummel*'s conviction, the Louisiana legislature has adopted an amendment prohibiting suspension and probation in such cases. LA. R.S. 40:966 (Supp. 1981) (a fact noted by Judge Johnson in his dissenting opinion). 646 F.2d at 1003 n.1. The statute, therefore, now seems to be far more constitutionally suspect.

208. 646 F.2d at 1003.

209. *Id.* at 1007.

As to the constitutionality of the sentence as imposed on Terrebonne under the circumstances, Judge Rubin's plurality opinion analyzed the implications of the Supreme Court decision in *Rummel*, stating, "Although affirming an en banc decision of this court denying *Rummel* relief . . . the Court rejected the proportionality analysis suggested in our majority and dissenting opinions,"²¹⁰ and that the Court had "upheld *Rummel*'s sentence because the imposition of a life sentence for the offense involved served an obvious and substantial state interest and hence was not, in fact, grossly disproportionate."²¹¹ Then, employing what might be characterized as a "substantial state interest" analysis, Judge Rubin said, "A life sentence for the crime of distributing heroin serves substantial state interests in the same manner that state interests were served by a life sentence for recidivism in *Rummel*."²¹² There is reason to believe, however, that distribution of heroin alone might not have been sufficient basis to uphold Terrebonne's life sentence over a cruel and unusual attack. In a controversial passage, strenuously objected to by the four concurring judges,²¹³ Judge Rubin relied heavily upon the fact that it had been brought out at the trial that Terrebonne had been twice previously convicted of felonies and that there was evidence from which it could be inferred that he had engaged in other criminal conduct. His opinion then concluded:

Because Terrebonne's prior criminal record and the evidence of other probable criminal behavior introduced at trial indicate that the life sentence imposed on him will serve the substantial state interests envisioned by the statute, we hold that Terrebonne's sentence is neither cruel nor unusual within the meaning of the Eighth Amendment.²¹⁴

It appears, therefore, that without the evidence of other criminal conduct, the plurality might have been unwilling to uphold the life sentence accorded Terrebonne. Interestingly, although Terrebonne's life sentence was upheld against the instant attack, Judge Rubin's plurality opinion contained several suggestions that other attacks might be more successful.²¹⁵

210. *Id.* at 1001 (citation omitted).

211. *Id.* at 1001-02 (reference omitted).

212. *Id.* at 1002.

213. Judge Brown concurred in this portion of Judge Reavley's special concurring opinion. See note 205, *supra*.

214. 646 F.2d at 1002-03.

215. *Inter alia*, the opinion states: "No issue was raised concerning whether the 'conduct of law enforcement agents [was] so outrageous' as to make Terrebonne's prosecution violate due process." *United States v. Russell*, 411 U.S. 423, 431-32 (1977); *cf.*

The dissenting opinion authored by Judge Johnson joined in by eight other members of the court took issue with Judge Rubin's use of a "substantial state interest" analysis to determine whether a sentence violates the cruel and unusual protection. Although conceding that *Rummel* "restricts the use of our three-pronged analysis in cases of recidivist statutes," the dissent contended that "the analysis is nevertheless valid under the particular facts of this case."²¹⁶ One of the nine judges concurring in the dissenting opinion, Judge Jerre S. Williams, expressed doubt, however, "that the three-pronged disproportionality test set out by this Court in *Rummel v. Estelle* . . . still retains the vitality Judge Johnson attributed to it in determining the validity of statutes such as that here involved."²¹⁷ Whether or not one agrees with the result reached by the United States Supreme Court in *Rummel v. Estelle*, its implications certainly need clarification.

CONCLUSION

About ten years have elapsed since the Supreme Court gave its generous blessing to plea bargaining in *Santobello v. New York*.²¹⁸ Although continuing to approve the peculiar institution,²¹⁹ the Court by its adoption of Federal Rule 11(e) has pulled away from federal judge participation in the process of plea bargaining.²²⁰ And by its decision in *Bordenkircher v. Hayes*,²²¹ the Court has seemingly adopted a general laissez-faire attitude towards what goes on in the

Sherman v. United States, 356 U.S. 369 (1958); 646 F.2d at 999 n.1; "Although the erroneous imposition of a 'mandatory' life sentence in ignorance of discretionary alternatives may violate both the Due Process Clause of the fourteenth amendment and Louisiana law, (see Hicks v. Oklahoma, 447 U.S. 343 (1980); Willeford v. Estelle, 637 F.2d 271 (5th Cir. 1981); State v. Foret, 380 So. 2d 62 (La. 1980)). Terrebonne did not raise the issue either in state court or in his federal habeas petition." *Id.* at 999-1000.

"If the alternatives available are cruel and unusual, it is presumably because one year is too paltry a penalty to be considered and life, even though subject to the ameliorating provisions allowed by other Louisiana statutes, is cruelly long." *Id.* at 1001 n.5.

"The scheme was attacked in both the state and federal courts as violating the Eighth Amendment by requiring a sentence of excessive length, not for the irrationality of its sentencing scheme. Consequently, we do not consider whether a sentencing scheme may be so irrational as to deny substantive due process." *Id.* at 1002 n.6.

216. *Id.* at 1009.

217. *Id.* (citation omitted).

218. 404 U.S. 257 (1971). See notes 20-22, *supra*, and the accompanying text.

219. See *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), discussed at note 82, *supra*, and the accompanying text.

220. See note 52, *supra*, and the accompanying text.

221. 434 U.S. 357 (1978), discussed at note 82, *supra*, and the accompanying text.

give-and-take of plea bargaining in the state system. Further, and perhaps even more disturbing to these writers, is *Rummel v. Estelle*,²²² reflecting great disinclination on the part of the Supreme Court to invoke the cruel and unusual clause to set aside long prison terms mandated by state legislatures—even one so long that virtually everyone, according to Justice Powell, would regard it as “grossly unjust.”²²³ These developments are of even greater concern in view of the recent trend towards legislatively-mandated narrow discretion fixed sentences, a trend that has the effect of escalating prosecutorial leverage.²²⁴ As the writers see it, taken as a whole these circumstances overly immunize and insulate the plea bargaining process from effective judicial regulation and control. Too often the net effect is to grant the prosecutor *de facto* power to determine the sentence a defendant is to receive—a power the writers feel should be exercised by the judge incidental to his traditional prerogative to fix a defendant's sentence within broad limits prescribed by the legislature.²²⁵

Determining sentence is, of course, one of the most delicate, difficult tasks encountered by the criminal justice system—one involving profound questions of social and individual justice. It calls preeminently for the wisdom, skill and training traditionally associated with the judge—not with the market place of negotiation where the factors that figure in the calculus of compromise may have very little to do with the aims of the criminal law.

The extensive overall reform of adversarial plea bargaining that seemed perhaps to be heralded by *Boykin v. Alabama*²²⁶ is still largely unachieved. Reconsideration of plea bargaining and analysis of post-*Boykin* developments cause the writers to doubt the feasibility of timely reform of the institution.²²⁷ Rather than embrace further attempts at reform, the writers believe that abolition of the present plea bargaining system, substituting for it a new judge-run non-adversary alternative to trial, is the best course of action. If the proposal has merit, the following broad outline should suffice to per-

222. 445 U.S. 263 (1980), discussed at note 134, *supra*, and the accompanying text.

223. See note 173, *supra*, and the accompanying text.

224. See discussion at note 108, *supra*, and the accompanying text.

225. See Cooper, *Plea Bargaining: A Comparative Analysis*, 5 N.Y.U.J. INT. L. & POL. 427 (1972).

226. 395 U.S. 238 (1969). Another possible interpretation of *Boykin*, however, was that it was designed to insulate state guilty pleas from collateral attack in federal court. For contemporaneous speculation as to post-*Boykin* developments, see Pugh, *supra* note 11.

227. One of the writers was formerly more sanguine about plea bargaining and optimistic that effective reform of the system would evolve. See Pugh, *supra* note 11.

suade the reader that further elaboration of the plan should be undertaken.

Adversarial plea bargaining of all kinds between prosecutor and defense counsel would be prohibited by law. Shortly after a defendant had been formally charged with an offense and the case had been fully investigated, defendant could, without prejudice, make an application *in camera* for a specially designated judge (hereafter called a sentencing judge) to ascertain the *maximum* penalty the defendant would receive if he pleaded guilty and thereby opted for a non-adversary alternative to trial. The sentencing judge (a person other than the one who would try the case if defendant decides to plead not guilty) would have full access to police and prosecutorial files, and defendant's criminal record. After studying this data, the judge would, by a penal order,²²⁸ expeditiously notify the defendant what the *maximum* sentence would be if he pleaded guilty. With this information, the defendant would be better able to decide whether he would elect the traditional adversarial trial route or the new non-adversarial alternative.²²⁹ Since a critical factor in many criminal prosecutions concerns the constitutionality of admitting certain evidence, perhaps a defendant should be permitted to delay this decision until after a motion to suppress had been decided.²³⁰ In any event, a defendant would not be permitted to elect the new procedure until safeguards similar to those embodied in Federal Rule 11 were complied with.

By pleading guilty and thereby electing the non-trial alternative, the defendant would insure that he would receive a sentence no longer than that stipulated in the penal order. There would then be a full sentence hearing, in consequence of which the defendant might well be given a lighter sentence than that stated in the order. Although there are constitutional problems with such a plan,²³¹ the

228. The procedure is somewhat analogous to a penal order procedure available in certain circumstances under German law. See Langbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439, 455-58 (1974).

229. If a defendant rejected the penal order, the sentencing judge should be precluded from entering a second penal order more enticing to the defendant. Otherwise, one would get into bargaining between the judge and the defendant similar to that now between the prosecution and the defense.

230. Perhaps a defendant should be permitted to delay this election even further—until after there has been an opportunity for the trial court's decision on the motion to suppress to be reviewed by an appellate court.

231. See *United States v. Jackson*, 390 U.S. 570 (1968), noted in Note, *Guilty Pleas, Jury Trial, and Capital Punishment—The Effects of United States v. Jackson*, 29 LA. L. REV. 389 (1969).

writers feel that it is far superior to the present adversarial plea bargaining system, and hope it would pass constitutional muster.²³²

The sentence hearing would be open to the public, and all circumstances relative to punishment would be explored—much as is today done in many continental criminal trials.²³³ At this sentence hearing, in addition to a pre-sentence report prepared by a trained professional responsible to the court, defense counsel and prosecutor could present, in expeditious fashion, data deemed by them to be pertinent. The proceeding would not, however, be essentially adversarial in character. The judge, instead of being the passive referee he often is in American trials, would be the dominant active figure²³⁴—making all inquiries necessary to enable him to determine the sentence he deems most appropriate from the standpoint of both society and the defendant.

By legislation the sentencing judge would, for this sentence hearing, be freed from the restraints of legislatively imposed mandatory minimum sentences (just as the prosecutor usually is today in plea bargaining because of his charging power). Further, for this purpose, the sentencing judge should be authorized to reduce the charge against the defendant to what he deems the appropriate charge applicable to the case. This exercise of discretion would further enable him to individualize the sentence in a manner similar to that now generally available for the prosecuting authority in plea bargaining. To protect against abuse, and facilitate development of appropriate sentencing guidelines, it probably would be well to let both the defendant and the prosecution appeal the sentence actually imposed. To make the system work, however, even on appeal defendant could not be given more than the maximum earlier set by the judge in the penal order. A variation on the plan would permit the prosecution, prior to defendant's election, to seek review of the penal order in the appellate court.

The advantages to the guilty defendant of the non-trial option (rather than going to trial) are obvious. By it, the defendant comes to grips with his problem in a quick, simple, relatively inexpensive procedure. Perhaps more significantly, he avoids concentration on the details of the crime and his role in it, and focuses the court's attention on his major concern, minimizing the penalty. There would probably be a natural tendency for a judge in such a hearing to

232. See in this connection *Corbitt v. New Jersey*, 439 U.S. 212 (1978).

233. See Pugh, *supra* note 24; J. LANGBEIN, *COMPARATIVE CRIMINAL PROCEDURE: GERMANY* (1977).

234. *Id.*

show leniency to a defendant who manifests remorse and repentance for his wrongdoing. It may be hoped, however, that sentences meted out at such a hearing would not be reduced below those justified by penological considerations.²³⁵ Parenthetically, it is also to be hoped that a defendant electing the traditional trial route would be given a sentence no greater than the judge feels is appropriate to him individually, that a defendant's punishment would not be augmented for the purpose of discouraging others from asserting their right to trial, and that the trend towards legislatively mandated minimum sentences would be reversed.²³⁶ Further, the writers feel that all sentences should be reviewable by an appellate court at the instance of either the prosecution or the defense, minimizing the risk of improper differentials between sentences arrived at through the trial and non-trial routes, and affording open consideration of sentences.

The non-adversarial alternative to trial would be very different from the present plea bargaining system and, in the writers' opinion, much preferable. Rather than the result of haggling or bargaining, the defendant's sentence would be determined by the court under a fair, expeditious public procedure—subject to appeal by both the defendant and the prosecution.

235. See Cooper, *supra* note 225.

236. See note 108 *supra*, and the accompanying text.

