PLEA BARGAINING AND THE JUDICIARY: AN ARGUMENT FOR REFORM

Steven R. Schlesinger†
Elizabeth A. Malloy††

TABLE OF CONTENTS

I. INTRODUCTION: THE NEED FOR REFORM OF PLEA BARGAINING

The purpose of this Article is to argue that increased judicial participation in plea bargaining would be a salutary reform of our criminal justice system. Specifically, the Article proposes a pre-plea conference at which the judge and both parties discuss the defendant's case, as well as correctional alternatives, and the judge informs the parties what sentence a guilty plea would bring. It is not the authors' intention to discuss the legitimacy of plea bargaining in American criminal justice; this has been done elsewhere.[1] Rather, given the important role played by plea negotiation in our legal system, the Article explores what steps could be taken to improve plea bargaining.

The operation of the American criminal justice system differs substantially from the ideal of an adversary confrontation. The "reality is bureau-

---

† B.A. 1967, Cornell University; M.A. 1969, Claremont Graduate School; Ph.D. 1973, Claremont Graduate School. Acting Chairman and Associate Professor, Department of Politics, The Catholic University of America.

†† Member of the Senior Class, Department of Politics, The Catholic University of America.

1. For a more detailed discussion of the legitimacy of plea bargaining, see ENKER, *Perspectives on Plea Bargaining*, in U.S. TASK FORCE ON THE ADMINISTRATION OF JUSTICE: THE COURTS (1967) [hereinafter cited as U.S. TASK FORCE]; D. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL (1966); Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L.REV. 167 (1964).

cratic bargaining,"[2] and conviction without trial through plea bargaining is the most frequent means for the disposition of criminal cases. Plea negotiation, defined broadly by the Georgetown Survey of Criminal Law and Procedure as "the defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state,"[3] is retained by our system of criminal procedure because it serves a number of useful purposes.

Most importantly, plea bargaining eases the burden of overcrowded court dockets.[4] In addition, by the defendant's plea of guilty, he aids in assuring prompt and certain application of correctional measures and acknowledges responsibility for his actions. Preserving the meaningfulness of the trial process for cases in which there is a real basis for dispute, and eliminating the risks of adversary litigation are important values served by bargaining.[5]

Plea negotiation, however, has its liabilities. Bargains may compromise the integrity of the criminal justice system by bringing about inappropriate or unjust convictions, by frustrating intelligent sentencing, and by giving a sense of purposelessness and lack of control to the entire process.[6] In addition, factual information relating to the individual characteristics of the defendant, as expressed in the pre-sentence report, is usually not developed or utilized when plea bargaining is used.[7]

Plea negotiation is often condemned as unethical and contrary to Anglo-American notions of criminal justice. As one author states:

> For those who believe that the single goal of criminal justice is the determination of truth—to find and sentence the actual perpetrator of the offense in question—and that the best protection for society is the most stringent safeguarding of individual rights and liberties, the logical system would be one in which every defendant is afforded a trial at which

---

2. Jones, *Prosecutors and the Disposition of Criminal Cases: An Analysis of the Plea Bargaining Rates*, 69 J. CRIM. L. 402 (1978).

3. H. MILLER, W.F. MCDONALD & J. CRAMER, PLEA BARGAINING IN THE UNITED STATES (1976).

4. The utility of plea bargaining in disposing of large numbers of cases is detailed by Judge Lummus in THE TRIAL JUDGE 43-46 (1947) as follows:

> If all defendants should combine to plead guilty, and should dare to hold out, they could break down the administration of criminal justice in any state of the union. . . . The prosecutor is like a man armed with a revolver who is cornered by a mob. A concerted rush would overwhelm him. . . . The truth is that a criminal court can operate only by inducing the great mass of actually guilty defendants to plead guilty.

5. The Supreme Court approved the practice of plea bargaining in *Santobello v. New York*, 404 U.S. 257 (1971), labeling it "an essential component of the administration of justice." *Id.* at 260. In *Santobello*, the Court recognized the right of a defendant to remedial relief when the government breaches its plea bargain obligation after the defendant has plead guilty.

6. J. BOND, PLEA BARGAINING AND GUILTY PLEAS (1975).

7. U.S. TASK FORCE, *supra* note 1, at 117.

the prosecutor must fully prove its case.[8]

However, the goals of the criminal justice system are coming under an increasingly realistic review and discussion. For example, Judge Macklin Fleming, in *The Price of Perfect Justice,* observes "for when we aim at perfect procedure, we impair the capacity of the legal order to achieve the basic values for which it was created. . . ."[9] Because of our inability to provide "perfect justice" for all, we have adopted a compromise system in which plea bargaining is permitted, but subject to certain controls. The President's Task Force on the Courts concludes that "[m]aintaining a proper balance between effectiveness and fairness has always been a challenge to the courts."[10]

Complete abolition of plea bargaining raises many problems. In August 1975, Alaska's Attorney General banned plea bargaining, thereby forbidding both charge and sentence negotiations. The effects of this action, as evaluated by Alaska's Judicial Council in a two-year study, were to increase some sentences and to increase modestly the number of trials. But the elimination of plea bargaining reduced guilty pleas only slightly, from ninety-four percent to ninety-two percent of all cases.[11] In other words, the Alaska reform had only a slight impact in reducing the pressure to plead.

In another experiment aimed at increasing the productivity of the criminal justice system, Philadelphia District Attorney Arlen Specter abolished plea bargaining during his term in office, from 1969 to 1973. His action was fundamentally unsuccessful, since instead of bargaining over the charge to which defendants would plead guilty, prosecutors and defense attorneys bargained over whether the defendant would waive his right to a jury trial and elect a bench trial.[12] Bench trials are speedy and serve some of the same purposes as plea bargaining; the assistant attorneys under District Attorney Specter offered the defendants the same type of implied sentencing concessions previously provided to induce guilty pleas.[13]

Insufficient attention has been given to the informal negotiation which forms a crucial part of American criminal procedure. It has been estimated that up to ninety percent of all cases entering our criminal courts are dismissed without trial through negotiation of pleas.[14] Plea bargaining is usually a low-visibility procedure which occurs in a private and informal set-

---

8. Whitman, *Recent Developments: Judicial Plea Bargaining,* 19 STAN. L. REV. 1082 (1967).

9. M. FLEMING, THE PRICE OF PERFECT JUSTICE: THE ADVERSE CONSEQUENCES OF CURRENT LEGAL DOCTRINE ON THE AMERICAN COURTROOM (1974).

10. U.S. TASK FORCE, *supra* note 1, at 1.

11. Rubenstein & White, *Alaska's Ban on Plea Bargaining,* 13 LAW & SOC. REV. 367 (1979).

12. C. SILBERMAN, CRIMINAL VIOLENCE, CRIMINAL JUSTICE 279 (1978).

13. *Id.*

14. G. COLE, THE AMERICAN SYSTEM OF CRIMINAL JUSTICE 296 (1975).

ting. Often decisions "are made over lunch or in the hallway of the criminal court building."[15] This tends to arouse fears that bargaining does not operate fairly, and imparts to the defendant and often to the public an image of a system which lacks meaningful purpose.[16] As a result, "[t]he judge, the public, and sometimes the defendant himself cannot know for certain who got what from whom in exchange for what."[17]

The emphasis which our current legal practices place upon plea bargaining reflects the assumption that negotiations are important, if not essential. Milton Heumann suggests, therefore, that changes in our current plea bargaining practices be explored: "If a concern for justice motivates many who do research in the legal arena, one thing is plain. The quest for justice in the 'trial courts' necesitates a comparable quest in the 'plea bargaining courts.' These courts process - and will continue to process - most criminal cases."[18] If Heumann is correct, we must then examine the process of plea negotiation itself.

II. The Role of the Judge

Currently, the role which the judge plays in plea bargaining,[19] as in other aspects of this process, is often concealed from view by the covert nature of the negotiations. In order to convert plea bargaining into a visible, "forthright, and informed effort to reach sound dispositional decisions,"[20] fuller judicial consideration of proposed bargains and involvement in the negotiation process has been recommended.[21] The objective of this reform is not to move away from conviction without trial and the values which it serves, but is rather to bring to negotiated dispositions some of the attributes of formal trial procedure. In this way, judicial control of plea negotiation balances the interests of both the public and the defendant.

Current practices of negotiation in our criminal courts recognize the need for some type of judicial inquiry to determine whether a guilty plea is voluntarily and understandingly made. This is because plea bargaining

---

15. Jones, *supra* note 2, at 402.

16. U.S. Task Force, *supra* note 1, at 112.

17. *Id.* at 9.

18. M. Heumann, Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys 170 (1977).

19. One significant empirical study focusing on the judicial role in plea bargaining is Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, 76 Colum. L. Rev. 1059 (1976). He describes plea bargaining systems in 10 cities, and concludes that occasional and inconsistent involvement of judges in plea bargaining is the most common pattern.

See also Ryan & Alfini, *The Trial Judge's Participation in Plea Bargaining: An Empirical Perspective*, 13 Law & Soc. Rev. 479 (1979), for an empirical study of the legal, organizational and social contexts in which trial judges are more or less likely to participate in plea bargaining.

20. U.S. Task Force, *supra* note 1, at 12.

21. N. Morris, The Future of Imprisonment 55 (1974).

raises complex constitutional questions which demand judicial attention.[22] Specifically, standards should safeguard against an innocent person being induced to plead guilty; at the same time, the fifth amendment protects the defendant's right not to incriminate himself in testimony, and plea bargaining conflicts inherently with the defendant's sixth amendment right to a trial.[23] In accordance with American Bar Association standards, it is the responsibility of the supervising judge to determine that the defendant's plea is the result of a knowing choice, that he understands the nature of the charge and the consequence of the plea, and to inform the defendant that by a plea of guilty he waives his right to trial.[24]

The reform considered in this Article involves an increased level of judicial participation in negotiations, often referred to as "judicial plea bargaining," in which a judge indicates that "he will impose a certain sentence or accept a certain reduced charge if the accused pleads guilty."[25] This judicial participation would take place within a pre-plea conference in which the prosecutor, defense attorney, defendant and often the victim meet with the judge in an on-the-record hearing prior to the possible entry of a guilty plea. Such consultation permits the judge to determine whether there is a factual basis for the plea, encourages frank discussion of the facts of the case, and furthers consideration of sentencing alternatives.[26]

The article "Restructuring the Plea Bargain" which appeared in the *Yale Law Journal* in 1972 proposes such a pre-plea conference.[27] A judge, with access to sentencing information and with the authority to replace the prosecutor as the source of the plea concessions, would supervise the conference and exercise full responsibility for the concessions which the defendant receives in exchange for his plea. The conference would, ideally, adhere to the following guidelines which "Restructuring the Plea Bargain" suggests:[28]

(1) Prior to the conference, the judge declines to grant motions to dismiss the case, except on exceptional grounds.

(2) Individual consultations between the prosecutor and the defense are discouraged.

---

22. *See* Berger, *The Case Against Plea Bargaining*, 62 A.B.A. J. 621 (1976); Dean, *The Illegality of Plea Bargaining*, 38 FED. PROB. 18 (1974); Wheatley, *Plea Bargaining—A Case for its Continuance*, 59 MASS. L.Q. 31 (1974); Note, *The Unconstitutionality of Plea Bargaining*, 83 HARV. L. REV. 1387 (1970).

23. U.S. TASK FORCE, *supra* note 1, at 116-17.

24. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY § 1.4-.8 (1968).

25. Ferguson, *The Role of the Judge in Plea Bargaining*, 15 CRIM. L.Q. 26, 29 (1972).

26. Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509 (1972).

27. The term "pre-trial settlement conference" has similarly been discussed by Alschuler, *supra* note 19, at 1124, and by N. MORRIS, *supra* note 21, at 55-57.

28. Note, *Restructuring the Plea Bargain*, 82 YALE L.J. 286, 300-03 (1972) [hereinafter cited as *Restructuring the Plea Bargain*].

(3) The defendant is informed by the judge of his right to a pre-plea conference.

(4) If the defendant requests, the judge grants the conference and orders both pre-plea discovery and a pre-sentence investigation.

(5) When available, the contents of the pre-sentence report are disclosed to both parties and discoverable evidence is presented by the attorneys to the judge.

(6) The judge hears the defendant's motions to suppress evidence.

(7) The conference is held in the judge's chambers, or preferably in open court, and transcribed.

(8) In the presence of the prosecutor, defense attorney, and defendant, the judge explores the accuracy of the pre-sentence report and of any discoverable evidence. He explores the correctional alternatives most consistent with the defendant's culpability, if he choses to enter a plea of guilty. The judge also considers the prospects for rehabilitation of the defendant.

(9) Both parties submit to the judge proposed dispositions of the defendant's case.

(10) The judge then orders two sentencing dispositions. The first is that for conviction after trial, and the second would follow a plea of guilty. This second sentence would be determined by a guide to specific "discount rates" to be imposed if a guilty plea is entered. The article does not detail any provisions for this "discount rate."

(11) The defendant choses to plead guilty or to stand trial. If he pleads guilty, the judge's terms immediately take effect. When the defendant tenders his guilty plea, the judge asks the same questions about voluntariness and understanding as would currently be asked.

(12) If the defendant chooses to stand trial, he is tried before a judge other than the one who participated in the conference. The record of the conference is closed until the end of such a trial.

(13) If the defendant is convicted at trial, the trial judge receives the record of the pre-plea conference and pre-sentence report. The sentence imposed after trial may not exceed that which the negotiating judge set as the post-trial

disposition.

(14) The prosecutor may not change the indictment after the conference and before the trial.

(15) The defendant may enter a guilty plea prior to the time of his scheduled trial, and the terms of this plea shall correspond with those offered by the pre-plea conference judge.

III. Opposition to Judicial Plea Bargaining

It will be helpful at this stage to consider the arguments of those who oppose judicial plea bargaining. These opponents cite four justifications for their opposition to this reform. First, they argue that increased judicial participation in plea bargaining creates the impression in the mind of the defendant that he would not receive a fair trial if he were to reject the plea offered and go to trial before that same judge.[29] During the pre-plea conference, the judge hears evidence from the defendant which he may not be able to ignore should the case go to trial before him. At the conference the judge may form an opinion concerning the defendant's guilt as well as concerning the proper disposition of the case. Once the judge voices his opinions at the conference, the argument goes, he may become committed to their validity, and thus be unable to suspend these conclusions if the plea is rejected and the case goes to trial.

Second, critics of increased judicial participation in plea bargaining point to the risk of coercion. The risk of refusing the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even it he is innocent. The defendant may be coerced into a guilty plea if the judge is an active participant in the process, since some evidence indicates that individuals defer to authority figures.[30] In some situations, judicial participation may assume a very overt form. For example, in 1973, a Colorado judge coerced the defendant's plea by warning that he would "put him away forever if he did not accept the bargain."[31]

The criminal courts have shown an increasing awareness of the coercive impact of judicial plea bargaining. Since the judge occupies an authoritative position, his observations, admonitions, and suggestions may appear to be commands to the frightened defendant.[32] In *United States ex rel. Elksnis v. Gilligan*,[33] the federal district court held a plea to be involuntary because it was the result of judicial coercion and not made with an understanding of its consequences.

---

29. J. Bond, *supra* note 6, at 288.
30. *Id.* at 287.
31. Colorado v. Clark, 183 Colo. 201, 515 P.2d 1242 (1973).
32. J. Bond, *supra* note 6, at 285.
33. 256 F. Supp. 244 (S.D.N.Y. 1966).

> The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, at once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a substantially longer sentence.[34]

It is the responsibility of the trial judge to determine the voluntariness of the plea when it is accepted. Adversaries of the pre-plea conference suggest, thirdly, that judicial participation in plea discussions renders it increasingly difficult for the judge to determine objectively the voluntariness of the plea when it is offered. The judge cannot be impartial in accepting the voluntariness of a plea if he has previously encouraged the accused to accept what he regards as a good bargain. Participation in the pre-plea conference may encourage the judge to be an advocate who is actively encouraging the defendant to plead guilty, rather than an impartial arbiter protecting the rights of the accused. The court in *Elksnis* stated that:

> [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 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.[35]

Finally, those who oppose the pre-plea conference reform contend that this conference is not conducive to respect for the law, but rather gives the appearance of impropriety by encouraging the defendant to think of the judge as just one more official to be bought off.[36] There is a need, it is ar-

---

34. United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244 (S.D.N.Y. 1966). The petitioner was indicted on a second-degree murder charge and pleaded guilty to first-degree manslaughter in response to a trial judge's promise of a maximum sentence of ten years. *Id.* at 254. Alleging that he discovered later the defendant's felony conviction record, the judge refused to hold to the bargain and sentenced the defendant to a 17 ½ year term. *Id.* The petitioner protested the breach of agreement, and the district court held the guilty plea involuntary because it was the result of judicial coercion. *Id. See also* Rogers v. State, 136 So. 2d 331, 335 (Miss. 1962): "Because of the nature of the judicial function and the power and prestige of a circuit judge, any acts or words of his containing promises, or tending to persuade, have a much greater significance than acts or words of others." *See also* Von Moltke v. Gillis, 332 U.S. 708, 729 (1948): "There must be both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible."

35. United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 255.

36. J. Bond, *supra* note 6, at 289.

gued, to protect the dignity of the judge as a symbol of even-handed justice which, in turn, enhances the prestige and dignity of the entire judicial system. Even if the judge is able to maintain an objective attitude, opponents of judicial plea bargaining argue that both the public and the defendant may not accept the judge's lack of prejudice. In this and other areas relating to the legal process, the appearance of doing justice may be as important as doing justice in actuality. Judges in practice assume "a responsibility for the functioning of the overall criminal justice system."[37] This Article will respond to each of these criticisms in the next section.

IV. The Argument for Judicial Plea Bargaining

The criticisms made by the opponents of judicial plea bargaining can be effectively answered. But before an attempt to answer them is made, the advantages of judicial plea bargaining must be examined. The advantages which judicial participation brings to our inadequate system of plea bargaining clearly warrant the implementation of this reform. Judicial plea bargaining (1) enhances the intelligence of the defendant's plea; (2) facilitates more appropriate sentencing; (3) reduces sentence disparities among those who sentence; (4) reduces appeals for post-conviction relief; and (5) gives greater visibility to the entire plea bargaining process. In addition, contrary to the claims of the opponents of judicial plea bargaining, participation by the judge is not coercive, does not hinder a fair trial, does not give the appearance of impropriety, and does not bias the judge's determination of the plea's voluntariness.

A fundamental argument in favor of the pre-plea conference is that trial judges, by virtue of their position, temperament and experience, are better able to sentence than assistant district attorneys. In fact, one judge considers sentencing to be the inherent responsibility of the judge and thinks that "to suggest that the sentencing judge be turned out and replaced by these other professionals is to replace chaos with further and perhaps worse chaos."[38]

Judicial involvement assures that pleas proposed in connection with conviction without trial receive much the same attention as would be given to sentencing decisions. Through their contact during the pre-plea conference, the judge comes to know the defendant better through observation and discussion. This information supplements the pre-sentence report, thus allowing the judge to individualize justice in sentencing the defendant who

---

37. D. Newman, *supra* note 1, at 235. *See also* Commonwealth v. Senauskas, 326 Pa. 69, 191 A. 167, 168 (1937), wherein the court stated: "[F]or a judge to make a bargain, engagement, or promise in advance of the hearing of the case, irrespective of what the evidence might thereafter show the facts to be and as to what judgment he should render therein, would be judicial misconduct."

38. Mattina, *Sentencing: A Judge's Inherent Responsibility*, 57 Judicature 105 (1973).

pleads guilty.[39] Judicial participation also helps to restrict arbitrariness in sentencing by encouraging both the prosecution and defense to furnish information about the defendant which is relevant to an appropriate sentencing decision.[40] In addition, the defendant's awareness of the interest of the judge in his case, accomplished through the pre-plea conference, may enhance the possibility for successful rehabilitative efforts following the plea.[41]

Plea bargaining which is controlled primarily by prosecutors, however, suffers from inconsistencies which virtually preclude equal justice.[42] Prosecutors do not make available to all defendants the opportunity to negotiate on an equal basis. Furthermore, individual assistant district attorneys may form their own consistent procedures and standards for plea bargains, but discrepancies would still exist among prosecutors and state offices.

J.B. Jones, in his study "Prosecutors and the Disposition of Criminal Cases" examines the effect which prosecutors' values and social backgrounds have on plea bargaining. His findings suggest that "institutional variables such as the participant's [prosecutor's] social background, education, values, abilities, sentencing propensities and goals are indirectly predictive of case disposition."[43] These factors, and administrative variables such as the volume of cases, the length of time the case has been on the docket, and the number of cases per attorney, as well as external factors including the nature of the state criminal law and the social, economic and political character of the locality, all influence prosecutors' plea bargaining decisions.[44] The judge is able to prevent such prosecutorial inconsistencies by participating in the negotiating process. Realistically, discrepancies similar to the ones discussed above will develop among judges. But the smaller number of judges in relation to prosecutors, and adherence to suggested sentencing guidelines, will to a substantial degree reduce the influence of many of the institutional, administrative, and external factors discussed above.

In addition, judicial participation enhances the intelligence of the defendant's guilty plea. Criminal defendants are concerned primarily with the sentence they will receive. The defendant and his counsel are better able to

---

39. Lambros, *supra* note 26, at 515.

40. *See* Ryan & Alfini, *supra* note 19, at 502.

41. Vetri, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 893 (1964).

42. Prosecutorial coercion in plea bargaining was evident in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), in which the prosecutor recommended a five-year sentence if the defendant would plead guilty. The prosecutor warned the defendant that, if he did not accept the offer, the state would reindict him under the habitual criminal offender statute which carried a harsher sentence. *Id.* at 361. The Supreme Court held that once a discretionary prosecutorial decision has been made to indict an accused, a subsequent indictment under a more serious charge for the same offense would impose an unconstitutional burden on the defendant's right to plead not guilty. *Id. See* Schlesinger, *Chilling Effects in Criminal Trial Procedure: A Balancing Approach*, 10 CUMB. L. REV. 1, 16 (1979).

43. Jones, *supra* note 2, at 412.

44. *Id.*

decide whether to plead guilty if they know what sentence the judge will impose. To deny the accused this information is to force him "to plead in the dark."[45]

In addition to facilitating more appropriate sentencing, reducing sentencing disparities among those who sentence, and enhancing the intelligence of the guilty plea, judicial plea bargaining would reduce appeals for post-conviction relief. Since the judge can authoritatively state to the defendant what his sentence will be, there is no danger of the defendant receiving a harsher sentence than the prosecutor had recommended. The pre-plea negotiation prevents the defeat of expectations, and the accompanying complexities of "the plea-withdrawal procedure."[46]

Use of the conference also allows the bargaining to be placed on the record, giving visibility and thus legitimacy to the plea negotiation process. With decisions no longer being made "over lunch or in the hallway of the criminal court building,"[47] Albert Alschuler, in his commentary "The Trial Judge's Role in Plea Bargaining," suggests that implementation of the pre-plea conference permits effective appellate review "of the penalty that our criminal justice system imposes for the exercise of one's right to trial."[48] In addition, statistics which can be tabulated from on-the-record discussions will assist in research of other plea bargaining reforms.

Those who oppose judicial plea bargaining point to the coercive impact of judicial participation. However, a judge who participates in a pre-plea conference does not, it would seem, coerce the defendant to any greater degree than do the attorneys in a plea bargaining situation. Indeed, it has been stated that:

> [T]he influence on the accused of the threat or suggestion by the judge of differential sentencing is not an appropriate reason for prohibiting judicial plea bargaining without also prohibiting prosecutorial bargaining. It is inappropriate because every bargain, whether judicial or prosecutorial, subjects the accused to the pressure of differential sentencing of some kind.[49]

Another author argues that:

> Pressure to plead guilty is put upon the accused at every stage of our system of Criminal Justice. The option of pleading guilty would seem to make this pressure inherent in the system, for each element of the system—police, prosecutor, even judge—will strive to dispose of each case in the most efficient manner: by persuading the defendant to plead

---

45. *See* Note, *Official Inducements to Plead Guilty: Suggested Morals for a Marketplace*, 32 U. CHI. L. REV. 167, 183 (1964).
46. Alschuler, *supra* note 19, at 1129.
47. Jones, *supra* note 2, at 402.
48. Alschuler, *supra* note 19, at 1132.
49. Ferguson, *supra* note 25, at 35.

guilty.[50]

The reality of the judge's commanding position does not, of itself, compel a person to waive his right to trial and plead guilty. Rather, it is the judge's responsibility to conduct the pre-plea conference in an atmosphere of "sincerity and candor."[51] The debate over the coercive impact of judicial participation is, at best, speculative inasmuch as "no studies have tried to correlate the incidence of improvident guilty pleas with the degree of judicial participation in the bargaining process".[52] In addition, the proposed guildelines for the reform specify that the defendant must request the conference. The judge is helped in maintaining an impartial stance and a noncoercive posture by the fact that he cannot initiate discussions, but must wait until the defendant requests his opinion. The defendant's knowledge that his possible trial would be before a different judge would decrease the coercive impact of the conference judge's words and actions.

One's response to the reform of judicial plea bargaining depends upon how the judge's participation is structured. The anxiety expressed by some that the defendant who plea bargains with a judge as a party to the negotiation would not receive a fair trial appears to be unfounded. If the defendant stands trial, the guidelines of the conference demand that the case be tried before a different judge, and the record of the plea conference would be closed until the end of that trial.[53] This procedure is consistent with the case of *United States v. Gallington*, in which the judge rejected a guilty plea since the pre-sentence report did not support the agreed-upon plea. The appellate court held that "after rejecting a plea, a judge may excuse himself from further involvement in the case and should give serious consideration to doing so."[54]

The appearance of impropriety need not arrive with the implementation of this reform. As Donald Newman, author of *Conviction: The Determination or Guilt of Innocence Without Trial* states, "[t]he adjudication of guilt, that is, the actual conviction decision, is normally thought of as a judicial function or, in some contested cases, as the shared responsibility of the judge and jury."[55] As the one "neutral" participant in the process, the judge should be entrusted with an important responsibility in plea bargaining. If the judge is not openly permitted to participate directly in the bargaining process, he may participate in negotiations covertly. Such disreputable participation in bargaining by the judge is currently taking place and constitutes a major criticism of bargaining in general. In fact, Newman reports, frequently the defendant's counsel or family will confront the judge and at-

50. Whitman, *supra* note 8, at 1085.
51. Lambros, *supra* note 26, at 517.
52. J. Bond, *supra* note 6, at 287.
53. *See Restructuring the Plea Bargain*, *supra* note 28, at 300.
54. United States v. Gallington, 488 F.2d 637, 639 (8th Cir. 1973).
55. D. Newman *supra* note 1, at 90.

tempt to secure from him a sentencing promise. The propriety of defense counsel approaching a judge prior to a guilty plea arose in Pennsylvania in *Commonwealth v. Scoleri*.[56] The trial court found such conduct shocking and not becoming to a member of the Bar, and the appellate court stated that "this conduct was indefensible and outrageous and cannot be too strongly condemned."[57] The proposed reform should reduce these improprieties by converting judicial participation into a visible, structured effort. Some have suggested that judicial participation in plea discussions renders it increasingly difficult for the judge objectively to determine the voluntariness of the plea when it is offered. However, the substantial knowledge which a judge has gained in the conference concerning all the aspects of a defendant's case will put him in a stronger position than that of another trial judge to evaluate the voluntariness of the defendant's plea. After all, the validity of a judge's decision about voluntariness in part depends upon his knowledge of the case. For example, a judge who is convinced of the defendant's innocence will hesitate to accept a guilty plea from that defendant.

One means of virtually eliminating this problem is to require (as the Yale guidelines do not) that the voluntariness determination be made or concurred in by a different judge.

In sum, the pre-plea conference offers many advantages over and improvements to our current plea-bargaining system. In the words of Albert Alschuler,

> [j]udicial control of the plea bargaining process would offer defendants a clear and tangible basis for reliance in entering their pleas; it would, at least on occasion, permit effective regulation of the extent of the penalty that our criminal justice system imposes on the 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 most useful ways; and most importantly, it would restore judicial power to the judges.[58]

V. The Impact of Judicial Plea Bargaining on the Criminal Justice System

It is not sufficient to consider the advantages of this proposed reform without also reviewing the perspectives of the various individuals involved. George Cole, among others, emphasizes that our criminal process operates as a system of interlocking parts.[59] Thus, if plea bargaining is to be reformed, the consequences of such reform for the whole system must be contemplated since its adoption would affect judges, prosecutors, defense counsel, the de-

56. 415 Pa. 218, 202 A.2d 525 (1964).
57. *Id.* at _, 202 A.2d at 528.
58. Alschuler, *supra* note 19, at 1154.
59. G. Cole, *supra* note 14, at 130.

fendant, and correctional authorities.

Chief Justice Warren Burger has provided the impetus for a reevaluation of the judiciary's role in the criminal justice system.[60] The adoption of a pre-plea conference would place the greatest responsibility in the hands of the judges themselves, and their reactions to the conference are generally favorable.[61]

Donald Newman quotes a Kansas judge's reaction to the pre-plea conference proposal; the judge believes that it is proper for judges to indicate a sentence in advance of accepting the plea.

> This procedure gives a defendant and his counsel a more intelligent basis on which to decide whether to plead guilty or go to trial. The open court nature of the hearing follows a very good principle of judicial administration which is that a judge should not hear argument, hold conferences, or make decisions in chambers when they can be done in open court. In this way the authorities and the courts are protected from unjust criticisms.[62]

The detailed inquiry of the conference is time-consuming, but ultimately will result in fairer procedures. The additional time spent will eliminate a substantial number of plea withdrawal procedures, thereby saving some judicial time in the long run.[63]

Prosecutor-defense bargaining protects the "weak, elective American trial bench from the potential liability of unpopular decisions."[64] Norval Morris argues that "the judiciary seems more interested in protecting its trailing robes from the dirt of the market than in overturning the tables or regulating the market."[65] Some judges in the court system may oppose judicial participation in plea bargaining because it increases their level of responsibility for the outcome of the bargain and, consequently, their political liability for their decisions. However, one judge affirms that "the judiciary must forget their traditional reluctance to engage in public relations."[66] The legal system itself seems to demand an active, participating, judicial branch.

> Our system of policing, prosecution, and law enforcement is fragmented and decentralized to a remarkable degree. As a result, political responsibility for the decency and effectiveness of the system is widely diffused if it may be said to exist at all. The absence of genuine political and administrative responsibility for the system of criminal justice in the United

---

60. Lambros, *supra* note 26, at 522.
61. Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 505 (1972).
62. D. Newman, *supra* note 1, at 43.
63. W. Kerstetter & A. Heinz, Pretrial Settlement Conference: An Evaluation xiii (1970).
64. Langbein, *Understanding the Short History of Plea Bargaining*, 13 Law & Soc. Rev. 270 (1979).
65. N. Morris, *supra* note 21, at 51-52.
66. *Id.* at 110.

States has resulted in the substitution of judicial supervision.[67]

Judicial bargaining apparently meets with the approval of most defense attorneys and prosecutors.[68] But more important, a pre-plea sentence from a trial judge is more desirable for the defendant himself than an unreliable pledge from a prosecutor. In addition, from the defendant's point of view, open negotiations make it more difficult for lawyers to "con" their clients by misrepresenting the views of the judge and prosecutor; this is true because the suggested guidelines encourage the defendant to attend the pre-plea conference and thereby learn how his lawyer, the prosecutor and the judge in fact interact relative to his plea. In this way, he can be assured that his attorney adequately represents him.

Inevitably, plea bargaining and charge reduction in any form result in disparate sentencing. This presents a problem to correctional authorities since offenders learn of the bargaining "cop out" and compare their sentences with those of other inmates who have committed similar crimes.[69] Plea bargaining as currently practiced may leave the offender with the impression that he has outwitted the authorities, an attitude which is not conducive to success in correctional programs. In Morris' view, as expressed in *The Future of Imprisonment*, it is for that reason "impossible to build a humane and just system of imprisonment on the foundation of our present plea bargaining practices."[70]

The pre-plea conference helps to satisfy the desires of correctional personnel that the offender enter programs convinced that he has had his time in court, that officials have acted fairly, that he was permitted to tell his side of the story, and that his rights were respected.[71] Thus, the defendant's awareness of judicial participation in the bargaining process can provide a partial foundation for rehabilitation.

VI. The Current Status of Judicial Plea Bargaining

Some states have adopted judicial plea bargaining to one degree or another. Rule 3.171(c) of the *Florida Rules of Criminal Procedure*[72] places no restrictions on judicial bargaining, thus authorizing the courts to take an active role.[73] Illinois Supreme Court Rule 402, although it prohibits judicial initiation of bargaining, allows the trial judge to review a tentative bargain

---

67. Allen, *The Challenge of the Improverished Accused in the Administration of Criminal Justice*, 52 Symposium on the Criminal Law-University of Illinois (February 1965).

68. Alschuler, *supra* note 19, at 1152.

69. D. Newman, *supra* note 1, at 43.

70. N. Morris, *supra* note 21, at 51.

71. D. Newman, *supra* note 1, at 45.

72. Flanagan, *New Federal Rule of Criminal Procedure 11(e): Dangers in Restricting the Judicial Role in Sentencing Agreements*, 14 Am. Crim. L. Rev. 317 (1976).

73. *See* Fla. R. Crim. P. 3.171(c).

and sentence agreement, and to indicate if he concurs.[74] In this system, the defendant knows whether the judge approves of his bargain before it is entered, as he would after a pre-plea conference.

Donald McIntyre reports that trial judges in Chicago participate in an informal type of judicial plea bargaining, often listening to a summary of the facts of the case and indicating "to the defendant's counsel the kind of sentence that would be imposed on a plea in order to give him a precise and realistic basis for advising his client."[75] In Brooklyn, New York, the plea negotiation process is located in special courts where both the prosecution and defense arguments in felony cases are reviewed at arraignment, and often reductions are recommended and concessions indicated.[76] Donald Newman found that judges in Michigan often initiate plea discussions and decisions to reduce charges.[77]

The best controlled experiment regarding judicial participation in plea bargaining occured in 1974 in Dade County, Florida, where a year-long test was carried out.[78] Researchers chose 1,074 cases at random, of which 378 were assigned to a pre-plea settlement conference, and the remainder designated as the control group. The conference structure closely adhered to that set forth in the Yale guidelines,[79] but in the Florida model the arresting officer and the victim were invited to attend.

This experiment suggests that the pre-plea conference can be successful.[80] Ninety-six percent of the discussions covered the facts of the case; ninety-four percent touched upon any prior record; ninety-three percent recommended dispositions. Suprisingly, Heinz and Kerstetter report that statutory requirements were rarely discussed.[81] As expected, the judge played a pivotal role, as only nineteen percent of the defendants made five or more comments.[82] Conference sessions averaged ten minutes.

This Dade County experiment offers both encouragement and challenge to our judges and court administrators. Judicial meetings were brief and did not considerably detain judges from trial work. The disposition of cases was accelerated, and time was also saved because formal scheduling procedures discouraged postponements.[83] Judicial plea bargaining seemed to be no more

---

74. Flanagan, *supra* note 72, at 317.

75. McIntyre & Lippman, *Prosecutors and Early Disposition of Felony Cases*, 56 A.B.A. J. 1157 (1970).

76. *Id.*

77. D. NEWMAN, *supra* note 1, at 92.

78. Heinz & Kerstetter, *Pretrial Settlement Conference: Evaluation of a Reform in Plea Bargaining*, 13 LAW & SOC. REV. 349-66 (1979). *See also* AMERICAN JUDICATURE SOCIETY, CRIMINAL JUSTICE IN DADE COUNTY: A PRELIMINARY SURVEY (1973).

79. *Restructuring the Plea Bargain*, *supra* note 28, at 300-02.

80. Heinz & Kerstetter, *supra* note 78, at 358.

81. *Id.*

82. *Id.* at 359.

83. *Id.* at 360.

coercive than the traditional prosecutorial arrangements; in fact, the openness of negotiation procedures gave participants a higher degree of satisfaction with their treatment than that found in the control group.[84] An analysis of the experiment suggests that in future efforts to bring about pre-plea conferences, care must be taken to ensure more meaningful discussion between the judge and the offender so that better sentencing is encouraged.

VII. Impediments to Implementation

These conclusions are comforting, but factors which impede implementation of this reform must also be examined if we are to make a realistic assessment of the prospects for reform. While *The Challenge of Crime in a Free Society* reminds us that "it is a basic precept of our society that justice should not be administered with one eye on the clock and the other on the checkbook,"[85] taxpayers are often unenthusiastic about paying for their courts. The Dade County experiment emphasizes that costs for the pre-plea conference are low; yet at least in the short run, this reform unavoidably will impose certain costs. For example, additional personnel to prepare pre-sentence reports may be necessary. "In the final analysis, the incremental burden must be recognized—and accepted—as the price of a more equitable and effective criminal system."[86] Unless the necessary economic resources are available, "great principles just don't find their way into local jails, courtrooms, and police stations."[87]

A second difficulty which must be addressed is "the singular lack of enthusiasm [for any reform of the criminal justice system] among the rank and file of the legal establishment."[88] The root of this problem, according to Leonard Downie, may be found in our law schools which do not adequately prepare graduates for the improvement of trial courts. Downie argues that lawyers are taught to see any controversey as an adversary situation which is related to court precedents. "The existing legal system is accepted as a given, with unchangeable parameters to which the aspiring lawyer must always conform."[89] Either a basic shift of outlook must penetrate legal education and encourage young lawyers to advocate promising court reforms, or judges must stop paying so much attention to the wishes of lawyers because, as one observer states, "the Courts do not belong to the lawyers, they belong to the administration of public justice."[90]

Even in the light of promising experiments and of the advantages which

---

84. W. Kerstetter & A. Heinz, *supra* note 63, at 124.
85. U.S. President's Commission on Law Enforcement 257 (1967).
86. Note, *Restructuring the Plea Bargain*, 82 Yale L.J. 300, 311 (1972).
87. Heberling, *Judicial Review of the Guilty Plea*, 7 Lincoln L. Rev. 207-08 (1972).
88. L. Downie, Justice Denied: The Case for Reform of the Courts 157 (1971).
89. *Id.* at 163.
90. Callan, *An Experiment in Justice Without Plea Negotiations*, 13 Law & Soc. Rev. 342 (1979).

this reform can bring to criminal justice, our expectations cannot be too great. The implementation of the pre-plea conference will not resolve all difficulties associated with either plea bargaining or judicial responsibility. The standards which this reform seeks to implement may provide a clearer context for judicial consideration of a plea by putting that plea on the same footing as a sentencing decision, but difficulties inherent in sentencing choices are still left to be resolved.[91] In any case, the arguments against judicial plea bargaining seem unconvincing, while the advantages of the reform appear to be substantial.

91. U.S. TASK FORCE, *supra* note 1, at 13.