3-1-1981

Plea Bargaining and the Trial Judge, the New ABA Standards and the Need to Control Judicial Discretion

Norman Lefstein

Follow this and additional works at: http://scholarship.law.unc.edu/nclr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.unc.edu/nclr/vol59/iss3/3

This Article is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.
PLEA BARGAINING AND THE TRIAL JUDGE,
THE NEW ABA STANDARDS, AND THE
NEED TO CONTROL JUDICIAL
DISCRETION

NORMAN LEFSTEIN†

With the continued use of plea bargaining to dispose of criminal cases, it is imperative that plea bargaining legislation and practices are periodically reevaluated to ensure that the rights of criminal defendants are protected. In this Article, Professor Lefstein scrutinizes plea bargaining practices in North Carolina. He first examines the current plea bargaining statutes, and then the actual practices that occur in North Carolina courts. Unfortunately, there are often inconsistencies between the two. The North Carolina legislation distinguishes itself from plea bargaining statutes developed by other states and by national organizations in that it expressly allows judicial participation in the plea bargaining process. Professor Lefstein examines this judicial activity and concludes that the lack of any external standards for control of judicial participation and discretion has resulted in serious problems with the North Carolina legislation. In a final section, Professor Lefstein reviews the newly revised standards on plea bargaining established by the American Bar Association. If enacted in North Carolina and in other states, these standards would greatly improve plea negotiation procedures. Unfortunately, these standards themselves are flawed, and Professor Lefstein, who served as the Reporter in charge of the development of these standards, offers suggested amendments that would improve them and provide for fairer and more consistent plea bargaining practices.

† Professor of Law, University of North Carolina School of Law. LL.B., 1961, University of Illinois College of Law; LL.M., 1964, Georgetown University Law Center. Professor Lefstein has served since 1977 as a Reporter to the American Bar Association's Standing Committee on Association Standards for Criminal Justice. His assignments as a Reporter included Chapter 14, PLEAS OF GUILTY, ABA STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980), which is discussed extensively in this Article.

This Article was supported by grants from the North Carolina Law Center during the summers of 1976 and 1977. Although the views expressed here are those of the author, appreciation is expressed to those students—now alumni—who aided in the preparation of this Article: R. Michael Leonard (for his assistance in both data collection and research); and William E. Bates and Meg D. Goldstein (for their research assistance). Also appreciation is expressed to JoAnn Luehring, a third-year student at the University of North Carolina School of Law, for her tireless research aid. And, finally, thanks are due to Professor Charles E. Hinsdale, University of North Carolina Institute of Government, for his patience in discussing with the author this project and the North Carolina court system, and to Dean Emeritus Henry P. Brandis and Dean Kenneth S. Broun of the University of North Carolina School of Law, and to Professor Robert L. Farb of the University of North Carolina Institute of Government, all of whom reviewed a draft of the Article's text and made thoughtful suggestions.
The negotiated settlement of criminal cases by the prosecution and defense, usually referred to as plea bargaining, is an integral part of America's criminal courts. Although criticism of plea bargaining remains common, most commentators and organizations that have studied the criminal justice system have concluded that despite problems and abuses, the practice is here...
to stay for the foreseeable future.\(^3\) Indeed, the United States Supreme Court not only has rejected constitutional challenges to plea bargaining, but also in 1971 termed the practice "an essential component of the administration of criminal justice."\(^4\) Accordingly, in recent years state legislatures,\(^5\) the federal courts,\(^6\) and national organizations\(^7\) have sought to develop procedures for its effective control.

Rules designed to regulate plea bargaining in North Carolina were enacted in 1973.\(^8\) Unlike statutes in other jurisdictions, North Carolina law states that the trial judge "may participate" in plea bargaining "discussions."\(^9\)

3. See, e.g., M. Heumann, supra note 1, at 162:

[T]o speak of a plea bargaining-free criminal justice system is to operate in a land of fantasy. At a minimum, implicit plea bargaining would be the norm in the system that abolished plea bargaining, and I suspect that not too much time would elapse before explicit plea bargaining would again move to the fore.

H. Miller, supra note 1, at 11 ("Leaving aside all considerations of administrative or financial necessity, some form of plea negotiation will probably persist. . . "); Alschuler, Judge's Role, supra note 2, at 1122 ("Plea negotiation will probably remain a central feature of the American criminal justice system for the foreseeable future. . . "); Rosenberg, Guidelines to the Judge's Role in Plea Negotiations, 14 The Judge's J. 46, 47 (1975). But cf. NAC COURTS, supra note 2, Standard 3.1 (condemning plea bargaining and calling for its total prohibition after 1978); M. Rubinstein, S. Clarke & T. White, Alaska Bans Plea Bargaining 31 (1980):

We conclude that plea bargaining as an institution was clearly curtailed. The routine expectation of a negotiated settlement was removed; for most practitioners justifiable reliance on negotiation to settle criminal cases greatly diminished in importance. There is not usually as productive as they used to be.

(Emphasis in original).


7. E.g., American Law Institute (ALI), Model Code of Pre-Arraignment Procedure § 350.3 (proposed official draft 1975) [hereinafter cited as ALI Code]; NAC COURTS, supra note 2, at 42-65; NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM RULES OF CRIMINAL PROCEDURE, RULES 441-44 (1974) [hereinafter cited as URCP]; ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, STANDARDS 14-3.1-3.4 (2d ed. 1980) [hereinafter cited as ABA Pleas of Guilty]. Because the NAC has recommended abolition of all plea bargaining, its recommendations for the reform of the process are meant to apply only until plea bargaining is eliminated. See NAC COURTS, supra note 2, STANDARD 3.1. The ALI, National Conference of Commissioners on Uniform State Laws, and the ABA have endorsed plea negotiations. See ALI CODE, supra, § 350.3; URCP, supra, Rule 441, Comment; ABA Pleas of Guilty, supra, STANDARD 14-3.1, Commentary.


9. Id. § 15A-1021(a). See note 18 infra (text of statute). North Carolina is unusual in sanctioning explicit involvement of the judiciary in plea discussions. Only two other states, Vermont and Illinois, explicitly authorize judicial involvement. Vermont conditions court participation on the recording of the proceedings by a court reporter or recording equipment. Vt. R. Crim. P.
This also differs from the Federal Rules of Criminal Procedure and from standards approved by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, which expressly prohibit such judicial participation. In 1979, the American Bar Association revised its standards on plea bargaining and, contrary to the position it had adopted in its 1968 standards, authorized trial judges to participate in plea negotiations.

There is considerable difference, however, between the ABA standards concerning judicial participation and the North Carolina statute.

This Article examines the North Carolina legislation for the control of plea negotiations, and the actual plea bargaining practices of the State’s judges, prosecutors, and defense attorneys. Also addressed is the broad discretionary power of trial judges to determine whether and in what manner to participate in the plea negotiation process. In a concluding section, the Arti-


Authorization of judicial involvement in North Carolina plea discussions may be less significant than appears at first blush, because judicial participation occurs in some form in all systems. See Alschuler, Judge’s Role, supra note 2, at 1061-1154; ABA Pleas of Guilty, supra note 7, at 14,84 & n.18. North Carolina is unique only in expressly sanctioning judicial participation in preliminary discussions.

10. Fed. R. Crim. P. 11(e)(1); ALI Code, supra note 7, § 350.3; URCP, supra note 7, Rule 441(a); NAC COURTS, supra note 2, Standard 3.7.

11. ABA Pleas of Guilty, supra note 7, Standard 14-3.3(c)-(f) allows a substantial role for the judge in the plea bargaining process. Subsection (c) permits the prosecution and defense to request a conference with the judge to discuss plea arrangements if the parties have been unable to arrive at an agreement on their own. Id. 14-3.3(c). The court may then, if it wishes, meet with the parties, and hear their presentations. The judge may indicate a plea acceptable to the court, or may order a pre-plea report before announcing acceptable charge or sentence concessions. The prosecution and defense may choose to accept or not accept the judge’s offer. Id. These procedures may result in the defendant learning the sentence contemplated by the court prior to the time a guilty plea is entered. In addition, pursuant to subsection 14-3.3(b), if the parties have reached a plea agreement, they may submit its terms to the court, for judicial approval. Id. 14-3.3(b). If a plea agreement is not submitted to the judge and no conference requested, the ABA allows the judge to ask whether negotiations have occurred and to adjourn the proceedings to allow plea discussions to take place. Id. 14-3.3(e).

The first edition of the ABA Standards on Guilty Pleas, ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty, Standard 3.3(a) (1968), forbade judicial participation in plea discussions. These standards, however, did allow the prosecution and defense to reveal to the court the proposed plea arrangement. If a plea agreement was reached, the court indicated acceptance or rejection of the agreement. Id. 3.3(b). Subsection (b) of the revised standards, discussed in the preceding paragraph, is similar.

12. See text accompanying notes 93-98 infra.

13. State statutes dealing with plea bargaining offer no guidance to the judge in deciding whether to consider a plea agreement reached by prosecution and defense. Ark. R. Crim. P. 25.3 (1977) is typical:

If a plea agreement has been reached . . . upon request of the parties the trial judge may permit the disclosure to him of the agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate whether he will concur in the proposed disposition.
cle reviews the newly revised ABA standards and recommends amendments to
the standards and to the plea negotiation statutes of North Carolina and other
states needed to assure fairer and more uniform treatment of criminal defend-
ants.

I. METHODOLOGY

During the summer of 1976 I began collecting information on the manner
in which plea negotiations were conducted in North Carolina’s criminal
courts. Initially, I visited one of the state’s larger, multi-judge judicial districts
and conducted lengthy interviews with superior court judges, prosecutors,
public defenders, and private defense attorneys. A total of eighteen interviews
was conducted, each lasting between one and two hours on the average. Four
judges, six prosecutors (including the district prosecutor), four public defend-
ers (including the district defender), and four private attorneys who devoted at
least half of their practices to criminal defense were interviewed.14 At the outset,
all interviewees were advised that neither the district in which they pract-
ticed nor their names would be published in any article developed from my
research. During all interviews I asked basically the same questions: How
does plea bargaining occur? What kinds of plea bargains are struck? To what
extent, if at all, do plea bargaining practices differ from what the state statute
contemplates? What roles do judges play in plea negotiations? I also observed
approximately six hours of court proceedings, involving three superior court

(Emphasis added). Provisions such as the foregoing are virtually identical to ABA Pleas of
Guilty, supra note 7, Standard 14-3.3(b) and ABA Project on Standards for Criminal
Justice, Standards Relating to Pleas of Guilty, Standard 3.3(b) (1968). See note 11
supra.

14. The method employed was a form of participant observation in which I
attempted to
determine what occurs during plea bargaining by asking the participants. Attendance at plea
negotiations was not deemed feasible in this one-person study. For a discussion of participant
The method and rationale used were similar to those employed by Alschuler in the research
that formed the basis of his articles on plea bargaining. See note 2 supra. Alschuler wrote of his
research method:

I visited ten major urban jurisdictions . . . . [I]n each city, I talked with prosecu-
tors, defense attorneys, trial judges, and (usually) other criminal justice officials. My
interviews did not follow a set format, and the resulting study is not a scientific survey.
As I noted in an earlier article based on the same interviews [Alschuler, The Prosecutor’s
Role in Plea Bargaining, 36 U. Chi. L. Rev. 50 (1968)], I have engaged in a kind of legal
journalism.

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

Alschuler, supra note 1, at 1181 (footnote omitted). A criticism of Alschuler’s research methodol-
ogy, which is applicable partly to my own, is found in McDonald, Cramer & Rossman,
Prosecutorial Bluffing and the Case Against Plea Bargaining, in Plea Bargaining 1-3 (W. Mc-
Donald & J. Cramer eds. 1980).
judges, in which guilty pleas or no-contest pleas were tendered by defendants. Following each day of data collection, typewritten summaries of all interviews and court observations were prepared. In conversations reported in this Article, all statements enclosed in quotation marks are verbatim. All other remarks attributed to persons have been paraphrased.

To determine whether certain of the practices related during interviews and courtroom observations were prevalent in other parts of the state, I mailed a questionnaire during the summer of 1977 to the state's then fifty-six superior court judges.\textsuperscript{15} Replies were received from forty-four judges (seventy-nine percent), although two judges sent general letters of response in lieu of the questionnaire. Data from the completed questionnaires are presented in this Article, although fewer than forty-two responses invariably are listed, as sometimes questions were not answered, or were answered in an ambiguous manner or in a way that suggested the question may not have been understood. Because anonymity was promised if the questionnaire were returned, no names of judges are reported. A copy of the questionnaire and its accompanying letter are reproduced in an appendix to this Article.

No claim is made that the findings presented in this Article are the product of a comprehensive, scientific inquiry. Interviews were conducted in only one district, and there may well be some differences in plea bargaining practices in other parts of the state, particularly due to approaches of different prosecutors.\textsuperscript{16} While a majority of the state's superior court judges responded to the questionnaire, it is surely true that questionnaires are not as reliable as would be more extensive interviews and observation. Furthermore, the data for this study were collected several years ago.

Despite these disclaimers, I believe substantial truth respecting plea bargaining practices in North Carolina is revealed in this Article. Two principal justifications account for my confidence, although admittedly the second reason is particularly lacking in scientific basis. First, the information derived from interviews of judges, prosecutors, and defense lawyers was corroborated by the questionnaire responses of the state's superior court judges. Second, in February 1980, I was afforded the opportunity to speak to the state's superior court judges concerning plea bargaining in North Carolina, at which time I summarized my principal research findings.\textsuperscript{17} In discussions with superior

\textsuperscript{15} As of 1980, there are 58 resident superior court judges in the state's 33 judicial districts. N.C. GEN. STAT. § 7A-41 (Cum. Supp. 1979). In addition, there is authorization for appointment of eight special superior court judges. Id. § 7A-45.

\textsuperscript{16} See Bond, Plea Bargaining in North Carolina, 54 N.C.L. REV. 823 (1976). Bond notes that practices vary widely from district to district, particularly with respect to the extent of bargaining, factors that influence the prosecution's decision to negotiate, delegation of authority to negotiate to staff district attorneys, and use of charge dismissals, charge reductions, and sentence recommendations. Id. Bond also reports that some judges “participate actively” in plea negotiations. Id. at 826.

\textsuperscript{17} The presentation was made at the Conference of Superior Court Judges of North Carolina on February 22, 1980, in Pinehurst, North Carolina. Although the major research findings contained in this Article were discussed in my presentation, no mention was made of the judicial treatment of “recommended” and “agreed upon” sentences, because of time constraints and the greater complexity of the findings. See text accompanying notes 46-50 infra.
court judges following my presentation, many disagreed with certain of my recommendations for change, but, significantly, not a single judge quarreled in any way with my description of North Carolina plea bargaining practices and the varying roles that judges perform. Indeed, I specifically asked several of the judges if I had described the system in North Carolina accurately or if I were in error in any way; the reply was always the same: “No, you’ve got it right.”

II. NORTH CAROLINA’S STATUTE

The research findings in Part III can best be appreciated after examining North Carolina’s legislation governing plea bargaining. The state’s plea bargaining statute, recommended by the state’s Criminal Code Commission, follows a tentative draft of plea bargaining standards proposed by the American Law Institute. Section 15A-1021(a) of the North Carolina General Statutes authorizes prosecutors and defense attorneys in superior court to discuss the possibility of a defendant’s pleading guilty to one charge in return for the pros-

18. The official commentary that introduces Article 58, Procedures Relating to Guilty Pleas in Superior Court, N.C. GEN. STAT. § 15A (1978 & Supp. 1979) states that the article was drafted using AMERICAN LAW INSTITUTE, MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Tentative Draft Number 5), ARTICLE 350 (1972) as a model. The relevant provisions of this 1972 ALI Code closely parallel the proposed official draft of the ALI issued in 1975. See ALI CODE, supra note 7. Article 58 consists of N.C. GEN. STAT. §§ 15A-1021 to 1027 (1978 & Supp. 1979). The key provisions discussed in this Article are §§ 15A-1021 to 1024, 1026:

§ 15A-1021. Plea conference; improper pressure prohibited; submission of arrangement to judge; restitution and reparation as part of plea arrangement agreement, etc.—

(a) In Superior Court, the prosecution and the defense may discuss the possibility that, upon the defendant’s entry of a plea of guilty or no contest to one or more offenses, the prosecutor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.

(b) No person representing the State or any of its political subdivisions may bring improper pressure upon a defendant to induce a plea of guilty or no contest.

(c) If the parties have reached a proposed plea arrangement in which the prosecutor has agreed to recommend a particular sentence, they may with the permission of the trial judge, advise the judge of the terms of the arrangement and the reasons therefor in advance of the time for tender of the plea. The proposed plea arrangement may include a provision for the defendant to make restitution or reparation to an aggrieved party or parties for the damage or loss caused by the offense or offenses committed by the defendant. The judge may indicate to the parties whether he will concur in the proposed disposition. The judge may withdraw his concurrence if he learns of information not consistent with representations made to him.

(d) When restitution or reparation by the defendant is a part of the plea arrangement agreement, if the judge concurs in the proposed disposition he may order that restitution or reparation be made as a condition of special probation pursuant to the provisions of G.S. 15A-1351, or probation pursuant to the provisions of G.S. 15A-1343(d). If an active sentence is imposed the court may order that the defendant make restitution or reparation out of any earnings gained by the defendant if he attains work release privileges under the provisions of G.S. 148-33.1, or that restitution or reparation be imposed as a condition of parole in accordance with the provisions of G.S. 148-57.1. The order providing for restitution or reparation shall be in accordance with the applicable provisions of G.S. 15A-1343(d).

When restitution or reparation is ordered as a part of a plea arrangement or a condition of parole or work release privileges, the sentencing court shall enter as a part of the commitment that restitution or reparation is ordered as part of a plea arrangement. The
Administrative Office of the Courts shall prepare and distribute forms which provide for ample space to make restitution or reparation orders incident to commitments.

§ 15A-1022. Advising defendant of consequences of guilty plea; informed choice; factual basis for plea; admission of guilt not required.—

(a) Except in the case of corporations or in misdemeanor cases in which there is a waiver of appearance under G.S. 15A-1011(a)(3), a superior court judge may not accept a plea of guilty or no contest from the defendant without first addressing him personally and:

1. Informing him that he has a right to remain silent and that any statement he makes may be used against him;

2. Determining that he understands the nature of the charge;

3. Informing him that he has a right to plead not guilty;

4. Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;

5. Determining that the defendant, if represented by counsel, is satisfied with his representation; and

6. Informing him of the maximum possible sentence on the charge, including that possible from consecutive sentences, and of the mandatory sentence, if any, on the charge.

(b) By inquiring of the prosecutor and defense counsel and the defendant personally, the judge must determine whether there were any prior plea discussions, whether the parties have entered into any arrangement with respect to the plea and the terms thereof, and whether any improper pressure was exerted in violation of G.S. 15A-1021(b). The judge may not accept a plea of guilty or no contest from a defendant without first determining that the plea is a product of informed choice.

(c) The judge may not accept a plea of guilty or no contest without first determining that there is a factual basis for the plea. This determination may be based upon information including but not limited to:

1. A statement of the facts by the prosecutor.

2. A written statement of the defendant.

3. An examination of the presentence report.

4. Sworn testimony, which may include reliable hearsay.

5. A statement of facts by the defense counsel.

(d) The judge may accept the defendant's plea of no contest even though the defendant does not admit that he is in fact guilty if the judge is nevertheless satisfied that there is a factual basis for the plea. The judge must advise the defendant that if he pleads no contest he will be treated as guilty whether or not he admits guilt.

§ 15A-1023. Action by judge in plea arrangement relating to sentence; no approval required when arrangement does not relate to sentence.—

(a) If the parties have agreed upon a plea arrangement pursuant to G.S. 15A-1021 in which the prosecutor has agreed to recommend a particular sentence, they must disclose the substance of their agreement to the judge at the time the defendant is called upon to plead.

(b) Before accepting a plea pursuant to a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly. If the judge rejects the arrangement, he must so inform the parties, refuse to accept the defendant's plea of guilty or no contest, and advise the defendant personally that neither the State nor the defendant is bound by the rejected arrangement. The judge must advise the parties of the reasons he rejected the arrangement and afford them an opportunity to modify the arrangement accordingly. Upon rejection of the plea arrangement by the judge the defendant is entitled to a continuance until the next session of court. A decision by the judge disapproving a plea arrangement is not subject to appeal.

(c) If the parties have entered a plea arrangement relating to the disposition of charges in which the prosecutor has not agreed to make any recommendations concerning sentence, the substance of the arrangement must be disclosed to the judge at the time the defendant is called upon to plead. The judge must accept the plea if he determines that the plea is the product of the informed choice of the defendant and that there is a factual basis for the plea.

§ 15A-1024. Withdrawal of guilty plea when sentence not in accord with plea arrangement.—If at the time of sentencing, the judge for any reason determines to impose
plea bargaining

Execution's decision not to bring or to dismiss other charges. The statute also authorizes defense counsel to negotiate in an effort to persuade the prosecutor to recommend or not to oppose a certain sentence. The statute expressly recognizes that the decision to prosecute or to dismiss one or more charges belongs to the prosecutor, whereas the sentencing decision is a judicial function.

a sentence other than provided for in a plea arrangement between the parties, the judge must inform the defendant of the fact and inform the defendant that he may withdraw his plea. Upon withdrawal, the defendant is entitled to a continuance until the next session of court.

§ 15A-1026. Record of Proceedings.—A verbatim record of the proceedings at which the defendant enters a plea of guilty or no contest and of any preliminary consideration of a plea arrangement by the judge pursuant to G.S. 15A-1021(c) must be made and preserved. This record must include the judge's advice to the defendant, and his inquiries of the defendant, defense counsel, and the prosecutor and any responses. If the plea arrangement has been reduced to writing, it must be made a part of the record; otherwise the judge must require that the terms of the arrangement be stated for the record and that the assent of the defendant, his counsel, and the prosecutor be recorded.

Although these provisions closely follow the drafts of the 1972 and 1975 ALI Codes, there are several significant divergences: (1) ALI Code § 350.3(3), reflected in § 15A-1021(b), attempted to spell out types of "undue pressure," but the Criminal Code Commission decided, according to its Official Commentary, that any specific definition might restrict the meaning of the phrase, and also might suggest that such pressures had been widely engaged in previously. N.C. Gen. Stat. § 15A-1021(b), Official Commentary. The Commission did, however, direct that ALI Code § 350.3(3) be quoted in the Official Commentary. Id. (2) The Commission preferred the term "plea arrangement" to the ALI "plea agreement" to avoid any implication that the negotiations were binding. Id. -1021(c), Official Commentary. (3) G.S. § 15A-1024 did not adopt that part of ALI Code § 350.6 requiring the court to determine from the defendant whether the sentence pronounced violated any understanding the defendant had concerning his sentence, so that the defendant's acquiescence in the sentence would appear in the record. Id. -1024, Official Commentary. Also, § 350.6 required that the defendant be given an opportunity to withdraw his plea if the judge pronounced a sentence more severe than that provided for in the plea agreement; § 15A-1024 allows withdrawal if the sentence pronounced differs at all from the plea arrangement. Id.

The legislature thus sought to avoid judicial weighing of the severity of short incarceration versus long probation. See id. (4) G.S. §§ 15A-1023 to 1024 allow for a continuance until the next session of court if the plea arrangement is rejected or if the plea is withdrawn; the ALI Code § 350 does not contain continuance provisions. See note 33 infra.

19. Id. § 1021(a).

20. Id.

21. The Official Commentary to § 15A-1021 states:

The final word on sentencing must come from the judge; the [Criminal Code] Commission (unlike the A.L.I. proposal) gave the final decision as to charge reduction or dismissal to the prosecutor. The judge cannot veto that. Therefore, it is significant that subsection (c) refers to "a proposed plea arrangement in which the solicitor has agreed to recommend a particular sentence. . . ."

15A -1021(c), Official Commentary.

The distinction between prosecutorial control of charge reductions and dismissals and judicial control of sentencing is less meaningful than might at first appear. Charge and sentence concessions are opposite sides of the same coin; in both the major concern is the length of the defendant's sentence. A prosecutor who reduces or dismisses charges unilaterally influences sentences by restricting judicial sentencing options:

From the defendant's perspective, the primary significance of the charge-reduction process plainly lies in its effect on the sentence that he will receive. The basic commodity that prosecutors offer defendants in exchange for their pleas remains the same in a system of charge-reduction bargaining as in a system of sentence-recommendation bargaining. In apparent recognition of this fact and in an apparent attempt to prevent prosecutorial circumvention of the trial judge's sentencing authority, the Federal Rules of Criminal Procedure require judicial approval of prosecutorial charge-reduction agreements.
The North Carolina statute departs from the ALI standards in expressly allowing judicial participation in plea discussions. Although the Criminal Code Commission recommended that the trial judge not be permitted to participate in plea discussions, the word "not" was deleted from the legislation in 1975, as a result of an amendment introduced by State Senator Thomas H. Suddarth. When I interviewed Senator Suddarth concerning the reason for his amendment, he said that he was "horrified" at the thought of banning judicial participation, because in his experience involvement of the judge was essential for "the expeditious handling of criminal cases." He explained that a judge should be permitted to call the parties together before a trial to inquire "where they are in their negotiations," and then to assist the prosecutor and defense lawyer in reaching a settlement. To forbid a judge from engaging in such conduct, in Senator Suddarth's view, would be to eliminate a useful means of resolving criminal cases.

Because only the word "not" was deleted from section 15A-1021(a) and no changes were made in related provisions of the bill, the statute, taken as a whole, is unclear and incomplete. Perhaps most importantly, no standards of any kind are provided to govern judicial participation in plea negotiations. The statute indicates neither when nor in what manner the trial judge may participate. The crucial question respecting the degree of pressure, if any, that a judge may use in seeking to convince a defendant to plead guilty is not addressed. Moreover, section 15A-1021(b) provides that "[n]o person representing the state . . . may bring improper pressure upon a defendant to induce a plea of guilty or no contest"—a provision apparently intended to discourage any such conduct by police or prosecution. Because the trial judge may

Alschuler, Judge's Role, supra note 2, at 1074 (footnotes omitted).

Prosecutorial control over sentencing may become greater in the future in light of the trend in many jurisdictions to enact determinate sentencing laws that narrow sentence ranges for offenses. These laws reduce judicial sentencing discretion and relegate to prosecutors increased power to dictate sentences by selecting the charge. See Miller, supra note 1, at ch. VI-37; notes 140-44 and accompanying text infra.

FED. R. CRIM. P. 11(e)(1)-(2) allows the judge to reject a plea agreement involving the dismissal or reduction of charges. URPC, supra note 7, RULE 443 also prescribes judicial approval of charge concessions. The ABA has not taken a position on whether courts should have authority to approve charge concessions by a prosecutor. ABA PLEAS OF GUILTY, supra note 7, STANDARDS 14-1.1, 14-3(b)(ii) Commentary. Some states, such as California; CAL. PENAL CODE §§ 1192.1, .4, .5, 1385 (West Supp. 1979); Colorado, COLO. REV. STAT. § 16-7-302 (1973); Minnesota, MINN. R. CRIM. P. § 15.07 (1974); New York, N.Y. CRIM. PROC. LAW § 220.10(3)-(4) (McKinney Supp. 1980); and Virginia, VA. CODE § 19.2-254 (Supp. 1980), permit courts to reject charge concessions. Requiring judicial approval may be meaningless, however, if judges readily and invariably approve prosecutorial charge concessions because they fear that rejection of prosecution recommendations will undermine the plea bargaining system. See Alschuler, Judge's Role, supra note 2, at 1138.

23. Id.
24. Id.
25. The need for standards to guide judicial participation in plea negotiations is discussed at notes 110-22 and accompanying text infra.
26. The legality of a judge using pressure to induce a defendant to plead guilty is discussed at notes 71-91 and accompanying text infra.
participate in plea discussions pursuant to section 15A-1021(a) and a judge is not normally regarded as "representing" the state, section 15A-1021(b) is deficient in not expressly listing the judge. Surely the legislature did not intend to imply that the trial judge, unlike police and prosecution, may bring "improper pressure" upon a defendant to induce a plea. The wording of section 15A-1021(b) is obviously the by-product of changing one part of a statute without simultaneously amending its other provisions.

Plea discussions between the judge, prosecution, and defense contemplated by section 15A-1021(a) apparently are permissible any time—prior to or during recess of a trial or just before entry of a plea of guilty or no contest. In addition, section 15A-1021(c), which is applicable "in advance of the time for the tender of the plea," states that if "the prosecutor has agreed to recommend a particular sentence, . . . [the parties] may, with the permission of the trial judge, advise the trial judge of the terms" of the plea agreement; then "[t]he trial judge may indicate whether he will concur in the proposed disposition." Of course, the trial judge may do much more than simply indicate acceptance or rejection; the judge may, pursuant to section 15A-1021(a), participate in the actual plea discussions with the parties. As a result of the Suddarth amendment, the language of subsection (c) became unnecessary, as a judge who can participate in plea discussions can necessarily engage in any lesser form of participation, such as permitting disclosure of a recommended sentence upon which the parties have agreed. Section 15A-1021(c) was proposed by the Criminal Code Commission, which believed that the trial judge would be precluded from participating in plea discussions. Its purpose was to limit the judge to simply saying "yes" or "no" to proposed plea agreements.

Regardless of whether the trial court has participated in plea discussions as permitted by section 15A-1021(a), and regardless of whether the trial court has been asked to state whether it agrees or disagrees with a proposed sentence recommendation, as authorized by section 15A-1021(c), when a plea is tendered the parties must advise the court—pursuant to section 15A-1023(a)—of any sentence that the prosecutor has agreed to recommend. In addition, under section 15A-1023(b), if the court is advised of "a plea arrangement in which the prosecutor has agreed to recommend a particular sentence, the judge must advise the parties whether he approves the arrangement and will dispose of the case accordingly." If the judge rejects the "arrangement," the parties must be so advised and an opportunity afforded to them to modify the arrangement. Also, when a plea arrangement is rejected, the defendant is entitled to a continuance of the case "until the next session of court." Similarly, in accordance with section 15A-1024, "[i]f at the time of sentencing" the court determines that it cannot abide by the "plea arrangement" that it previously

28. Id. §-1021(c).
29. Id. § 15A-1021(c) is similar to provisions contained in the plea negotiation statutes of most other jurisdictions. See notes 5, 9, & 13 supra.
31. Id.
32. Id.
accepted and thus seeks to impose a different sentence, the judge must inform the defendant of this fact, permit withdrawal of the plea, and grant "a continuance until the next session of court." 33

Section 15A-1026 requires that a verbatim record be made and preserved of the proceeding at which a defendant enters a plea of guilty or no contest. It also requires a verbatim record "of any preliminary consideration of a plea arrangement" pursuant to section 15A-1021(c). This requirement, however, has been construed by the North Carolina Supreme Court to apply only to situations in which an agreement is actually reached and a plea of guilty entered pursuant to the agreement. 34 There is no requirement that a verbatim record be made when the judge declines to accept a plea of guilty or no contest. 35

33. Id. -1024. The significance of "a continuance until the next session of court" is unclear. One writer has suggested this provision guarantees that a defendant will not be disadvantaged by facing the judge before whom a guilty plea was withdrawn. Eagles, Articles 52 and 53 of Subchapter 9, and Subchapter 10 of the Code of Pretrial Criminal Procedure-Motions Practice, Motions to Suppress, Pleas, Plea Arrangements and Immunity, 10 Wake Forest L. Rev. 517, 533 (1974). Neither North Carolina statutes nor court decisions, however, appear to define "next session of court." Corpus Juris Secundum distinguishes "term" and "session": "term" refers to a period of time for holding court, whereas "session" is a time during a term in which the court actually sits for the transaction of judicial business. 21 C.J.S. Courts § 147 (1940). Thus, a session can refer to one day of a term or to a shorter time period such as a morning session. Further, state laws differ markedly in defining terms and sessions. Id. § 162. In North Carolina a session seemingly refers to a period of time scheduled by the Chief Justice of the North Carolina Supreme Court for court to be held in a particular county by a particular judge to hear either civil or criminal cases. Superior court judges rotate from district to district (one or more counties), serving a minimum of six months in each. Because the lengths of court sessions are not defined in North Carolina statutes, it seems possible that the next session of court may be held by the same judge. (For further information on the judicial district system, see note 37 infra.) The Governor, however, can appoint special superior court judges to be assigned to any court, N.C. Gen. Stat. §§ 7A-45 (1969 & Supp. 1979), and the Chief Justice has the discretionary power to order a special session of superior court in any county. N.C. Gen. Stat. § 7A-46 (1969). Conceivably, these provisions could be employed to ensure a new judge at the next session of court for any defendant who withdraws a guilty plea.

Apparantly the legislature intended the continuance provision to guarantee the defendant a new judge to hear his or her case without the bias that knowledge of an unsuccessful plea arrangement might entail. Indeed, the provision is meaningless without this result. The 1975 ALI Code, which is nearly identical to the 1972 ALI Code upon which the North Carolina legislation is based, see note 18 supra, does not explicitly call for continuances, but the Commentary to § 350.5 indicates that if a judge rejects a plea arrangement, a subsequent trial should be held, if feasible, before a different judge, to eliminate possible prejudice. See ALI Code, supra note 7, § 350.5, Commentary. Other national organizations have addressed whether a defendant should be tried before a new judge if a plea arrangement is rejected and a pre-plea report has been reviewed by the rejecting judge. The ABA does not require that a new judge be substituted, and cases in which judges were not disqualified in analogous situations are favorably cited. See ABA Pleas of Guilty, supra note 7, at 14.81 n.10. In contrast, the URCP states, "If a plea is not accepted, a judge who has examined a report . . . may not over the defendant's objection preside at the trial of the case." URCP, supra note 7, Rule 443(b).

34. State v. Slade, 291 N.C. 275, 229 S.E.2d 921 (1976). N.C. Gen. Stat. § 15A-1026 (1978) clearly seems to require a transcript of any preliminary consideration of a plea arrangement reached between the prosecution and defense if the judge is consulted pursuant to § 15A-1021(c). Nevertheless, the court in Slade ruled that the requirement of a verbatim record being made and transcribed is "conditioned upon an agreement being reached and a plea of guilty being entered." 291 N.C. at 278, 229 S.E.2d at 924 (emphasis added). The rationale for the court's conclusion lies in its reasons for requiring a verbatim record,—"to insure that defendant is fully aware of the ramifications of his plea of guilty," and to provide a record of the terms and conditions utilized by the prosecution to induce the guilty plea. Id. Thus, the court implicitly concluded that, because a rejected plea arrangement is not subject to appeal under § 15A-1023(b), a verbatim record of the proceedings at which the judge rejected the arrangement would serve no purpose. The court's conclusion is bolstered by the fact that the North Carolina statute does not require a transcript of plea discussions in which the judge participates pursuant to § 15A-1021(a). As a practical matter, the Slade ruling has the effect of requiring a verbatim record when a plea arrangement is
record be made and preserved of plea discussions to which the judge is a party pursuant to section 15A-1021(a).

III. RESEARCH FINDINGS

A. Forms of Plea Bargaining

As noted earlier, the North Carolina statute authorizes the parties to negotiate respecting the offenses to be charged and the defendant's sentence. During interviews prosecutors and defense attorneys were asked about the types and frequency of plea agreements that were actually made and whether there were other kinds of plea agreements in addition to those specifically sanctioned by statute. Without exception, they agreed that so-called "straight" pleas of guilty, meaning guilty pleas only to the offense or offenses charged and without a sentence recommendation or the waiver or dismissal of any other charges, are relatively infrequent. Estimates of such straight pleas ranged from five to fifteen percent of all pleas. As one defense attorney explained, a "straight plea" is entered only in the unusual case in which there are no charges that the prosecutor is willing to dismiss or there is no lesser offense to which a plea can be offered or that will be accepted by the prosecutor.

The most common type of plea agreement—with the estimates usually placed at about fifty percent of all pleas—is a plea to a lesser offense or to one of several charges, with the prosecutor agreeing either to waive or dismiss all remaining charges. For example, as one prosecutor explained, armed robbery may be reduced to common-law robbery, or rape may be reduced to assault on a female, or the remainder of multiple charges of armed robbery or rape may be dismissed in return for a guilty plea to only one charge.

The next most common form of plea bargaining involves sentence recommendations by the prosecutor, although such recommendations may sometimes be part of a larger plea arrangement in which the prosecutor has agreed to dismiss certain charges or to accept a plea to a lesser charge. Most of the prosecutors and public defenders interviewed were specifically asked how often they are involved in guilty pleas in which a sentence recommendation is presented to the court. Their replies were substantially consistent. Of the three prosecutors who were asked, one estimated that sentence recommendations were present in twenty percent of his guilty plea cases, another guessed presented to the court for its consideration, but then permitting destruction of the record if either the judge rejects the arrangement or the defendant later decides to plead not guilty. This Article suggests that a verbatim transcript be made of all plea discussions in which the trial judge participates, regardless of whether a guilty plea is entered. See text accompanying note 116 infra.


36. Presently, robbery is a felony in North Carolina carrying a punishment of seven years to life in a state prison. N.C. GEN. STAT. § 14-87 (Supp. 1979). Common-law robbery is punishable by up to ten years' imprisonment. Id. §§ 14-87.1, -1.1. Rape in the first degree is punishable by life imprisonment. Id. § 14-27.2. Punishment for second-degree rape is imprisonment for up to 40 years. Id. § 14-27.3. The same punishments are provided for first- and second-degree sexual offenses. Id. §§ 14-27.4, .5. Attempt to commit first-degree rape or attempt to commit a first-degree sexual offense carries a penalty of up to 20 years in prison, and attempted second-degree rape or second-degree sexual offense is punishable by imprisonment up to 10 years. Id. § 14-27.6.
ten percent, and the third placed the figure at between twenty and twenty-five percent; of the four public defenders, two estimated twenty-five percent, a third defender suggested twenty percent, and the fourth defender guessed fifty percent.

When the attorneys were asked why sentence recommendations were present in some cases and not in others, the predilection of the trial judge invariably was mentioned as among the most significant reasons. Although judges are rotated periodically through each superior court by the state's Administrative Office of the Courts, all of the judges assigned to the division in which this particular superior court was situated were well known to the prosecutors and defense lawyers.\textsuperscript{37} As one public defender observed, after a short time you get a "line" on each of the judges, and you learn what he or she will tolerate in terms of plea bargaining practices. A prosecutor, using more colorful language, agreed. Some judges, he said, are the "garbage men" or "crash" judges who will accept virtually all sentence recommendations placed before them, thus enabling the district attorney to "move the calendar." This prosecutor's boss, the district attorney, explained that his office arranges the calendar for a court session to accommodate the plea bargaining and sentencing policies of each judge.\textsuperscript{38} Thus, if a certain judge is regarded as lenient, and defense attorneys like to plead their clients before the judge or if the judge is one who ordinarily will accept the prosecutor's sentence recommendations, the calendar will contain a large number of cases expected to be disposed of pursuant to plea agreements.

The truth of the district attorney's statements was illustrated in an unexpected way. While I was visiting in the courthouse on a Friday afternoon, the district attorney's office was suddenly informed by the Administrative Office of the Courts that Judge A, who had been scheduled to hold court for the next six months beginning the following Monday, would be unavailable because of illness in his family. Furthermore, the substitute for Judge A would be Judge

\textsuperscript{37} North Carolina is divided into 33 judicial districts, which in turn are organized into four divisions. Each district has been assigned one or more regular resident superior court judge(s). \textit{Id.} § 7A-41. Each regular judge rotates through all districts in his or her division, sitting for six months in each. If the district has two judges, each sits for 12 months; if three judges, the rotation period is 18 months, and so on. In a district (one or more counties) with only one resident judge, litigants have no choice between judges for six months, unless a special judge is appointed or a special session of court is called under G.S. §§ 7A-45, -46 (1969 & Supp. 1979). \textsc{J. Brannon, The Judicial System in North Carolina} 6 (1977). See note 33 supra.

\textsuperscript{38} In North Carolina the prosecutor has control over the calendar of criminal cases to be tried during a session of court. N.C. Gen. Stat. § 7A-49.3 (1969); Shirley v. State, 528 F.2d 819, 820 (4th Cir. 1975). The State's speedy trial statute, however, restricts the prosecutor's discretion, as time limits are provided within which a case must be either brought to trial or dismissed. N.C. Gen. Stat. §§ 15A-701 to -704 (1978 & Supp. 1979).

Prosecution control of the calendar is criticized in \textit{ABA Standards for Criminal Justice, The Prosecution Function}, Standard 3-5.1 (2d ed. 1980) [hereinafter cited as \textit{ABA Prosecution Function}]. The ABA recommends court control in order to avoid the appearance of conflict of interest or discriminatory practices by district attorneys. \textit{Id.} Commentary, at 3.70. The National District Attorneys Association supports dividing calendar control between the court, which would schedule time periods during which criminal cases would be tried, and the prosecutor, who would determine the order of cases to be tried. \textit{National District Attorneys Association, National Prosecution Standards}, Standard 15.1 (1977).
B, a judge who did not normally sit in this superior court district, but who was reputed to be a tough sentencing judge who did not like sentence recommendations. The district attorney's office immediately understood what this meant. Defense attorneys would object to entering guilty pleas, and it also would be futile to present sentence recommendations that previously had been negotiated. Thus, during the following week, of forty-nine defendants whose cases were on the original calendar of Judge A, twenty-six were expressly continued. Indeed, several continuances even were arranged on Friday afternoon by defense attorneys who learned of Judge B's substitution for Judge A. Others were arranged the following week in Judge B's courtroom because, for example, the defendant was said to be ill or defense counsel had a prior commitment. Still other cases were continued when they were called once in open court, passed because defense counsel was said to be occupied elsewhere in the courthouse, and then never called again. Privately, the prosecutors and defense lawyers conceded to me that the large number of continuances was caused by the unavailability of Judge A to accept the agreements previously negotiated. Indeed, the desire of defense lawyers to continue cases received fresh, if superfluous, impetus when early in the week a defendant sentenced for armed robbery before Judge B received forty years—a sentence that was regarded by defense lawyers as considerably greater than what Judge A would have given.

Interviews with superior court judges also confirmed substantial attitudinal differences among judges concerning their readiness to accept sentencing recommendations. Judge C, for example, told me that he was "violently opposed to the solicitor and defense attorney passing sentence," and that he "doesn't want to be a rubber-stamp." In his judgment, the court should impose sentence, but he expressed concern that "the solicitor now feels like he can run the whole damn court." In contrast, Judge D explained that he had faith in the district attorney and in his conclusions about cases, and that the district attorney usually understood how the police felt about the cases and knew more of the defendant's background than did the judge. Not surprisingly, Judge D stated, "I do go along with the vast majority of recommenda-

39. Gen. Rules of Prac. for the Super. & Dist. Courts 3 provides: "An application for a continuance shall be made to the presiding judge of the court in which the case is calendared." The third paragraph of rule 3 refers to "criminal cases," stating that where the defendant is in jail the case shall have "absolute priority." Rule 1 states that the rules "are applicable in Superior . . . Court . . .," without specifying either criminal or civil cases. In civil cases, N.C. Gen. Stat. § 1A-1, Rule 40 (1969) provides that continuances will be granted only upon application to the court and only for good cause shown. The only other specific references to continuances in criminal cases apparently are contained in G.S. § 15-10.2 (1978) (court may grant any "necessary and reasonable continuance" requested by the defense in cases involving incarcerated persons against whom detainers have been lodged), and G.S. § 15A-701(b)(7) (Supp. 1979) (factors for judges to consider in granting continuances under the Speedy Trial Act).

Some of the representations made by counsel to obtain continuances may have been misleading or even false. Consider in this connection ABA Code of Professional Responsibility, DR 7-102(A)(5) (1979), which states that "a lawyer shall not [knowingly make a false statement of law or fact]."

40. See note 36 supra.
tions,” and that, as a practical matter, “the district attorney sentences in a lot of instances.”

Because prosecutors and defense attorneys believed that some judges were receptive to sentence recommendations whereas others were not, and because the judges themselves expressed differing attitudes on the subject, I hypothesized that widely differing estimates would be given if all superior court judges were asked to state the percentage of cases in which they received sentence recommendations. Accordingly, the first item on the questionnaire sent to the state’s superior court judges asked that they indicate the percentage of cases in which they were presented with prosecution and defense agreements relating to sentence. The pattern of judicial responses presented below substantiates my hypothesis.

Table 1
Percentage of Cases in Which Judge Is Presented with Agreements Relating to Defendant’s Proposed Sentence

<table>
<thead>
<tr>
<th>No. of Judges Responding</th>
<th>Percentage of Judges Responding</th>
<th>Percentage Estimates</th>
</tr>
</thead>
<tbody>
<tr>
<td>3</td>
<td>7.5</td>
<td>0%</td>
</tr>
<tr>
<td>8</td>
<td>20</td>
<td>1% - 10%</td>
</tr>
<tr>
<td>8</td>
<td>20</td>
<td>11% - 20%</td>
</tr>
<tr>
<td>3</td>
<td>7.5</td>
<td>21% - 30%</td>
</tr>
<tr>
<td>1</td>
<td>2.5</td>
<td>31% - 40%</td>
</tr>
<tr>
<td>3</td>
<td>7.5</td>
<td>41% - 50%</td>
</tr>
<tr>
<td>7</td>
<td>17.5</td>
<td>51% - 60%</td>
</tr>
<tr>
<td>2</td>
<td>5</td>
<td>61% - 70%</td>
</tr>
<tr>
<td>5</td>
<td>12.5</td>
<td>71% - 80%</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
<td>81% - 90%</td>
</tr>
<tr>
<td>0</td>
<td>0</td>
<td>91% - 99%</td>
</tr>
<tr>
<td>40</td>
<td>100%</td>
<td>100%</td>
</tr>
</tbody>
</table>

Thus, three judges (7.5 percent) claimed that they never receive a sentence recommendation, and eight judges (20 percent) said that such recommendations were present in no more than 10 percent of their cases. On the other hand, fourteen judges, 35 percent of those who responded, acknowledged that sentence recommendations were presented to them in 51 percent of more of their cases.

In addition to plea arrangements respecting charges and the defendant’s sentence, the North Carolina legislation also specifically refers to plea agree-
ments involving "restitution or reparation." Thus, the statute provides for a number of plea negotiation possibilities. Nevertheless, there are also plea agreements between prosecutors and defense lawyers that are not explicitly sanctioned by statute. For example, if the trial judge is one who commonly will accept a plea of no contest, the prosecutor and defense lawyer may negotiate over whether to allow such a plea to be entered. One day I observed a private defense lawyer in court with four of his clients, all of whom entered pleas of no contest before Judge A, who was known to be receptive to such pleas. In one of the cases, the defendant was charged with possession of a controlled substance (marijuana). The only agreement with the prosecutor was that a no contest plea would be entered. The defendant was placed on probation for two years and the defense attorney, whom I previously had interviewed, whispered to me as he was leaving the courtroom, that "before some other judges there would have had to have been more of a bargain than a no contest plea because of the risk of a stiff sentence."

Prosecutors and defense attorneys also negotiate about the judge before whom a defendant will plead, and whether sentencing should be continued in order that the defendant may be sentenced before a different judge than the one before whom the plea was entered. For instance, the case of a defendant charged with rape was on Judge C’s calendar on the same day that Judge A was holding court down the hall. Initially, the defendant and defense attorney were in Judge C’s courtroom. The case was called and passed, to afford time for negotiations. Ultimately, the parties agreed that the defendant would be permitted to plead guilty before Judge A; moments later the defense attorney and defendant appeared in Judge A’s courtroom, defendant’s name was called, and Judge A was told that “this” was an “add-on case.” A guilty plea to second degree rape then was entered. In another case, a prosecutor agreed to calendar a case before Judge A in return for defendant’s agreement to plead to armed robbery. Remarkably, this defendant originally had been scheduled to plead guilty to common-law robbery before Judge A; however, when Judge A became unavailable and Judge B was substituted, the prosecutor agreed to a continuance until the following week only on condition that defendant plead to armed robbery before Judge A. The defense attorney, a public defender, told me that he felt his client would fare better with a plea to armed robbery before Judge A than with a plea to common-law robbery before Judge B.

The identity of the prosecutor assigned to the defendant’s case also may

42. Id. § 15A-1011(b) provides that “[a] defendant may plead no contest only with the consent of the prosecutor and the presiding judge.” Because prosecution approval is required, negotiations concerning entry of no contest pleas are virtually inevitable. North Carolina statutes on plea negotiations, however, do not refer to plea arrangements involving no contest pleas. See note 18 supra (text of statutes).
43. The extent of negotiations concerning choice of judges undoubtedly is determined by the number of judges resident in the district, and also by the expiration date of a judge’s term. The rotation of superior court judges to districts and the length of their terms are discussed in note 37 supra.
44. See note 36 supra (penalties upon convictions for armed robbery and common-law robbery).
have an important bearing on plea bargaining practices. The district attorney and his assistants explained that there were no written plea negotiation guidelines and that all assistants had complete authority to negotiate agreements without obtaining prior approval from anyone. The assistant district attorneys reported, however, that there were certain norms to which as a group they sought to adhere, and that occasionally they consulted with the district attorney concerning a proposed agreement. Nevertheless, because of the broad discretion accorded to them, the prosecutors were free, by their own admission, to let their personal attitudes toward defense lawyers influence the plea agreements that they made. Thus, one prosecutor stated that the “personalities” of the defense lawyers sometimes made a considerable difference, as prosecutors react differently to different defense lawyers. Another prosecutor was more blunt; according to this three-year veteran, there are “some defense lawyers I like and I give them a break,” whereas there are “a few I do not like and I won’t bargain with them.” Significantly, some defense attorneys believed that the clients of certain attorneys received more favorable plea bargains than others. According to an assistant public defender who felt that he personally did not always obtain satisfactory plea agreements, the best deals were given by prosecutors to the private defense lawyers most well known in the criminal bar—the “powerful attorneys.” According to one of the private attorneys who the assistant public defender regarded as “powerful,” prosecutors made good deals with him because there is “a strong inclination to go along with people you get along with.”

B. Recommended and Agreed upon Sentences

As noted in the preceding section, sentence recommendations by prosecutors are a relatively frequent type of plea agreement, but such recommendations actually take at least two distinct forms. Prosecutors and defense attorneys unanimously reported that some judges distinguish between situations in which the prosecutor “recommends” a sentence and pleas that are said to be “agreed upon” or “conditioned.” For the former, the transcript of plea form, which is signed by the prosecutor, defendant, defense counsel, and judge, states that the prosecutor “recommends that the defendant receive” a

45. Prosecutors are reluctant either to define or limit the broad discretion available to them in plea negotiations. Bond, supra note 16, at 833. Several national organizations, however, have called for regulations to guide such discretion. The ABA recommends that each public prosecutor develop a handbook of policies and procedures to guide prosecutorial participation in plea negotiations. ABA PROSECUTION FUNCTION, supra note 38, Standard 3-2.5. Similarly, the NAC recommends formulation of guiding statements and also suggests certain criteria. NAC COURTS, supra note 2, Standard 3.3. These NAC recommendations are one of several stop-gap measures endorsed to govern plea bargaining during an interim period before the practice can be eliminated. See note 3 supra. The ALI directs each prosecutor to promulgate procedures pertaining to plea discussions and agreements, in order to encourage equal treatment of similarly situated defendants. ALI CODE, supra note 7, § 350.3(2). These organizations commonly cite written guidelines as a means of maintaining consistent practices and continuity in the face of staff turnover.

In 1980, for the first time in its history, the United States Department of Justice issued a document containing prosecution policies, including the subject of plea negotiations, for use by U.S. Attorneys throughout the country. See U.S. DEPARTMENT OF JUSTICE, PRINCIPLES OF FEDERAL PROSECUTION, reported in 27 CRIM. L. RPTR. 3277 (August 6, 1980).
specified sentence; in the latter instance, the plea form recites either "the defendant will receive" or "it is agreed that the defendant will receive" a specified sentence. Judges who distinguish between these two forms of plea agreements do not regard a "recommended sentence" as binding; if after the plea is accepted a different sentence is imposed, defendant's plea cannot be withdrawn. On the other hand, if defendant's plea entered in return for an "agreed upon sentence" is rejected by the court, these judges believe that defendant must be afforded the opportunity to withdraw the plea. Virtually all of the prosecutors, public defenders, and private defense attorneys interviewed stated that they had observed cases in which the trial court rejected "recommended sentences" and imposed harsher sentences, but denied defendant's request to withdraw the plea.

The four judges who were interviewed disagreed about whether they should give different treatment to "recommended" and "agreed upon" sentences. Judge A stated that he always permits withdrawal of the plea if the negotiated sentence is rejected, regardless of the precise language in the transcript of plea form. Judge D, who was the only one of the four judges who stated that he thought the matter was controlled by the state's plea bargaining statute, claimed to follow a similar policy. In contrast, Judge B stated that a prosecutor's "recommended sentence" is only a recommendation; if it is rejected by the court at the time of sentencing, the plea cannot be withdrawn. An "agreed upon" sentence is different, according to Judge B; the plea is actually conditioned upon defendant's receiving the specified sentence, and if a different sentence is imposed, defendant must be permitted to withdraw the plea. Judge C expressed a similar viewpoint, but added that as a matter of

---

46. The transcript of plea form was drafted by the Administrative Office of the Courts of the North Carolina Department of Justice in response to requests by superior court judges for assistance in complying with statutory requirements for the entry of pleas of guilty or no contest. The form essentially tracks the requirements of N.C. GEN. STAT. § 15A (1978), particularly § 15A-1022. See note 18 supra. Although the form is not required to be used, the Administrative Office of the Courts reports that it is widely used by judges throughout the state. Telephone interview with Dallas A. Cameron, Jr., Assistant Director for Legal Services, Administrative Office of the Courts, Raleigh, North Carolina (August 11, 1980).

Particularly pertinent to this Article are questions 11 and 12 of the plea transcript form:

11. Have you agreed to plead as a part of a plea bargain? Before you answer, I advise you that the courts have approved plea bargaining and if there is one, you may advise me truthfully without fear of incurring my disapproval. Answer ______.
12. [If applicable] The District Attorney and your counsel have informed the Court these are all the terms and conditions of your plea:
   (a) Is this correct? Answer ______.
   (b) Do you accept this arrangement? Answer ______.

The differential wording is inserted in the blank spaces of question 12, which usually are filled in by defense counsel prior to the hearing.

47. Suppose prosecution and defense have reached a plea arrangement, but the prosecution withdraws approval of the agreement prior to entry of the plea. According to State v. Collins, 300 N.C. 142, 265 S.E.2d 172 (1980), unless defendant has relied detrimentally upon the plea arrangement, the prosecution is not obligated to honor the agreement. Id. at 148, 265 S.E.2d at 176. There is no discussion in Collins of "agreed upon" or "recommended" sentences, although the plea agreement quoted in the decision is in the "agreed upon" form. See id. at 148, 265 S.E.2d at 175. Contra, United States v. Cooper, 594 F.2d 12, 19 (4th Cir. 1979).
practice he does not deny withdrawal of a "recommended sentence" plea un-
less "I've made it absolutely clear [when the plea is accepted] that this [bar-
gained sentence recommendation] is only a recommendation."

The questionnaire sent to the superior court judges asked whether they
"believe there is a difference in plea bargains where the solicitor 'recommends' a sentence as opposed to plea bargains where the defense attorney and solici-
tor state that the sentence is 'agreed upon' or that a plea is 'conditioned upon' the defendant receiving the proposed sentence." Of the forty judges who re-
responded to this question, twenty-seven (sixty-seven percent) stated that there was a difference and thirteen (thirty-three percent) claimed there was not. The explanatory statements solicited from the judges concerning this question mir-
rored the diverse views received earlier from Judges A, B, C, and D. For
instance, one judge wrote that "[a] recommended sentence leaves the court the discretion to modify the sentence. An agreed upon sentence takes away dis-
cretion in sentencing. I won't take a plea where the plea is conditioned upon such and such a sentence."

The confusion that exists respecting "recommended" sentences is difficult
to understand because the North Carolina statute on the subject is unambigu-
ous. N.C. GEN. STAT. § 15A-1024 provides that "[i]f at the time of sentencing, the judge for any reason determines to impose a sentence other than provided
for in a plea arrangement between the parties, the judge must inform the de-
fendant of that fact and inform the defendant that he may withdraw his plea."48 A "plea arrangement," according to other provisions of the statute, refers to the "prosecutor . . . [having] agreed to recommend a particular sen-
tence."49 Hence, it seems clear from the face of the statute that a defendant
who has had a "recommended sentence" rejected by a judge must be afforded
the opportunity to withdraw his or her plea.

The statute makes no allowance for the "agreed upon" or "conditioned"
plea. Plea arrangements are referred to in the statute only as agreements "in
which the prosecutor has agreed to recommend a particular sentence."50 All
judges, however, seem to grant the statutory right of withdrawal when the plea
is in the "agreed upon" or "conditioned" form. Therefore, the primary impor-
tance of this wording seems to be to make the "recommended" sentence wording mean something less, thereby, as to the latter, encouraging judges to
deviate from the plain wording of the statute.

Unlike the North Carolina statute, other codes do not authorize with-
drawal of a plea when the prosecutor "recommends" a sentence pursuant to a
plea agreement that is then rejected by the court. The ABA's 1980 revision of
its Pleas of Guilty standards provides that if the trial court does not agree with

49. Id. §§ 15A-1021(c), -1023(b). The only other section of the statute that uses this phrase is
§ 15A-1023(c), which refers to "a plea arrangement relating to the disposition of charges in which
the prosecutor has not agreed to make any recommendations concerning sentence." No provision
of the statute refers to an "agreed upon" sentence. For the full text of N.C. GEN. STAT. §§ 15A-
1021 to -1024, 1026, see note 18 supra.
50. See note 49 and accompanying text supra.
a proposed sentence concession, withdrawal of the plea is permissible only if "prior to the entry of the plea the judge concurs, whether tentatively or fully, in the proposed . . . sentence concessions; or the guilty plea is entered upon the express condition, approved by the judge, that the plea can be withdrawn if the . . . sentence concessions are subsequently rejected by the court."

Similarly, the Federal Rules of Criminal Procedure provide that when a plea agreement between the parties involves a sentence recommendation, plea withdrawal is not permissible if a different sentence is imposed, so long as "the court shall advise the defendant that if the court does not accept the recommendation or request the defendant nevertheless has no right to withdraw his plea."

The wisdom of the approach of the ABA standards and the Federal Rules of Criminal Procedure is open to serious question. Undoubtedly, these rules appeal to lawyers, as the rules are clear and logical. After all, if a judge promises a sentence in return for a guilty plea and the sentence is not received, defendant's plea, in fairness, should be permitted to be withdrawn. On the other hand, if there is only a sentence recommendation that is rejected by the court, why should the defendant be permitted to withdraw his or her plea? Perhaps, however, strict logic ought not be so rigorously applied to persons faced with the stress of pleading guilty, particularly as felony defendants typically expect judicial approval of prosecution sentence recommendations. The first edition of ABA Pleas of Guilty standards adopted the position that whenever the sentence imposed differs from that contemplated by the parties in a plea agreement, the defendant's plea can be withdrawn. The commentary to these standards explained:

[I]f the trial judge later changes his mind, he must inform the defendant of this fact and provide the defendant with an opportunity to withdraw his plea. . . . [E]ven though the prior concurrence of the trial judge was conditional, so that strictly speaking his later decision on final disposition is not contradictory, it nonetheless seems fair to give the defendant an opportunity to withdraw his plea. If the judge were not to give the defendant this chance, but instead held the defendant to his plea and refused to grant the concessions contemplated in the plea agreement, the defendant would probably believe that he had been dealt with unfairly. There are obvious reasons, from a correctional standpoint, why a defendant should be satisfied that he was treated fairly when he arrives at the penitentiary.

The current North Carolina statute adheres to this approach, although the
statute is apparently neither understood nor followed by all of the state's superior court judges.55

C. Judicial Participation and Differential Sentencing

1. Practices

There is considerable evidence nationwide that defendants are induced to plead guilty because they expect lighter sentences than if they are tried and convicted, particularly if conviction follows a jury trial.56 Indeed, it is usually argued that without the expectation of a more favorable sentence following a guilty plea, a system of plea bargaining and widespread guilty pleas would collapse because there would be no incentive for defendants to forego trials.57


56. The expectation of lighter sentences in return for pleading guilty commonly is termed "implicit bargaining":

The mere availability of the guilty plea can be irresistible inducement for defendants to waive the right to contest charges against them. The President's Commission on Law Enforcement and Administration of Justice has reported: "Even where there have been no explicit negotiations, defendants relying on prevailing practices often act on the justifiable assumption that those who plead guilty will be sentenced more leniently." It can be argued that every defendant who pleads guilty has entered into an implicit bargain in the form of a reasonable expectation of sentencing leniency. The quid pro quo of the bargain is no less substantial because it is unspoken. Comment, 22 Ala. L. Rev. 76, 86 (1969) (footnote omitted and emphasis added).

Miller, supra note 1, at ch. VI-1-2 (footnotes omitted).

Defendants are understandably extremely interested in knowing precisely the sentence they will receive. Alschuler, Judge's Role, supra note 2, at 1140. Accordingly, defendants are almost surely more comfortable with a system of explicit plea negotiations in which sentences can be ascertained with certainty. In implicit bargaining, the expected sentence differential must be greater in order to induce a guilty plea than would be required if the bargaining occurred openly. Id. at 1080. In a few jurisdictions, such as Alaska, efforts have been made to abolish plea bargaining; in actuality, of course, only explicit bargaining has been banned, thus escalating the importance of implicit bargaining. See Miller, supra note 1, at ch. 1-31.

57. "A defendant told only that his sentence would probably be the same after a conviction by trial as after a conviction by plea and that neither sentence could be known in advance would sense very little incentive to plead guilty," Alschuler, Judge's Role, supra note 2, at 1082. See Note, Restructuring the Plea Bargain, 82 Yale L.J. 286 (1972). Miller's study also supports this view:

The findings of this study and of studies made of the attempts to eliminate plea bargaining in New York and Alaska indicate that most defendants want some measure of certainty that they will receive a more lenient sentence before they will agree to plead guilty. . . . Where there is certainty that differential sentences between plea and trial will be minimal, more defendants opt for trial and backlogs occur.

The judges and prosecutors whom we interviewed believe that incentives are necessary to induce guilty pleas. Miller, supra note 1, at ch. VI-33 (footnotes omitted). See generally id. at ch. VI.

But see M. Rubenstein, S. Clarke, & T. White, supra note 3; Rubenstein & White, Alaska Bans Plea-Bargaining, in PLEA BARGAINING 51 (W. McDonald & J. Cramer eds. 1980): "[T]he rates of guilty pleas, pleas to reduced charges, and dismissals changed very little [after Alaska banned plea bargaining], suggesting that some of the previously held beliefs about the causal associations of plea-bargaining with these phenomena need reexamination." It was found that court processes accelerated rather than bogged down; that trial rates increased substantially but
In my interviews with prosecutors, defense attorneys, and judges, I asked about the prevalence of “differential sentencing”—the practice of sentencing differently those who plead guilty compared to those who exercise their right to trial. Without exception, prosecutors and defense lawyers stated that differential sentencing was a well-recognized fact of life in the state’s criminal justice system. The four judges who were interviewed, however, were less willing to acknowledge the practice of differential sentencing. Only Judge A readily conceded that he routinely gave lighter sentences to those who pleaded guilty and harsher sentences to those who were tried and convicted. As Judge A explained, it is “just human nature to look more favorably on a defendant who admits his guilt.” At the other extreme, Judges B and D stated that they were determined not to sentence any differently defendants who pleaded guilty compared to those who were convicted following a jury trial. Somewhere between the comments of these three judges were those of Judge C, who said that he tried not to be more lenient with defendants who plead guilty, but he believed that “subconsciously” he may sometimes react negatively against defendants who are tried and convicted, and sentence them more severely. Moreover, Judge C said that if a defendant takes the witness stand and lies, the lying “compounds the problem” for the defendant, who will almost certainly be sentenced more harshly.

The questionnaire sent to the state’s superior court judges asked whether they “sentence defendants who plead guilty less harshly than defendants who go to trial.” Their responses are presented in Table II:

---

58. The United States Supreme Court in United States v. Grayson, 438 U.S. 41 (1978), upheld the discretionary right of a judge to consider the falsity of a defendant’s testimony at trial in imposing sentence. Id. at 55. The Court reasoned that the defendant’s demeanor under oath is probative of his personality and prospects for rehabilitation, and is therefore a relevant factor in sentencing. Id. at 50.

In dissenting, Mr. Justice Stewart pointed out that there had been no determination of defendant’s mendacity, and that every defendant who chooses to testify risks the possibility of punishment due to the trial judge’s perception of his testimony; thus, defendant’s right to testify was burdened, and the burden was not outweighed by the additional contribution to the judge’s basis for rendering a sentence. Id. at 55-58 (Stewart, J., dissenting).
Table II
Frequency of Less Harsh Sentences for Defendants Who Plead Guilty

<table>
<thead>
<tr>
<th>Frequency</th>
<th>No. of Judges Responding</th>
<th>% of Judges Responding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>Almost Always</td>
<td>8</td>
<td>20.6%</td>
</tr>
<tr>
<td>Sometimes</td>
<td>21</td>
<td>53.8%</td>
</tr>
<tr>
<td>Rarely</td>
<td>3</td>
<td>7.7%</td>
</tr>
<tr>
<td>Never</td>
<td>7</td>
<td>17.9%</td>
</tr>
</tbody>
</table>

The data contained in the foregoing table strongly suggest that the prosecutors and defense lawyers interviewed were accurate in their perception that differential sentencing of defendants is common among the state’s superior court judges. Twenty-nine of the thirty-nine responding judges (75%) acknowledged that differential sentencing was practiced “almost always” or “sometimes,” whereas only seven judges (18%) claimed that they never gave lighter sentences to defendants who pleaded guilty.

Furthermore, even the responses of the judges who denied differential sentencing practices should be interpreted in light of the interview statements of Judges B and D. While both of these judges categorically denied giving lighter sentences to defendants simply because they plead guilty, certain of their other statements cast doubt upon these denials. Significantly, both said that during the trial of a case they sometimes seek to encourage a guilty plea by suggesting to the defendant that a lighter sentence will be imposed than if conviction follows a jury verdict. Although Judge B said that he was disinclined to mention the specific sentence for fear of putting the defendant under “duress,” Judge D stated that he had sometimes during a trial promised a defendant probation in return for a guilty plea.

Indeed, from my interviews with prosecutors, defense lawyers, and judges, it seems clear that some trial judges seek to induce guilty pleas either just before the beginning of jury trials or while they are actually underway. The promise of differential sentencing, of course, is the technique used to convince the defendant to forego a pending jury trial. For example, a public defender told of a case in which his client was charged with assault with intent to commit rape. During the midst of trial, the judge suddenly called the defense attorney and prosecutor to the bench and, off-the-record, told the attorney that if defendant would plead guilty, thereby aborting the trial, the sentence would not exceed ten years. The judge continued, however, that if

59. N.C. Gen. Stat. § 14-22, which was then in effect, imposed punishment of one to fifteen years. N.C. Gen. Stat. § 14-22 (1969) (repealed 1979). This charge now falls under N.C. Gen. Stat. § 14-27.6 (Supp. 1979), proscribing attempts to commit first- or second-degree rape, which carry a penalty of up to 20 years and up to 10 years, respectively.
defendant rejected this offer and was convicted by the jury, the sentence would be the then fifteen year maximum. During a recess the public defender relayed this message to his client; the client promptly pleaded guilty and was sentenced to ten years.

Normally, the pressure applied by judges to induce guilty pleas is more subtle than that applied in the foregoing example. A private defense attorney told me that in his cases, when plea discussions were initiated during trials, the judge would usually say something like, “isn’t there some way this can be worked out,” or “this is a serious case, and if that boy is convicted I’ll have to give him an active sentence.” Similarly, a public defender (not the one who told me of the rape case related above) said that he had tried cases in which judges called the lawyers up to the bench and said, “can’t you all settle this case?” According to this defender, ordinarily sentences were not mentioned, but the implication was clear that if the trial were completed and the defendant convicted, the sentence would be greater than if a plea were entered immediately.

Judge C also referred to the implications when a judge discusses a possible guilty plea with the lawyers while a trial is in progress. For instance, Judge C said that when an obviously guilty defendant insists on an “uncomfortable trial,” the threat of a harsher sentence upon conviction by a jury “would be implied if not said outright.” Judge C also said that he does sometimes “pressure” the parties during a trial to come to a settlement, usually in cases in which he feels the defendant deserves a light sentence that will be more difficult to justify following conviction by a jury.

Several prosecutors complained that the judicial practice of seeking to induce guilty pleas during trials sometimes “coerced” them into accepting pleas to lesser offenses to which they were opposed. The most vivid illustration of such coercion was related by a private defense attorney, who told of a felony case in which the judge interrupted his closing argument to summon counsel to chambers. The judge asked what defendant would accept in return for a guilty plea, and defense counsel replied, “a plea to a misdemeanor and a suspended sentence.” When the prosecutor interrupted to say that he was not sure he could accept a plea to a misdemeanor, the judge retorted, “Mr. Solicitor, you just accepted it,”—and he did. The judge terminated the trial, entered a guilty plea to a misdemeanor, and imposed a suspended sentence.

Apparently several reasons account for the judicial practice of suggesting settlements just before or during trials. Several lawyers attributed it to the desire of judges to speed the court’s criminal docket and to avoid the possibility of reversal on appeal. Also, in at least some cases, the judges appear to be motivated by a desire to give the defendant a lighter sentence than they

60. These observations parallel findings by Alschuler, who reports that the primary motivation of judges in encouraging settlement was to “process large caseloads with seriously inadequate resources.” Alschuler, Judge’s Role, supra note 2, at 1099. Moreover, a judge who is reluctant to bargain may be inundated with demands for jury trials, made either by defense counsel wanting to teach the judge a lesson in liberality or by defendants who refuse to plead guilty without a bar-
believe could be justified following conviction by a jury, as in the case described in the preceding paragraph. Several of the defense attorneys stated that they welcomed intervention of the judge whatever the reasons, because it usually meant, as one private defense lawyer told me, that "a good deal will be possible." Similarly, another private practitioner said it was usually to his client's advantage if the judge "calls him back" and says, "let's plead." A third private defense attorney, however, was troubled by a judge's mention of a specific sentence in return for the client's guilty plea. Indeed, this lawyer stated that he would not inform the defendant of the sentence mentioned by the judge for fear that it would place too much "pressure" on the client to plead guilty. The lawyer explained that if he told the defendant of the sentence promised by the judge the defendant would probably feel "that the trial was unfair and that he was being railroaded."

Efforts to obtain transcripts of conversations in which judges have sought to induce defendants to plead guilty shortly before or during trials proved unsuccessful. Such colloquies are almost never recorded by a court reporter. Indeed, the prosecutors and defense attorneys told me that virtually all conversations with judges pertaining to plea bargaining, whether in chambers or at the bench, and whether before or during trial or at the time a defendant is scheduled to plead, are unrecorded. Moreover, several of the defense attorneys stated that they preferred to have all discussions with the judge off-the-record. As one private defense lawyer explained, it would be "cumbersome" if all conversations with judges were recorded verbatim, and he wanted the gain. Id. at 1101 & n.131. Alternatively, a presiding judge may pressure the trial judge to carry his load. Id. at 1102.

Heumann notes both "moving the business" and avoiding reversal on appeal as reasons why judges seek settlements, and adds a third consideration:

[P]lea bargaining saves the judge some time and effort, and, overall, serves to make his job easier. There is no need to prepare for a trial, to write instructions for the jury, to rule on legal issues at stake in a case. Accepting a guilty plea and asking the defendant the checklist of questions on the voluntariness of his plea is a much simpler process. And when an agreed recommendation is part of the negotiated disposition, one of the most vexing problems for a judge—sentencing—is also removed.

HEUMANN, supra note 1, at 144.

61. Alschuler reports that judges occasionally "blasted" defendants into guilty pleas by threatening to impose the maximum sentence if the defendant were convicted at trial. Alschuler, Judge's Role, supra note 2, at 1090. A common response by the defense attorney was that "[j]udges use dynamite only on the defendant who deserves it—the defendant who is not amenable to sound advice. A judge can often be very helpful, and I am grateful when he is." Id. (footnote omitted). Alschuler also relates that judges often pressure defense attorneys, particularly public defenders, to enter guilty pleas. Alschuler, supra note 1, at 1237. Although most public defenders claimed they did not let the pressure determine the outcome, some admitted that they normally went along with the judge's suggestions, largely because the judge's actions were more apt to compromise the prosecutor's position than to surrender the defendant's interests. Id. at 1238. The judge's intervention, however, was more tolerated than welcomed. Id.

62. This lawyer's conduct is in sharp contrast to ABA STANDARDS FOR CRIMINAL JUSTICE, THE DEFENSE FUNCTION, Standard 4-6.2(a) (2d ed. 1980): "In conducting discussions with the prosecutor the lawyer should keep the accused advised of developments at all times and all proposals made by the prosecutor should be communicated promptly to the accused." If defense counsel should inform the defendant of prosecutorial developments, it should be even more imperitive to advise the defendant of statements made by the judge. This lawyer apparently balked at what he viewed as coercive judicial participation, but it is difficult to understand how a defendant can make an intelligent plea choice if information concerning the judge's thoughts is withheld.
judge to remain "loose;" if a court reporter were present, the atmosphere would be more formal, making it more difficult to obtain favorable "deals" from the judge. This attorney added that prosecutors probably would like to have everything taken down verbatim, as that would prevent defense lawyers from "making time with the judge."

Judges differed on whether discussions in which they are presented with plea arrangements should be recorded. Judge C said he felt it was "impractical" to record all plea discussions at which he was present, and that such a practice would cause little substantive change, it would "just make you more careful about the way you put things." On the other hand, Judge D claimed that he rarely participated in any plea discussions that were off-the-record, whether in chambers or at the bench. He emphasized that it "looks bad," presumably to the public, to have conversations at the bench off-the-record, and that in his view, "we've had too much secrecy in the court."

The questionnaire sent to the superior court judges asked them to indicate whether they "initiate and/or participate in plea discussions before or during the trial," and the extent to which such discussions are recorded verbatim. Additional questions asked the judges to estimate the extent to which plea discussions in which they participate are recorded when they occur in chambers, at the bench, and in open court in the absence of the jury. The responses of the judges are summarized in Tables III-VII:

Table III
Extent to Which Judges Initiate and/or Participate in Plea Discussions Shortly Before or During Trials

<table>
<thead>
<tr>
<th>No. of Judges Responding</th>
<th>% of Judges Responding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>3</td>
</tr>
<tr>
<td>Almost Always</td>
<td>9</td>
</tr>
<tr>
<td>Sometimes</td>
<td>14</td>
</tr>
<tr>
<td>Rarely</td>
<td>11</td>
</tr>
<tr>
<td>Never</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>42</td>
</tr>
</tbody>
</table>
### Table IV

Frequency That a Court Reporter Records What Is Said by the Parties When Judge Initiates and/or Participates in Plea Discussions Shortly Before or During Trials

<table>
<thead>
<tr>
<th>No. of Judges Responding</th>
<th>% of Judges Responding</th>
</tr>
</thead>
<tbody>
<tr>
<td>Always</td>
<td>1</td>
</tr>
<tr>
<td>Almost Always</td>
<td>0</td>
</tr>
<tr>
<td>Sometimes</td>
<td>5</td>
</tr>
<tr>
<td>Rarely</td>
<td>10</td>
</tr>
<tr>
<td>Never</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>36</td>
</tr>
</tbody>
</table>

### Table V

Frequency That a Court Reporter Records Everything That Is Said by the Parties in Chambers When a Proposed Sentence Agreement Is Discussed

<table>
<thead>
<tr>
<th>Frequency of Recording</th>
<th>No. of Judges Responding</th>
<th>% of Judges Responding</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>28</td>
<td>82</td>
</tr>
<tr>
<td>1-10%</td>
<td>6</td>
<td>18</td>
</tr>
<tr>
<td>11-20%</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>21-30%</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>31-40%</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>41-50%</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>51-60%</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>61-70%</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>71-80%</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>81-90%</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td>91-100%</td>
<td>0</td>
<td>100%</td>
</tr>
<tr>
<td></td>
<td>34</td>
<td>100%</td>
</tr>
</tbody>
</table>
Table VI
Frequency That a Court Reporter Records Everything That Is Said by the Parties in the Courtroom at the Bench When a Proposed Plea Agreement Is Discussed

<table>
<thead>
<tr>
<th>Frequency of Recording</th>
<th>No. of Judges Responding</th>
<th>% of Judges Responding</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>21</td>
<td>65.7</td>
</tr>
<tr>
<td>1-10%</td>
<td>5</td>
<td>15.6</td>
</tr>
<tr>
<td>11-20%</td>
<td>1</td>
<td>3.1</td>
</tr>
<tr>
<td>21-30%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>31-40%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>41-50%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>51-60%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>61-70%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>71-80%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>81-90%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>91-100%</td>
<td>5</td>
<td>15.6</td>
</tr>
<tr>
<td></td>
<td>33</td>
<td>100%</td>
</tr>
</tbody>
</table>

Table VII
Frequency That a Court Reporter Records Everything That Is Said by the Parties in Open Court When a Proposed Plea Agreement Is Discussed

<table>
<thead>
<tr>
<th>Frequency of Recording</th>
<th>No. of Judges Responding</th>
<th>% of Judges Responding</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td>1</td>
<td>2.7</td>
</tr>
<tr>
<td>1-10%</td>
<td>1</td>
<td>2.7</td>
</tr>
<tr>
<td>11-20%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>21-30%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>31-40%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>41-50%</td>
<td>1</td>
<td>2.7</td>
</tr>
<tr>
<td>51-60%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>61-70%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>71-80%</td>
<td>0</td>
<td>—</td>
</tr>
<tr>
<td>81-90%</td>
<td>1</td>
<td>2.27</td>
</tr>
<tr>
<td>91-100%</td>
<td>33</td>
<td>89.2</td>
</tr>
<tr>
<td></td>
<td>37</td>
<td>100%</td>
</tr>
</tbody>
</table>

The foregoing tables support the statements of prosecutors and defense attorneys that it is not uncommon for superior court judges to be involved in plea discussions just before or during trials, and that such discussions are rarely recorded by a court reporter. As reported in Table III, only five of
forty-two judges (12%) stated that they "never" initiate and/or participate in plea discussions shortly before or during trials, and only eleven judges (26%) said that they did so "rarely," whereas twenty-six of the judges (62%) conceded such initiation and/or participation either "sometimes," "almost always," or "always." Tables IV through VII show that plea discussions in which judges participate are not normally recorded. Only when a proposed plea agreement is discussed in open court does a court reporter usually record everything that is said (Table VII). When plea discussions occur shortly before or during trial (Table IV), in the judge's chambers (Table V), or at the bench (Table VI), however, what is said by the judge and the parties is almost never recorded.

2. Legality

It is clear that a defendant's guilty plea is not involuntary because induced by prosecution threats of greater charges if a plea bargain is rejected. In Bordenkircher v. Hayes, the Supreme Court sustained as constitutional the actions of a prosecutor who caused the accused to be reindicted on more serious charges because he refused to plead guilty to the offenses with which he was originally charged. The Court explained its rejection of defendant's due process argument:

Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.

While confronting a defendant with the risk of more severe punishment clearly may have a 'discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable'—and permissible—'attribute of any legitimate system which tolerates and encourages, the negotiation of pleas.' It follows that, by tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.

There is also little doubt that an unspoken judicial practice of rewarding defendants who plead guilty by granting them more lenient sentences is constitutionally permissible. If it is commonly understood, for example, that a par-

64. Id. at 365.
65. Id. at 363-64 (citations omitted).
ticular judge sentences defendants who plead guilty more leniently than those who go to trial, a defendant who pleads and is sentenced by such a judge cannot claim that the plea is involuntary because induced by the court’s reputation. In *Brady v. United States*, the Supreme Court sustained the voluntariness of a defendant’s guilty plea to kidnapping. Because the applicable law provided that a defendant tried before a jury was subject to the death penalty, defendant in *Brady* argued that his guilty plea was induced by a desire to avoid a possible death sentence. In rejecting defendant’s argument that his plea was involuntary, the Supreme Court, in dictum, stated that Brady’s claim was no different from that of other defendants who plead guilty because they are told “the judge is normally more lenient with defendants who plead guilty than with those who go to trial.”

*Brady* was the first Supreme Court decision to recognize that “it is [not] unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State [by pleading guilty]. . . .”

But what if the guilty plea is induced neither by prosecution threats nor by the reputation of the judge, but is instead the result of judicial threats of a greater sentence if a guilty plea is not entered? Or suppose the judge Pressures the defendant into pleading guilty by implying that a longer sentence will be imposed if a plea offer is rejected? Will such conduct by a judge, who, unlike the prosecutor, is supposed to be a neutral arbiter, render any ensuing guilty plea involuntary? In North Carolina, as noted earlier, both prosecutors and defense lawyers claimed—and some judges conceded—that defendants are sometimes pressured into pleading guilty and threatened with longer sentences if they refuse to do so.

The United States Supreme Court has never addressed directly the constitutionality of judicial threats or pressure to induce defendants to plead guilty. Several North Carolina cases have dealt with the issue, however. In

---

67. *Id.* at 751.
68. *Id.* at 744.
69. *Id.* at 751.
70. *Id.* at 753.
71. *See* text accompanying notes 56-62 *supra*.
72. In *Brady v. United States*, 397 U.S. at 751 n.8, the Supreme Court specifically reserved this question:

> We here make no reference to the situation where the prosecutor or judge, or both, deliberately employ their charging and sentencing powers to induce a particular defendant to tender a plea of guilty. In Brady’s case there is no claim that the prosecutor threatened prosecution on a charge not justified by the evidence or that the trial judge threatened Brady with a harsher sentence if convicted after trial in order to induce him to plead guilty.

In *Ramsey v. New York*, 440 U.S. 444 (1979), the Supreme Court declined to review a case in which the following question was presented:

> whether a guilty plea is obtained in violation of due process of law when it is induced by a judge’s threat that, should the defendant be convicted after trial, he will receive a sentence almost four times greater than one once seriously discussed, and more than twice as great as the one held out as a part of a plea offer.
the first North Carolina case on the subject, State v. Benfield,73 the trial judge behaved in a manner that was similar to judicial conduct described to me by lawyers, although the case was decided in 1965, more than ten years before my interviews. During the trial of a robbery case, the judge conducted a conference with the prosecutor and defense counsel, at which he informed the defense lawyer that if there were a jury verdict of guilty the "defendant could expect 'a long sentence.'"74 When advised by defense counsel of the court's statement, defendant changed his plea to guilty. The Supreme Court of North Carolina held that the guilty plea was involuntary, notwithstanding that at the time of its entry defendant claimed that his plea was freely and voluntarily made.75

In State v. Boone,76 defendant was convicted of receiving stolen property following a jury trial and was sentenced. During the trial the court told defendant's counsel in chambers that defendant would receive "'an active prison sentence if he persisted in his plea of not guilty and did not accept a lesser plea proffered by the Assistant District Attorney.'"77 Subsequently, the judge stated in open court "'that he would be compelled to give the defendant an active sentence due to the fact that the defendant had pleaded not guilty and the jury had returned a verdict of guilty as charged,'"78 and that a "'prison sentence would be necessary although the court was not familiar with the past record or character of the defendant.'"79 The Supreme Court of North Carolina vacated defendant's sentence and remanded the case to the trial court for resentencing:

The statement of the trial judge, expressed by him in open court,

Id. Although certiorari initially was granted, the case later was dismissed because it was said not to be clear that the issue actually was contained in the record. Id.

In its leading case on judicial vindictiveness at sentencing, the Supreme Court held that a judge cannot impose a harsher sentence upon a defendant who is reconvicted following a successful appeal, unless the record clearly and objectively justifies the increased punishment based on events since the first trial. North Carolina v. Pearce, 395 U.S. 711, 725 (1969). "'[S]ince the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.'" Id. Arguably, the Court's rationale in Pearce is applicable in cases in which defendants are fearful of pleading not guilty and demanding a trial lest the judge penalize them by imposing a more severe sentence in the event of conviction. In Bordenkircher v. Hayes, the Supreme Court distinguished that case from Pearce:

To 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, see North Carolina v. Pearce, supra . . . and 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 is "patently unconstitutional." But 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. 434 U.S. at 363 (citations omitted). See text accompanying notes 63-65 supra.

73. 264 N.C. 75, 140 S.E.2d 706 (1965).
74. Id. at 77, 140 S.E.2d at 708.
75. Id.
77. Id. at 712, 239 S.E.2d at 465.
78. Id.
79. Id.
indicated that the sentence imposed was in part induced by defendant’s exercise of his constitutional rights to plead not guilty and demand a trial by jury. This we cannot condone. . . . The trial judge may have sentenced defendant quite fairly in the case at bar, but there is a clear inference that a greater sentence was imposed because defendant did not accept a lesser plea proffered by the State. Defendant had the right to plead not guilty, and he should not and cannot be punished for exercising that right.80

In the third case, State v. Bagley,81 it was undisputed that the judge told defense counsel during the trial and off-the-record that if defendant would plead guilty the sentence would be ten years. The defense lawyer claimed that in offering the ten year sentence, the judge also stated that the sentence “‘could save him [the defendant] some time.’”82 Defendant rejected the offer, was convicted by the jury of possession and sale of heroin, and was sentenced to fifteen years. In sustaining defendant’s sentence, the North Carolina Court of Appeals distinguished the case before it from Boone finding that, “[u]nlike Boone . . . the record [was] devoid of any reasonable inference that defendant was penalized for pleading not guilty.”83 The court noted that the sentence offer was made before the judge had heard all the evidence, and that there was evidence in the record to support the court’s finding that defendant was a substantial heroin dealer.84

There are two primary, interrelated lessons to be learned from the Benfield, Boone, and Bagley cases. The first is that a defendant who pleads guilty as the result of a judicial threat of a greater sentence may be able to claim that the plea is involuntary; the second is that a defendant cannot be “punished” or “penalized” for pleading not guilty and insisting on a jury trial. These positions of the North Carolina courts, as well as the corollary proposition that a defendant who pleads guilty can be rewarded for doing so, are adhered to by courts everywhere.85

80. Id. at 712-13, 239 S.E.2d at 465.
82. Id. at 333, 250 S.E.2d at 90.
83. Id.
84. Id.
85. See, e.g., Brady v. United States, 397 U.S. 742 (1970) (Constitution does not prohibit granting leniency to defendants who plead guilty and thereby benefit the state); United States v. Thompson, 476 F.2d 1196 (7th Cir.), cert. denied, 414 U.S. 918 (1973) (granting leniency to defendants who plead guilty does not mean that defendants who insist on trial are penalized if leniency not received); United States v. Stockwell, 472 F.2d 1186 (9th Cir.), cert. denied, 411 U.S. 948 (1973) (record must show that defendant's sentence was not punishment for refusing to plead guilty); United States ex rel. Dale v. Williams, 459 F.2d 763 (3rd Cir. 1972) (guilty pleas entered in anticipation of leniency may be accepted in return for cooperation with prosecution); United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963) (defendant's guilty plea not voluntary when trial judge announced that in the event of conviction at trial he would impose a life sentence, the maximum penalty); People v. Jackson, 79 Ill. App. 3d 698, 398 N.E.2d 959 (1979) (defendant may not be penalized by imposition of harsher sentence for exercising right to jury trial); People v. Palmer, 55 Mich. App. 43, 222 N.W.2d 26 (1974) (defendant's cooperation is appropriate consideration in deciding whether to grant charge or sentence concessions); State v. Lacy, 195 Neb. 299, 237 N.W.2d 650 (1976) (a more severe sentence cannot be imposed to punish a convicted defendant for insisting on a trial, but sentence concessions are proper when a defendant pleads guilty);
The revised ABA Pleas of Guilty standards also agree that a defendant cannot be penalized for electing to stand trial:

The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere.86

The ABA, however, does approve "sentence concessions to defendants who enter a plea of guilty or nolo contendere when consistent with the protection of the public, the gravity of the offense, and the needs of the defendant, and when there is substantial evidence to establish that" certain other conditions are present.87 Thus, assuming adherence to the ABA’s standards, greater sentences for those who are tried and convicted compared to those who plead guilty does not mean that the former are being punished; it simply reflects that the latter are being rewarded.

Unfortunately, for the defendant convicted following a trial, there is a significant problem in applying the North Carolina cases and the ABA standards: how can the defendant know that the sentence imposed is not—in the words of the ABA—"in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law"?88 How can the defendant be certain that he or she is not being “punished” or “penalized” for having exercised the constitutional right to trial? There is, of course, no way of knowing whether such punishment has been imposed unless the court actually announces that the defendant’s sentence includes a penalty for having insisted on a trial, as arguably occurred in the Bagley and Boone cases.89 Furthermore, probably no procedure can be devised for assuring that defendants are never punished for insisting on a trial.90 There is, however, a proposal that would, if adopted, make some critics of plea bargaining more comfortable.

State v. Black Bear, 187 Neb. 670, 193 N.W.2d 563 (1972) (court may grant charge and sentence concessions to defendants who plead guilty).

86. ABA PLEAS OF GUILTY, supra note 7, Standard 14-1.8(b).
87. Id. Standard 14-1.8(a). The "other conditions" cited include that defendant be willing to bear responsibility for his or her acts; that concessions will facilitate more suitable alternative correctional measures or prevent harm to defendant from the form of conviction; that defendant has shown a desire to make reimbursement or spare the victim(s) the ordeal of trial; and that defendant's cooperation with the prosecution may lead to the apprehension of other offenders. Id.
88. Id. Standard 14-1.8(b).
89. Yet, even in Bagley and Boone, the appellate courts in reviewing the trial judges' actions focused on inferences, as appears in the quote in the text accompanying note 80 supra. The sentence imposed on Boone actually may have been entirely appropriate given the evidence brought out at trial, and thus may have been adequately justified by the "protective, deterrent, or other purposes of the criminal law" referred to in ABA PLEAS OF GUILTY, supra note 7, Standard 14-1.8(b). Conversely, the harsher sentence imposed on defendant Bagley may actually have been in retaliation for not accepting the judge's plea bargain, even though the judge did not make any threatening statements about a penalty, and even though the North Carolina Court of Appeals decided in hindsight that the sentence was justified by the evidence. In neither case can it be known with absolute certainty what was in the judge's mind and whether the defendant was penalized for insisting on a trial.
90. Determinate sentencing laws, which specify a sentence range for a given offense, limit judicial discretion and make it more difficult for a judge to impose a harsher sentence as punishment for a defendant who insists on trial. See ABA PLEAS OF GUILTY, supra note 7, Commentary.
Plea Bargaining

The judge, upon request of the defense, would announce in advance of trial the length of the defendant's sentence in the event of conviction following a trial, and the reduction, if any, if the defendant pleads guilty. This procedure has the dual virtues of permitting the defendant to learn precisely how he or she will benefit from pleading guilty, and of bringing into the open sentencing practices that generally escape appellate review and public scrutiny.

IV. Judicial Discretion

It is evident from the foregoing description of North Carolina procedures that the superior court judge has exceedingly broad discretion in plea negotiations. A superior court judge, for example, may permit the prosecutor and defense attorney to discuss a plea arrangement with the court, and may permit disclosure to the court of a negotiated settlement containing a recommended sentence. On the other hand, in the exercise of its absolute, unreviewable discretion, the trial court may flatly refuse to permit plea discussions in its presence, and may also refuse in advance of the time for the tender of the plea to permit the parties to disclose the proposed terms of a negotiated settlement. No statute, court rules, standards, or informal guidelines of any kind


Several states have enacted determinate sentencing statutes. E.g., CAL. PENAL CODE § 1170 (West Cum. Supp. 1979); IND. CODE ANN. §§ 35-50-1-1 (Burns 1979); ME. REV. STAT. ANN. tit. 17-A, § 1252 (Supp. 1980). Typically under these laws, judges retain authority to increase or decrease the defendant's sentence based on mitigating or aggravating circumstances, as defined by statute. These factors normally are unrelated to the existence of a guilty plea. ABA Pleas of Guilty, infra note 7, at ch. 14-45. For discussion of the new North Carolina determinate sentencing statute scheduled to take effect in 1981, see notes 141-143 and accompanying text infra.

91. This idea appears to have been broached first in a Yale Law Review note, Note, supra note 57, at 301. It was endorsed substantially by Alschuler in Judge's Role, supra note 2, at 1124-26. The suggested procedure as set out in the Note called for the defendant to be given the opportunity at his or her first court appearance to request a preplea conference. Assuming one were requested, a social investigation report would be compiled and reviewed at the conference, along with a proposed disposition of the case presented separately by the prosecution and defense. Charge reduction would be arrived at by the judge, eliminating prosecutorial overcharging. After the conference, the court would reveal its judgment of a proper sentence if the defendant were convicted at trial, plus its recommendation for a reduced sentence upon a plea of guilty. The reduced sentence would be calculated by applying a specific discount rate based upon a median plea concession in the jurisdiction. This procedure would greatly reduce the judge's sentencing discretion and afford the defendant certain knowledge of the sentence to be received. The defendant would then elect either to accept the reduced sentence or go to trial. The entire conference would be transcribed. Such a process, it has been argued, would produce more uniform and less arbitrary sentences following guilty pleas. Alschuler, Judge's Role, supra note 2, at 1125. It also would allow the defendant a more rational role in plea bargaining, would curb prosecutorial and judicial discretion, and would save time and resources. Note, supra note 57, at 304. Miller endorses a form of the Yale note proposal, but would not use the preplea conference if the parties have agreed upon a sentence among themselves. Miller, supra note 1, at ch. V-28-29, ch. VI-38-40. See Enker, Perspectives on Plea Bargaining, in TASK FORCE REPORT: THE COURTS 108 (App. A 1967). For further discussion of these proposals, see note 136 infra.

92. See statutes cited note 18 supra; text accompanying notes 26-29 supra.

93. N.C. GEN. STAT. § 15A-1021(e) (1978). See text accompanying notes 26-29 supra. No case has been discovered in which the absolute discretion of the trial judge regarding preliminary consideration of plea agreements has been challenged. Presumably, the judge's discretion is not without bounds. For example, if a judge announced that he or she would participate in plea discussions or would permit disclosure of tentative plea arrangements only for defendants whose cases were calendared for Mondays, surely an appellate court would view the policy as an arbi-
guide the judge in deciding whether and how to participate in plea discussions, and whether to permit disclosure of negotiated settlements. Moreover, a particular judge's attitude toward plea arrangements, once it becomes known to the parties, substantially influences whether sentence recommendations are negotiated between the parties and submitted to the court.  

Similarly, the trial court has complete discretion to decide whether to intervene prior to or during a trial in an effort to persuade a defendant to enter a plea. Again, no rules, standards, or informal guidelines prescribe the trial court's conduct in this sensitive area. And perhaps most importantly, virtually all involvement of trial judges in plea negotiations occurs outside the presence of court reporters; neither appellate courts nor the public are able to learn with certainty what transpires.

Furthermore, it is clear that these procedures for plea negotiations are vastly different from all other phases of the criminal case in which the judge is involved. At all other stages of the criminal proceeding, virtually everything that is said is recorded verbatim. We thus insist on being able to learn, for example, whether the trial court was guilty of overreaching or other misconduct, or whether there was an innocent judgment error that prejudiced the fairness of the proceeding. Moreover, during the actual entry of a guilty plea, a verbatim transcript is required to be made and preserved, in order that any subsequent challenge to the plea on grounds of voluntariness can be fully inspected.

At no other stage of a criminal case does a judge have absolute discretion to decide whether to conduct a certain type of hearing. For example, a judge cannot decide that in a particular felony case or class of felonies there should not be a preliminary hearing or that the defendant should not be accorded a trial; nor does a judge have discretion to refuse to sentence a defendant who has entered a guilty plea. Although there surely are sound reasons for according judges broad discretion in a variety of situations, particularly in the conduct of trials and in ruling on objections to evidence, only in the area of plea
tary and capricious exercise of discretion. Absent such an extreme policy, vast discretion in the trial judge is accepted without the slightest question.

See text accompanying notes 37-40 supra.

See text accompanying notes 56-62 supra.

See text accompanying notes 62-63 supra.


Five reasons have been suggested for granting a trial judge unreviewable discretion: (1) to prevent appellate courts from becoming overburdened; (2) to maintain the morale of trial judges by removing from review all of their decisions; (3) to provide finality; (4) because of the impracticability of formulating rules to govern the exercise of discretion on some matters; and (5) because the trial judge is sometimes in a superior position to observe and understand the matters on which he or she rules. Rosenberg, Judicial Discretion of the Trial Court, Viewed from Above, 22 SYRACUSE L. REV. 635 (1971). The first three reasons can be criticized as failing to provide a basis for determining which decisions should be reviewable. Id. at 660-62. None of the reasons, moreover, would seem to justify total judicial discretion in plea bargaining. The trial judge's decision on the acceptability of a plea arrangement is nonappealable in North Carolina. N.C. GEN. STAT. § 15A-1023(b) (1978); see note 18 supra (text of statute). The subject of discretion in various contexts is explored in K. DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY (1969); K. DAVIS, DISCRETIONARY JUSTICE IN EUROPE AND AMERICA (1976); Davis, Discretionary Justice, 23 J. LEGAL EDUC. 56 (1971).
negotiations has a system developed in which the judge has total discretion to decide whether and how he will even deign to participate in the proceedings.

The broad discretion available to the trial judge in North Carolina is similar to that accorded to judges in other states. Except for expressly permitting superior court judges to participate in actual plea discussions, the North Carolina law closely resembles statutes and rules in other jurisdictions.\(^{99}\) Most importantly, the absolute discretion of the trial court to decide whether to permit disclosure of tentative plea agreements prior to the time scheduled for the defendant to plea is a common feature of these statutes.

The notion that the trial court should have complete discretion to define its participation in plea negotiations can be traced to the first edition of ABA Pleas of Guilty standards approved in 1968.\(^{100}\) These standards were the first to propose detailed procedures for plea negotiations, including a limited degree of judicial participation:

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 \(\text{may permit the disclosure to him of the tentative agreement}\) and the reasons therefore in advance of the time for tender of the plea. He \(\text{may}\) 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.\(^{101}\)

These ABA standards, however, did not seek to justify the trial court’s total discretion to decide whether to permit the parties to apprise the judge of a tentative plea agreement or whether the judge should indicate approval of the proposed disposition. Indeed, the commentary to the standard invited every judge to make up his or her own mind and act accordingly:

It must be emphasized that the standard does not compel the trial judge to receive advance notice of the plea agreement and the reasons therefor or to make any advance indication of the probable disposition. Many trial judges may appropriately conclude that the preferable practice is to receive advance notice concerning the plea agreement and to make an advance commitment only when necessary, i.e., in the case of a tendered plea to a lesser offense. The standard merely recognizes the propriety of limited advance consultation with the trial judge, with his permission and upon request from the parties, concerning the probable disposition upon entry of a plea of guilty or nolo contendere. The thrust of this standard, then, is that it is not improper for the judge to give some greater degree of certainty to the plea agreement process if, in his judgment, that can be accomplished in a manner which is consistent with the effective operation

---

99. See, e.g., statutes cited at note 5 supra.
100. ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty (1968).
101. Id. Standard 3.3(b) (emphasis added).
Subsequent to publication of these 1968 ABA standards, other national groups formulated guidelines authorizing trial courts to consider, in the exercise of their complete discretion, plea agreements negotiated by the parties. Provisions similar to those prepared by the ABA are included in the 1973 standards of the National Advisory Commission on Criminal Justice Standards and Goals,103 the Uniform Rules of Criminal Procedure approved by the Commissioners on Uniform State Laws in 1974,104 and the 1975 standards of the American Law Institute's Model Code of Pre-Arraignment Procedure.105 Remarkably, however, in not a single one of these documents is an effort made to justify the unbridled discretion given to the judiciary in the plea negotiation area.

There are, to be sure, serious problems with a system that permits the trial court to determine, in its absolute discretion, whether and how to participate in plea discussions or whether even to consider plea agreements negotiated between the parties. Most importantly, there is the high probability that similarly situated defendants will be dealt with differently. When some defense counsel are permitted to discuss a plea with the judge or to submit a proposed settlement to the court for its consideration, inevitably some defendants will be benefited by the discussions and the advocacy of their attorneys; other defendants, represented by attorneys denied the same opportunities, may be convicted or plead guilty to greater charges and suffer more severe punishments.

To illustrate the possibilities that may occur under North Carolina law and practices, consider the hypothetical cases of two defendants with identical backgrounds charged with armed robbery. The prosecutor offers both defendants the opportunity to plead to the lesser offense of common-law robbery, and, in an effort to treat both defendants identically, offers to recommend to the judge a sentence of two years for each defendant. One defendant's case is before Judge X, who wishes to be advised of and discusses plea agreements negotiated between the parties, and who agrees to and later imposes the prosecutor's recommended sentence of two years. The second defendant's case is before Judge Y, who is opposed to judicial participation in plea negotiations, who will not permit disclosure to the court of plea agreements, and who will never indicate, prior to entry of a guilty plea, the sentence that will be imposed. Consequently, the second defendant, unable even to submit the negotiated agreement to the court for its consideration, let alone learn of the court's reaction to a recommended sentence of two years, proceeds to a trial on the charge of armed robbery. The trial results in conviction, and the court, consistent with its policy of sentencing those who go to trial more harshly than defendants who plead guilty, imposes a sentence of ten years. Ironically, perhaps

102. Id. Commentary, at 76.
103. NAC COURTS, supra note 2, Standard 3.2 (judge must give his reasons for rejecting a plea agreement).
104. URCP, supra note 7, Rule 443(b).
105. ALI CODE, supra note 7, § 350.3(5).
the second judge would have found the negotiated plea agreement satisfactory if disclosure of its content had been permitted, and if the attorneys had been allowed to discuss the case and defendant's background in the court's presence. Because, however, the court refused to be a part of the negotiation process, the prosecution and defense were denied the opportunity to persuade the court of the wisdom of the proposed sentence recommendation.

V. REFORM: THE AMERICAN BAR ASSOCIATION STANDARDS AND SOME SUGGESTED AMENDMENTS

In view of my complaints concerning North Carolina's plea negotiation statute and plea bargaining practices, it will come as no surprise to learn that I believe procedural changes are necessary. To explain my proposals, it is useful first to examine several of the recommendations contained in the second edition of the ABA's Pleas of Guilty standards approved in 1979. Although these standards are by no means problem-free, their adoption in North Carolina and in other states would be exceedingly helpful.

These standards differ in several major respects from those approved by the ABA in its first edition issued in 1968 and also from standards that have been recommended by other groups. The ABA and other national organizations, as noted earlier, have sanctioned for a long while judicial participation to the extent of permitting sentence agreements negotiated between the parties to be submitted to the trial court for approval or rejection. The revised ABA standards continue this option, but unlike its first edition of standards, the ABA now specifically authorizes judicial participation in plea negotiations "[w]hen the parties are unable to reach a plea agreement [among themselves]" and both the prosecution and defense request a meeting with the judge.

There are significant differences, however, between the judicial participation in plea negotiations authorized under the North Carolina statute and that permitted pursuant to the new ABA standards. As we have seen, the statute in North Carolina simply states that the trial judge "may participate in the [plea] discussions." There are no standards to guide the court in deciding when and in what manner to participate, nor is there any requirement of a verbatim record of the court's participation. In contrast, the ABA's new standards require that all plea discussions at which the trial judge is present "be recorded

106. ABA Pleas of Guilty, supra note 7.

107. ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty, Standard 3.3(b) (1968); NAC COURTS, supra note 2, Standards 3.2, 3.7; URCP, supra note 7, Rule 443(b); ALI Code, supra note 7, §§ 350.3(5), 350.5(1).

108. ABA Pleas of Guilty, supra note 7, Standard 14-3.3(c).


verbatim and preserved."'' In addition, plea discussions in which the judge participates are required to "be held in open court unless good cause is present for the proceedings to be held in chambers." Finally, and perhaps most importantly, the judge is admonished to "serve as a moderator in listening to . . . presentations concerning appropriate charge or sentence concessions," while "never through word or demeanor . . . communicat[ing] to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered." If the parties neither advise the court that a plea agreement has been negotiated nor request to meet with the court, the trial judge is authorized to "inquire of the parties whether disposition without trial has been explored and may allow an adjournment to enable plea discussions to occur."

If enacted in North Carolina, these ABA recommendations would significantly improve plea negotiation practices. A transcript of all plea discussions in which the trial court participated would make it possible, as noted in the commentary to the revised ABA standards, "to . . . review . . . allegations of overreaching by the judge." Superior court judges, moreover, would be provided explicit guidance governing their participation in the plea bargaining process. Admonished about how to conduct themselves during plea negotiations, the risk that their actions might undermine the voluntariness of guilty pleas would be reduced. Adoption of the ABA standards also would define the role that judges may play just prior to the beginning of a trial. A judge could inquire of the parties whether there had been plea discussions and whether an adjournment for discussions would be useful, thus eliminating the more extensive—and sometimes coercive—judicial involvement that presently occurs.

There are, however, two major shortcomings in the ABA's revised standards. The most significant shortcoming is the absolute discretion the judge is permitted to exercise in deciding whether to participate in plea discussions and whether to allow an agreement negotiated between the parties to be submitted to the court. In this respect, the revised ABA standards are no different and no better than the first edition approved in 1968. Pursuant to the first edition, the

111. ABA Pleas of Guilty, supra note 7, Standard 14-3.3(f).
112. Id. The Commentary provides:
   Normally, therefore, a judge should not allow plea discussions in which he or she is involved to take place in chambers. The judge is the ultimate dispenser of justice, and justice should be publicly done. In rare situations where full public disclosure would not be in the interests of justice, for example, where it would jeopardize on-going police investigations or where it would force disclosure of an informant's identity, the judge may permit discussions to take place in chambers. These same types of situations would also be sufficient grounds for the judge to order the transcript of the plea discussions to be sealed. . . .
Id. Commentary, at 14.85.
113. Id. Standard 14-3.3(c).
114. Id. Standard 14-3.3(f).
115. Id. Standard 14-3.3(e).
116. Id. Commentary at 14.85.
117. See text accompanying notes 56-83 supra.
trial court had complete discretion to decide whether to consider an agreement negotiated between the parties;\textsuperscript{118} under the revised ABA standards, the trial court has the same discretion, as well as complete discretion to decide whether to participate in plea discussions when requested to do so by the parties.\textsuperscript{119}

Absolute discretion also is accorded the trial court in another important way under the revised ABA standards. If the trial court permits a settlement negotiated between the parties to be submitted for its consideration, the court, in the exercise of its absolute discretion, may then advise the defendant whether the proposed sentence concessions are satisfactory; alternatively, the trial court may, if it wishes, defer decision on whether to accept or reject the sentence concessions until after a preplea or presentence report is prepared.\textsuperscript{120}

As we have seen, if the defendant does not receive the sentence contained in the plea agreement, withdrawal of the plea is not permitted unless the trial court previously concurred either "tentatively or fully" in the contemplated sentence, or expressly conditioned the guilty plea on the court's acceptance of the agreement.\textsuperscript{121}

Neither the black letter nor the commentary to the revised ABA standards provides any justification for according the trial court absolute discretion in deciding whether (1) to consider a settlement negotiated between the parties; (2) to participate in plea discussions upon request of the parties; and (3) to advise a defendant in advance of a guilty plea or sentence whether the sen-

\textsuperscript{118} See text accompanying notes 100-102 supra.

\textsuperscript{119} When the parties are unable to reach a plea agreement, if the defendant's counsel and prosecutor agree, they may request to meet with the judge in order to discuss a plea agreement. \textit{If the judge agrees to meet with the parties}, the judge shall serve as a moderator in listening to their respective presentations concerning appropriate charge or sentence concessions.

ABA PLEAS OF GUILTY, \textit{supra} note 7, Standard 14-3.3(c) (emphasis added). The Commentary further discusses Standard 14-3.3(c):

Paragraph (c) continues where the first edition left off by providing regulations for the judge's conduct when presented with a plea agreement submitted by the parties. Specifically, this provision anticipates two types of situations arising where the parties may seek to confer with the judge. The first is where the parties have arrived at a plea agreement and wish to meet with the judge to determine the judge's reaction. This is similar to the procedure outlined in the first edition in which the parties could present the judge with a plea agreement to determine whether it was acceptable. The parties also may request a conference with the judge when they cannot arrive at an agreement but want to ascertain whether the judge is willing to indicate the charge and sentence concessions that would be acceptable.

\textit{Id.} Commentary, at 14.83.

\textsuperscript{120} \textit{Id.} Standard 14-3.3(b):

If a plea agreement has been reached by the parties which contemplates the granting of charge or sentence concessions by the judge, the judge should:

(i) order the preparation of a preplea or presentence report, when needed for determining the appropriate disposition;

(ii) give the agreement due consideration, but notwithstanding its existence reach an independent decision on whether to grant charge or sentence concessions; and

(iii) in every case advise the defendant whether the judge accepts or rejects the contemplated charge or sentence concessions or whether a decision on acceptance will be deferred until after the plea is entered and/or a preplea or presentence report is received.

\textit{Id.} Commentary, at 14.83.

\textsuperscript{121} \textit{Id.} Standard 14-3.3(g). See note 51 and accompanying text supra.
tence negotiated between the parties is acceptable. The arguments in the commentary in favor of authorizing the judge to decide whether to participate in plea discussions and whether to reveal the defendant’s sentence prior to a plea or sentence, are, in reality, arguments in favor of always requiring that the judge engage in plea discussions when requested to do so, and of always disclosing the defendant’s sentence before entry of a plea or the imposition of sentence:

Several advantages are afforded by these new procedures. First, the defendant may be able to learn whether a satisfactory plea agreement can be negotiated. Although a judge is not required to meet with the parties or reveal the charge and sentence concessions that would be acceptable, a judge may do so if he or she wishes, and thus defendants may be able to acquire the information they most want to have. As one writer has argued, ‘Defendants contemplating a guilty plea want to know, need to know, and . . . are entitled to know the sentence or the upper limits of the sentence they face in those instances where the judge can fairly predict his disposition at the time of the plea.’ The procedure . . . makes it more likely that the defendant will be able to learn of the sentence intended by the court.122

The second major difficulty with the revised ABA standards is the requirement that, as a precondition for judicial participation in plea discussions, both prosecution and defense must request to meet with the trial court.123 Surely it makes sense to forbid the trial court from injecting itself into plea negotiations when the defendant has no desire nor inclination to plead guilty. Such action by the judge might very well coerce a reluctant defendant into pleading guilty and thus threaten the voluntariness of any ensuing guilty plan.124 But when the defendant wants to discuss with the judge the sentence

---

122. Id. Commentary, at 14.83 (quoting Uviller, Pleading Guilty: A Critique of Four Models, 41 LAW & CONTEMP. PROB. 102, 117 (1977)).

123. See ABA PLEAS OF GUILTY, supra note 7, Standard 14-3.3(c); note 102 supra; text accompanying notes 108-109 supra.

124. Alschuler notes:

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

Alschuler, Judge’s Role, supra note 2, at 1123 (footnotes omitted).

The decisions whether to initiate the bargaining process should be left to the defendant and his attorney, and the trial judge should be forbidden from participating in or influencing this decision. To enforce this limitation of the trial judge’s role, a guilty plea induced by negotiations that the judge had initiated should be subject to later attack. Id. at 1146 (footnotes omitted). See note 72 supra. Bond discusses this issue in similar terms within the context of the North Carolina plea bargaining statute in Bond, supra note 16, at 826-28.

But see United States ex rel. McGrath v. LaVallee, 319 F.2d 308 (2d Cir. 1963) (plea found voluntary despite judicial participation and despite defendant’s unwillingness to plead guilty until case was called for trial and defendant spoke to judge and defense counsel in judge’s chambers); Alschuler, Judge’s Role, supra note 2, at 1103, n.140 (citing cases that refused to set aside pleas induced by judicial participation in plea bargaining).

that will be imposed, why should consent of the prosecutor to meet with the judge be a precondition? As the power to sentence is solely in the judge,\textsuperscript{125} why should not the defense be afforded the opportunity to persuade the judge of the sentence that is believed to be appropriate?\textsuperscript{126} The difficulty created for the defense by a rule that requires prosecution approval before a plea discussion with the judge can be held may be illustrated by considering a hypothetical case in which the prosecution and defense disagree concerning the length of the defendant's sentence. Assume that the prosecutor is prepared to recommend no less than a five year sentence for the defendant; the defense believes that at most a sentence of two to three years is justified. Under the revised ABA standards, the defense is precluded from discussing the impasse with the judge unless the prosecutor consents. Assuming that the prosecutor rejects a meeting and the defendant still wishes to plead guilty, the defense can either accept the prosecutor's five year recommended sentence or plead guilty without a plea argument. Thus, the revised ABA standards give the prosecutor substantial and unwarranted control over the sentencing function.\textsuperscript{127} Significantly, the requirement that both prosecution and defense must agree to meet with the court is not explained in either the black letter or commentary of the ABA standards. Ironically, under the current North Carolina statute, permission of the prosecutor is not a precondition for the defense to meet with the judge.\textsuperscript{128} Unfortunately, none of the important protections urged by the ABA to safeguard the plea negotiation process are available either.

In view of the various suggestions contained in this Article, it may be useful at this point to summarize the manner in which I believe plea negotiations should take place. First, the prosecution and defense should continue to

\textsuperscript{125} See note 21 and accompanying text supra.

\textsuperscript{126} Under the proposal made in Note, supra note 57, at 300-03 and endorsed by Alschuler, \textit{Judge's Role}, supra note 2, at 1124-26, plea negotiations would be initiated by defendant or defense counsel, thereby limiting the control of the prosecutor. For discussion of the Yale proposal, see note 91 supra.

\textsuperscript{127} The prosecutor inevitably does exercise some control over sentencing:

The prosecutor currently exercises, as he has for some time, inadvertent control over sentencing by virtue of his discretionary power. First of all, his decision whether or not to prosecute has an obvious impact on sentencing. . . . Secondly, where the facts fit more than one statutorily defined offense, the prosecutor can, by virtue of his discretionary power determine the section under which the charge will be brought. If his decision involves the choice of a felony vs. a misdemeanor charge, its effects may be highly influential. For example, the decision "will often determine whether the defendant, if convicted, will be eligible for probation. In addition, the place of confinement—state prison or county jail—may be determined by the prosecutor's decision. Finally, the maximum-minimum limitation of the indeterminate sentence will often vary according to the charge selected."

Perhaps the prosecutor's greatest impact on sentencing lies in the area of plea negotiation. . . .

\textsuperscript{128} See N.C. GEN. STAT. § 15A-1021(a) (1978); note 18 supra (text of statute).
be able to negotiate among themselves respecting the dismissal and reduction of charges, and the length of the defendant's sentence. 

Regardless of whether an agreement were reached, the defense could request a conference with the trial court to discuss a disposition of the case. The judge would be required to hold and preside at the conference, and the prosecutor would be obliged to participate. If the parties had already reached an agreement on sentence and the charges to which the defendant was willing to plead, the conference would focus on the justification for the proposed disposition. If no agreement had been reached, both sides would come to the conference prepared to justify the charge or charges to which the defendant should plead, and the sentence deemed to be most appropriate. The principal subjects discussed at the conference would be the conduct with which the defendant was charged and the defendant's past record, employment, and social history. All such discussions would be recorded verbatim, and the demeanor of the judge should be impassive. Although the court would neither encourage nor discourage a guilty plea, the court could, in the exercise of its discretion, "require or allow any person, including the defendant, the alleged victim, and others, to appear or to testify," as recommended by the revised ABA standards. In view of the importance of the conference to the defendant's future, the defendant would have a right to attend and to speak. The trial

129. This is a major point of difference between my proposal and the Yale, see Note, supra note 57, at 300-03, and Alschuler, see Alschuler, Judge's Role, supra note 2, at 1146-49, proposals. The Yale proposal would strongly discourage negotiations between defense and prosecution prior to any conference with the trial judge, whereas Alschuler proposes that such negotiations be prohibited. In my judgment, it is unrealistic to expect a ban on plea negotiating between prosecution and defense to be successful. In addition, there undoubtedly are cases in which such negotiations can be concluded to the mutual advantage of both sides, and with the additional benefit of conserving judicial time. Enker, supra note 91, at 117-18, and Miller, supra note 1, at ch. IV-26 also would allow a bargain to be struck without a judicial conference.

130. I agree with the ABA recommendation, ABA PLEAS OF GUILTY, supra note 7, Standard 14-3.3(f), that normally the plea conference should be held in open court. For the text of the ABA standard and its rationale, see note 112 and accompanying text supra.

131. This is consistent with all authorities cited in note 129 supra.

132. This follows the Yale proposal, Note, supra note 57, at 301, and Alschuler's proposal, Alschuler, Judge's Role, supra note 2, at 1148. Enker suggests that a record should be made of the conference if the parties previously had been unsuccessful in arriving at an agreement but would be unnecessary if the judge were merely reviewing an agreement already reached. Enker, supra note 91, at 118.

133. ABA PLEAS OF GUILTY, supra note 7, Standard 14-3.3(d). The possibility of such testimony also is envisioned by the Yale proposal, Note, supra note 57, at 301, and by Alschuler, Alschuler, Judge's Role, supra note 2, at 1124.

134. Alschuler argues that the defendant must be permitted to attend the conference, citing Snyder v. Massachusetts, 271 U.S. 97, 106 (1934) for the principle that the defendant's sixth amendment right to confront witnesses extends to other stages of his trial. Alschuler, Judge's Role, supra note 2, at 1134-36 & n.244. The policy arguments advanced by Alschuler are particularly persuasive: A defendant who learns the outcome of a plea bargaining session second-hand can never be entirely certain that his attorney adequately represented him during the negotiations. Indeed, the defendant may sometimes suspect his attorney of deliberate betrayal, particularly when the attorney was appointed by the court rather than selected by the defendant. The defendant may also suspect that the prosecutor or trial judge who negotiated the bargain was harsh, corrupt, incompetent, or insensitive; he may suspect that racism or other forms of prejudice infected the proceedings; he may, in short, suspect that his interests were inadequately considered for a variety of reasons or—what may be
court would be required to disclose, preferably after reviewing a preplea report prepared with the consent of the defendant, the sentence that would be

worse—that his lawyer secured a favorable bargain improperly. The presence of defendants during plea bargaining sessions could help to allay their suspicions of laziness, incompetence or impropriety when these suspicions are in fact unfounded. Too often, moreover, secret bargaining sessions do facilitate the abuses that defendants fear, and the presence of defendants during the plea bargaining process might therefore affect both the tone and the substance of this process in a desirable way. Specifically, the presence of defendants might encourage more vigorous advocacy on the part of defense attorneys and discourage the deprecating banter, the invocation of improper considerations, and the granting of improper favors that may sometimes occur between friends.

Although defendants rarely attend plea bargaining sessions today, only two arguments have been advanced in support of their exclusion: first, that they would not understand the proceedings, and second, that their presence might impair the frank interchange between prosecutors and defense attorneys that characterizes plea bargaining today, an interchange that usually works to the defendant's advantage. Phrased less generously, the first objection is apparently that defendants would see our criminal justice system as it is; and the second, that it is easier to disparage defendants and to violate their confidences behind their backs than to do so to their faces. Depending on one's viewpoint, these defects might reasonably qualify as advantages. Excluding defendants from plea bargaining sessions plainly cannot lead them to understand these sessions better, and to view the danger that a defendant might “misinterpret” the bargaining process as a justification for keeping him ignorant of it seems the height of paternalism.

Id. at 1135-36 (footnotes omitted).

In contrast, ABA Pleas of Guilt, supra note 7, Standard 14-3.3(d) does not recognize an absolute right of the defendant to attend the conference: “[w]henever the judge is presented with a plea agreement or consents to a conference in order to listen to the parties concerning charge or sentence concessions, the court may require or allow any person, including the defendant, the alleged victim, and others, to appear or to testify.” The Yale proposal, Note, supra note 57, Enker, supra note 91, and Miller, supra note 1, do not address specifically the defendant's right to be present at the conference.

135. The commentary to the ABA Standards stresses the importance of the preplea report:

There is much to be said for a court deferring acceptance of the plea and its responses to a plea agreement until preparation of a preplea report. Postponing acceptance until all relevant information is available assures the most intelligent exercise of the court's sentencing discretion. Review of the preplea report also can enhance the quality of the judge's decision on whether to approve a plea to a lesser included offense in those jurisdictions where judicial consent is required. Since acceptance of the plea may therefore bar prosecution for the greater offense, such decisions must be carefully made. Of course, preparation of a preplea report should not be undertaken without the defendant's consent.

ABA Pleas of Guilt, supra note 7, Standard 14-3.3(b), Commentary, at 14.81.

The defendant's consent for preparation of the preplea report is covered in ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures (2d ed. 1980) [hereinafter cited as ABA Sentencing Alternatives]:


(a) Except as authorized in paragraph (b), the presentence investigation should not be initiated until there has been an adjudication of guilt.

(b) It is appropriate to commence the presentence investigation prior to an adjudication of guilt only if:

(i) The defendant, with the advice of counsel if the defendant so desires, has consented to such action; and

(ii) adequate precautions are taken to assure that nothing disclosed by the presentence investigation comes to the attention of the prosecution, the court, or the jury prior to an adjudication of guilt. The court should be authorized, however, to examine the report prior to the entry of a plea on request of the defense and the prosecution.

Accord, Fed. R. Crim. P. 32(e)(1): “The [presentence] report shall not be submitted to the court or its contents disclosed to anyone unless the defendant has pleaded guilty or nolo contendere or has been found guilty, except that a judge may, with the written consent of the defendant, inspect a
imposed if the defendant pleaded guilty, and the sentence the defendant could expect to receive if tried and convicted. Thus, the defendant would know in advance of a plea the sentence to be received, and the extent of any benefit to be derived from pleading guilty. Finally, assuming no conference were held, the judge would be limited to inquiring whether it would be useful to have an adjournment for the purpose of discussing a disposition by plea.

VI. CONCLUSION

In recent years, change nationwide in plea bargaining procedures has been rapid. Although plea bargaining has been a part of the criminal justice system for a long time, it is just within the past ten to fifteen years that it has become highly visible, so that now plea agreements are routinely announced in court and made a part of the record. It is also within this time that the United States Supreme Court has acknowledged that plea bargaining exists, and has pronounced the practice to be both constitutional and healthy.

Procedures for the control of plea bargaining are still in the developmental stage, and calls for reform continue to be voiced, as evidenced by this and other articles, and by the ABA's reviewed Pleas of Guilty standards. Although it is undoubtedly perilous to predict the future, my guess is that legislative changes for the control of plea bargaining will continue in the direction proposed by the ABA—on-the-record, dispassionate judicial participation in plea negotiations. There is too much evidence that judges presently are involved in plea negotiations to expect that their participation will be ended, and it is contrary to the trend toward greater accountability to think that the ABA's call for recordation will be ignored. Perhaps the amendments to the ABA's revised standards suggested in this Article also will be found persuasive.

It is not entirely clear what effect the movement toward determinate sentencing laws will have on plea bargaining. Theoretically, such laws should

---

136. This recommendation is found in ABA PLEAS OF GUILTY, supra note 7, Standard 14-3.3(e). See text accompanying note 115 supra.


138. See, e.g., Alschuler, Judge's Role, supra note 2, at 1061-99, 1149, 1151-52. But see NAC COURTS, supra note 2, Standards 3.1, 3.7.

139. One possibility is that the move to determinate sentencing will force a transfer of sentenc-
have an impact because they narrow the sentencing discretion available to the trial judge, and thus the plea negotiating room of the parties. If the situation in North Carolina is typical, however, there may be considerable difference between theory and reality. The North Carolina legislature has approved a determinate sentencing law scheduled to take effect on July 1, 1981. The statute specifically provides, however, that the prosecution and defense may continue to negotiate concerning whether "a prison term different from the presumptive prison term applicable to the defendant" should be imposed, and the court is authorized to consider as a mitigating factor in support of giving less than the presumptive sentence that the defendant pleaded guilty as part of a negotiated plea. Given the pervasiveness of plea bargaining in

ing discretion from the judiciary to the prosecutor, thus enhancing the prosecutor's bargaining position. See Alschuler, supra note 90, at 566. Alschuler suggests that when a system of fixed or presumptive sentencing is instituted, plea bargaining should be altered by replacing the prosecutor's sentencing power with a legislative statement of the exact reward to be given for a guilty plea. Id. at 575. The purpose of the several varieties of determinate sentencing proposals is to assure that similarly situated defendants are treated similarly and that sentencing disparities are reduced. It is unclear, however, that these results necessarily will obtain, as a prosecutor, in arriving at plea bargains, generally is more interested in "securing a conviction than [in] achieving equity among similar situated defendants." ABA SENTENCING ALTERNATIVES, supra note 135, at 18-28.


(a) . . . If the judge imposes a prison term . . . the judge must impose the presumptive prison term provided by subsection (f) of this section [for class C through Class J felonies] unless he decides to impose a longer or shorter term after consideration of aggravating and mitigating factors. In imposing a prison term on a person convicted of a felony, the sentencing judge may consider any aggravating and mitigating factors that are reasonably related to the purposes of sentencing as provided by G.S. 15A-1340.3, and must consider each of the following aggravating and mitigating factors.

[Statute then sets forth factors concerning the nature of the offense, the defendant's role in the offense, defendant's prior record, defendant's mental or physical condition, whether any restitution was made, and the existence of a plea arrangement.]

(b) If the judge imposes a prison term for a felony that differs from the presumptive term provided by subsection (f) . . . the judge must enter on the record findings of fact regarding all aggravating and mitigating factors on which he bases his sentence.

N.C. GEN. STAT. §§15A-1340.4(a), (b) (Supp. 1979).

142. Fair Sentencing Act, ch. 760, § 3, 1979 N.C. Sess. Laws, 1st Sess. 850. This amendment to the state's plea negotiation statute, N.C. GEN. STAT. § 15A-1021(a) (1979), was to become effective on July 1, 1980. Law of June 25, 1980, ch. 1316, § 47, 1979 N.C. Sess. Laws, 2d Sess. 252 changed the effective date to March 1, 1981, the date the State's Fair Sentencing Act was scheduled to take effect. See generally Clarke, An Update on the Fair Sentencing Act, in ADMINISTRATION OF JUSTICE MEMORANDA, INSTITUTE OF GOVERNMENT, UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL (Nov. 1980). The amendment will change § 15A-1021(a) to read:

(a) In superior court, the prosecution and the defense may discuss the possibility that, upon the defendant's entry of a plea of guilty or no contest to one or more offenses, the prosecutor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence, including a prison term different from the presumptive prison term applicable to the defendant, if convicted under G.S. 15A-1340.4(f). If the defendant is represented by counsel in the discussion the defendant need not be present. The trial judge may participate in the discussions.

(Amended portion in italics). See note 18 supra (text of unamended version of statute).

143. N.C. GEN. STAT. §§ 15A-1340.4(a)(2)(j) (Supp. 1979). Id. -1340.4(b) requires that the judge record all aggravating and mitigating factors that influenced his decision. See note 141 supra. A proposal has been made to amend § 15A-1340.4(b) to provide that "a judge need not make any findings regarding aggravating and mitigating factors if he imposes a prison term pursuant to a plea arrangement under Article 58 of the Chapter, regardless of the length of the term, or
North Carolina, and this specific recognition in the state’s determinate sentencing law, it seems certain that plea bargaining practices will survive the new legislation substantially intact.144 This means, of course, that reform of the state’s plea negotiation statute should become a major priority of the state’s Criminal Code Commission and of the legislature.

if he imposes the presumptive term.” S. 1066, N.C. 1979 Session, 2d Sess. § 35 (1980). If adopted, this proposal seemingly would have the effect of exempting plea arrangements approved by the judge from the terms of the Fair Sentencing Act. The judge would be free to ignore presumptive sentences without the requirement of having to justify departure from the presumptive term.

144. In fact, plea bargaining may emerge even stronger. See note 140 supra. Alschuler forcefully argues this position. See Alschuler, supra note 90, at 563-76. Moreover, if the proposed amendment to North Carolina’s Fair Sentencing Act, see note 143 supra, is approved, the determinate sentencing provisions apparently will be bypassed by the plea bargaining process.
Hon._________
Superior Court Judge

Dear Judge________:  

I am a professor at the University of North Carolina School of Law and am presently engaged in a study of plea bargaining practices in the North Carolina Superior Courts. Upon completion of my research, I plan to prepare an article which describes plea bargaining procedures in felony cases. In all likelihood, the article also will contain suggestions for re-drafting the North Carolina law relating to plea bargaining.

A major focus of my research is the role which the trial judge plays in the plea bargaining process. As you know, the North Carolina statutes were amended in 1975 and now specifically authorize the trial judge to participate in plea negotiations. Last summer, in an effort to acquire first-hand information on plea bargaining practices under the new law, I spent considerable time in one judicial district observing court proceedings and interviewing judges, prosecutors and defense attorneys. Based upon my observations and interviews, I have prepared the enclosed questionnaire which I am sending to all Superior Court judges. A primary purpose of the questionnaire is to determine whether my findings of last summer are an accurate reflection of practices throughout the state.

I do hope that you will take the few minutes necessary to complete the questionnaire and that you will return it to me as soon as possible in the enclosed, self-addressed stamped envelope. If you are uncertain about any aspect of the questionnaire, please do not hesitate to call me collect (area code 919, 933-5106). I assure you that I will not use names of judges in my article; furthermore, responses to the questionnaire will in all other respects be kept confidential.

Your cooperation in completing the questionnaire is greatly appreciated.

Sincerely,

Norman Lefstein

Enclosure
STUDY OF PLEA BARGAINING IN SUPERIOR COURT
FELONY CASES

Explanatory note:

Several of the questions concern subjects for which precise statistical data is not available. Accordingly, you are asked to make percentage estimates and it is hoped that you will not be hesitant to do so. Your estimates will not be reported as anything more than what they are, i.e., guesses which necessarily involve some potential for error. As the time frame for your answers, please use the last two years (July 1, 1975 - July 1, 1977). With respect to all of the questions, if you need additional room in which to write, please use the lines provided at the end of the questionnaire.

1. In what percentage of the cases in which guilty pleas are entered are you presented with agreements relating to the defendant's sentence, i.e., the defense attorney and the prosecutor have agreed on a sentence which the prosecutor "recommends" that the court impose or there is a so-called "agreed upon sentence," where the prosecutor and the defense attorney have agreed on the sentence which the defendant should receive?

<table>
<thead>
<tr>
<th>Percentage Range</th>
<th>Answer</th>
</tr>
</thead>
<tbody>
<tr>
<td>0%</td>
<td></td>
</tr>
<tr>
<td>1%-10%</td>
<td></td>
</tr>
<tr>
<td>11%-20%</td>
<td></td>
</tr>
<tr>
<td>21%-30%</td>
<td></td>
</tr>
<tr>
<td>31%-40%</td>
<td></td>
</tr>
<tr>
<td>41%-50%</td>
<td></td>
</tr>
<tr>
<td>51%-60%</td>
<td></td>
</tr>
<tr>
<td>61%-70%</td>
<td></td>
</tr>
<tr>
<td>71%-80%</td>
<td></td>
</tr>
<tr>
<td>81%-90%</td>
<td></td>
</tr>
<tr>
<td>91%-99%</td>
<td></td>
</tr>
<tr>
<td>100%</td>
<td></td>
</tr>
</tbody>
</table>

Please feel free to use the percentage ranges shown above in responding to question two.

2. If you are sometimes presented with plea agreements relating to the defendant's sentence:

(a) In what percentage of these plea agreement cases are you first advised of the agreement in chambers?* ______ %

(b) In what percentage of these plea agreement cases are you first advised of the agreement in the courtroom? ______ %

* Throughout the questionnaire, "chambers" is intended to include any area outside of the courtroom.
(b) In what percentage of these plea agreement cases do you accept, without modification, the proposed sentence? ___%

If you do sometimes urge modifications in the sentence, please briefly indicate the nature or types of modifications you commonly suggest?

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

(c) If there are discussions in chambers concerning proposed sentences, in what percentage of the cases are the defendants present and able to listen to everything that is said pertaining to the case? ______%  

If there are discussions in chambers concerning proposed sentences, in what percentage of the cases does a court reporter record everything that is said pertaining to the case? ______%  

(d) If there are discussions in the courtroom at the bench concerning proposed sentences, in what percentage of the cases are the defendants present and able to listen to everything that is said pertaining to the case? ______%  

If there are discussions in the courtroom at the bench concerning proposed sentences, in what percentage of the cases does a court reporter record everything that is said pertaining to the case? ______%  

If there are discussions in open court concerning proposed sentences, in what percentage of the cases does a court reporter record everything that is said pertaining to the case? ______%  

3. Question one refers to “recommended sentences” and “agreed upon sentences.” Do you believe there is a difference in plea bargains where the solicitor “recommends” a sentence as opposed to plea bargains where the defense attorney and solicitor state that the sentence is “agreed upon” or that the plea is “conditioned upon” the defendant receiving the proposed sentence? ___Yes ___No  

Please briefly explain why you believe the two types of plea agreements are the same or your understanding as to how they differ:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

4. In cases where you believe that settlement without trial is desirable, do
you initiate and/or participate in plea discussions shortly before or during the trial?

Always ___ Almost Always ___ Sometimes ___ Rarely ___ Never

If you do initiate and/or participate in plea discussions shortly before or during the trial:

(a) Are the plea discussions recorded by a court reporter?

Always ___ Almost Always ___ Sometimes ___ Rarely ___ Never

(b) Is the defendant present and able to listen to everything that is said pertaining to the plea discussions?

Always ___ Almost Always ___ Sometimes ___ Rarely ___ Never

(c) How often do such plea discussions result in guilty pleas?

Always ___ Almost Always ___ Sometimes ___ Rarely ___ Never

5. Do you favor the North Carolina Law [§ 15A-1021(a)] which authorizes judicial participation in plea discussions?

Yes ___ Not Certain ___ No

As a matter of practice, do you initiate and/or participate in plea discussions with defense counsel and prosecutors concerning proposed sentences for defendants?

Always ___ Almost Always ___ Sometimes ___ Rarely ___ Never

6. The American Bar Association Standards Relating to Guilty Pleas, § 1.8, state that it is “proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty . . . when the interest of the public in the effective administration of criminal justice would thereby be served.” Do you sentence defendants who plead guilty less harshly than you do defendants who go to trial?

Always ___ Almost Always ___ Sometimes ___ Rarely ___ Never

7. In cases in which defendants enter guilty pleas:

(a) Do you take testimony from one or more witnesses concerning the crime to which the defendant has pled guilty?

Always ___ Almost Always ___ Sometimes ___ Rarely ___ Never

(b) Do you sentence the defendant on the same day on which the guilty plea is entered.

Always ___ Almost Always ___ Sometimes ___ Rarely ___ Never

(c) Do you have available some kind of a presentence report for your consideration in pronouncing sentence?

Always ___ Almost Always ___ Sometimes ___ Rarely ___ Never

8. Does it sometimes occur that you preside over trials after you have re-
jected plea agreements relating to sentence tendered to you by the parties? __Yes __No

If your answer is yes, on how many different occasions during the past two years has this occurred? _____ Are the number of occasions listed an estimate? __Yes __No

9. Please briefly describe the beneficial and detrimental changes which have occurred in plea practices since enactment of the state’s new plea bargaining legislation:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

* * *

Your personal comments involving either plea bargaining or any of the foregoing questions would be greatly appreciated. Please use the reverse side of this page if additional room is needed:

________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________
________________________________________________________________________

Date                                        Judge