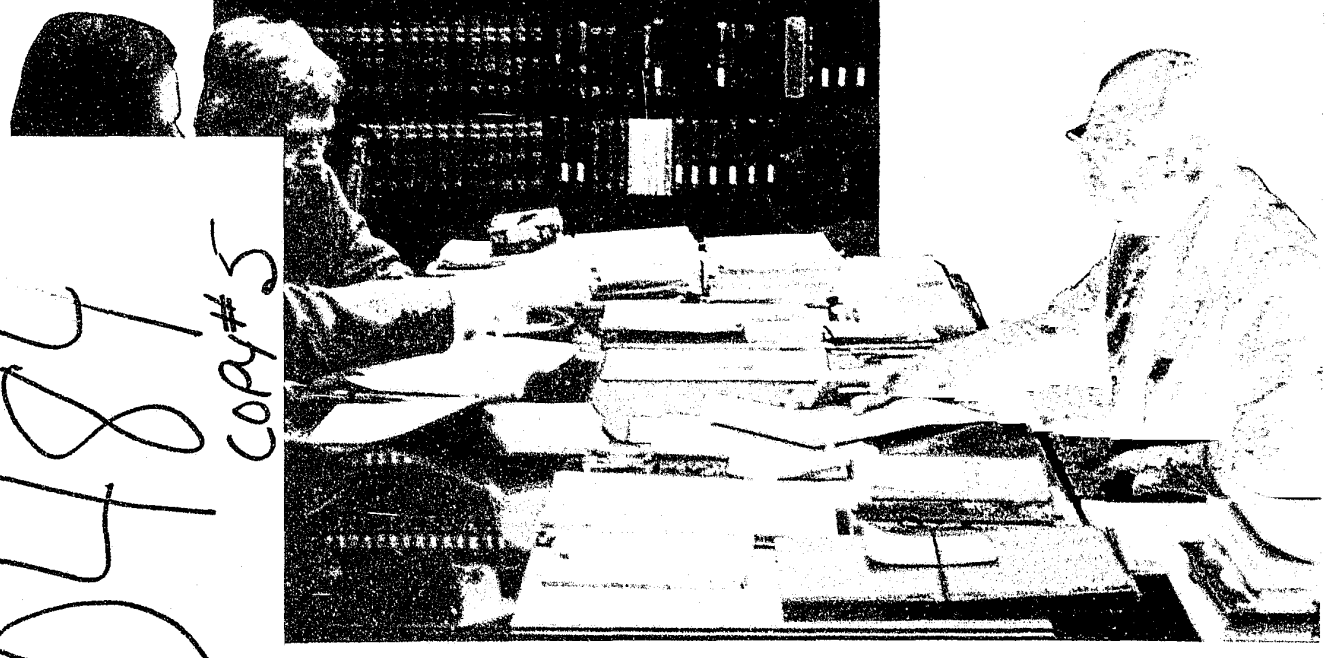
RESEARCH

Plea Bargaining in the United States



National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

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PREFACE

The following study is concerned with the nature and extent of plea bargaining in the United States. The focus of the study is on the variety of forms of plea bargaining and the roles of the actors who comprise this system.

This report is addressed to a wide audience, spanning a number of disciplines in law and the social sciences. It is also directed toward people with varying degrees of familiarity with the legal system. Hence, an attempt has been made to minimize particularistic social science or legal jargon which would hinder the clarity of the report to the public.

The project staff wishes to express their gratitude to those who have offered their ideas and criticisms in the formative stages of this project: To our Advisory Board Members: Abraham S. Blumberg, Phillip A. Hubbart, Robert M. Morgenthau, Dorothy W. Nelson, Lisa A. Richette, Arthur I. Rosett, Richard D. Schwartz, who assisted us in developing the focus of our study; to Albert Alschuler, Malcolm Feeley, Herbert Jacob, and Joan Jacoby who shared with us their experiences and wisdom; to our NILECJ monitors Cheryl Martorana and Robert Duncan, our appreciation for their understanding and cooperation in a difficult task; and a special thanks to the many criminal justice personnel in the jurisdictions which we visited who so generously gave of their time and knowledge

in assisting us in the completion of our project. We wish also to recognize Joan Jacoby and Edward Ratledge for performing the feasibility study for a cost analysis of plea bargaining. Finally, special recognition should be given to Research Associate Deborah J. Denno, and Research Assistant Kevin S. Cooman for their many hours of dedicated work on behalf of the project.

The project staff, of course, assumes complete responsibility for the contents of the report.

INTRODUCTION

The issue of plea bargaining occupies a central position among those concerned with the operation of the criminal justice system. There appears to be some uncertainty and confusion both inside the criminal justice system and with the public as to the nature, scope, purpose and value of plea bargaining as a form of case resolution in our system. Existing attitudes toward plea bargaining form a continuum spanning an entire range of positions from total endorsement to complete rejection.

The controversy over plea bargaining has become more intensive within the last ten years. The extent of the interest and controversy revolving around plea bargaining is evidenced in the enormous explosion of literature in the area. Over two-thirds of the books, articles, and studies on plea bargaining annotated in the project bibliography have been written in the last decade. And the research reflects numerous disciplines, including law, economics, political science and sociology. All indications are that the proliferation of research in plea bargaining will continue to expand.

For decades plea bargaining was infrequently discussed. It operated invisibly, without standards and with little judicial oversight. In the 1960's, however, national attention was given to the problem. The President's Crime Commission

issued a report in 1967, conditionally approving plea bargaining, and expressing the hope that norms would be provided by organizations such as the American Bar Associaton.[1/] In 1968, as part of its massive project on standards for criminal justice, the ABA issued its Standards Relating to Pleas of Guilty.[2/] The ABA recognized the many problems in plea bargaining and recommended standards bringing plea bargaining into the open under judicial oversight. In its Standards Relating to Prosecution Function and the Defense Function the ABA attempted to delineate the roles of prosecutors and defense counsel in plea negotiations.[3/]

In 1973, the National Advisory Commission on Criminal Justice Standards and Goals called for the termination of all plea bargaining no later than 1978.[4/]

In 1974 Chief Justice Burger transmitted to Congress proposed amendments to the Federal Rules of Criminal Procedure, including Rule 11 (plea bargaining). In notes to the proposed amendment it was stated that "there is increasing acknowledgement of both the inevitability and the propriety of plea agreements." The notes cited recent Supreme Court cases referring to plea bargaining as "an essential component of the administration of justice. Properly administered, it is to be encouraged." Santobello v. New York, 404 U.S. 257, 260 (1971). They also made frequent reference to the ABA Standards. In general the rule changes were consistent with ABA recommendations.

Despite these conflicting views there is little empirical evidence available to support or question the positions taken. Most studies have little positive to say about plea bargaining as it has been functioning. Many recognize it as an inherent, perhaps necessary part of the administrative of justice, others call for its abolition or for measures to control it. Many of these studies or commentaries have been based on conjecture, limited to conventional legal analysis, or empirically examined one local jurisdiction. There has been no major effort to obtain empirical data on a national level.[5/]

A primary rationale for plea bargaining is administrative efficiency and control of the calendar. Many judges and prosecutors have indicated that a substantial decrease in pleas would create chaos in the system of justice. They believe that plea bargaining is the essential underpinning for the continued existence of an orderly system of justice.

Advocates of plea bargaining make several claims and assumptions. By pleading guilty the defendant: (1) Aids in ensuring prompt and certain application of correctional measures; (2) avoids delay and increases the probability of prompt and certain application of correctional measures to other offenders; (3) acknowledges guilt and manifests the willingness to accept responsibility for conduct; (4) avoids public trial when the consequences outweigh any legitimate need for such; (5) prevents undue harm to the defendant from

the form of conviction; and (6) makes possible the granting of concessions to him when he has given or offered cooperation in the prosecution of other offenders.

Proponents believe in the legitimization of plea bargaining through standards and judicial oversight. They assume that under no circumstances can there be a rigid prohibition of plea bargaining in the real world. They reason that the abolishment of plea bargaining will create pressures for hidden negotiations, thus causing a regression to those days where the process was completely hidden from view -- with no safeguards. Thus, plea bargaining, subject to standards, becomes essential to the operation of the system.

Those opposed to plea bargaining believe it to be inherently undesirable, illegal and unreformable; that its existence and accompanying pressures will cause laxness in observing constitutional requirements. In short the evils of plea bargaining practices cannot be legitimized; purity is essential; and any negotiation renders the system impure. They explicitly assume the system will not collapse if bargaining is phased out properly.

A system of beliefs for those opposed to plea bargaining includes the following: (1) There is a real danger of innocent persons being convicted; (2) Prosecutors bargain primarily to move cases; (3) Bargaining distributes unevenly and inappropriately among the offenders the ability to get a deal providing a lenient disposition; (4) Bargaining is inefficient and wasteful; (5) It may reduce the deterrent impact of the law since it usually results in lower sentences;

(6) It makes correctional rehabilitation more difficult by limiting judicial sentencing discretion; and (7) Those who opt for a jury trial generally receive longer sentences.

Finally, some believe the costs of abolishing plea bargaining are not acceptable. In 1970, Chief Justice Burger called the consequence of a 10% reduction (90% to 80%) in the rate of guilty pleas tremendous, requiring the assignment of twice the judicial manpower and facilities. He alleged that a further reduction to 70% would treble the demand.[6/] Some question this estimate and others say the quality of justice should not be measured in fiscal terms.

The overall objective of the present project is that of providing an analysis of plea bargaining which will be useful to actors in the system, policy makers, planners and the public. Accordingly, an attempt has been made to develop a national perspective on the subject by reporting plea bargaining operations in a representative sample of jurisdictions across the country.

In the report, the emphasis is on describing the characteristics and dynamics of plea bargaining. Consequently, the data, derived primarily from interviews and observation, are for the most part qualitative. Thus no attempt has been made to subject any hypotheses to statistical verification. Given the state of knowledge regarding plea bargaining, our position is that testable hypotheses are best forged out of an understanding of the

nature and scope of what is occurring in the system. Such an understanding is the goal of this report. Phase II of the project will attempt to establish a method for obtaining a national data base.

Organization of the Report

The report begins with a summary of the findings and conclusions. Chapter One contains an overview of plea bargaining in the United States. Addressed in this chapter is the problem of defining plea bargaining, and the general problem of unexact and differing terminology used by different actors around the country. Also addressed is the extent of plea bargaining in the United States. Data from the annual reports of 20 states were compiled to provide an estimate of the extent to which guilty pleas comprise the system of conviction in our country. Finally, the various types of plea bargaining that were identified in the field are presented and described.

Chapter Two focuses on the role of the prosecutor. The issues of factual and legal innocence, prosecutorial discretion in the charging, screening and plea bargaining phases of the system are addressed. The importance of sufficient and accurate information before the charging decision can be made is emphasised. The factors in the charging decision and plea negotiation process are discussed. Finally, there is a section on the prosecutor as policymaker.

Chapter Three explores the role of defense counsel in the plea negotiation process and the conditions under which effective assistance can be provided to defendants. It compares the legal structure and requirements with the realities of the system. It analyzes the inside techniques which may be required for counsel to be effective. These include searching for the right form, actor and trial; how an ingrained "presumption of guilt" may affect the role of defense counsel the use and misuse of delay; and the role of discovery and limited resources.

Chapter Four analyzes the role of the judge as it pertains to judicial supervision of and participation in plea bargaining. Attention is also directed to the types of judicial participation that were served in our field research. Data is also presented on the extent to which legislatures and courts have created guidelines or standards relating to the role of the judge in both the participatory and supervisory roles in plea bargaining.

Chapter Five is devoted to the feasibility of a cost analysis of plea bargaining. An assessment of the practicality of determining the cost of plea bargaining in an overall system of case disposition is presented.

Chapter Six contains pertinent information on the methodological approach used in the study. Attention is given to the rationale for selecting the modes of data collection that were used and the major methodological decisions made in the study.

The latter part of the report contains the appendices of the report, including data on the guilty plea rates of 20 states by jurisdictions. Also included are forms used in relation to plea bargaining in some of the jurisdictions observed.

In the final report of the project there will be an annotated and indexed bibliography of references, including both published and unpublished manuscripts, books, periodicals, articles and government documents. The material will be indexed as to particular topics to provide a research tool for those interested in studying plea bargaining.

1/ The Challenge of Crime in a Free Society, 136 Report of the President's Commission on Law Enforcement and Administration of Justice (1967).

2/ Standards Relating to Pleas of Guilty, ABA Project on Standards for Criminal Justice (Approved Draft, 1968).

3/ Standards Relating to the Prosecution Function and the Defense Function, ABA Project on Standards for Criminal Justice (Approved Draft, 1971).

4/ National Advisory Commission on Criminal Justice Standards and Goals, Task Force Report on The Courts 46 (1973); Santobello v. New York, 404 U.S. 257, 260 (1971).

5/ See the Annotated and Indexed Bibliography.

6/ Chief Justice Warren Burger, State of the Judiciary 1970, 56 A.B.A. J. 929, 931 (1970).

EXECUTIVE SUMMARY AND OBSERVATIONS

Chapter One: OVERVIEW

What is Plea Bargaining?

There is no common definition of plea bargaining in general use throughout the United States, thus clouding discussions of plea bargaining issues. Moreover, the word "bargaining" has unpleasant connotations, causing some actors to deny that it exists. Allegations that plea bargaining has been abolished should therefore be approached skeptically. "Explicit" and "implicit" bargaining occurs. Explicit bargaining is specific. Where it is implicit defendants can "reasonably expect" certain dispositions, even though no overt bargaining has occurred. The kinds of agreements and dispositions can vary, depending on the circumstances of the case. Finally, not all criminal justice actors agree as to what elements constitute a plea bargain (whether it be some charge dismissals, a charge reduction, or an agreed upon sentence recommendation).

This study defines plea bargaining as "the defendant's agreement to plead guilty to a criminal charge with the reasonable expectation of receiving some consideration from the state."

The Extent of Plea Bargaining

Data available from 20 states indicates that the rates of pleas differ between jurisdictions. There appears to be little correlation between such rates and population size. One study

indicates that rural prosecutors accept plea bargains more readily than prosecutors in larger jurisdictions; another that relationships within a court system are the dominant factor in plea bargaining, with no correlation between plea rates and size of jurisdiction. These studies and data raise questions concerning assumptions about costs and caseload pressure in relation to plea bargaining.

In addition to varying plea rates, there are substantial differences in terminology and ways in which cases are counted. In counting cases most jurisdictions count defendants; some count the number of counts in an indictment. How cases are counted can make fundamental differences in terms of a statistical picture of plea rates, convictions and dismissals. Such terminological and counting differences cause difficulties in precisely assessing the meaning of the data.

The sparse data on plea rates, combined with counting and terminological problems, raises questions as to whether adequate data exists upon which to base generalizations about the influence of caseloads and consequent costs on plea rates.

Types of Plea Bargaining

The project classified plea bargaining in two ways, explicit and implicit. Both kinds can occur in one jurisdiction; but in 27 of 30 jurisdictions explicit plea bargaining was dominant, particularly in felony cases. Explicit plea bargaining involves overt negotiations between two or three actors (prosecutor, defense attorney and judge) followed by an agreement on the

terms of the bargain. Implicit bargaining involves an understanding by the defendant that a more severe sentence may be imposed for going to trial rather than pleading guilty. Defense attorneys can, however, be clear in advising the defendant of this probable outcome.

Where explicit plea bargaining occurs concessions may include charge modification, sentence agreement or both. The variety of sentence concessions or actors involved in the bargaining process may be virtually unlimited. Five major types of explicit plea bargaining were identified:

1. Judges participating and indicating the sentence.
2. Modification of charges by the prosecutor.
3. Prosecutorial agreement to make a sentencing recommendation.
4. Combination of 2 and 3.
5. Combination of 1 and 2.

Many jurisdictions had more than one type even though one or two types were dominant in each jurisdiction. The most common pattern involved charge modifications and sentence recommendations by the prosecutor (4). The second most common involved charge modifications alone (2). In one jurisdiction prosecutorial sentence recommendations are the dominant pattern; another combined charge bargaining and judicial indication of the sentence. In some jurisdictions judicial participation is substantial, although a minority of the judges may be so involved because of the way cases are assigned.

Chapter Two: THE PROSECUTOR'S ROLE IN PLEA BARGAINING

I. Background: Prosecutorial Discretion

The United States prosecutor began as a small town part-time position emphasizing traditional legal orientation towards the individual case. At the turn of the 19th century the growth of cities and increase in crime caused the prosecutor to begin modifying this role. The concentration of population continued after World War II. Many prosecutors in metropolitan jurisdictions now assume managerial and policy making roles.

Historically the inevitability and the desirability of prosecutorial discretion in screening and charging has been recognized. There has been an evolving role which judges have played in the plea bargaining process primarily as to the sentence imposed, a traditional judicial function. But prosecutors now more frequently than in previous decades make sentence recommendations or have established policies regarding sentence recommendations. Reaction from judges has been mixed.

Few jurisdictions have established a systematic and rigorous procedure to control the discretion exercised by assistant prosecutors in disposing of cases. Where this is done involves one of the following: 1) the chief prosecutor reviews the bargain in complex and serious cases; 2) a floor offer is established for particular crimes and clearance is required from a senior deputy for any variances; or 3) detailed standards are promulgated to guide assistants in the negotiating process. In other jurisdictions the chief prosecutor makes no such effort, stating that as professionals the assistants are free to exercise discretion.

Most new assistants learn to weigh competing goals and various factors through a process of socialization as to the norms of the courthouse. This usually involves working with a more experienced prosecutor and learning through trial and error.

II. Information and the Decision to Bargain

The prosecutorial decision to bargain occurs after consideration of a number of factors. Studies and project findings indicate that most prosecutors consider the strength of a case as an important factor prior to making a decision. Two other important factors relate to the seriousness of the offense and the prior record and reputation of the offender. Offense seriousness is frequently evaluated on the basis of its impact on the victim. The offender is viewed in terms broader than just the prior record. Information from a variety of sources is used to assess the offender in the community and any reputation as a "troublemaker".

Other factors are considered, including the reputation of defense counsel, how the police report the incident and their attitude towards the defendant, applicable sentencing provisions, the victim's account of the incident, the offender's prior relationship with the defendant, if any, and the offender's attitude towards the defendant (most frequently for the crimes of rape and assault).

Some studies found that underlying these specific factors are such constants as the caseload and other pressures on the

system (i.e., community attitudes). However, in individual cases these constants were not always crucial to the disposition of that case.

In general the ability of a prosecutor to make a rational decision stems from the information available at the decision making point. How this information is processed, how it is weighted or controlled, where it comes from, at which point in the process it is presented, and its methods of processing and use within a prosecutor's office, plays a key role in the prosecutorial decision making process.

In many jurisdictions police/prosecutor relationships can determine how police information is received, processed and used. The police supply two types of information: (1) the formal background of the defendant (rap sheet); and (2) their account of the crime and other information they regard as relevant. Prosecutors differ in their willingness to accept police evaluations at face value. Prosecutors and defense attorneys may attempt to influence the nature of the police description of a crime or police assessment of the defendant.

The victim may play an important role in the prosecutor's assessment of a case, particularly as to the qualitative information on which a decision may be based. Victim information can influence the prosecutor as to the seriousness of the offense or the offender.

Defense counsel may influence the supply, interpretation and control of information. In general defense counsel attempt

to ameliorate the potential harshness of the charge and sentence through information about the defendant's character indicating worthiness to receive a break.

Roles played by different actors may be evaluated in terms of their contribution to the information process. Systems vary as to who performs informational tasks and the degree to which there is a division of labor to perform them. This may be determined by the size of the jurisdiction, the relationships between the prosecutor and law enforcement agencies and the nature of the courthouse organization.

How information is processed and used may also depend on the going rate or market value of particular cases. And this consideration may be complicated by which particular assistant is handling the case. Assistant prosecutors may differ in their conclusions about the strength of the case and the seriousness of the offender.

The key factor of the strength of a case in the decision making process, combined with the pressures to move cases through guilty pleas, raises the question of whether innocent defendants can be convicted.

Can Innocent Persons be Convicted?

The presumption of innocence is at the heart of American jurisprudence. It means there can be no guilt until an adjudication of such guilt by a legally competent authority. The presumption directs officials how to proceed in a case and is in effect a command to ignore factual

guilt where the factual determination is adverse to the suspect and answers to legal questions which are favorable to the suspect may result in legal innocence.

Factual Innocence

Factual innocence or guilt relates to whether or not in fact the defendants committed the act charged. Actors in the system differ as to whether or not factually innocent defendants plead guilty. Most prosecutors and defense attorneys believe factually innocent people do not plead guilty. Almost all prosecutors assert they would not proceed with a case where they felt the defendant was in fact innocent.

Prosecutors differ as to the nature and scope of evidence for them to be convinced of a defendant's factual guilt. Almost all prosecutors say they do not engage in plea bargaining if there is no factual case. Most believe that defendants do not plead guilty if they are factually innocent and that the screening process (police and prosecutorial) is sufficiently reliable and error-free so that defendants passing through the screen are in fact guilty. Finally, in their view cases not screened out contain substantial evidence of factual guilt. Some actors (prosecutors and defense counsel) believe that all defendants passing through this screen are guilty of something.

Factual guilt may be determined by how the police and prosecutor obtain and screen information. These procedures differ markedly in the various jurisdictions. Moreover, when defense counsel enter into plea negotiations some prosecutors believe this to be evidence of factual guilt.

The major procedural safeguard against conviction of the factually innocent is judicial inquiry into the factual basis of the plea. But the extent of the inquiry varies substantially from judge to judge. Thus, the inquiry may not be infallible and a variety of pressures may cause a defendant to admit to facts which did not occur.

Some prosecutors and defense attorneys believe the plea negotiation process is superior to a trial in determining the factual truth of a case. Some believe that a conviction of a factually innocent defendant may more likely occur at trial than through plea negotiations. Others believe that adequate defense resources and careful screening would negate such a hypothesis.

Legal Innocence

A factually guilty defendant may be legally innocent because a "weak" case may be difficult to prove at trial. Bargaining permits "half a loaf" where trial outcome is in doubt. Historically, plea bargaining was referred to as "compromising" or "settling" criminal cases.

Scholars have criticized the half load philosophy as contradicting the prosecutor's duty to see that justice is done. Others criticize this practice because it occurs in weak or doubtful cases and may result in disparate treatment,

ignore rehabilitation needs and increase the risk of false conviction. Under this view the more difficult (marginal) the case the more it should merit careful scrutiny.

Other scholars support the "half loaf" philosophy, and distinguish factual guilt from issues calling for judgment as to legal guilt. They maintain that in these cases justice may more likely occur through negotiation, and that quasi-legal questions raise problems of "variable guilt" suitable for compromise.

Prosecutors distinguish factual from legal innocence and guilt. Most are unwilling to dismiss a case solely because it may be difficult to obtain a jury conviction. Such cases are regarded as prime targets for plea negotiations.

Prosecutors regularly calculate the strength or weakness of a case and the probability of conviction at trial. Many believe this to be a reliable formula. But research indicates that estimating the strength of the case is a variable dependent upon many factors, including the experience of a prosecutor. The lines are hard to draw. Moreover, as a case progresses through the system the nature and scope of available information may change, thus causing differing estimates to be made.

There is skepticism regarding estimates of case strength stemming from prior experience with jury trials. In jurisdictions with few trials the adequacy of the sample of cases is limited. Where trials are more frequent the base of experience may be biased because of complex case selection procedures which consider many variables before a case goes to trial. Moreover, the estimate of conviction probabilities may be part of a self-

fulfilling prophecy, subject to change if more cases did go to trial.

Prosecutors differ as to the validity of the doctrine of legal guilt. Some argue that the law protects only the factually innocent; others feel obligated to inform the defense counsel when the prosecution's case has collapsed. Contact with victims affects some prosecutors who must choose between the concrete reality and an abstract ideal. Securing half a loaf appears to be a "natural" choice in many cases. Proponents of the "half loaf" deny its coerciveness because of the shades of judgment and the fact that the weakest case may still result in a jury conviction.

Added to these complexities are five patterns delineating the "weak" case: (1) Evidence linking defendant to crime is weak; (2) Evidence is strong but there is doubt about intent, self-defense, provocation or other legal defense; (3) Defendant committed act and cannot avail self or above defenses but a legal flaw may cause suppression of needed evidence; (4) Evidence necessary for trial is "absolutely" unavailable; or (5) "Theoretically" unavailable. Most prosecutors appear willing to plea bargain in all five situations, offering "sweet deals" in very weak cases.

The major differences in approaching weak cases occurs at the dividing line between the first three types and the last two types. In the first three plea bargaining may involve honest differences of opinion regarding the strength of the

case. The information available can be important in such cases and prosecutorial practices differ from jurisdiction to jurisdiction.

The last two kinds of weak cases raise issues other than levels of information. The propriety of "bluffing" is the issue. Bluffing has many meanings. A very few prosecutors will bluff in cases which to their knowledge involve factual innocence. Bluffing may mean refusing to provide information to defense counsel and "puffing" about the strength of a case, a practice regarded as hard bargaining. Another bluffing practice involves leading defense counsel to believe the case is ready for trial when it is not. For example, a key witness may be dead and hence no longer available absolutely.

A witness may be alive and on a trip around the world. In such a case the witness may be theoretically unavailable. One scholar condemns bluffing in these cases as the clearest example of the subversion of the doctrine of legal guilt through plea negotiation practices. Some prosecutors follow this practice if certain "ethical" bluffing practices are followed. They will not respond "ready for trial" when the clerk calls the calendar. But they will not on their own initiative tell that the prosecution is not ready to go to trial. Most prosecutors act under this standard. Two smaller groups involve prosecutors who bluff without restrictions and others who feel that bluffing of any kind is improper.

Some prosecutors are unwilling to dismiss cases they may lose at trial if they are reasonably certain of factual guilt. This is offensive to their sense of substantive justice. Others cite experiences where they have successfully gained convictions at trial when what they perceived as bluffing did not work.

Those few with no reservations about bluffing regard it as part of the "gamesmanship" of plea bargaining. The extent of bluffing is difficult to estimate and it varies markedly from jurisdiction to jurisdiction, and in some instances within a jurisdiction.

Judicial Supervision of Legal Innocence and Bluffing

There appears to be little effort by the judiciary to prevent bluffing. Few judges establish the legal basis of the plea when carrying out their responsibility for establishing a factual basis. Judges do not believe their supervisory responsibilities extend to establishing the probability of legal guilt of the defendant.

Evaluating a Case

When assessing the seriousness of the offense and the offender the prosecutor goes beyond the mere elements of the crime and into actual offender behavior. Thus the offense category does not inform the prosecutor of the seriousness of the offense in all cases. Relationships between the defendant and the victim and the effect of the crime on the victim are also examined.

A frequently used item of information on the offender is the prior record. But some research indicates that the prior criminal record by itself does not always play a key role. Included in the case estimate may be the defendant's demeanor, residence, and associates. The issue is whether or not the defendant is a "bad person."

The seriousness of the offender, the offense and the strength of the case are not examined as independent entities. Each may interact with the other and may affect the prosecutorial decision. One scholar believes these criteria are so intertwined that the prosecutor may consider them at the same time in making a decision.

Either view may be correct and it is clear that the strength of certain evidence may be colored by prosecutorial knowledge or perception of the defendant's or victim's character. Defense attorneys may intuitively understand this matter and when introducing information about the defendant's character try to affect the prosecutor's assessment of the strength of the evidence.

III. Prosecutorial Policies and Plea Bargaining

Most chief prosecutors do not provide their assistants with guidelines to help them properly evaluate the value of a case. Substitutes for such guidelines include the requirement that "difficult" cases be cleared with the chief prosecutor before a bargain is reached. Explicit policies may be established for certain specific offenses or certain types of offenders. Deviations from the norm must be cleared with a senior deputy.

There are few office policies relating to the accountability of assistant prosecutors. There are few enforced, systematic procedures for internal review of decisions (i.e., written documentation as to who authorized the decision and the grounds for it).

Most systems involve partial internal review and control. A decentralized system may involve a senior deputy in charge of a team. Assistants must receive approval from that senior deputy before agreeing to a bargain. Senior prosecutors may establish a market value on a case. In other jurisdictions minimal review and control are present, and the chief prosecutor may view assistants as professionals who can exercise discretion.

Efforts by some prosecutors in establishing office policies have resulted in mixed reactions from assistants within the prosecutor's office, judges and defense attorneys. Judges and defense attorneys have defeated some of these attempts in a variety of ways.

The strongest examples of efforts at control involve the inauguration of partial or full "no plea bargaining" policies. These have met with considerable resistance and have involved direct negotiations between defense attorneys and judges as to the sentence in some instances. Assistants accustomed to bargaining and exercising discretion appear confused as to what their role is under a "no plea bargaining" policy.

Efforts by chief prosecutors to establish strong policies followed by resistance from a variety of sources, illustrates the difficulties in attempting change in a criminal justice system that may be characterized as a "non-system" of justice.

A prosecutor cannot dictate policy to the judges, control how police agencies may operate in a jurisdiction, or regulate the conduct of defense attorneys.

Despite these limitations the evidence suggests that strong policies can have a profound impact on the system. Certain functions, primarily charging, are controlled solely by the prosecutor. Strong screening procedures, in conjunction with the charging power, can reduce the possibility of factually and legally innocent defendants being convicted through plea bargaining. Strong screening can so screen out weak cases as to increase the number of trials and change sentencing patterns, particularly as to strong and serious cases.

Chapter Three: EFFECTIVE AND COMPETENT DEFENSE COUNSEL

Bench and Bar on Defense Counsel

The American Bar Association and the United States Supreme Court have attempted to delineate the role of defense counsel in the plea negotiating process. Under ABA standards defendants should not plead unless counsel is available or properly waived by the defendant. Defense counsel act in an advisory capacity; plea agreements can be made "only with the consent of the defendant." Counsel is required to be fully informed on the facts and law and advise the defendant with complete candor, neither understating or overstating risks or exerting undue influence.

According to ABA standards only the defendant makes decisions as to what plea to enter, whether to waive jury trial, or testify at the trial. All other strategic and tactical decisions are the exclusive province of the lawyer after consultation with the client.

If after a full investigation and study of the controlling law and evidence defense counsel believes that a conviction is probable, the defendant should be so advised and his consent sought to engage in plea discussions with the prosecutor. Counsel should keep the defendant advised of all proposals and developments and not knowingly misrepresent the status of the case during plea discussions.

The obligations of defense counsel should be read in connection with the ABA position that charge and sentence concessions are appropriate for defendants who plead guilty. The burden on defense counsel to properly advise a defendant is heavy, particularly when many believe that the sentence imposed is dependent on whether the defendant pleads guilty or goes to trial.

The United States Supreme Court has spelled out the general obligations of defense counsel, and has highlighted the irrevocable nature of a proper plea of guilty (it is a conviction). The court has emphasized the importance of defense counsel as the sole advocate of the accused, with responsibility for making certain that the defendant understands the rights waived upon pleading guilty, and the defendant's understanding of the available pleading options and their implications. A defendant must have full knowledge through out in order to make intelligent and voluntary decisions.

These standards are imprecise. The court has wrestled with few specific situations which would more precisely outline counsel's role. The court recognizes the difficulties which defense counsel has in advising defendants and the judgments which must be made. And it has placed basic responsibility on trial court judges to "strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courtroom."

The court does not hold defense attorneys responsible for predicting future changes in the law and does not include within "the range of competence demanded of attorneys in

criminal cases" the duty of investigating possible constitutional deprivation prior to a guilty plea. It holds that failure on the part of counsel to inform the defendant of possible constitutional defenses does not provide independent collateral relief. This holding was based on the grounds that a guilty plea represents a break in the chain of events which has proceeded it. Thus, when a defendant solemnly admits in open court his guilt "he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea."

One scholar has criticized these rulings as "essentially hypocritical" because they ingore the records in the cases and degrade the right to trial by treating the waiver of this right in a manner not reconcilable with the court's treatment of other waiver problems.

Some lower courts have attempted to come to grips with defense counsel's role. One court described the ABA standards as relevant guideposts in an uncharted area, then concluded that there is a difficulty in judicial evaluation of counsel's effectiveness and competence. It cited the fact that little such evidence is reflected in the trial record.

Most plea discussions occur in judicial chambers, the prosecutor's office, or in the back of the courtroom or just outside of it, and no record of these discussions is made. Given the difficulties of assessing counsel's effectiveness from a trial record, the impossibility of such an assessment without any record suggests itself.

The legal delineation of counsel's role emphasizes the weakness of judicial supervision and the legal profession's unwillingness, reluctance or difficulty in grappling effectively with issues directly affecting the outcome of criminal cases. What is more to the point, the standards of the ABA and the Supreme Court do not address the realities of the system which go to the heart of defense counsel's role as an effective advocate.

Finding the Right Forum, Time and Participant

The right timing of a plea may be related to understanding the sentencing practices of different judges, obviously important in terms of the sentence imposed upon the defendant. Thus a defense attorney should know these practices, how a more acceptable judge may be scheduled, and who in the system can assist in the search, even in jurisdictions where judicial scheduling practices have attempted to end "judge shopping". In most jurisdictions actors indicated that with experience one can predict the type of sentence imposed by particular judges on particular offenders for particular crimes.

Other forums and other participants may also be important. Shopping for particular assistant prosecutors was characterized by some defense attorneys as critical. Not only did prosecutors have points of view on different issues, but defense counsel's relationship with certain assistants could affect the disposition.

In yet other jurisdictions some defense attorneys characterized the police as important in prosecutorial

decision making. Obtaining delay was cited as effective in cooling down police animosity towards a defendant.

One scholar found that discretionary power to confer privilege or be lenient is also power not to confer privilege or leniency. It is susceptible to abuse, discrimination, favoritism and caprice and "may be extremely damaging to private interests." Thus effective defense counsel must know how to thread a path through a labyrinth of interrelationships and practices. Neither the ABA or the courts have addressed these problems in setting standards for effective assistance of counsel.

Defense Counsel's Effectiveness -- Relationship With Other Actors

Defendants may have apprehensions as to whom defense counsel is serving. Perhaps the most important consideration in evaluating the effectiveness of defense counsel are the relationships with other actors in the system, characterized as "symbiotic" in nature by one scholar. A defense attorney stated the importance of relationships another way: "Personality conflicts hurt the defendant." In some jurisdictions, a "don't rock the boat" attitude dominated and actors (judges included) who took their duties in an adversary system seriously found other actors in the system critical of their performance.

What emerges is a picture of shared relationships as being of prime importance in many jurisdictions. The existence of a stable work group within a courtroom and its method of operating may have a direct relationship to the severity of the charge or sentence. Some defendants notice and resent this

and may prefer to handle their own cases. One national commission concluded that "the plea bargaining system is characterized by deception and hypocrisy which divorce the [defendant] from the reality of his crime."

Defendants' suspicions are shared to some extent by the public, a matter frequently alluded to by prosecutors who made attempts to restrict or prohibit plea bargaining in their jurisdiction.

The suspicions by defendants and the public are to some extent based on the relative secrecy with which negotiations are conducted.

Defense Counsel's Effectiveness -- The Presumption of Innocence

Many defense counsel appear to assume that a defendant is guilty of something, thus enhancing the rate of guilty pleas as well as reinforcing a "presumption of guilt throughout the system." This view may distort the attorney-client relationship and obstruct the investigation into facts and law mandated by the ABA and Supreme Court. Certainty as to factual guilt appears to override investigation into legal guilt.

Both public defenders and private defense attorneys may "lean" on defendants in persuading them to plead guilty. A burning out syndrome was noted for some public defenders, thus causing them to assume that most defendants are guilty, thus leading to the danger of innocent defendants pleading guilty to crimes. Yet other defense attorneys (public and private) insist that assertions of innocence by a defendant

would cause them to go to trial. Some defense attorneys expressed uneasiness at being subject to litigation through post conviction habeas corpus petitions by defendants dissatisfied with counsel.

Advice on how to plead in an individual case remains a difficult estimate frequently based on sketchy information, a less than cooperative client, and diverse pressures from the system. There is a problem in assessing the effectiveness of counsel at trial where there is a record. The informality and relative secrecy of plea negotiations, and the fact that no record is kept, make it virtually impossible to evaluate defense counsel's effectiveness in the plea bargaining process.

Defense Counsel's Effectiveness -- Use and Misuse of Delay

Defense attorneys can use delay to assist their client or assist themselves in collecting a fee. On occasions delay may serve both purposes. Many actors in the field and some studies indicate that delay can be of substantial assistance to defendants, particularly those on some form of pretrial release. It may adversely affect defendants who are detained in jail during this period.

On occasion the prosecution and defense may use delay as a weapon in their attempt to bring about a settlement of a case without trial. It is difficult to determine in a given case when the defense maneuvers affect the defendant adversely or favorably. And the practices of judges in granting continuances vary widely from jurisdiction to jurisdiction and indeed from courtroom to courtroom.

Defense Counsel's Effectiveness -- Public V. Private Counsel

Confusion and conflict revolve about the relative advantages and disadvantages of these two kinds of counsel. Some believe the public defender is disadvantaged because of a high volume of cases and lack of resources. Some public defenders are frustrated at being unable to have personal contact with defendants. Yet some prosecutors indicate that public defenders know the system better and can be more effective than private counsel.

Misdemeanor cases sharply illustrate the problem where defendants with privately retained counsel under no financial constraints were able, in the words of one assistant prosecutor, to "paper them to death" and try large numbers of misdemeanor cases successfully. At the opposite extreme are misdemeanants who are permitted by the court to waive counsel casually and then are sentenced to prison. In between are an assistant public defender and assistant prosecutor dealing with large numbers of cases without adequate preparation.

The relationship between public defenders and prosecutors may depend on the public defenders' perception of their role. In some jurisdictions a cooperative relationship led to cases being pled out with regularity. The public defender "leaned" on "guilty" defendants to plead guilty. The relationships appeared amicable. In other jurisdictions the public defender followed a policy of trying cases where innocence was asserted without pressuring the defendant. In these jurisdictions some hostility and tension was observed between the public defender and the prosecutor's office.

Threats of "court Busting" (taking all cases to trial) were found in the literature and in jurisdictions visited. Most actors seem to feel this represents a potential strength in the public defender's office since organizationally only a public defender could realistically carry out such a threat. We found no instances of it being actually carried out and were unable to assess the reality of this threat.

The existence of a private "cop-out bar" was found in a number of jurisdictions. Public defender services and strong prosecutorial screening policies appear to have had an adverse affect upon such a bar. Many actors reported this bar to be shrinking by virtue of one or both of the above occurrences. A high degree of sensitivity towards the issues involved in plea bargaining and apprehension by actors in the system of the public's view may also have contributed to the decline of the "cop-out bar."

Defense Counsel's Effectiveness -- Resources

In general the resources which appear to be required by the ABA and Supreme Court are not available in misdemeanor courts. Public defenders and defense attorneys were observed handling such cases by rote with little advance preparation in evidence. For felony cases the availability of resources was sufficient for proper investigation to be undertaken in selected cases.

To overcome such limited resources the ABA and a number of defense attorneys place great stress on the nature and scope of discovery proceedings whereby defense counsel may learn of the strength of the prosecution's case. We found

wide variances in discovery procedures, and sometimes they were dependent upon relationships between defense attorneys and the prosecutor's office.

It seems difficult for counsel to meet the standards of effectiveness required by the ABA and the courts without access to the information upon which the prosecution is based. We found that public and private defense attorneys, along with prosecutors, consider the strength of the case, the background of the offender and the seriousness of the offense in advising the defendant. With inadequate information as to these three factors defense attorneys could not rationally advise defendants on the issue of how to plead.

Should there be a continued lack of resources, accompanied by ineffective discovery, we must ask whether effective assistance of counsel is possible under such circumstances, an issue not addressed by the ABA or the courts.

Defense Counsel's Effectiveness -- Is Defense Counsel Necessary?

One surprise was the allegation that defendants might fare better without counsel. This point of view was scattered among prosecutors, public defenders and private defense attorneys. These attitudes were supported by one study indicating that in misdemeanor court defendants with no counsel who plead not guilty fared substantially better than defendants with counsel.

The network of relationships and pressures found in many jurisdictions is important to the plea bargaining process.

There is evidence that many defense attorneys regard their relationship with prosecutors fundamental to their effectiveness. Playing the game and not rocking the boat preserved the proper relationship. And as noted earlier, the game is played in secret, a factor encouraging the informal relationships endemic throughout the system. Has this so distorted the adversary system as to render counsel ineffective?

Chapter Four: THE ROLE OF THE JUDGE

Judicial Participation in Plea Bargaining

Judicial participation in plea discussions is opposed by the American Bar Association and the National Advisory Commission on Criminal Justice Standards and Goals. It is also prohibited by the Federal Rules of Criminal Procedure. Some states disallow any form of judicial participation, while others, such as Illinois, prohibit the judge from initiating plea bargaining but allow participation in the discussion.

In our observations we found at least some judges in more than half of the jurisdictions visited taking an active role in the negotiation process. This participation took place in scheduled and unscheduled pretrial conferences in chambers or at the bench. The prosecutor and defense counsel were usually present. In 12 of 25 states visited by project staff there is case or statutory law which speaks to the issue of judicial participation by the judge. Ten states prohibit it; two states permit it.

A major objection to judicial participation in negotiations is based on the powerful position of the judge. Plea negotiations involving direct judicial participation might be inherently coercive. A second major objection is that a judge cannot properly oversee a process in which he is a direct participant.

Those advocating a direct judicial role suggest that only through active judicial participation can a sufficient amount of predictability in the sentence be insured. Some believe

that such participation may expedite the process. Contrary to those objecting to judicial participation, there is a belief that only through involvement can a judge effectively oversee the plea bargaining process.

Judicial participation may not involve influencing the kind of agreement which may be reached. But judges may "encourage" or "force" defense attorneys and prosecutors to arrive at some plea agreement. Such "arm twisting" tactics by judges may place prosecutors and defense attorneys in the position of pleasing the court by reaching any agreement. This conflicts with their obligations to the people and defendant. It may affect later proceedings in a case. As one defense attorney stated, "A lot of things can happen in the course of trial -- particularly when a judge doesn't like you."

Sentencing Differential Between Guilty Plea and Trial

It has been alleged that judges induce guilty pleas by imposing more severe sentences when a defendant chooses a trial rather than pleading guilty. Some studies suggest that differential sentencing exists at the misdemeanor and felony levels.

There is a split as to the propriety of differential sentencing. Proponents believe leniency is proper for those who accept responsibility for their conduct by pleading guilty and contribute to the efficient and economical

administration of the law. They assert that those submitting themselves to prompt correctional measures should be granted sentence concessions, and that differential sentences for those demanding trial is not undue punishment if it is not excessive. Those opposed believe that guilty pleas have no direct relevance to the appropriate disposition of an offender and that the constitutional right to trial should not be the cause of enhanced punishment.

Direct evidence of differential sentencing among one or more judges was found in three fourths of the jurisdictions studied. These judges cited two major reasons. First, they profess to believe that by pleading guilty a defendant takes the first step towards rehabilitation. Second, they stated that during trial they may obtain adverse information about the defendant and the crime or that defendants may perjure themselves. These judges believe such information justifies a harsher sentence.

Behind this practice, however, is an attitude that differential sentencing is a proper way to encourage defendants to plead guilty, thereby expediting the flow of cases. This position was disguised or not admitted by some judges; others were frank in upholding the practice. Some studies indicate that some defense attorneys, as well as prosecutors, support the practice. In at least four jurisdictions we found evidence of a "standard discount." Defendants who plead guilty received a particular punishment. If convicted at trial, however, they received an added increment. Defense attorneys knew of this practice. Thus, it is a form

of "implicit bargaining."

Forms of Judicial Participation - General

Several observations regarding judicial participation in plea bargaining may be made. Judges do not agree on, nor do they perform their judicial role uniformly. The ways in which individual judges participate in or supervise the plea bargaining process differs substantially.

It is important to make a distinction between what is typical for a judge and typical for the jurisdiction. Typicality can refer to how most judges (or prosecutors or defense counsel) conduct themselves in the plea bargaining process. It can also refer to how most plea bargains are reached. For example, in a jurisdiction with a large number of judges, two may actively participate in plea negotiations and dispose of 80% of the criminal docket in that jurisdiction. The remaining judges may not participate in plea negotiations and account for only 20% of the caseload. The percentage of judges involved indicates the typical form to be one of judicial nonparticipation. Looking at the proportion of case dispositions, however, the typical form becomes one of active judicial participation in plea bargaining.

On-Site Observations of the Judicial Role

We found general judicial support for the concept of plea bargaining in all but one jurisdiction, El Paso, Texas. There was considerable variance, however, as to types of plea

bargaining and the form of judicial participation deemed desirable and proper by members of the judiciary.

The most common rationale for plea bargaining was the need to move cases. A second rationale was that plea bargaining disposed of minor or obvious cases which shouldn't be tried, thus making time for cases which should be tried. A third reason was that plea negotiations achieved substantive justice and mitigated the harshness of the law in many cases.

Judges split on the role of the prosecutor in plea negotiations. Most want sentence recommendations because of the prosecutor's familiarity with the case and possession of useful information. Others felt that prosecutorial sentence recommendations constitute an encroachment on the judicial role.

Four factors shape judicial interaction with other actors in the criminal justice system: (1) The level of the court (felony or misdemeanor); (2) The method of assigning prosecutors and public defenders to the court; (3) The dominant type of plea bargaining arrangement; and (4) The size of the judicial operation.

Data on case docketing and judge shopping suggest a pattern involving two elements: (1) The selection of a judge as a sole or major part of the plea bargain; and (2) Finding a judge who sentences leniently or follows a prosecutorial sentence recommendation without fail.

Judge shopping may be curtailed by randomly assigning judges to cases. It is effective only where the judge assigned the case is responsible for its disposition (individual calendaring), thus precluding the selection of judges through the use of continuances. Where master calendaring permits cases to be reassigned at each stage of the proceeding it appears to facilitate judge shopping and liberal granting of continuances to defense counsel and prosecutors. This wastes court time, as well as the time of prosecutors, witnesses, victims and defendants.

Forms of Judicial Participation - Specific

Data in this report suggests that judicial participation may be classified in two ways: (1) Whether or not the judge participates in explicit plea negotiations and the extent to which that occurs; and (2) The extent to which differential sentencing is practiced as a means of inducing pleas. Using these criteria our data suggests six major types of judicial participation. These may be identified as follows:

(1). No explicit or implicit bargaining; and no "leaning" on other participants to plea bargain.

(2). No explicit bargaining; may or may not bargain implicitly; and "leans on" or "facilitates" bargaining by other participants.

(3). No explicit bargaining; may or may not bargain implicitly, and "forces" pleas through pressure on other actors.

(4). Explicit bargaining with a specific sentence recommendation; may or may not bargain implicitly.

(5). Explicit bargaining with a general sentence or recommendation; may or may not bargain implicitly.

(6). Implicit bargaining only.

Of the six types outlined above, forms (4) and (5) appear to be the most common.

Variations existed as to the specific manner in which judicial participation occurred. Generally it occurred in chambers or off the record in court. One judge held discussions on the record, in court, a practice noticed for its lack of typicality. Generally the prosecutor and defense attorney were present, but there were instances where discussions did not include both.

Formal Judicial Supervision of Guilty Pleas

Of 25 states visited, 21 have adopted a statute or criminal rule pertaining to some judicial supervision of the guilty plea process. All states have cases which require some of these responsibilities to be fulfilled. Individual judicial compliance with these rules and court opinions covering in court supervision of guilty pleas varies widely.

Those aspects of supervision on which courts have concentrated are the following: (1) The plea entered by the defendant is both a knowing and voluntary one; (2) There is a factual basis for the plea; (3) The defendant should be informed of the sentencing consequences of his plea; and (4)

The defendant be allowed to withdraw the plea where there has been a violation of due process. Most judicial efforts appear to be directed toward determining if the plea is both knowing and voluntary. Judges rarely inform the defendant of any collateral consequences of the plea.

Factual Basis of the Plea

A variable pattern was observed, ranging from accepting pleas of guilty as sufficient evidence of a factual basis, to the opposite extreme, where the judge required evidence to be presented by hearing at least one witness before accepting the plea.

In three-fourths of the jurisdictions visited judges determine factual basis and accuracy of the plea by simply asking the defendant if he has committed the offense charged. Most judges indicated they would delve more deeply into the facts where the defendant asserted innocence. Other judges said that they would refuse to accept such a plea.

Until recently, guidelines were quite general, and could be met with little more than a cursory inquiry of the defendant by the judge.

Withdrawal of Guilty Pleas

Most judges allowed defendants to withdraw guilty pleas if the sentence was harsher than that agreed upon during a plea negotiation. Only one judge indicated he would not routinely allow the defendant to withdraw his plea in such a case.

There are two rationales for allowing plea withdrawal in situations where a sentence agreement between the defense attorney and prosecuting attorney is not binding on the judge. Prosecutors know judicial sentencing practices; therefore recommendations were generally consistent with expectations based on these practices. Not allowing withdrawal where the judge could not follow the recommendation would undercut the prosecutor's position in future negotiations. Second, judges believed it was only fair to the defendant that if the agreement could not be implemented it should not be binding.

Thus the withdrawal of guilty pleas arising out of plea negotiations does not appear to be a significant problem in the jurisdictions visited.

Observations

1. Data Base - The existing data base does not track cases through the criminal justice system, indicate with specificity the type of disposition, the stage at which it occurred or distinguish between felonies and misdemeanors. Until such a data base is available many controversial issues in plea bargaining cannot be properly evaluated, much less resolved. The gross data available indicates that population may have no correlation with plea rates, a finding confirmed by several studies. What this means in terms of costs and pressures of the docket cannot be ascertained. It is essential that adequate data be available to answer these two questions.

It is also essential that uniform terminology be adopted to describe the flow of cases through the system. There must be an agreed upon definition of plea bargaining and agreed upon stages of the criminal justice process which describe the status of a case as it progresses through the system. Without definitional and terminological uniformity it is virtually impossible to attempt answers to the many issues involved in plea bargaining.

2. Openness and Accountability - With rare exception plea negotiations are conducted off the record regardless of who participates in the discussions or the forum in which the discussions take place. Legal standards for assessing the

effectiveness of defense counsel and those requiring formal supervision of the plea bargaining process by the courts are framed in generalities. They do not require the courts to do more than make cursory inquiry into the realities of the plea negotiation process and whether or not actors have lived up to their obligations. Thus trial courts exercise little real supervision; appellate courts rely on trial courts for such supervision; and there is virtually nothing on the record for appellate courts to review.

This situation exists because of the informality, low visibility, and the nature of the relationship between the actors in a given court system. Many improper practices documented in this report in part result from such an environment and atmosphere. Bringing the plea negotiation process into the open and on the record will not resolve all the problems recounted in this study. But the application of sunshine to the process is a necessary first step in restoring a proper balance between the adversary system and plea negotiations.

The American Bar Association is now reviewing its Pleas of Guilty standards and is considering approaches which would bring more of the process into the open.

3. Prosecutors' Office Policies and Enforcement - Commentators and standard-setting organizations have recommended that

prosecutorial discretion in general, and particularly in regard to plea bargaining, should be controlled by internal office policy guidelines. The American Bar Association Project on Standards for Criminal Justice has recommended that "each prosecutor's office should develop a statement of (i) general guidelines to guide the exercise of prosecutorial discretion and (ii) procedures of the office. The objectives of these policies as to discretion and procedures should be to achieve a fair efficient and effective enforcement of the criminal law.

"In the interests of continuity and clarity, such statements of policies and procedures should be maintained in a handbook of internal policies of the office."

The ABA recommendations are weak, merely recommending that some "general policies" be established. Even this recommendation has not been adopted in many jurisdictions.

The National Advisory Commission on Criminal Justice Standards and Goals has also recommended that office policies be developed. It went further than the ABA and specified that the policies should be "detailed." Few prosecutors have attempted to provide detailed guidance in assessing factors relevant to plea bargaining. Prosecutors should develop policy guidelines with respect to plea bargaining decision making; such guidelines should be specific.

There has been little attention to the question of internal accountability within prosecutors' offices. Office policies must

be implemented. This means that the chief prosecutor must be able to determine who made the critical decisions in a case, on what grounds, and whether there was appropriate clearance from a supervisory official. This type of internal accountability does not exist in many prosecutors' offices.

4. The Victim and Plea Bargaining - The study has found that some prosecutors do confer with victims in particular kinds of cases. It also found that in general victims do not play a key role in the plea bargaining process. The victim has a right to be heard. Moreover, information which only the victim may be able to supply can be of value to the prosecutor in assessing the nature of the case.

A key factor in plea making decisions is the seriousness of the offense, particularly in harm done to the victim. It is an important factor in many prosecutorial decisions. Some judges indicated that differential sentencing may be a result of their opportunity to observe both the defendant and the victim at trial, thus obtaining a clearer picture of how the crime affected the victim. If this is vital to a judge in determining the sentence after trial it should be no less vital in determining the sentence after a plea of guilty. It makes little sense to say that the harm to the victim is only applicable in the sentencing decision where there has been a trial.

5. Resources and Information - It is abundantly clear that the kind of information received by prosecutors and defense attorneys, and how it is processed and used, may have a fundamental impact on the decision making process for both parties in plea discussions. Where the flow of information is controlled or weighted can have an important bearing on decisions. Therefore the same information should be made available to all actors in the system, consistent with the requirements of privacy and the integrity of an ongoing investigation.

Of critical importance is the need for adequate information for defense counsel. Defense counsel has a heavy burden which can be met only if the resources available to obtain such information are made available or full discovery becomes the rule, providing defense counsel with the same information available to the prosecutor. Without such an information flow the right to effective counsel may be impossible to achieve.

6. Can Plea Bargaining Be Abolished? - This project reserves its judgment on the question of eliminating plea bargaining. Without commitment to a particular view some observations can be made. A prosecutor may eliminate plea bargaining in his office, but this does not mean that plea bargaining will have been eliminated from the criminal justice system. It may move to a different locus of actors, i.e. the defense counsel and the judges. A prosecutor who persuades these actors to join in eliminating overt plea bargaining may only institute an implicit system which has even less visibility

and control than an explicit system.

Before considering this step criminal justice officials should consider other alternatives which may reduce the visible defects in plea bargaining. Some of the above suggestions may substantially limit the impact of the observed defects. Some other suggestions relating to managing the system and case flow may also be beneficial.

If the problem is too many bargains struck to reduce case backlog, the remedy may be more thorough prosecutorial screening. If the question is a matter of saving costs, a possible remedy may be the establishment of a cut off point after which plea bargains are no longer accepted. In short, where prosecutors are not managing by careful allocation and control of resources, plea bargaining may be used as the solution to many ills in the system. This may result in a high rate of "undesirable" plea bargains (ones which were not carefully considered with the kind of deliberation they deserve). The answer should not necessarily involve throwing out the baby with the bath water.

Chapter One

OVERVIEW

I. WHAT IS PLEA BARGAINING?

Given the central importance of plea bargaining in the current administration of criminal justice, it was surprising to find in the field a considerable divergence and confusion over what constitutes plea bargaining. Although a clear and comprehensive definition of plea bargaining has been available in the literature since at least 1966,[1/] no single definition for use of the phrase "plea bargaining" is universally accepted by practitioners in the field. On the contrary, there is a variety of special definitions of this phenomenon and special uses of this phraseology, not only between but within jurisdictions. It became evident early in the course of this research that in discussing plea bargaining it is imperative to first clearly define one's terms. It cannot be assumed that there is any common agreement on the scope of this subject.[2/] For instance, when a committee of the Virginia Bar Association recently began its special inquiry into the matter of plea bargaining, it devoted much of its first meeting trying to reach agreement on what it meant by "plea bargaining."

For purposes of the present study the terms "plea bargaining" and "plea negotiations" are used synonymously. Plea bargaining is defined as the defendant's agreement to plead guilty to a criminal charge with the reasonable

expectation of receiving some consideration from the state. The following paragraphs will examine this definition in some detail. Attention will also be given to the various special definitions and usages of the phrase "plea bargaining" found in the field

A frequent source of misunderstanding and irritation both on the part of the public as well as criminal justice officials is the word "bargain" in the phrase "plea bargaining." This is truely an unhappy choice of words. The word "bargain" is regarded by many as misleading, inflamatory and pejorative, rather than descriptive of what actually occurs. The word is suppose to convey the idea of a compromise or the settlement of the case. Theoretically both parties, the state and the defendant, give up something in exchange for getting something. But the word is rich in connotations and suggests the idea of "bargain basement justice" and "white sales days at the courthouse".

Some individuals believe that defendants may dictate to criminal justice officials what sentences they will accept. The thought of compromising with criminals, expecially on their terms, is repugnant to the citizenry. It inflames the public and shakes its confidence in the court system. Prosecutors report that plea bargaining is the single most misunderstood and most difficult part of their work to explain to the public. Several of them reported that they deliberately avoid reference to the word "bargaining" in

public discussions. Some objected to its use during interviews with project staff. They have found that that word alone has made the issue controversial and difficult to discuss rationally. One district attorney flatly refuses to admit that "plea bargaining" occurs in his jurisdiction. However, he does admit to a great deal of "settling" of criminal cases.

The connotations of "bargaining" may be inflamatory and misleading. The popular belief that defendants are getting "a break" or "less than they deserve" or "a deal" in all cases is not always true.[3/] In some cases defendants may believe they are getting a "bargain" and they may be encouraged in that belief by their attorneys (who may or may not know otherwise). In fact, they may get nothing in return for their plea of guilty.[4/] Prosecutors may overcharge for the purpose of inducing a plea to one count of an indictment. Thus the sentence imposed may be no different than if the defendant had been convicted at trial. Furthermore, some research suggests that deals given by the prosecutor are taken away later by the parole board.[5/]

Despite its drawbacks, the present study will use the phrase "plea bargaining." This is done solely out of deference to common usage. There is no requirement in our definition of plea bargaining that the plea agreement be a "bargain" for either party in any sense of that word. An

agreement to enter a plea in exchange from some consideration constitutes a "plea bargain" for purposes of this study even if the consideration given is minimal, illusory or substantial, but later nullified by subsequent actions of a parole board. Similarly, it is still a "bargain" even if the state has spent as much time and effort on the case as it might have had it gone to trial and if the probability of conviction had been as high as it could possibly be.

A second element in this study's definition of plea bargaining is the requirement that there be a plea of guilty to a criminal charge. This distinguishes plea bargaining from what might be called "disposition bargaining." In the field this distinction is not made. Lawyers in several jurisdictions use the phrase "plea bargaining" to refer to situations where the criminal matter is dropped from prosecution all together. These are situations where the defendant does not enter a plea of guilty to any offense whatever, but rather is allowed to walk free.[6/]

A word of explanation is in order as to why this inaccurate use of the phrase "plea bargaining" occurs. There are two main reasons. First, the process by which defense counsel go about getting cases dismissed is very similar to that which they use when they plea negotiate. In dismissal and bargaining situations the basic process involves an evaluation of information by the defense attorney and prosecutor which frequently comes to their attention through a voluntary exchange or discovery proceeding. In one case

the information may show convincingly that the defendant did not commit the crime, i.e. an alibi defense, or that the evidentiary problems are so difficult as to render a conviction impossible. Thus the case may be dismissed. In the second situation the information may only show that the defendant will be able to put up a strong, if not an absolutely convincing, defense, or that the prosecution witnesses are reluctant or "flaky." Thus, the prosecution may want to plea bargain rather than run the risk of losing the case.

The distinction between cases where defendants are innocent and should have their cases dismissed, and those where obviously guilty defendants should be made to plead to something is not as clear as it might seem. Obtaining a case dismissal is not always a matter of bringing certain information regarding objective fact (e.g. defendant was out of town) to the attention of the prosecutor. It can be more subtle and may receive extended discussion. Mather found the following in her study of case dispositions in Los Angeles.

> "In light cases [ones in which the sentence would probably be lenient] which were weak because there was reasonable doubt that the defendant was guilty of <u>any</u> offense, PDs would seek a complete acquittal, either by explicit bargaining or trial. Depending upon his perception of the DA handling the case, the PD might try to persuade the DA to dismiss the charge or to talk with him to arrange a SOT trial for not guilty." 7/

The second reason for inaccurate use of the phrase "plea bargaining" arises because the dismissal of a case or the granting of immunity may be predicated upon the defendant's willingness to testify against another defendant. While the defendant does not plead guilty he renders a service to the state in exchange for which his case is dismissed. There is a bargain, but it is not a "plea" bargain. On the other hand some defendants whom prosecutors regard as being both legally and factually innocent[8/] do not have their cases dismissed without paying some toll to the state. This may involve individuals with prior records or known "bad actors."[9/]

A third element in the definition of plea bargaining used in the study is the "reasonable expectation" of the defendant. This language is intended to include within the scope of this definition of plea bargaining two kinds of plea bargaining which have been described in the literature as, "implicit" and "explicit" bargaining. In some situations defendants (through their lawyers) negotiate for explicit considerations from the state such as a charge reduction; a specific sentence recommendation; a promise by the prosecutor that he will not oppose a request for probation; or some other specific consideration. This kind of bargaining has been referred to by Newman as "explicit."[10/] On other occasions defendants do not negotiate in the sense of requesting or discussing certain kinds of concessions. Instead they learn that if they go to trial they will be punished

more severely than if they plead guilty. There is nothing to discuss. That is simply the pattern of judicial sentencing based on policy statements by judges or years of sentencing practices. Newman calls this "implicit" bargaining.[11]

We shall adopt Newman's usage, but a note of clarification is necessary. Once again the language gets confusing. Implicit bargaining is usually made very explicit! That is, defendants are told clearly by someone -- usually their lawyers, but sometimes by judges, prosecutors, police officers, or others -- that they had better plead guilty or they will be punished more severely if they go to trial.[12]

A fourth element in the present study's definition of plea bargaining is its deliberate lack of specificity as to either the nature of the consideration given or the official status of the state's representatives making the offer. The considerations usually offered are charge- or sentence-related modifications. But, there is virtually no limit to the kinds of considerations that might be devised. Similarly, the representative of the state in plea negotiations is usually the prosecutor, but other officials may become involved in the negotiating process. For example, a court clerk may agree to assign a case to a particular judge known for his leniency if the defendant agrees to plead guilty. In several jurisdictions, where

there is a ban or severe restrictions on prosecutorial plea bargaining, defense attorneys have gone directly to the judge and asked for a reading on what sentence would be imposed should the defendant plead guilty.

Other uses of the phrase "plea bargaining" can now be examined in light of the definition set forth above. In making this review one will find that local definitions and uses of the phrase "plea bargaining" frequently have the effect of conveying the impression that plea bargaining is minimal or non-existent. The more notable examples of this are the official proclamations of an end to plea bargaining in some jurisdictions. For example, on July 11, 1975 the Associated Press reported from Juneau, Alaska,

> "The practice of negotiating pleas and sentences in criminal cases will end in Alaska Aug. 15 in a move Atty. Gen. Avrum Gross calls 'to some degree experimental.'
>
> "Gov. Jay Hammond announced Thursday an end to plea bargaining. . . ."

In this instance the intent of the announced reform as it was subsequently enforced was to mean that plea bargaining of all kinds would be abolished. That is, defendants would be given no consideration by any prosecutor solely for pleading guilty.

In other jurisdictions where plea bargaining has reportedly been "eliminated" the claim in reality is considerably more modest than it appears on its face. The claim is actually limited to one or more of the following things: One form of plea bargaining has been eliminated,

e.g. sentence bargaining or charge reduction; or the rate of cases in which plea bargaining occurs has been drastically reduced; or plea bargaining by one agency of justice, usually the prosecutor, has been stopped; or plea bargaining in certain types of cases has stopped. None of these claims, even in combination with each other, amount to the proposition that plea bargaining has been completely eliminated from the jurisdiction. New Orleans, Louisiana, for example, has been identified as a place where plea bargaining has been "eliminated". However, the District Attorney makes clear in his Annual Report some of the qualifiers on this claim. He reports, "Outstanding progress has been made in two other areas of the trial division. Plea bargaining (where a defendant pleads guilty to a lesser charge and usually receives a light sentence) has been virtually eliminated."[13/] By "virtually eliminated" he means that most (about 88%) of the guilty pleas entered are pleas to the original charge. While this is indeed a significant reduction in the rate of charge reductions and a major change in the way in which plea bar gaining once occurred in New Orleans, it clearly is not equivalent to the claim being made in Alaska that all plea bargaining of all kinds will be eliminated. Rather, it is a limited claim which in effect allows for the fact that some sentence-related concessions by the prosecutor continue to occur as does some charge reduction.

In Honolulu, Hawaii, a new Prosecuting Attorney was appointed on February 27, 1975 and "all but abolished any plea bargaining."[14/] Under the no plea bargaining system that went into effect, "[p]lea bargaining is allowed only in cases involving multiple counts. . . ."[15/] How this claim is to be interpreted is unclear at best. In many jurisdictions plea bargaining is almost synonymous with multi-count cases. Thus, if you eliminate plea bargaining in all other cases and allow it in these cases it hardly seems to be a "no plea bargaining" policy.

In Black Hawk County, Iowa, all forms of explicit bargaining have reportedly been eliminated since April 1, 1974.[16/] But a site visit by this project determined that prosecutors in Black Hawk County regularly engage in discussions with defense counsel regarding sentence recommendations. If there is agreement, the prosecutor will agree to "not resist a request for suspended sentence" or "to remain silent on any recommendation made in the presentence report." By local definition, this prosecutorial practice is not plea bargaining, but by our standards it is.

In Maricopa County, Arizona, "plea bargaining has been eliminated" for selected offenses over the course of the last five years.[17/] In this instance, the "elimination of all forms of the practice" refers to three things: (a) charge bargaining where either multiple charges are dropped or

(b) the defendant pleads to a lesser charge and (c) sentence recommendations by the prosecutor. This prohibition is not "an inflexible rule". Plea bargaining is allowed for the purpose of obtaining cooperation from potential informers and when cases are weak.

Again, such a report can be taken to mean that an important change may have occurred. But it cannot be read as meaning that all plea bargaining, as we have defined it, has been eliminated.

Still other reports of jurisdictions in this country and abroad where plea bargaining "does not exist" or "has seen eliminated" came to the attention of this project. Our experience has been that such reports should generally be regarded with considerable skepticism. At one extreme some are nothing more than playing games with words. Wittingly or not, they attempt to deny the existence of plea bargaining by denying the name. Others are simply over-statements. Very little plea bargaining goes on so it is said that none exists -- in the same way in which a person wearing only a bathing suit might be described as being "naked." Still other denials are based on definitions of plea bargaining that have been narrowly construed. The ultimate test for any such claim is the question, "Does the defendant believe he gains something to his benefit by pleading guilty in the system in question?" If so, then plea bargaining exists, whether it be explicit or implicit.

Other special definitions of plea bargaining that came to light in the field are interesting. The former chief of the Superior Court Division of the U.S. Attorney's Office in the District of Columbia said that plea bargaining "in the true sense does not occur in D.C. because the prosecutor didn't have to accept a plea offer made by defense counsel. As long as the prosecutor could always go to trial if he had to then plea bargaining did not really exist." A County Court judge in Henrico County said that "plea bargaining" does not go on in his court because he is not bound by the sentence recommendation of the prosecutor. However, when asked how often he departs from the deal worked out by the prosecutor he could remember only one instance in his ten years on the bench.

In Hamilton County, Tennessee approximately 80% of the convictions are by guilty pleas; but the chief prosecutor stated flatly that "no plea bargaining at all" occurred in the jurisdiction. In his mind this was synonymous with defense counsel and prosecutors "sitting around haggling over charges." Thus a few minutes later he found no inconsistency in saying that prosecutors do make sentence recommendations in exchange for guilty pleas!

In a speech to the Pennsylvania District Attorney's Association, John Crane, Chief Deputy District Attorney of Delaware County, stated, "When I first came to the Bar of Delaware County in 1955. . . [n]on-jury trials were rare

and plea bargaining almost non-existent. The Commonwealth did not have to bargain."[18] In this instance the statement seems to be true only to the extent that it refers to the prosecutor's role in plea bargaining. A defense attorney familiar with the practices of Delaware County in 1955 said that there was bargaining. It was virtually all implicit bargaining.

It should be noted that from a historical perspective the phrases "plea bargaining" and "plea negotiations" have only recently become more commonly used labels for this phenomenon. Prior to the 1950's it was also known as "settling" criminal cases or "compromising" criminal cases.[19] This phenomenon has also been referred to as "plea copping."[20]

Given the wide differences in perceptions regarding what "plea bargaining" is, it is imperative that any action to eliminate, restrict, or guide "plea bargaining" take pains to specify in exact detail what is being included under that rubric. It is instructive to look at the extent to which this has been done in those places where such efforts have been made. In the Florida legislature a bill was introduced with the intention of taking such action. The legislative summary described the purpose of the bill as follows:

> "Prohibits state attorneys in the prosecution of a criminal case and judges assigned to a criminal case from plea bargaining with the person being prosecuted. Provides that violation shall constitute malfeasance in office." [21]

The text of the bill further specifies what is meant by "plea bargaining". It reads:

> "Neither the state attorney in the prosecution of a criminal case, nor any judge assigned to any criminal case, shall enter into any agreement with the defendant in the case whereby the defendant shall be permitted to plead guilty to a lesser offense than the offense with which he is charged." 22/

While this type of legislation may appear to some to be designed to "eliminate plea bargaining," it falls far short of that mark if one uses the comprehensive definition of plea bargaining that we have proposed. This bill does not prohibit the offering of any and all concessions that might be dreamt up by the state. It only prohibits one limited kind of plea bargaining tactic, namely allowing defendants to plead to a lesser offense than the offense charged. Such a law may discourage prosecutors from charging the defendant at a higher level than they are reasonably certain they could convict him of at trial. But, it leaves completely open a related plea bargaining tactic of adding multiple charges of counts later to be dropped in exchange for a plea (not to mention numerous other tactics that are used). To describe such a bill as being designed to "eliminate plea bargaining" is misleading at best. 23/

The broadest definition of plea bargaining contained in a proposal to eliminate plea bargaining is that of the National Advisory Commission on Criminal Justice Standards and Goals. It comes close but is not entirely congruent

with the definition used in the present study. The Commission recommended as follows:

> "As soon as possible, but in no event later than 1978, negotiations between prosecutors and defendants -- either personally or through their attorneys -- concerning concessions to be made in return for guilty pleas should be prohibited. In the event that the prosecution makes a recommendation as to sentence, it should not be affected by the willingness of the defendant to plead guilty to some or all the offenses with which he is charged. A plea of guilty should not be considered by the court in determining the sentence to be imposed." 24/

This definition is intended to eliminate all concessions (not just charge reductions) by the prosecutor for guilty pleas. It also is intended to eliminate implicit and explicit bargaining by the judge.

This, indeed, is a broad definition of plea bargaining but not all inclusive. It does not proscribe, for example, the practice of court clerks assigning cases to lenient judges if the defendant will agree to plead guilty. Granted, bargaining such as the latter kind, i.e. by government officials other than prosecutors and judges is uncommon today. But if plea bargaining as defined by the National Advisory Commission were in fact to be eliminated, this alternative type of bargaining would (if not proscribed) undoubtedly take on greater importance.

II. THE EXTENT OF GUILTY PLEAS IN THE UNITED STATES

In 1966, Newman suggested that around ninety percent of all convictions result from guilty pleas.[25] Although he pointed out that there are some variations, both on the felony and misdemeanor levels, this figure has been accepted somewhat uncritically. One has only to examine the literature on plea bargaining very briefly to see the extent to which this figure is used as a benchmark in the field. It is cited by judges, prosecuting attorneys and researchers as the standard figure for guilty plea rates.[26]

To more systematically examine the rates of guilty pleas, and particularly the variance in the rates within and across states, data were collected on dispositions of felonies, and in some cases misdemeanors, in 20 states.[27] Information was collected from all 50 states, but in only 20 were the data somewhat comparable. Moreover, there were terminological and definitional problems which preclude a definitive comparative analysis. Nevertheless, this data base permits an analysis against which the 90% standard can be checked.

In the following tables (I, II and III) data concerning the rate of guilty pleas for these 20 states are presented. In most states the conviction rate, whether by trial or plea, was used as the basis of comparison. In some states the total figure includes acquittals after trial.

Other terminological differences include the unit of analysis and what constitutes a disposition by trial. In most states the defendant is the unit of analysis; a few use the number of counts in the indictment as the basis of statistical compilation.[28/]

Only the most tentative conclusions can be made based on the data presented here. In the context of this analysis, population data is used as a indicator of work load. The assumption here is that as population within a jurisdiction increases, the number of cases to be disposed of will also increase. Direct indicators of work load, comparable across jurisdictions, are not sufficiently available to be useful. Moreover, work load may be only a rough indicator of stresses on the system which may be generated by that jurisdiction's capacity to process cases. Data on capacity are almost totally nonexistent. Interpreted with caution, however, the data provides insights as to guilty plea rates and their variance within and between states.

In general the guilty plea rate cannot be deemed synonymous with the rate of plea bargaining. It does, however, provide an upper limit for the extent to which plea bargaining may occur. Project field research, particularly through the interviewing of participants in the system, suggests that the vast majority of all felony guilty pleas are arrived at through plea bargaining. For misdemeanors the percentage would be substantially lower.

In Table I the guilty plea rate for each of the 20 states are grouped by population into four divisions. They are jurisdiction with a population of: (1) Up to 100,000; (2) 100,000-250,000; (3) 250,000-500,000; and (4) Over 500,000.

These figures show a mixed pattern of guilty plea rates based on population. Of the 20 states included, three (Illinois, New Jersey and Pennsylvania) have a lower guilty plea rate as the size of jurisdiction increased. Three states (Kansas, South Carolina, and Texas) maintain a relatively even guilty plea rate across jurisdictions, while five states (Louisiana, New York, Minnesota, Ohio and Oklahoma) show a mixed pattern. These data suggest that the population of the jurisdiction may not be related to the guilty plea rate.[29/]

TABLE I

MEAN GUILTY PLEA RATES BY POPULATION OF JURISDICTIONS

States	Jurisdictions by Population							
	1-100,000		100,000-250,000		250,000-500,000		500,000 & over	
	a.	b.	a.	b.	a.	b.	a.	b.*
Idaho	87.8	(37)	94.5	(1)	-		-	
Illinois	91.4	(83)	86.5	(8)	82.6	(6)	84.0	(2)
Iowa	(Breakdown by population not available) See Appendix.							
Kansas	71.0	(96)	69.3	(2)	69.8	(1)	-	
Louisiana	72.0	(63)	92.8	(5)	86.4	(2)	85.1	(1)
Michigan	86.4	(65)	88.8	(10)	90.4	(3)	93.5	(3)
Minnesota	83.6	(78)	89.3	(3)	85.5	(1)	85.4	(1)
Missouri	73.8	(108)	79.6	(3)	-		87.6	(3)
New Jersey	96.2	(5)	92.3	(5)	88.1	(6)	88.2	(5)
New York	92.1	(34)	89.9	(14)	94.5	(4)	92.7	(9)
North Dakota	89.7	(53)	-		-		-	
Ohio	68.9	(68)	80.4	(11)	88.8	(4)	78.5	(5)
Oklahoma	67.3	(74)	89.0	(1)	90.7	(1)	80.9	(1)
Pennsylvania	82.3	(28)	86.6	(19)	85.5	(8)	65.6	(4)
South Carolina	95.8	(41)	97.3	(4)	-		-	
South Dakota	91.5	(54)	-		-		-	
Texas	90.9	(218)	89.6	(11)	92.7	(2)	91.6	(4)
Utah	71.5	(22)	78.8	(3)	80.4	(1)	-	
Vermont	95.2	(7)	100.0	(1)	-		-	
Wyoming	55.4	(22)	-		-		-	

* a. = $\bar{X}$ Plea Rate.
b. = Number of Jurisdictions.
\- = No jurisdiction in this population range.

A major problem in using a mean figure for guilty plea rates is that it often distorts the differences which may exist between jurisdictions within one state as well as across states. To avoid this distortion the mean was computed for jurisdictions (by state) in the upper and lower decile of plea rates, i.e. the 10% of jurisdictions with the highest plea rate and 10% with the lowest plea rate. The mean population of each jurisdiction was also computed. The data in Table II show the extent to which major differences do exist in all states for jurisdictions of under 100,000. It indicates that differentials in types of dispositions exist in all states and confirms the earlier finding that there appears to be no relationship between population and the guilty plea rate.

In jurisdictions with a population of 100,000-250,000, the same pattern exists, although the differences are not as great. Table III contains the mean guilty plea rate for the upper and lower quartiles of five states. In three out of the five states the mean population in jurisdictions which had a lower plea bargaining rate was higher than the population of the jurisdictions with a greater plea bargaining rate.

TABLE II

MEAN GUILTY PLEA RATES OF (1) 10% OF JURISDICTIONS WITH THE HIGHEST GUILTY PLEA RATE; and (2) 10% OF THE JURISDICTIONS WITH THE LOWEST GUILTY PLEA RATES. (Jurisdictions Under 100,000 population).

States	10% of Jurisdictions With Highest Guilty Plea Rate		10% of Jurisdictions With Lowest Guilty Plea Rate	
	Mean Population *	Mean Plea Rate	Mean Population *	Mean Plea Rate
Idaho	5,433	100%	17,845	62.9%
Illinois	14,168	100%	20,254	69.3%
Kansas	8,073	100%	8,117	40.7%
Louisiana	22,837	100%	24,069	57.2%
Michigan	19,488	100%	15,088	21.3%
Minnesota	18,446	100%	10,621	36.4%
Missouri	12,593	100%	15,447	35.9%
New York	45,192	99.1%	51,644	79.4%
Ohio	29,110	98.2%	37,531	11.9%
Oklahoma	17,862	98.9%	16,730	37.9%
Pennsylvania	59,753	94.7%	60,001	58.2%
South Carolina	29,512	98.4%	33,202	89.8%
South Dakota	6,342	100%	7,716	72.8%
Texas	6,902	100%	10,874	49.5%
Utah	4,986	100%	9,118	54.5%
Wyoming	15,295	92%	18,085	50.3%

* Refers to the population of the jurisdiction, not the caseload.

TABLE III

MEAN GUILTY PLEA RATES OF (1) 25% OF JURISDICTIONS WITH THE HIGHEST GUILTY PLEA RATE; AND (2) 25% OF THE JURISDICTIONS WITH THE LOWEST GUILTY PLEA RATES. (Jurisdictions of 100,000-250,000 population).

States	25% of Jurisdictions With Highest Guilty Plea Rate		25% of Jurisdictions With Lowest Guilty Plea Rate	
	Mean Population*	Mean Plea Rate	Mean Population*	Mean Plea Rate
Michigan	129,161	92.9%	167,366	84.3%
New York	140,498	95.3%	134,366	85.3%
Ohio	138,714	89.9%	156,962	72%
Pennsylvania	176,380	91.4%	149,629	68.5%
Texas	145,800	93.2%	197,960	86.2%

* Refers to the population of the jurisdictions, not the caseload.

The data presented in Tables I, II and III are not conclusive, but raises serious questions about the extent of guilty pleas in the United States and the allocation of resources to relevant criminal justice agencies. Project staff found that a major rationale for plea bargaining in most jurisdictions is administrative necessity. Chief Justice Warren Burger has stated this rationale more pointedly than any other participant in the system. Beginning with the 90% figure, the Chief Justice asserts that a 10% decrease in plea rates would double costs and that a 20% decrease would triple them.[30/]

The data in the above tables do not support this assertion or that by many practitioners that without more resources they could not try more cases. We recognize that each jurisdiction has its own set of unique problems. But can such problems explain the substantial differential in the guilty plea rates? Some jurisdictions within a state try 100-300% more cases than another jurisdiction. They function under the same criminal code and rules. We do not know if major differences exist as to judicial, prosecutorial and defense resources. But we must ask whether these fluctuations may be accounted for by factors other than "administrative necessity" and case backlog. Many prosecutors and judges allege that trying more cases requires more resources. The data cause us to ask: "Within the existing framework of resources, is a higher trial rate possible?"

This raises questions as to whether the capacity of a system can be measured. In using the term capacity, one is faced with the problem of evaluating performances of judges and lawyers. This problem has been inadequately addressed. In the annual state reports used to compile the data on plea rates, it was stressed that statistics referring to judicial workload were not meant to be construed as comparing the amount of work performed by respective judges. Annual reports of prosecutors and public defenders have little useful information on how their personnel actually spend their time. Project staff has observed wide variation in approaches to the workload responsibilities of different criminal justice personnel. There are few standards or guidelines for these actors regarding the processing of cases. And there is little data. In Phase II of this project we will attempt to develop a data base which will assist a jurisdiction in assessing resource allocations.[31/]

We draw no conclusions from the statistics presented in this chapter. But we do ask whether jurisdictions with double or triple the trial rate of other jurisdictions have a corresponding increase in costs. We question whether "unique" jurisdictional problems alone explain the wide variances which exist. We know that prosecutorial policies may affect guilty plea rates, but evidence as to costs are not available.

III. TYPES OF PLEA BARGAINING

A basic purpose of the national survey in Phase I of this study was to determine the variety of forms of plea bargaining that exist; to classify those forms and to report the frequency with which the different types of plea bargaining occur. The purpose of classificatory research such as this is to categorize observations into types to provide a means by which concrete occurrences can be ordered and compared. This type of research is regarded among scientists as a necessary preliminary stage in the development of general theories and a general understanding of a phenomenon. It involves, according to McKinney, a "purposive, planned selection, abstraction, combination, and (sometimes) accentuation of a set of criteria with empirical referents that serves as a basis of comparison of empirical cases."[32] According to Hall this process involves the "determination of the critical variables of differentiating the phenomenon under investigation."[33]

The two criteria which form the basis for the classification of plea bargaining systems presented below are: (1) the explicitness of the bargaining that occurs, and (2) a combination of the type of concession negotiated and the actors involved in the negotiation. Before the findings can be discussed, however, attention must be called to the units of analysis used.

In analyzing the types of plea bargaining that occur it is necessary to carefully distinguish the units of analysis. The focus of the analysis can be on individuals such as judges, prosecutors, defense counsel or defendants or on collectivities such as the jurisdiction as a whole or a sub-part of the jurisdiction such as that part which deals with felonies. There is no "right" or "wrong" unit of analysis. Different units will simply yield different perspectives on the problem and will be more or less useful for one's purpose. Failure to make explicit one's unit of analysis results in ambiguous and misleading generalizations.

In reporting the typical forms of plea bargaining it is imperative that the units of analysis be made clear because "what is typical" can have two (or more) substantially different meanings. On the one hand, it can refer to what most judges (or prosecutors or defense counsel) do with respect to plea bargaining. On the other hand, it can refer to how most guilty pleas are obtained.

These are quite different questions as the following hypothetical example illustrates. A jurisdiction may have twenty judges. Two of them may actively participate in obtaining guilty pleas and may account for the disposition of 80% of the caseload obtained in that jurisdiction. The remaining eighteen judges may refuse to participate in plea negotiations but only account for 20% of the caseload.

What is the typical form of bargaining in that jurisdiction? From the point of view of the proportion of judges involved, the "typical" form is one of non-judicial participation. But, from the point of view of the proportion of cases disposed, the "typical" form is one of active judicial participation in the bargaining.

The present study employs both units of analysis; individuals and collectivities. However, the tendency will be to use jurisdictions rather than individual actors as the unit of analysis. Furthermore, the focus will be on felony cases unless otherwise indicated.

With regard to the difference between implicit and explicit bargaining two additional points must be made. First, implicit bargaining may occur in jurisdictions where explicit bargaining also occurs. Some proportion of the caseload may be disposed of through explicit negotiations and some proportion of the balance of the caseload in which pleas of guilty are entered may be the result of implicit bargaining.

The second point has to do with the difficulty of determining the existence of implicit bargaining. An objective determination would require an analysis of sentencing patterns and a showing that defendants who pled guilty consistently received lighter sentences than those who went to trial when everything else was held equal. The project has not attempted such an analysis.

A subjective determination would simply require a finding that defendants in a jurisdiction believed that implicit bargaining occurred. This was done through interviews with defense counsel and others. Of the two, this is the more important criteria of the presence of implicit bargaining. If defendants believe that the implicit bargaining exists then they will act accordingly and plead guilty in expectation of a lighter sentence.

In 27 of the 30 jurisdictions[34/] explicit bargaining appeared to be the means of disposing of most of the felony cases in which there were pleas of guilty.[35/] The three exceptions are: Greenville, South Carolina; El Paso, Texas; and Anchorage and Juneau, Alaska. In Greenville it appeared that there may have been about as many implicit as explicit bargains in the jurisdiction taken as a whole (i.e. summing the output of the two separate courts). In El Paso, Texas explicit and implicit bargaining appears to have been eliminated as the result of policy changes.[36/] In Alaska, an effort is underway to eliminate explicit bargaining by prosecutors. It seems to have met with partial success in the urban jurisdictions.

At the misdemeanor level, judgments about most of the jurisdictions could not be made due to the limited time available for interviews and observations. However, implicit bargaining does occur at the misdemeanor level in some jurisdictions. In Dallas County, Texas, it operates

openly. There are standard sentencing discounts for pleading guilty at the first appearance in court. If the fine is $150, it will be reduced by $50. If the sentence calls for 60 days in jail, it will be reduced by 10 or 20 days or to time served for defendants who did not make bail.

Explicit bargaining also occurs at the misdemeanor level but it is limited in many places by the fact that there is little room to negotiate. There may be no lesser charges to which the offense can be reduced or the sentence may be probation or a suspended sentence in any event. Thus, except in jurisdictions where "misdemeanors" include more serious crimes, the prosecutor has very little bargaining power.

It has also been reported by practitioners in the field that many persons charged with misdemeanors plead guilty as charged without any expectation of special consideration for pleading guilty.

Explicit plea negotiations can involve a myriad of different types of concessions and several different actors or combinations of actors participating in the negotiations. The types of concessions offered are only limited by the imaginations of the parties involved. The two broad categories of concessions which are most commonly used are charge modification and sentence-related concessions. Charge modification may involve either the reduction of the charge to a lesser charge or the dismissal of one or more charges.

Sentence-related concessions are popularly thought of in terms of giving a lighter sentence in exchange for a plea. But, this is a narrow conception of what happens. There is a veritable panoply of sentence-related concessions which can occur. The following is a partial listing of some of these concessions. The list cannot be complete because ingenious prosecutors, judges, defense counsel, defendants, police, probation officers, courthouse clerks and others are continually inventing new variants of an old theme. The list does not represent the concessions available in any particular jurisdiction but rather is a composite portrait of the variety of concessions found across jurisdictions. However, in any given jurisdiction, several of these concessions may be used.

Sentence-related concessions may involve the following kinds of agreements: (1) judges may agree to impose specific lengths of time to be served in prison or on probation;[37/] (2) prosecutors may agree to recommend to the judge a specific length of time to be served; (3) judges may only agree to indicate a range of time to be imposed; (4) prosecutors may agree to not invoke special sentencing provisions for repeat or habitual offenders; (5) prosecutors may agree to remain silent at the sentencing hearing; (6) prosecutors may agree to not oppose or resist the defendant's request for leniency or specialized rehabilitation programs; (7) prosecutors may agree to keep the victim away from the sentencing hearing or, more generally,

underplay the harm done to the victim; (8) judges and prosecutors may agree to have the defendant serve his prison time in one particular prison institution rather than another; (9) judges may agree to a special sentencing arrangement under which the defendant serves a certain period of probation and then his conviction is, in effect, erased and his case designated "non-adjudicated"; (10) judges may agree to impose a certain fine or a certain amount of restitution; (11) judges may agree to impose concurrent sentences in other separate matters involving the defendant which are before the judge, such as pretrial release, probation, or parole violations; (12) prosecutors or clerks may agree to schedule a defendant before a lenient judge; (13) policemen may agree to recommend leniency or not oppose requests for leniency; (14) probation officers may agree to interpret certain data in a way favorable to the defendant.

While a great variety of explicit forms of bargaining exists, the question which will be addressed here is "Which forms are most common?" To answer this question five broad categories are used. (See Table 1) These categories refer to the patterns of explicit plea bargaining of felony cases that prevail in the jurisdictions visited. They are necessarily rough and not intended to imply mutual exclusivity. Jurisdictions described as having one or two forms of bargaining as their major patterns may also use other forms in a small proportion

Table 1

Dominant Pattern of Explicit Bargaining

in Felony Cases by Jurisdiction

Dominant Pattern	Jurisdiction
1. Most explicitly bargained cases involve judicial participation with judges indicating specific sentences.	None
2. Most explicitly bargained cases involve modifications of charges by the prosecutor.	Bergen Co., N.J.; Clark Co., Nev.; El Paso Co., Colo.; Jefferson Co., Ala.; Kalamazoo Co., Mich.; King Co., Wash.
3. Most explicitly bargained cases involve the prosecutor agreeing to make a sentence recommendation.	Black Hawk Co., Iowa.
4. A combination of 2 and 3. Some cases involve charge reductions. Others involve the prosecutor agreeing to make a sentence recommendation. Some judges may be involved directly in the negotiations.	Alameda Co., Cal.; Allen Co., Ind.; Arlington Co., Va.; Bernalillo Co., N. Mex.; Cook Co.; Ill.; Dade Co., Fla.; Dallas Co., Tex.; Delaware Co.; Pa.; Greenville Co., S.C.; Hamilton Co., Tenn.; Hartford Co., Conn.; Henrico Co., Va.; New Orleans Parish, La.; Pima Co., Ariz.; Rockland Co.; N.Y.; San Bernardino Co., Cal; Trumbull Co., Ohio; Plymouth Co., Mass.
5. A combination of 1 and 2 above. Some cases involve prosecutor modifying charges. Other cases involve judges participating in negotiations and offering specific benefits. Prosecutors agreeing to make a sentence recommendation is not a regular feature of this system.	Richmond Co., N.Y.

NOTE: Alaska is not included in this listing. The Attorney General forbade state prosecutors from participating in any charge or sentence bargaining. But project staff visited Alaska while the transition from plea bargaining to full implementation of the prohibition was occurring. We have no current knowledge of practices.

of bargained cases. This classification does not deny that reality or suggest that the only kind of explicit bargaining that occurs in a jurisdiction is the type depicted by the category. It is only used as a device for organizing the data in a way that allows for some estimate of central tendency.

As indicated in Table 1 the most common form of explicit bargaining is by far one in which the prosecutor is involved in the negotiations and those negotiations involve either one of two things: charge modification by the prosecutor or the prosecutor's agreement to make a sentence recommendation to the judge. (Dominant Pattern 4).

Some prosecutors offices that maintain they do not make explicit sentence recommendations have been included in this category. In these jurisdictions the letter of this no-sentence-recommendation policy is followed but the spirit is not. The prosecutors will communicate their sentencing views to the judge through the use of standardized cues which everyone understands. Usually the case will be that the prosecutor will not object to a defense counsel's request for a lenient sentence. The failure to object will be interpreted by judges to mean that the prosecutor approves the sentence.

Thus, in effect, these prosecutors are making sentencing recommendations. In fact, the agreement not to object is routinely negotiated between defense counsel and prosecutor in virtually the same way that a sentence recommendation would be negotiated. Therefore, these jurisdictions have

been grouped together with ones where sentence recommendations by prosecutors are openly acknowledged.

The second most common form of explicit bargaining is also one in which the prosecutor plays a key role. It involves the modification of charges. As indicated in Table 1 this is the prevailing pattern of explicit bargaining in six jurisdictions. (Dominant Pattern 2). That is to say that most of the felony cases explicitly bargained in these jurisdictions involve a charge modification by the prosecutor and nothing else. The prosecutor does not make overt or covert sentence recommendations and no other explicit bargaining (such as, for example, bargaining over sentences between defense counsel and judges) occurs to any significant extent.

A third pattern of explicit bargaining occurs in one jurisdiction (see Table 1 - Dominant Pattern 5). This involves a combination of prosecutors modifying the charges but not usually making sentence recommendations, and some judges participating in negotiations about sentences with defense counsel.

A fourth pattern in Table 1 (Dominant Pattern 3) is primarily explicit sentence bargaining in those cases bargained to the extent of the prosecutor agreeing to remain silent as to presentance report recommendations.

One pattern listed in Table 1 did not characterize any jurisdiction visited. It is a single pattern of negotiation with most bargained cases involving judicial participation through negotiation over specific sentences (Dominant Pattern 1).

Literature on the judge's role in plea negotiations can lead one to expect that this pattern would be found.[38/] It has been reported that judges sometimes participate directly in the negotiation process and negotiate over the sentence to be imposed. Our findings do not contradict this. Such judicial involvement was observed in several jurisdictions, but never as the sole or dominant pattern. It was always one of two or more forms of bargaining.

Finally, one pattern listed in Table 1 was found to characterize only one jurisdiction. This single pattern prevails where most bargained cases involve the prosecutor agreeing to make a sentence recommendatin (Dominant Pattern 3). In Black Hawk County, Iowa, a "no plea bargaining" policy was proclaimed by the chief prosecutor. But in approximately 10% of the cases bargaining occurs when the prosecutor agrees not to resist a request for a suspended sentence.

In grouping jurisdictions together in the broad categories presented in Table 1 to show general patterns, considerable information about the differences between jurisdictions in the same general category was necessarily lost. In Table 2 some of that information has been supplied. For each jurisdiction a short description of the major patterns of plea bargaining in felony cases is presented.

In summary, the results of this part of the finding of our national survet are as follows: (1) Plea bargaining occurs in almost all American jurisdictions over 100,000 population. (2) Plea bargaining is more often explicit than implicit (although the threat of implicit bargaining may always lurk in the background). (3) The prosecutor, more often than the judge or other employee of the state, is the agent who negotiates with the defendant or his attorney. (4) Numerous kinds of explicit considerations can be and are made in plea negotiations. Charge modifications are not the sole consideration offered and may not be the most frequently offered consideration. (5) The most common pattern of explicit bargaining on a jurisdiction-wide basis (i.e. not on a judge-specific basis) is one in which there is a combination of various kinds of considerations offered (charge and sentence modifications) by prosecutors and some of the judges. (6) The second most common pattern is one where virtually all bargaining is done by the prosecutor and involves charge modifications. (7) Direct judicial participation in plea bargaining occurs in most jurisdictions. Where it does occur and there are multiple judges in the court, it is usually a minority of those judges who do it. But, in some instances this minority account for a disproportionate share of the dispositions of the court system.

Table 2. Summary Descriptions of Plea Bargaining in Felony Cases by Jurisdiction.

JEFFERSON CO., ALA.	Virtually all bargaining is explicit. Sentence recommendations by the prosecutor is the major form of plea bargaining, but he also modifies charges in about 10%-15% of the bargained cases.
ALASKA	Virtually all bargaining is explicit. In some jurisdictions defense counsel negotiate sentences directly with the judges in the absence of the prosecutor. Also, the prosecutor modifies charges in some cases to obtain pleas. A "no plea bargaining" policy is being imposed on prosecutors by the State Attorney General.
PIMA CO., ARIZ.	Virtually all bargaining is explicit. Most of the bargaining is in terms of charge reductions. The prosecutor has a policy against making sentence recommendations but some sentence recommendations are made and the practice of the prosecutor not objecting to certain sentences is used.
ALAMEDA CO., CAL.	Virtually all bargaining is explicit. There is a formal meeting once a week in the judges' chambers with the judge participating in the negotiation process. The prosecutor makes sentence recommendations in most cases. Many cases involve both a charge reduction and a sentence recommendation.
SAN BERNARDINO, CO., CAL.	Virtually all bargaining is explicit. Most cases involve a charge reduction and a sentence recommendation by the prosecutor.
EL PASO CO., COLO.	Virtually all bargaining is explicit. Most bargains are over charge modification. Sentence bargaining is rare (but does occur).
HARTFORD CO., CONN.	Virtually all bargaining is explicit. Some cases involve charge modification; others involve sentence recommendations.
DADE CO., FLA.	Virtually all bargaining is explicit. Some cases involve charge modification. Others involve sentence recommendations. Some judges do participate directly in negotiations but most negotiating is done between defense counsel and prosecutor.

Table 2. (contd.)

COOK CO., ILL.	Virtually all bargaining is explicit. The negotiations involve a combination of charge reduction and sentence recommendation Some judges participate directly in the negotiations.
ALLEN CO., IND.	Virtually all bargaining is explicit. However, it is estimated that only 15% of the convictions are the result of bargaining The explicit bargaining is the form of specific sentence recommendations by the prosecutor in some cases and charge reductions in others. The former method is somewhat more common.
BLACK HAWK CO., IOWA	A "no plea bargaining" policy is in operatio in the prosecutor's office. However, in some cases - about 10% - explicit bargaining occurs in the form of the prosecutor agreeing not to resist a request for a suspended sentence. Implicit bargaining is denied by the judges but questioned by a local study.
NEW ORLEANS PARISH, LA.	Explicit plea bargaining between prosecutor and defense counsel has been reduced. It occurs in only about 10% of the guilty pleas entered. It involves charge reduction or modifications in use of habitual offender provisions. Explicit and implicit bargaining with judges occurs.
PLYMOUTH CO,. MASS.	Virtually all bargaining is explicit. The focus of the negotiation is the prosecutor's sentence recommendation, but charges are also modified in the same case as part of the sentence recommendation package.
KALAMAZOO CO., MICH.	Virtually all bargaining is explicit. All bargaining revolves around charge modifications. The prosecutor virtually never makes sentence recommendations that are linked to plea bargains.
ST. LOUIS, MO.	Most bargaining is explicit between prosecutor and defense counsel and involves charge reduction and/or sentence recommendation. About a quarter of the judges actively participate in negotiations. Usually they encourage defendants to accept the state's offer by threatening more severe penalties if the case goes to trial.

Table 2. (contd.)

CLARK CO., NEV.	Virtually all bargaining is explicit. Virtually all cases involve negotiations between defense counsel and prosecutors over charge modifications.
BERGEN CO., N. J.	Virtually all bargaining is explicit. Virtually all cases involve negotiations between defense counsel and prosecutors over charge modifications.
BERNALILLO CO., N. M.	Virtually all bargaining is explicit. Virtually all cases involve negotiations between defense counsel and prosecutors over charge modifications.
RICHMOND CO., N. Y.	Virtually all bargaining is explicit. Most cases involve charge reductions. There is an almost automatic reduction of one grade in the crime classification system. In addition some judges will indicate the specific sentence they will impose.
ROCKLAND CO., N. Y.	Virtually all bargaining is explicit. Most bargaining is done at a pretrial conference at which the defense counsel, the prosecutor, and the judge participate. The prosecutor usually modifies the charge and indicates his willingness not to object to the sentence which the judge is going to impose. Defense counsel and judge negotiate the sentence.
TRUMBULL CO., OHIO	Virtually all bargaining is explicit. It occurs at a pretrial conference at which the judge, the prosecutor and the defense counsel are present. Most negotiations involve charge modification. The prosecutor prefers not to make sentence recommendations but does occasionally make them usually in connection with charge reductions in particular cases.
MULTNOMAH CO., ORE.	Almost all bargaining is explicit. Negotiations are primarily between defense counsel and prosecutor and may involve charge or sentence bargaining. The prosecutor has a "no bargain" policy for impact crimes and career criminals. In these cases, however, multiple counts may be dropped or reduced. Judges rarely become involved in plea bargaining.

Table 2. (contd.)

DELAWARE CO., PENN.	Virtually all bargaining is explicit. The prosecutor and defense counsel negotiate over charge modifications and sentence recommendations. Judges are not allowed to participate by law but indicate their approval or disapproval of an agreement by either accepting or not accepting the matter for a hearing.
GREENVILLE CO., S. C.	Explicit bargaining occurs in less than 30% of all felonies plea bargained. The balance are bargained by implicit methods. Of the explicitly bargained cases some involve charge modifications; some sentence recommendations by the prosecutor; and in some, defense counsel negotiate sentences directly with the judges.
HAMILTON CO., TENN.	Virtually all bargaining is explicit. Some cases involve charge reduction but more often the negotiation is over a sentence recommendation by the prosecutor.
DALLAS CO., TEXAS	Virtually all bargaining is explicit. Most bargains are over sentence recommendations. There is very little charge reduction.
EL PASO CO., TEXAS	A "no plea bargaining" policy has been imposed by the court. Explicit bargaining does not occur. A small amount of implicit bargaining may occur.
ARLINGTON CO., VA.	Estimates of the extent to which bargaining is explicit are not available. Of the explicit bargaining which occurs some cases are over charge modifications. Other cases are over the sentence recommendations of the prosecutor.
HENRICO CO., VA.	Explicit bargaining occurs in approximately two-thirds of the bargained cases. Of these about half involve sentence recommendations by the prosecutor and the rest involve charge reductions.
KING CO., WASH.	Explicit charge bargaining occurs in most felonies (60%) not categorized as "high impact felonies." Impact felonies (serious crimes of violence) are assigned specific recommended sentences by the prosecutor. Bargaining revolves around the charge - and the sentence as aggravated or mitigated by various factors.

1/ D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial, 1966

2/ Our findings in this regard made it all the more apparent that mail surveys intended to learn about plea bargaining practices are open to serious doubt as to their validity and reliability.

3/ The American Bar Association and the courts approve of more lenient sentences for those who plead guilty (while at the same time disapproving of harsher sentences for those who exercise their right to trial). See Standards Relating to Pleas of Guilty, §1.&, ABA Project on Standards for Criminal Justice (Approved Draft, 1968); and Brady v. United States, 397 U.S. 742 (1970).

4/ In an undetermined number of cases they may ask for nothing, but simply plead guilty. Thus there is no bargain.

5/ H. J. Shin, "Do Lesser Pleas Pay?": Accomodations in the Sentencing and Parole Processes," 1 J. Crim. Just. 27-42 (1973). A member of the Parole Board in one state informed a project staff interviewer that the Board looks behind the plea in its deliberations, thus negating the bargain in some instances by delaying the release date. Conversely an assistant district attorney in another state said that the Parole Board attempted to confirm releasing what they perceived as the prosecutor's view of a bargained case, namely that leniency was part of the deal. Thus release occurred earlier than might otherwise be the case.

6/ An example of this misuse of the phrase, "plea bargaining" is found in the following explanation of the no plea bargaining policy in the Prosecuting Attorney's Office of Honolulu, Hawaii. "Plea bargaining is allowed only . . . in rare instances when witnesses are not available, in which case the office will nolle prosequi." (Communication to the Georgetown University Project on Plea Bargaining in the United States from Mrs. Dale M. Oliva, Planner, Prosecutor-Public Defender Clearinghouse and Institute, City and County of Honolulu, Hawaii, Ap. 12, 1976). Note that she has called "plea bargaining" a situation that resulted in a nolle prosequi (dismissal). But, when a case has been "nolled" the defendant has not pled to anything. Thus, the more accurate phraseology would be "disposition bargain."

7/ L. Mather, "The Outsider In the Courtroom," in The Potential For Reform of Criminal Justice, H. Jacob, ed., 270 (1974). Mather uses the phrase "disposition bargaining" to describe those bargains which result in acquittals. SOT means "submission on transcript".

8/ See Chapter Four, infra.

9/ One district attorney said he would push for a plea in such cases despite the weaknesses in the case. He did not see his job as seeking justice. See Project on Standards for Criminal Justice (Approved Draft, 1971): "The duty of the prosecutor is to seek justice, not merely to convict." See Standards Relating to the Prosecution Function §1.1(c).

10/ Newman, op. cit.

11/ Id. at 60.

12/ If such statements appear on the record the plea and sentence may be subject to reversal. See U.S. v. Wiley, 267 F.2d 453 (7th Cir. 1959); Gillespie v. State, 355 P.2d 451 (1960).

13/ New Orleans District Attorney, 1975 Annual Report, 7.

14/ Supra, note 6.

15/ Id.

16/ Note, "The Elimination of Plea Bargaining in Black Hawk County, A Case Study," 60 Iowa L. Rev. 1063 (1975).

17/ M. Berger, "The Case Against Plea Bargaining," 62 A. B. A J. 621 - 624 (1976). Mr. Berger, the former district attorney, no longer holds that office. We do not know if his successor is continuing his policies.

18/ J. Crane, Speech to Pennsylvania District Attorney's Association on Plea Bargaining, July 13, 1975, mimeo, 1.

19/ See e.g. Miller, "Compromise of Criminal Cases," 1 S. Cal. L. Rev. 1 (1927).

20/ See e.g. Kuh, "Plea Copping," 24 N.Y. B. Bull. 160 (1966-67).

21/ State of Florida, HR 1108 (Regular Session 1976). (Emphasis added.) (The bill was not enacted.)

22/ Ibid at §1. (Emphasis added.)

23/ A similar effort to "eliminate plea bargaining" is made in New York in 1973. A law was passed to prevent narcotics violators from avoiding harsh penalties through plea bargaining. The law prohibited judges and prosecutors from accepting guilty pleas to reduced charges. That law suffered from the same limitations as the Florida law described above. For further discussion of the New York law see A. Rosett and D. R. Cressey, Justice By Consent 6, 192 (1976).

24/ National Advisory Commission on Criminal Justice Standards and Goals, Task Force Report on Courts 46 (1973).

25/ D.J. Newman, Convictions, op. cit. at 3.

26/ See, e.g., The Challenge of Crime in a Free Society, A report by the President's Commission on Law Enforcement And Administration of Justice 134 (1967); C. T. Bayley, "Plea Bargaining: An Offer a Prosecutor Can Refuse," 60 Judicature 229-232 (1976); The Unconstitutionality of Plea Bargaining, 83 Harvard L. Rev. 1387 (1970); K. Gallagher, "Judicial Participation in Plea Bargaining: A Search for New Standards," 9 Harv. D. R. - C. L. L. Rev. 29 (1974); Comments: Plea Bargaining Mishaps -- The Guilty, 65 Crim. L. Criminol. 170 (1974); J. Wishingrad, The Plea Bargain in Historical Perspective, 23 Buffalo L. Rev. 499 (1974); Notes: CriminaL Law - Pleas of Guilty - Plea Bargaining, The American Bar Bar Association's Standards on Criminal Justice and Wis. Stat. Section 971.08, Wis. L. Rev. 583 (1971); S.M. Davis, the Guilty Plea Process: Exploring the Issues of Voluntariness and Accuracy, 6 Val. U. L. Rev. 111 (1972). See also an Associated Press Bulletin datelined Juneau Alaska, 07-11-75 (13:01 EDT) on PLEA BARGAINING. "A study by Alaska Judicial Council released in March indicated that 94 percent of all criminal cases in the state were plea bargained, compared to a national projected average of 90 percent." (Underlining added).

27/ The states include: Idaho, Illinois, Iowa, Kansas, Louisiana, Michigan, Minnesota, Missouri, New Jersey, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Vermont and Wyoming. Most of the data was taken from annual calendar year reports by state judicial organizations for 1974. The data for the remaining 30 states were not comparable due to a variety of differences in recording and reporting tecniques. Most commonly, states recorded data by judicial district which often encompassed more than one county.

28/ More detailed data is presented in Appendix A , broken down by county for each state, and including trial rates. Before the table for each state a brief statement is made regarding the method which is applicable for each particular state.

29/ The problems of definition and terminology are compounded by the small number of jurisdictions with higher populations, thus causing the relationship between guilty plea rates and population to be tenuous. New Jersey includes as jury trials cases in which the guilty plea is not entered until after a jury selection has begun. Non-jury cases are counted as trials if the plea is entered after opening statements have been made.

30/ Chief Justice Warren Burger, State of the Judiciary-1970, 56 A.B.A.J. 929, 931 (1970).

31/ See Chapter Five: COST ANALYSIS.

32/ J.C. McKinney, Constructive Typology and Social Theory 32-22 (1966).

33/ R. H. Hall, Organizations: Structure and Process 41 (1972). See also generally, C.G. Hempel, "Typological Methods in the Sciences," in Proceedings American Philosophical Association, Eastern Division 84 (1952).

34/ The following jurisdictions are included: Jefrerson County, Ala.; Alaska; Pima County, Arizo.; Alameda County, Cal.; San Bernardino County, Cal.; El Paso County, Colo.; Hartford County, Conn.; Dade County, Fla.; Cook County,Ill.; Allen County, Ind.; Black Hawk County, Iowa; New Orleans Parish, La.; Plymouth County, Mass.; Kalamzoo County,; Mich.; St. Louis, Mo.; Clark County, Nev.; Bergen County, N.J.; Bernalillo County, N.M.; Richmond County, N.Y.; Rockland County, N.Y.; Trumbull County, Ohio; Multnomah County, Oregon; Delaware County, Pa.; Greenville County, S.C.; Hamilton County, Tenn.; Dallas County, Texas; El Paso County, Texas; Arlington County,Va.; Henrico County, Va.; King Co., Wash.

35/ There was some suggestion that the current predominance of explicit bargaining as a means of securing guilty pleas is a recent historical phenomenon, at least in some jurisdictions. It appears that prior to the "criminal law revolution" of the 1960's, implicit bargaining may have been the dominant mode of securing pleas of guilty in

jurisdictions where explicit bargaining has since come to be the major practice. In Delaware County, Pennsylvania, for example, one defense counsel reported that in the 1950's implicit bargaining was so much a way of life that in the jail the sheriff would simply announce over the public address system, "All those who want to plead guilty come forward and sign the appropriate forms." There would be a rush to the desk to get the forms. Today, however, most bargaining is explicit and with the prosecutor. In St. Louis City, Missouri a defense counsel described what he referred to as the practice of "burning the black candle" which occurred prior to the mid-1960's. Defendants would be ushered into the judge's chambers and told in effect to plead guilty or run the risk of receiving a more severe sentence if they went to trial. However not that defendants have been given counsel this implicit bargaining system has been replaced by an explicit bargaining system in which the prosecutor plays the key role.

36/ El Paso has adopted a no-plea bargaining system supported by both the prosecutor and the judges. These policies are observed to be in operation, and have resulted in a drastic reduction in the rate of guilty pleas, creating a higher trial rate and an increasing backlog (to be quantified in Phase II).

37/ This is frequently done with the contingency that the judge not learn anything adverse about the defendant before imposing sentence.

38/ A. Alschuler, "The Trial Judge's Role in Plea Bargaining: Part I", unpublished manuscript, 1976; also, see generally A. Alschuler, "The Prosecutor's Role in Plea Bargaining," 36 U. Chi. L. Rev.(1968) 50-112.

Chapter Two

THE PROSECUTOR'S ROLE IN PLEA BARGAINING

I. Background: Prosecutorial Discretion

The American public prosecutor exercises broad discretionary powers. He decides whether to proceed with a criminal prosecution, what charges to bring, at what level and in what number, whether to nolle prosequi a case, whether to plea bargain a case and on what terms. Ever since the crime commissions of the 1920's[1] documented the crucial role of the prosecutor in the administration of criminal justice, there has been a continuing concern over this discretionary power of the American prosecutor. It is generally recognized that the exercise of discretion in the administration of criminal justice is inevitable and useful but also dangerous.[2]

Discretion may be defined narrowly as "an authority conferred by law to act" in one way or another according to one's "considered judgment and conscience."[3] A more useful notion, however, is that "a public officer has discretion whenever the effective limits on his power leave him free to make a choice among possible courses of action or inaction."[4] In the latter instance, the discretion of the public prosecutor is so extensive that Mr. Justice Jackson, while Attorney General, said, "the prosecutor has more control over life, liberty and reputation than any other person in America. His discretion is tremendous."[5]

The concern about the prosecutor is not that he exercises discretion -- for that is inevitable and desirable -- but that he exercises it without guidelines and without any supervision or review of his actions. As Davis points out,

> "The American system...usually leaves the city and county prosecutors largely unsupervised, with the result that the enormous power to prosecute or not to prosecute is typically (1) unchecked by higher authorities, (2) secretly exercised, (3) often influenced by political or other considerations extraneous to justice, and (4) without findings, without reasoned opinions, and without a system of open precedents." 6/

Various proposals to reform the current situation have had in common one basic theme, namely, devising ways of reviewing, checking, and guiding the prosecutor's discretion. Davis notes that at a minimum there should be internal review within the prosecutor's office. "Possibly the most important check of discretionary action is simply the normal supervision of subordinates by superiors. Supervision may include advance instructions, checking of random samples, the subordinate's reference of difficult problems to the superior and appeals by the affected party from the subordinate to the superior. Obviously, sufficient supervision can be a good protection against arbitrary exercise of discretion." 7/ Other suggested reforms include: requiring that the prosecutor put in the file a signed statement of fact upon which he bases his decision to take whatever action he chose in a case, 8/

increase judicial review of prosecutor's actions,[9] requiring that all interested parties (i.e. the arresting police officer and the complaining witnesses) be given timely notice and opportunity to contest the prosecutor's decision to nolle prosequi a case,[10] allow the judiciary to replace the public prosecutor with a private prosecutor,[11] the development of explicit guidelines for structuring prosecutorial decision.[12]

The attempt to control prosecutorial discretion is motivated by concern about the undesirable consequences of unstructured, uncontrolled, discretion. Several such consequences of the existing situation have been enumerated. One complaint is that inexperienced prosecutors make bad deals in plea bargaining. That is, they may give too much away or they may improperly weigh the factors they should consider in arriving at an appropriate plea offer. Furthermore, it is sound management theory that the chief executive, not the new, inexperienced assistant prosecutor should make major policy decisions for an office. Letting each prosecutor make his own determination not only runs the risk of giving too much away to the defendant but also creates an uneveness in the administration of law. Discretion is, afterall, antagonistic to the rule of law whereby similarly situated defendants are supposed to be treated in similar ways. It is hard enough to reconcile the rule of law with the exercise of discretion when policies are set by one chief executive. It is impossible when policies are determined on an ad hoc basis by each individual prosecutor.

In addition to the problem of improperly weighing legally relevant (i.e. proper) factors, there is a second problem. It is that improper (i.e. legally irrelevant) factors can influence prosecutorial decisions in an unchecked system. Favoritism on the basis of political influence, political or social status of the defendant or his lawyer or relatives in the community, or personal relationships between prosecutors and defense counsel can improperly influence prosecutorial decisions. Other extra-legal factors which may be improperly influential are: the prosecutor's desire to have a "winning" conviction record; desire for prestige within his own office (based on his personal record of conviction); his desire to avoid adverse publicity; the victim's or the police desire for revenge improperly motivated; the race, religion, ethnicity, political preferences, deportment and demeanor, age or sex of the defendant; and administrative convenience (i.e. the choice of a disposition based not on the merits of the case but solely because of organizational or personal convenience).

It is important to point out that concern about prosecutorial discretion has focused on two levels of prosecutorial action. Most of the literature has focused upon the prosecutor's decision in individual cases, what factors are weighed, weight given to each factor and consistency. Another longstanding concern has been prosecutorial responsibility for differing proportions of types of dispositions of cases flowing through the system.

The crime commissions of the 1920's for instance, were critical of the method prosecutors used for individual case dispositions, as well as the "excessive rate" of nolle prosequi's and plea bargained cases. It was the "excessive and irresponsible" use of these dispositions which led those commissions to conclude that there was a substantial deficiency in the enforcement of criminal law.[13/]

This concern over the relative proportion of different types of dispositions emphasizes that discussions of prosecutorial discretion and its structure should proceed at two levels: (1) what factors should be considered and the weight they should be given in individual cases, and (2) how should prosecutorial (and therefore court) resources be prioritized? That is, what classes of cases should reach what kinds of dispositions with what frequency? The two questions are distinct but interrelated. Formulae for structuring prosecutorial discretion should address both questions.

The focus on the prosecutor's responsibility for apportioning different types of case dispositions was a minority concern in the literature of the past. More recently this issue has been revitalized and is beginning to receive substantial attention.[14/] Reasons for its past neglect are probably related to the issue itself. It goes straight to the prosecutor's potential roles as key policy-maker and manager of the criminal justice system. Controlling types of case dispositions is partially involved. The more

global issue is the extent to which the chief prosecutor can and should be responsible for both the shape and quality of the work product of the criminal justice system and the mechanics through which results are produced.

Theoretically the prosecutor can influence the products of all criminal justice agencies beginning with the police and including the correctional system. But this study will emphasize his influence and relationship with the police and court system. The "work product" of this part of the system includes the following: The relative proportion of the disposition of all incoming cases (i.e. percent not charged; percent dismissed; percent nolle prosequi'd; percent tried; percent convicted at trial); the relative expenditure of criminal justice resources for different types of crimes and criminals (e.g. percent of resources spent on dog bite cases vs. armed robberies; or percent of first-time vs. repeat offenders); and the severity of sentences imposed and the distribution of severe sentences among types of crime and criminals.

The concept of the "mechanics" of producing this work product in general refers to the way in which the work flow of any particular criminal justice system is organized and operated. This includes the organization and operation of the prosecutor's office and how it interacts with other parts of the system; the extent to which other parts of the system are permitted to perform prosecutorial functions; and the extent to which similarly-situated defendants are treated alike.

As a rule, prosecutors have not fully recognized or tried to fully exploit their potential role as the key policymaker in the criminal justice system.[15] They lack training and incentive to be managers. Their legal training tends to develop an individual-case orientation which is the antithesis of the manger's concern for general patterns across many cases. The "case-or-controversy" principle requires issues to be addressed in the context of a particular case. It is the mindset with which prosecutors (as well as other legal actors) tend to approach issues. It is largely irrelevant to the question of establishing policies to control the proportion of different types of dispositions.[16] Nor is it helpful in determining the role of the prosecutor as potential policymaker for the criminal justice system.

This issue is not solely a legal issue. Moreover, there is little documentation and analyzed experience on which to base well-informed policy judgments. Legal education may inform one as to the major legal constraints on the prosecutor who attempts to control the procedures and products of the criminal justice system. There is ,for example, the doctrine of the separation of powers between the judiciary, executive, and legislature. There are also legal restrictions and requirements set by law: sole or shared jurisdiction over the charging decision; rules as to speedy trial, arraignment, discovery, preliminary hearings and grand jury; the allocation of sentencing authority; the

sentencing structure (mandatory, judge or jury, habitual criminal sentencing, indeterminate sentencing); and the nature of the penal code (codification and penalty structure). Yet within this legal structure the prosecutor still has considerable freedom to choose a greater or a lesser role.

It remains unclear as to what role should be undertaken by the prosecutor. Historically he is a latecomer in the administration of criminal justice.[17/] The office of the public prosecutor became a major feature in the administration of criminal justice after the American Revolution. But it was not until the end of the last century, with the growth of major urban areas and a concomitant explosion in the workload of the urban criminal courts, that the potential significance of the prosecutor in the administration of justice began to emerge. Until that time, the key figure was the judge. The prosecutor had only to act as a lawyer trying cases, frequently on a part-time basis.

As the court's caseload increased, however, the opportunity arose for the prosecutor to be more than a case oriented lawyer. A prosecutor could become the single most important figure in the system, exerting influence on the rate and organization of the flow of work and the fairness and severity with which defendants are treated. As they are elected officials the needs and desires of the community could be reflected in establishing priorities.

Thus the office could become the center for major policy making in the criminal justice system.

This opportunity, however, has arisen only as a potential. The issue is far from settled, although the general trend is clear. There is growing recognition that the prosecutor should assume the major managerial and policy-setting role. Not all accept this trend and where it has occurred there remain disagreements over the proper allocation of authority between the three branches of government as well as within the executive branches (e.g. between the police, prosecutor and corrections).

Plea bargaining is one of three basic functions (the other two are initial charging function and the decision to nolle prosequi) which constitute the means through which the prosecutor can become the dominant influence in the criminal justice system. In the context of plea bargaining the roles of the judge and the prosecutor may shift as the managerial and policy role of the prosecutor emerges. This shift began in the last century and has not yet ended. In long-established urban jurisdictions some prosecutors continue (or have just begun) to test the limits of their emerging role. These jurisdictions provide opportunities for observing the shifts as they occur. An even sharper contrast exists in those jurisdictions where prosecutors have been catapulted from a cracker-barrel to a supermarket operation overnight. This has occurred where there has

been rapid (within a decade or two) increase in population and a concomitant increase in crime.

In such jurisdictions one can observe the shifts occurring. The general trend seems to be towards enhancing the position of the prosecutor as key policymaker. This may occur by a lack of leadership on the part of the judges; their relinquishing responsibility; or through the initiative of enterprising prosecutors.

In Delaware County, Pennsylvania, for example, which grew from a small rural jurisdictions to a large suburban jurisdiction in 20 years, the locus and form of plea bargaining shifted significantly. Formerly most bargaining was implicit and the judges played a correspondingly larger role. This may have been the result of a part-time prosecutorial staff which only in 1976 became full-time. Today virtually all bargaining discussions are explicit and between the prosecutor and defense counsel.

In Greenville, South Carolina several years ago a new prosecutor took office and on his own initiative began making sentencing recommendations as part of the plea bargaining system. Circuit court judges acquiesced in this arrangement; the county court judge has refused to accept the procedure. In Kalamazoo, Michigan the prosecutor does not now make sentence recommendations as part of the plea bargain. He hopes to institute this procedure in the future. However, the judges see this as an encroachment upon their sentencing fuction and are currently opposed. In

other jurisdictions judges have welcomed and encouraged the prosecutor's interest in making sentence recommendations. For that matter some judges insist that prosecutors make sentence recommendations even where the chief prosecutor has tried to implement a no plea bargaining policy. In Black Hawk County (Waterloo), Iowa, some judges believe the prosecutor is playing politics in refusing to make sentence recommendations.

In short, the role of the prosecutor has been emerging for about a century but has not yet arrived. He is still in search for an identity. It remains for research to document the diverse roles and their impact so that an informed base of experience can be established.

The discussion thus far as focused on the prosecutors at two levels. There is the level of the individual case, i.e. the factors and tactics involved in the decision making process associated with reaching a plea agreement in an individual case. There is also the need to understand plea bargaining in its larger organizational context. In this larger perspective plea bargaining must be seen as one of four interrelated methods by which the court system disposes of its caseload (the other three being not charging cases (prosecutor), dismissing them (prosecutor and judge) or going to trial (defendant)). The dynamic, compensating nature of the criminal justice system (to be explained further below), and the place of plea bargaining in that dynamic must be understood. This inevitably leads

to questions about the prosecutor's role as key policymaker in the system.

In short, the question "What is the prosecutor's role in plea bargaining?" is somewhat confounding, because there are, in effect, two prosecutors (sometimes in the same person). There is the assistant prosecutor "in the trenches" dealing with the individual cases; and there is "the brass" setting policy by deliberate action or by default and whose policies (or lack thereof) have a strong influence on the form, tone, and relative significance of plea bargaining as a method of case disposition in the particular jurisdiction.

Of course there is an interrelatedness between the two levels of analysis. Where the prosecutor does little initial screening relying on plea bargaining as the primary method of case disposition, the quality of plea bargaining in individual cases (i.e. its coerciveness, fairness, and reasonableness) will be affected. The proportion of case dispositions resulting in plea bargains would be different if the same system had rational screening procedures. This is just one illustration of interrelatedness which must be examined.

In Phase I of our national study of plea bargaining we have attempted to understand plea bargaining at both levels of analysis. The findings are divided into two major sections corresponding with these levels of analysis. The

first deals with the tactics and decision making processes on the part of prosecutors involved in reaching a plea agreement in individual cases. The second looks at plea bargaining in the larger organizational context.

II. Information and the Decision to Bargain

The literature on the prosecutor's role in plea bargaining has focused primarily on the factors considered in negotiating the terms of a plea agreement. In one of the classic early studies of prosecutorial discretion, Baker listed the factors involved in plea bargaining as follows:

> "Will my witness stand up? Do I have a good chance for conviction? Is my opposing counsel able and efficient in defense? Will he get continuances and drag the case out until my case is worn down? Will he try to influence my witnesses? Is he able to sway the jury? If I secure a conviction what will be the sentence? Will the trial of this case be so long and arduous that it will take my time to such an extent as to hamper my work in other cases? Would the judge and sheriff want the case ended without trial? How will the public feel about it? In this type of case we have horse traders' techniques, pure and simple. What is the best thing to do ? -- take a plea of guilty and a lesser term than is deserved, the sure thing, or take a chance, gambling for a longer term with possibility of a 'not guilty' verdict." 18/

Three decades later The American Bar Foundation conducted its major study of the administration of criminal justice and Donald Newman authored its report on plea bargaining. This study picked up where Baker left off and provided a comprehensive catalog of the factors considered by and the circumstances under which prosecutors engage in plea negotiations. 19/ The contribution of the Newman study was the comprehensiveness of his cataloging of the factors involved in plea bargaining and his illustration of those factors in operation with anecdotal material.

Subsequent research has attempted to determine which of the many factors enumerated were the most significant and most common determinants of negotiation. The research has attempted to determine what relative weight was given to the different factors and whether and how these factors interact with each other. In his study of plea bargaining in a midwestern, middle-size community, Neubauer found four factors particularly influential in plea bargaining. They were: the seriousness of the offense, the suspect's past conduct, the strength of the prosecutor's case, and the reputation of the defense counsel.[20/]

In his study of the prosecutor's role in plea bargaining Alschuler correctly points out the difficulty involved in determining the weight given by prosecutors to different factors in plea bargaining.[21/] Factors unimportant in most cases might assume great importance in others. Other factors may loom in the background, such as a backlog of cases, but not enter into the day-to-day plea negotiating decisions.

Despite these difficulties Alschuler attempts to set forth the most important variables. He notes that the important factors in a particular case may depend upon the role assumed by the prosecutor; administrator; advocate; judge; or legislator.

Alschuler reports that administrative considerations, i.e., the need to dispose of cases, is a major factor in plea bargaining. But he concludes that the most important

factor in plea bargaining is the strength or weakness of the state's case.[22] Alschuler found himself in basic agreement with the findings of a 1964 survey of chief prosecuting officials from various states regarding the factors which motivated their bargaining decisions. Only 27% said that sympathy for the defendant was a relevant factor. Thirty-two percent said the harshness of the law affected their decisions; and 37% said the caseload was significant. In contrast, 85% agreed that strength of the state's case was an important factor.[23]

Until recently the methods used for studying the prosecutor's plea bargaining decision have been questionnaries, interviews and observations. But in 1976 LaGoy, et.al. published the results of a study of this topic which used a more rigorous procedure for analyzing the information usage in decision making.[24] LaGoy, et.al. adapted a "decision game" technique developed by Wilkins for use in analyzing information usage in sentencing.[25] They changed the situation from the decision to sentence to the decision of the prosecutor to agree to the terms of a proposed plea bargain offered by defense counsel. The technique allowed them to examine four basic areas in the decision-making: (1) the types and amount of information used by prosecutors in the plea bargaining process; (2) the relative weight accorded to types of information in the decision as to whether or not to reduce charges as part of a plea bargain; (3) the point in the filtering of

information at which decisions are made and the nature of those decisions; and (4) the decision making pattern or style present among prosecutors at that stage.

A random sample of 20 prosecutors drawn from several jurisdictions in the northeastern United States were presented with two case histories representing typical situations in which prosecutors may grant or refuse charging concessions in return for a plea of guilty. The first case involved the possession of a large quantity of heroin; the second a forcible rape.

At the outset of the "decision game" the prosecutors were told of the prosecutorial concessions demanded by the defendant in each case in return for a guilty plea. At this point the prosecutors knew nothing about the case. They were then allowed to select items of information which they would want to know before agreeing to the plea offer. The analysis allowed for determination of what items of information were selected by prosecutors, the order chosen, and at what point they were ready to make their decision.

In the heroin case seven items of information were chosen most frequently by the prosecutors in making their decisions. The top four were: "Defendant's criminal record" (20), "police attitude toward proposed bargain" (18), "police account of incident" (18), "type and admissibility of evidence" (15).[26/]

In the rape case 8 items were selected more than 50% of the time and of these the ones most often selected

were: "Defendant's criminal record" (20), "victim/complainant's account of incident", (19), "victim: description and prior relationship with defendant" (18), and "victim/complainant's attitude toward proposed bargain" (15). The items of information the prosecutors wanted to know first were: "Victim/complainant's account of the incident" (12), and "defendant's criminal record" (4).[27/]

The study found considerable disagreement among prosecutors regarding whether the plea bargain should be accepted. In the heroin case 13 prosecutors accepted; seven rejected. In the rape case 6 accepted and 14 rejected.

The study concluded that the amount of information used to reach decisions and the type of decision reached varies considerably among prosecutors in plea bargaining. This variability did not appear to be related to factors such as the age, experience or other personal attributes of the prosecutor. The most important factors in the decisions were the defendant's prior record, age, the type, strength and admissibility of the evidence, and sentencing provisions.

Contrary to the findings of others, the sentencing reputation of the trial judge received relatively little attention. The prosecutors used a wider range of types of information than has been believed. They tended to give more weight to police complaints as a source of information than to private complaints. The attitude of the complainant was found to be a more important factor. In

the rape case the victim was not happy with the plea bargain and the proposed offer was rejected by the prosecutors 71% of the time.

Another surprising finding was the greater willingness of rural prosecutors to accept plea bargains as compared to their urban counterparts. This raises questions about the shop worn explanations of plea bargaining as a response to overcrowded dockets and administrative pressures in large urban areas.[28/]

The LaGoy study and preceding studies of the prosecutor's decision making in plea negotiations have expanded the scope and substance of our understanding of this area. But this remains a complex topic which has yet to be fully analyzed in a systematic fashion. The contribution of the First Phase of the present study to this line of inquiry is to set forth certain analytic distinctions as well as our finding based on observations in the field.

To be fully understood the decision making process relating to plea negotiations must be broken into its elementary components.[29/] First there must be information on which the prosecutor bases his decision. To understand plea bargaining decisions one has to examine what information is available at the time the prosecutor reaches an agreement. What specific items of information are available to him; how complete and accurate is it; what is its quality? Other related questions then begin to arise. Who presents the information? At what stage of the process is the information

presented? How is it weighted? Does the weighing change depending upon the point in the criminal justice system at which the information is presented? Does the addition of new information modify earlier decisions? Does the weighting of items of information differ by characteristics of the decision maker (particularly, the experience of the decision maker but also other characteristics)? What is the role of office policy in determining how information will be supplied and used? What are the bases upon which some information sources are given greater credence than others, i.e. is all the information used or is some immediately discounted and if so, why?

Focusing on the essential role of information usage and supply helps to make sense out of many activities surrounding plea negotiations as well as the differences in plea bargaining between jurisdictions. In his study of the criminal disposition process in New Haven, Feeley found that much activity in the criminal justice process could be understood in terms of the supply and usage of information.[30/] What to do with a defendant often turned on what information was supplied. Our findings agree in part with Feeley. One can get a good understanding of the roles of the various actors in plea negotiations when one focuses on the question of information supply and usage.

Information has two general uses. Either it is used to establish facts (i.e. supply certain information) or to

verify facts (i.e. establish the truth of the information that has been supplied). The roles of different actors in the criminal justice system are usually divided between these two functions. The role of the police in plea bargaining involves the type of information they supply to the prosecutor (or sometimes judge).[31/] The information supplied by the police is usually of two sorts. There is the rap sheet (arrest record) which is a piece of information which the policeman "supplies" only in the sense of being a courier. Then there is other information that the police supply, namely, their account of the criminal incident leading to the arrest as well as any other information about the defendant or the incident that they regard as relevant to bring to the attention of the prosecutor.

LaGoy found that prosecutors are especially interested in hearing the police account of the crime when heroin possession is involved.[32/] We found that prosecutors are interested in the policeman's report of the incident as well as other information the policeman can supply (aside from the rap sheet) in virtually all cases, not just heroin possession. What is more, they are not simply interested in just the policeman's account of of the incident. They also want the policeman's assessment of the character of the defendant.[33/] A senior prosecutor in Delaware County, Pennsylvania explained that prosecutors ask the arresting policeman who brings them the case jacket

"whether or not this guy is in trouble. Sometimes the policeman will tell you that although he looks like trouble, he really is not a bad buy or vice versa. Sometimes the police can tell you that he is a known troublemaker in their jurisdiction." The prosecutor hastened to add that police officers are usually objective in this kind of assessment.

A senior prosecutor in Dade County, Florida appeared to be a bit more discriminating in his acceptance of information from the police, although the information he sought also was related to the police assessment of the defendant's character. He explained: "If the policeman says I don't like this guy and want to bust his ass and doesn't explain himself any further, I am not satisfied that he really tried to make the case. But on the other hand if the policeman reports that this guy is only the wheel man and won't give us the names of the two robbers who pulled the job, then I am willing to go along with a request for a tougher deal. Or if they say that the defendant told one story to the policeman at the crime scene and is now telling a different story, then I'll take this information into account as a legitimate concern of the police."

The police can be important for the information they present and for the information they may suppress. It is commonly recognized by defense counsel in most jurisdictions that a police officer may hold the key to a

"successful" (from the defendant's perspective) plea bargain. A former defense counsel, now an associate justice of the Superior Court of Massachusetts, reported that the first thing a good defense counsel does is to to see the policeman. He does this not only to find out the facts in a case but to try to "work on the policeman." An experienced defense attorney in Richmond, Virginia reported the same tactic.

One "works on" a policeman in several ways. For one thing the defense attorney attempts to work on the policeman's view of the character of the defendant. He tries to persuade him that the defendant is not as bad a person as he may have appeared to be. Secondly, the defense attorney attempts to persuade the policeman to "withhold" certain information about the actual crime. This is not spoken of as "withholding information" and it is not thought of as "lying." Rather, it is put in terms of "toning down" the facts. For example, if the defendant brutally beat the victim who was a helpless old lady who begged for mercy, the policeman will be asked to simply report (to either the prosecutor or the judge) that "the defendant inflicted some lacerations." Thus the same basic information is presented but in a qualitatively different way.

This attempt to control the quality of information is a central issue in plea bargaining and is engaged in by prosecutors as well as the police. Prosecutors who have

to secure the acquiescence of a judge before a plea agreement can be finalized may suppress the full impact of certain kinds of information. They also will report to the judge that the brutally assaulted victim "received some lacerations." One aspect of the victim's role in plea negotiation can be understood best in this context.

It is well understood that the victim can add to the qualitative nature of the information on which decisions are made. If, for example, the brutally assaulted old lady in our example above were allowed to testify in court, the difference between "receiving some lacerations" and "being brutally assaulted" would undoubtedly emerge and have an impact on the sentence imposed.

Thus, keeping the victim away from the judge and the jury is one of the prime motivations for plea bargaining. As one California defense attorney explained, "The last thing I want to have happen is to let the judge see the victim. I'll take almost any deal rather than run the risk of having the victim take the stand. You never know what is going to come out." The potential impact of the victim on the sentence is so critical that in some cases one of the terms of the plea bargain is that the prosecutor will precent the victim from influencing the judge. A defense attorney in one jurisdiction reported that the bargain reached with the prosecutor was for the prosecutor

to prevent the victim from appearing in court. To keep the victim away from the sentencing hearing this prosecutor deliberately misinformed the victim as to the time of the hearing. The victim arrived two hours after the sentence was actually imposed and was told by the prosecutor in feigned apologetic concern that there had been a last minute change in schedules and the case had already been disposed of. It was too late for the victim to affect the sentence.

The other part of the victim's role with respect to the information supply and usage in plea negotiations, is quite similar to the policeman's role. Victims can bring additional information to the attention of the prosecutor which may influence the prosecutor's plea bargaining decision. Again there are different kinds of information. What the victim tells the prosecutor may affect the prosecutor's assessment of the seriousness of the offense or of the seriousness of the offender. The senior prosecutor in Dade County cited examples illustrating these two situations. "If an employee stabs his employer in the back or brings his employer close to bankruptcy as a result of embezzlement or other violations of trust, then I feel that the victim's request for a tough sentence should be respected. Also if a victim tells me that he has been calling the police about this defendant for two years and the police have never arrested him before and that during that time this guy has been making a lot of trouble, then

that would count heavily with me. I would go along with his request for a tough plea deal."

In the first example the information shows the prosecutor that the crime was more serious than was first apparent. In the second example the prosecutor learned something that he could not have gotten from the rap sheet, namely, that the defendant was a more serious criminal than he otherwise appeared at first glance.

The defense counsel's role in plea bargaining can also be seen in terms of influencing supply, interpretation, and control of information. Sometimes the defense counsel simply supplies a piece of information that the prosecutor did not previously have that will affect the prosecutor's view of the strength of the case or the possibility that the defendant has a legal defense. Most frequently the kind of information introduced by defense counsel relates to the assessment of the defendant's character or worthiness to receive a break.[34/]

Another tactic of defense counsel may be to obtain a guilty plea before the prosecutor can obtain adequate information about the defendant and the crime. If defense counsel learns that the defendant has an extensive out-of-state criminal record counsel may seek a plea bargain before the prosecutor obtains the record. In prosecutors' offices with poor information management procedures a criminal record may not be readily available even if in-state. One wiley defense counsel from South Carolina described this tactic as "sneaking the sun past the rooster."

While not typical, the above example illustrates the potential problem of rapid case resolution in the name of efficiency. One young prosecutor in Greenville, South Carolina complained about a plea agreement reached three months earlier. He later obtained additional information about the defendant's prior record which caused him to regret the deal. "If I knew then what I know now I would never have agreed to those terms."

Th ›bject of this point is that the propriety of deals made) ' prosecutors may be partially related to the adequacy of their ability to gather and process information. In jurisdictions where adequate prosecutorial resources are spent on the rapid and thorough collection of information relevant to the plea bargaining decision, the rooster will not be caught napping.

How information relevant to the plea bargaining decision will be used and what weight will be given to it will depend upon the credibility of the person supplying the information. The credibility of the supplier is not determined by his official role. That is, a person by virtue of the fact that he is a defense counsel, police officer, or victim does not automatically receive greater or lesser credibility. Rather, credibility is something that is established on a personal basis. For defense counsel who appear regularly in court credibility is a valuable asset. Once established it can greatly facilitate their work. A defense counsel in Greenville, South Carolina

reported having cases dismissed by calling the prosecutor's office and telling them that the defendant was not at the scene of the crime on the day of the offense. This was possible because the prosecutors trusted him. Other defense counsel could not be so trusted. Similarly, prosecutors come to know that certain police officers are "too zealous". Thus, they tend to discount the credibility of these officers.

It is obviously difficult to establish the credibility of victims on the basis of long term performance. They are not regular members of the courthouse group. But assessment of their credibility (and witnesses) are made. These assessments may be based on obvious lies and inconsistencies in the stories recounted by victims and witnesses. In other instances the assessments may be based on an evaluation of the character of the victim (or witnesses).

Daudistel reports an incident that illustrates the point. A woman went to the district attorney's office to file a complaint against her husband for assault. The police officer discussed the case with the assistant prosecutor. The officer told the prosecutor of the woman's wishes and that physical evidence of some injury was present. The assistant prosecutor interviewed the woman. He told the officer that her "appearance was rather cheap" and that her dress was very short. Daudistel reports that "the [woman's] appearance was clearly taken by the attorney as

evidence of moral character. After he had observed the woman and made statements about her appearance and dress, questions about the actual occurrence of a crime became the topic of the conversation between the district attorney and the officer. All of this occurred before either person had examined the official police report on the matter."[35/]

After information has been presented and sifted for its credibility it is desirable to have it verified. Jurisdictions differ in their information processing technology as to how they receive initial information supplied to them, how long it takes for that information to be assembled, and in the means of verification.

Most information used as a basis for a plea bargain is verified through the pre-sentence report. In some jurisdictions this may be the sole function of the pre-sentence report in plea bargained cases. Judges frequently accept the terms of the plea contingent on the pre-sentence report containing no new information that would cause the judge to reassess the case. One judge in El Paso County, Texas does not look at pre-sentence reports for the sentence recommendation. "I don't ever follow them. I just want them (the probation officers) to verify the facts."[36/]

In jurisdictions with no probation service the verification function will fall on some other agency. In rural jurisdictions this is likely to be the police or sheriff. In El Paso County, Texas, for example, the judge and prosecutor travel a circuit to outlying, rural sections of the circuit.

An assistant prosecutor explained that in those sections the local sheriffs have a major influence in selecting an appropriate plea bargain. They have this influence because they are virtually the sole source of information. They know what the defendant did and are usually familiar with the defendant's background (whether there is a criminal record, whether the defendant is a trouble maker or a "good guy" who just got caught doing something wrong). The sheriff will also know the educational background, employment history, family circumstances, as well as problems with alcohol, drugs or other matters which ordinarily would be investigated by a probation officer.

At this point it is useful to summarize the discussion on information processing. It is basic to decision making and provides a useful perspective for examining plea bargaining in terms of how information is processed. The differences between jurisdictions regarding the roles of different criminal justice actors in plea bargaining can be understood in terms of the division of labor regarding information processing. In rural jurisdictions the division of labor regarding information processing may be minimal. The sheriffs or police may do it all. At the other end of the continuum is the large jurisdiction with a sophisticated division of labor with respect to information processing and analysis. In such jurisdictions the police and victims may supply certain pieces of information. The prosecutor may obtain additional information, and it all

may be verified and possibly expanded by the probation department.

It is important not to be misled by formal titles and job descriptions of actors in the criminal justice system. The literature on the criminal justice system may have the unfortunate affect of conveying that there are clear delineations in jobs performed by different agencies of the criminal justice system. For example, the literature suggests that the "police role" is to investigate and make arrests; the "prosecutor's role" is to screen and prosecute cases; the probation officer's role is to obtain information and make sentencing recommendations.

In reality the distinctions between the different roles in the system are not so hard and fast. One understands the criminal justice process better, especially the differences between jurisdictions in the administration of justice, if instead of looking at job titles (such as police, prosecutor, defense counsel, etc.) one looks at basic functions which must be performed by someone in the system. One such basic function is the gathering, interpretation, verification, and use of information. Systems vary in regard to who performs these tasks and the degree to which there is a division of labor to perform them.

It is frequently noted by criminal justice researchers that cross jurisdictional studies are impossible because of the bewildering differences in the way in which jurisdictions

operate. Such differences are not as bewildering as they appear when one ceases to focus on job titles and begins examining basic functions. In this functional perspective, one can achieve a more general understanding of the criminal justice process. For example, in the literature "screening" is described as a prosecutorial function.[37/] But this view may blind one to a full understanding of the roles of other actors in screening cases.

From a functionalist perspective screening is something that someone in the system of criminal justice does. It may be the prosecutor or another functionary. In jurisdictions such as New Orleans, Louisiana where considerable prosecutorial emphasis has been placed on the thorough screening of cases, screening is primarily a prosecutorial function. In Seattle, Washington the police conduct a thorough investigation and the prosecutor screens out relatively few cases.

In yet other jurisdictions with fewer resources or a different allocation of prosecutorial resources, screening may be accomplished in part by prosecutors, police, defense counsel, bailiffs, clerical workers, or anyone else who can supply information relevant to the screening decision. The defense counsel in Greenville, South Carolina who had a case screened out by calling the prosecutor's office can be thought of as "screening" the case. However, he himself described that action as "plea negotiations"; and other criminal justice researchers would

call this "disposition bargaining."[38/] But from a purely functional point of view this defense counsel was doing what a prosecutor would have done in New Orleans, Louisiana. There it is called "screening". If the Greenville prosecutor's office allocated its resources in a way similar to New Orleans, the assistant prosecutor screening that case would have been expected to find out the piece of information which in fact was determined by the defense counsel. In fact, it would be inconceivable for such an incident to occur in New Orleans.

In Henrico County, Virginia, a misdemeanor court judge explained he relied upon the information and knowledge of one of the clerical workers in the courthouse administration on occasion in relation to sentencing a defendant pleading guilty. She had knowledge of the family background of the defendants and was able to supply information which the judge felt was useful in reaching a sentencing decision.

In addition to the issues of how information becomes available; when; how it is verified; and what determines its credibility, there is the issue of how it is ultimately used. How does a person know when a plea bargain is a good and proper bargain? This question can be asked either from the point of view of the state or from the point of view of the defendant. For the prosecutor the question is, "How does he know that he is not 'giving away City Hall', on the one hand; and how does he know that he is not asking

for too severe a sentence, on the other? This question goes to the heart of plea bargaining. It relates to how the prosecutor uses the information that he has available to him; balances the competing objectives of efficiency, fairness, justice, and punishment; and what risks may be taken.

Prosecutors asked how they know they have reached the "right" deal usually respond in vague terms like, "It comes with experience," or "You learn eventually how to evaluate a case." When pressured further, they begin to explain that one must first learn the local "market value" or "true value" of a case, referring in part to the local standards of severity for punishing different types of crime. Where the state criminal code provides latitude in sentencing for specific offenses different communities in the state may have different local ideas as to what an appropriate sentence is for various crimes. In Montgomery County, Pennsylvania, an assistant prosecutor explained that defense counsel who practice regularly in the Philadelphia criminal courts may occasionally defend a first degree burglar in the Montgomery County criminal courts. These attorneys are surprised to find that these cases are not automatically considered for probation. The market value in Montgomery County involves some time in jail. From the prosecution's perspective in Montgomery County first degree burglary cases require an agreement to serve some time in jail.

Learning the local value of a specific type of crime may not be easy as the Montgomery County example suggests. Judges differ in their sentencing practices. In large jurisdictions with numerous judges it becomes far more difficult to say what the true market value of a case is beyond the simple distinction between cases that should result in jail time and cases that may receive probation. Even this may be difficult. In some jurisdictions judges disagreed as to whether or not certain offenses should always receive jail time.

Assessing the market value of a case does not refer solely to learning the going market rate. It involves the balancing of numerous additional factors. The three most commonly mentioned factors to be balanced are the seriousness of the offense, the seriousness of the defendant and the strength of the case.

The process by which most prosecutors learn how to evaluate cases is ill-defined. For most prosecutors in most jurisdictions it is a process of socialization to the work norms of the local courthouse. The new prosecutor (i.e., someone without defense trial work) usually learns how to evaluate a case by trial and error through a gradual process of induction into the norms of the courthouse. This usually means that assignment as an assistant to a slightly more experienced prosecutor in the screening division of the prosecutor's office or in the misdemeanor trial division. After some period of experience the young assistant may be permitted to do felony level work.

During the break-in period the assistant is supposed to learn what the going market rates are and how one balances out different factors. Instruction from superiors is of little help in the complex task of balancing the various factors that go into evaluating a case. Most frequently the advice is limited to warning the prosecutor to be cautious. A senior prosecutor in Delaware County, Pennsylvania explained that he advises new prosecutors to "watch your ass. Project yourself. You're a lawyer first and a prosecutor second. Check with somebody. Don't be Mr. Nice-Guy. Don't make a fool of yourself or a reputation of poor judgment. Don't bring stuff into a judge and have it rejected."[39/] A senior prosecutor in St. Louis, Missouri said that he tells his assistants that they can exercise their discretion "as long as they're right."

Young prosecutors know that a "safe" decision from their perspective is one where they are sure that they do not go under the going market value for a case. Most of them begin plea negotiating by asking for the local standards in terms of a stiff bargain. Some defense counsel recognize this and may not want to bargain with inexperienced prosecutors. One defense counsel stated: "Young DAs are all blood, guts and gore. They don't want to give you anything. It's worse than going to trial on the top charge."

The new prosecutor quickly learns that members of the localcourthouse community will not permit the "safe"

thing, i.e., asking for a maximum sentence. Pressure is quickly brought to bear to make him see that that is "unreasonable." That pressure comes from all quarters, fellow prosecutors, judges and defense counsel. In Delaware County, Pennsylvania, a young prosecutor recalled vividly an important incident in his learning how to evaluate cases. It was one of the first cases he plea bargained. When he presented it to the judge in court he asked for the maximum sentence. He heard some laughter in the back of the room and a more senior prosecutor stepped up, took the folder from his hand and pushed him aside, explaining to the judge that the state only wanted 2-1/2 years.

In Henrico County, Virginia assistant prosecutors trying cases in one of the misdemeanor courts learn some very direct lessons about assessing the local market value of a case. If they recommend a sentence which the judge regards as inappropriate, the judge accepts the sentence but after the proceedings are over he calls the assistant prosecutor into his chambers and "chews him out." He tells him to "never make a sentence recommendation like that again in this court". In other jurisdictions the judicial reaction to prosecutors who are not "reasonable" is a little less drastic but forceful nonetheless. One judge in Dade County, Florida called the supervising prosecutor about the assistant prosecutor in his courtroom. He complained that the prosecutor was not being reasonable. Still other judges in other jurisdictions exert various forms of pressure such as making other cases more difficult for the prosecutor to try.

Learning how to evaluate a case was seen by most prosecutors as equivalent to learning how to sentence a case. Furthermore, many young prosecutors complain about this central fact of plea bargaining. They feel for one thing that they had not received the training to "sentence" a defendant. In their view that is what they were doing.

In the process of balancing the factors considered in striking a plea agreement one of the most central factors is the strength or weakness of the case. Our findings are in general agreement with previous research on this matter. Because of the central importance of this particular factor and the complexity of the issues it raises it is discussed at considerable length below. In particular it is discussed in the context of the question of whether innocent defendants can be convicted.

Can Innocent Persons Be Convicted?

One of the major concerns about plea bargaining is the possibility that innocent people may be convicted under this system of disposing of cases. The present study has attempted to examine this issue empirically. Before presenting the results, however, an important distinction which is often overlooked in these discussions must be made. It is the distinction between factual and legal innocence. The question of whether or not plea bargaining results in the conviction

of the "innocent" is really two questions. Does it result in the conviction of the factually innocent? And, does it result in the conviction of the legally innocent?

The clearest discussion of the difference between legal and factual innocence is that of Professor Herbert Packer in his discussion of his two models of the criminal process.[40] That analysis bears repeating.

A factually guilty person is one who did in fact commit the act with which he is charged. But that does not mean that he is legally guilty. Under Anglo-American law he is presumed to be innocent. As Packer points out this presumption of innocence is not to be thought of as the opposite of the presumption of guilt. It is irrelevant to the presumption of guilt. The two concepts are different rather than opposite ideas. The difference is best illustrated by an example. Assume a murderer kills his victim in plain view of a large number of eye witnesses. Later he confesses to the crime. Under such circumstances it is clearly absurd to maintain that he is not the person who committed the crime in fact. But that is not what the presumption of innocence means. Rather it means that "until there has been an adjudication of guilt by an authority legally competent to make such an adjudication, the suspect is to be treated, for reasons that have nothing whatever to do with the probable outcome of the case, as if his guilt is an open question."

"The presumption of innocence is a direction to officials about how they are to proceed, not a prediction

of outcome. The presumption of guilt, however, is purely and simply a prediction of outcome. The presumption of innocence is then, a direction to the authorities to ignore the presumption of guilt in their treatment of the suspect."[41/]

The reasons the presumption of innocence tells the authorities to ignore the presumption of guilt are derived from the very heart of the Anglo-American tradition of jurisprudence. It is a tradition which has developed a criminal procedure to ensure that the government not be oppressive in its prosecution of citizens accused of crime. It is a criminal procedure developed in response to the placing of a high value on individual liberty and a belief that it is better that ten guilty men go free than one innocent man be wrongly convicted of a crime. This tradition extends far beyond the 1960 supreme court decisions imposing the "exclusionary rule" on the state. It refers to several centuries of the development of procedural safeguards such as the requirement that the government prove its case beyond a reasonable doubt; the right to a trial by jury; the right to counsel; the right to due process of law; and other basic procedural safeguards. These safeguards and other legal requirements which restrict the government's power are deliberately designed to prevent the government from operating with maximal efficiency. These restrictions constitute the contents of the doctrine of legal guilt. According to this doctrine, "a person is not held to

be guilty of a crime merely on a showing that in all probability, based upon reliable evidence, he did factually what he is said to have done. Instead, he is to be held guilty if and only if these factual determinations are made in procedurally regular fashion and by authorities acting with competences duly allocated to them. Furthermore, he is not to be held guilty even though the factual determination is or might be adverse to him, if various rules designed to protect him and to safeguard the integrity of the process are not given effect: the tribunal that convicts him must have the power to deal with his kind of case ("jurisdiction") and must be geographically appropriate ("venue"): too long a time must not have elapsed since the offense was committed ("statute of limitations").... None of these requirements has anything to do with the factual question of whether the person did or did not engage in the conduct it is charged as the offense against him; yet favorable answers to any of them will mean that he is legally innocent."[42/]

The concern over the possibility of plea bargaining resulting in the conviction of innocent people extends both to the issue of legal innocence and factual innocence. Our findings regarding this two-fold set of concerns are presented separately, first for factual innocence and then for legal innocence. We recognize the difficulty in treating these concepts separately because they easily become intertwined. Yet we believe it useful to discuss them in this manner.

Factual Innocence

The question here is whether people who are factually innocent of the crime with which they are charged are likely to be wrongly convicted through plea bargaining. It is possible that a factually innocent person could be charged with a crime and could be offered a plea bargain which he would accept rather than risking a trial and receiving a more serious sentence. Or, an innocent person might accept the plea offer because the penalty could be less expensive than the cost of fighting the case at trial. This latter kind of case seems to be especially likely in misdemeanors where the cost of hiring an attorney can far outweigh the cost of the fine imposed if a conviction occurs.

The methodological problems involved in attempting to find out how many such cases occur are of heroic proportions. This was not attempted in the present study. Rather this issue was addressed in an indirect way by questioning prosecutors, defense counsel, and judges for their estimates of the number of times they had seen a case where the defendant was factually innocent but still pled guilty, or for their general estimates of how frequently such cases occur. Some informants reported that this kind of event definitely does occur. A justice of the peace in Clark County, Nevada who has trial jurisdiction over misdemeanor cases said that he knows defendants plead guilty in order to avoid going to trial even though they are innocent. He gave the example of old ladies who are brought into court for shoplifting. He

said that a lot of times these elderly women are senile and don't know what they are doing when they go into a store and pick up an article and slip it into their purse. However, they plead guilty rather than going through the whole criminal justice process because it is too much of a strain on them.

A young attorney with only two years of experience in Hamilton County, Tennessee reported a case where the defendant indicated to him that he was not guilty of the crime. However, the co-defendant was willing to turn state's evidence and therefore the first defendant was facing a ten to twenty year sentence if convicted by a jury. The state offered him five years. The attorney after much soul searching decided that he would recommend to his client that the five years might be the "best way to go" even though he was innocent. The defendant took the deal.

On the other hand, however, other informants did not think that the problem existed at all or to any significant extent. A 27 year old assistant prosecutor with two years experience in Dade County, Florida did not feel that factually innocent people were being convicted by plea bargaining today. "The defense bar is better than ever. I never worry about an innocent person being convicted."

Similarly, a young assistant public defender in Dela.-County, Pennsylvania said that of the 25 guilty pleas in which he had been involved, he never had the feeling that the defendant was factually innocent.

When one talks to prosecutors about the possibility that factually innocent people are convicted by plea bargaining they are generally of the opinion that it does not happen. They unanimously assert that they would never intentionally let it happen; and they always have an example of a recent case they dismissed when they learned that the defendant was indeed factually innocent. According to the Code of Professional Responsibility a prosecutor cannot bring charges unless they are supported by probable cause. Moreover, the prosecutor has a higher ethical responsibility than simply getting convictions. He must see to it that justice be done.[43/] If he is certain the defendant is legally or factually innocent it is his ethical responsibility to dismiss the case. All prosecutors who were interviewed believed that they were meeting the ethical responsibility as to factual innocence.

Individual prosecutors differ substantially as to the kind and amount of evidence required to convince a prosecutor of the factual guilt of a defendant. In Kalamazoo, Michigan, a senior prosecutor stated that it is office policy that plea bargaining cannot be engaged in unless the assistant prosecutor is convinced that the defendant is factually guilty. In Dade County, Florida a senior prosecutor advises the assistant prosecutors under his supervision that "if you don't have a case, don't prosecute. You can't fire a gun without bullets. If the bullets aren't there, it's not your job to make them up."[44/]

Other examples of variances to acceptance of factual guilt were found. In New Orleans, Louisiana a young, supervisory-level prosecutor with two years of experience indicated that the mere fact that a defendant pled guilty was sufficient to convince him the defendant was factually guilty. "No one would plead if they weren't guilty," he explained. In Kalamazoo, Michigan, the DA's office as a matter of policy offers any defendant the opportunity to convince the DA of his factual innocence by taking a polygraph test.[45/]

Many prosecutors believe they do not obtain convictions for factually innocent defendants because police and prosecutorial screening sifts out the factually innocent defendant. This belief is reinforced in two ways. The bulk of cases not screened out are ones in which the evidence is strong that the defendant did in fact commit the crime. Secondly, there is a belief held by some actors in the system, including defense counsel and judges as well as prosecutors, that all defendants coming through the process are guilty of something, if not the particular crimes for which they are charged.

Even where the evidence does not clearly establish the factual guilt of the defendant, many prosecutors are confident that the police and the prosecutorial screening process are sufficiently reliable and accurate and error free that defendants who pass through the screen

will be found guilty by a jury. Obviously the level of proof which prosecutors demand at screening is not equivalent to the level of proof required if the case went to trial. Moreover, prosecutors are not obligated to be convinced beyond a reasonable doubt that a defendant will be found guilty in order to be convinced of his factual guilt.

Project staff found substantial differences in screening procedures and effectiveness. Moreover, the degree to which police investigatory practices are supervised or advised by prosecutors varies substantially. In New Orleans the district attorney's screening procedures are rigorous, frequently involving interviews with investigating officers, victims and witnesses. About half of the cases brought in by the police are rejected for prosecution. One senior deputy district attorney felt that the police should not screen heavily, that it is the responsibility of the prosecutor to make screening decisions. In Seattle the police conduct a thorough investigation and provide a minitrial brief complete with a list of witnesses and a summary of what each witness will say, as well as the field notes on which the summaries are based. About 10% to 15% of the cases brought to the prosecutor's office are screened out. In other jurisdictions the gradations are infinite. Some district attorneys uncritically accept cases brought by the police. Others conduct a selective screening controlled by the uniqueness of a case, the evidence or the particular

offender against whom charges are brought. These gradations and how prosecutors make their decisions can be illustrated by some instances uncovered by project staff.

A senior prosecutor in St. Louis City, Missouri described a recent case. A defendant was charged with murder while burglarizing an elderly lady's apartment. Some of her property, including a television set was stolen. The only evidence involved the defendant's attempt to pawn the victim's television set one day after the crime. Under a local ordinance the pawnbroker was required to take his photograph. Based on this photograph he was arrested and charged with murder. The prosecutor explained that he was trying to get the defendant to plead to second degree murder. He was asked whether he wasn't worried about that the defendant might in fact be innocent. He replied that he knew the defendant was factually guilty "because I sent two of my best investigators who are black and competent men out on the street to check out the case. They went down to the section of town where this guy hangs out and they talked to the people down there about his involvement in this crime. They found out that the street talk says he's guilty. The guys down there on wise-guy alley say he did it, so I know he is guilty."

An assistant prosecutor in Greenville, South Carolina said factual guilt of the defendant may be verified by defense counsel. In some cases defense counsel tell him directly that the defendant has admitted guilt. In other cases the willingness of defense counsel to make a plea

bargain leads the prosecutor to understand that the client is guilty. In this instance reliability is assured because these attorneys are public defenders with a policy of not asking for a plea bargain if defendants maintain their innocence. Thus, if these attorneys are asking for a bargain, the prosecutors "know" their clients have admitted factual guilt.

The major procedural safeguard against the conviction of factually innocent defendants through a guilty plea is the judge's inquiry into the factual basis of the plea at the time the defendant is pleading. Errors in the reliability and accuracy of the screening procedures of the police and prosecutor can theoretically be uncovered through this procedure. Prior to 1966 only a minority of state trial courts made inquiries into the factual basis before finally accepting guilty pleas.[46] This has drastically changed. In 22 of the 25 jurisdictions visited by this project, the court is required by law to make an inquiry into the factual basis of the plea.[47] In our field visits we found that most judges do inquire into the factual basis of the plea. For some this is a minimal inquiry; others go into the matter in some depth.[48] Whether or not this judicial inquiry represents a substantial safeguard against the possibility of convicting factually innocent persons may depend on the thoroughness with which the inquiry is made.[49]

When judges do make sufficient inquiry into the factual basis of the plea and are not satisfied as to the factual basis two kinds of results may follow. They may cause the case to be dismissed or enter a plea of not guilty. Dismissal seems most likely to occur in the misdemeanor cases in jurisdictions where the screening of misdemeanor cases by the prosecutor is minimal or non-existent. Under those circumstances the judge's inquiry into the factual basis of the plea may constitute the only real screening of the case that occurs. This may hold whether or not there is a defense attorney involved in the case. At the misdemeanor level project staff observed that where a public defender was assigned to misdemeanor court that case jackets were not examined prior to the actual court appearance.

The judicial inquiry into the factual basis of the plea is not an infallible safeguard against convicting the factually innocent. It can be defeated and manipulated. Factually innocent defendants may choose to plead guilty to avoid severe punishment or additional costs. On their own initiative, on the advise of counsel, or under the brow-beating of the judge they may decide to admit to facts which are not true. Where judges actively encourage guilty pleas or sentence harshly for going to trial, the judicial inquiry into the factual basis of the plea may not be a reliable safeguard against conviction of the factual guilty. 50/

The issue of convicting factually innocent people through plea bargaining causes some criminal justice officials to note that convicting factually innocent people may occur at trial as well. In Dade County, Florida an experienced public defender felt it was more likely that factually innocent defendants would be convicted where plea bargaining was eliminated than through plea bargaining. He cited a case involving a young black male charged with robbery, eye witnesses with "positive" identification, but what he believed was a strong defense. This defense required articulate testimony and ability to remain cool under cross-examination. The young defendant could not meet either of these tests and was convicted despite the fact that no other evidence linked him to the offense.

The public defender subsequently learned that one juror was a store owner who had been robbed several times and felt that someone should be made to suffer for these robberies. He reportedly had been a major influence among the jurors in securing the guilty verdict.

This public defender observed that jurors may feel that when a crime has occurred somebody must be guilty. For him jurors do not understand the law. They believe that where there is smoke there is fire. If someone is arrested then he may be convicted on the mere fact that the police decided to arrest him. Another defense attorney from Dallas County, Texas with over seven years experience said that he had seen four cases in which he felt factually innocent defendants were wrongly convicted after a trial.

Some prosecutors and defense attorneys believe that the plea negotiation process is superior to a trial in determining the factual truth of a situation. They reach this conclusion, however, for different reasons. The defense attorneys believe that factually innocent defendants are more likely to be convicted at trial than through the plea negotiation process. The prosecutors believe the exact reverse.

On the other hand defense attorneys with adequate resources believe a trial will be beneficial to their clients in many cases. And prosecutors who screen carefully have indicated that cases accepted for prosecution will not likely be pled out to lower charges because of their belief in the strength of case.

Legal Innocence

There are cases where the prosecutor is certain of factual guilt, but which for various reasons are "weak" or doubtful, thus rendering it difficult to prove legal guilt at trial. Through plea bargaining the state may obtain convictions for some offense -- even if it is not the offense the defendant committed. By plea bargaining the state avoids the possibility of losing the case at trial. Thus plea bargaining allows the prosecutor to "get half a loaf of bread" in cases where he fears he may not get any. The defense attorney of course, has the same problems of evaluating the evidence and must advise the defendant of the options and possible outcomes.

This arrangement is akin to the process of settling civil cases. The plaintiff compromises his claim, the defendant agrees to pay it; a trial is avoided; and the possibility of "winning big" or "losing big" is avoided. Historically the process which today is called "plea negotiating" or "plea bargaining: was formerly (pre-1950) generally referred to as "compromising criminal cases" or "settling criminal cases."[51/]

This function of plea bargaining has been controversial for some time. In 1929 Raymond Moley noted that prosecutors and judges vigorously defended plea negotiation in cases where it appeared the defendant might win acquittal. Their rationale was that "it is better not to take a chance of losing a case before a jury but to make certain of at least a small amount of punishment for the offender. Half a loaf is better!"[52/] Moley points out the self-interest of prosecutors who follow this philosophy. Their reputations as prosecutors are enhanced because they secure a high rate of convictions, some of which might have been lost if the case had gone to trial. But, Moley argues, this is no justification for the practice of seeking the "half loaf". "It is not the business of the prosecutor to get as many convictions as possible. It is the duty of the State to see that justice is done within reasonable limits. Either a person is guilty of the crime charged, or he is not. It does not satisfy the requirements of justice to punish him for one crime because it is impossible to punish him for the

correct one. The value of the services of a prosecuting officer should not be rated by the number of persons whose guilt he has established."[53]

Other commentators support the "half loaf" philosophy under certain circumstances. Professor Enker distinguishes cases involving matters of objective historical fact - such as matters of mistaken identity - from cases involving issues which call for some judgment. Examples involving judgment are whether the defendant had the requisite intent, been provoked, was insane, or whether he was intoxicated. The latter cases are ones in which the chances of conviction may be uncertain. Enker maintains that in such cases justice will more likely occur through plea negotiations. "Plea negotiation leads to more 'intelligent' results [than jury trial]. A jury can be left with the extreme alternatives of guilty of a crime of the highest degree or not guilty of any crime, with no room for any intermediate judgment. This is likely to occur in just those cases where an intermediate judgment is the fairest and 'accurate' (or most congruent)."[54] Former District Attorney Arlen Spector of Philadelphia argues that quasi-legal questions raise problems of "variable guilt" and are therefore suitable for compromise.[55]

Professor Alschuler argues against plea negotiations in weak or doubtful cases. He is disturbed by the practice of bargaining hardest in the weakest cases. Going beyond Moley he points out inherent dangers in this practice. It can result in grossly disparate treatment for identical

offenders (assuming that the offenders are guilty); it ignores the correctional treatment that the defendant may require; and it increases the risk of false conviction.[56] Alschuler agrees that plea bargaining does have the advantage of being more flexible than traditional forms of adjudication. But he noted that flexibility is a hallmark of lawless systems of justice. Without rules or standards the personal biases of the actors, corrupt motives, and other extra legal factors can have uncontrolled influence over the outcome of the case. Finally, Alschuler argues, "From my perspective, the more difficult the issue, the more it merits careful scrutiny. It is a prerequisite of justice in troublesome, contested cases that someone who is not committed to one viewpoint or the other listen to the evidence."[57]

With these issues in mind this project examined the attitudes and practices of prosecutors regarding their willingness to negotiate pleas in weak cases. We found that practices and the "half-loaf" philosophy Moley reported in the 1920's, and Alschuler in the 1960's continues to thrive today. In Maricopa County, Arizona, the prosecutor banned all forms of plea bargaining in his office with certain important exceptions which are necessary in the interests of justice. Prosecutor Berger explained:

> "It should be pointed out that although our office prohibits plea bargaining, it recognizes exceptional cases when plea bargaining is still necessary. For example, a case may be so weak that a plea to some other charge may be preferable to going to trial and losing the entire case. This could happen when, for example, a critical witness has died or is unavailable." [58]

When prosecutors say they would never intentionally convict an "innocent person" they virtually always means one kind of innocence, namely, factual innocence. A prosecutor personally convinced that a defendant did not in fact commit the crime probably will drop the prosecution. On the other hand, many prosecutors personally convinced that a defendant committed the crime, but who also believe it questionable that the government could prove its case at trial, may not dismiss the case. Frequently an attempt will be made to strike a plea agreement. Finally, where prosecutors are uncertain as to the factual guilt of the defendant they may still attempt to negotiate a plea.[59/]

Few prosecutors interviewed by project staff are willing to dismiss a case solely because it may be difficult to prove at trial.[60/] On the contrary, virtually all prosecutors regard these weak cases as prime targets for plea negotiations.[61/] Some jurisdictions single out thie type of case in written policy guidelines. This is particularly significent because plea bargaining guidelines are nonexistent in many jurisdictions and skimpy in others.

The written policy of the Circuit Solicitor of Greenville, South Carolina, is illustrative. One of the six written guidelines state as follows:

> "While other circumstances may arise, the following four areas are suggested as the ones when this office may consider plea negotiations with defense attorneys:
>
> (a) When a codefendant will testify for the State and his testimony is critical to the State's case;

(b) When the State has a weak case and the odds of conviction are not great;

(c) When the defendant is serving a lengthy prison term and the trial of a subsequent would have no practical effect on his sentence and the cost to the State to try him would not be justified;

(d) When there are multiple offenses pending against a single defendant." 62/

Some prosecutors operate intensive screening procedures to reduce the number of weak cases entering the criminal justice system. Such prosecutors believe that weak cases are largely kept out of the system. But not all "weak" cases are screened out, and how weak is defined and special circumstances or offenders may influence the screening decision. Such prosecutors may not have feelings similar to other prosecutors about weak cases. Moreover, where the screening of weak cases is done primarily for administrative purposes, not the achieving of justice, relatively "strong" weak cases may be screened out.

In all jurisdictions weak cases get through the screen; and strong cases may later "fall apart". When this happens prosecutors usually try to obtain a plea. A peculiarity of New Orleans, due to its strong screening program, is that the the presence of a defense attorney at screening, might create a plea bargaining situation in a case which might otherwise be screened out.

Both in the literature and in practice there is general reference to the notion of the "weak case." But

this term lumps together situations with important differences. The term "weak" case is deceptively simple. It masks the complex judgment involved in reaching a determination of whether a case is weak. Whether or not to plead a weak case must await resolution of the full complexity of the case.

Assessment of the strength or weakness of a case means predicting the probability of conviction if it goes to trial. Lawyers in criminal cases regularly make such calculations. Cases are classified as "dead bang" cases (high probability of conviction) and "weak" cases. A specific probability of conviction may be given - such as 50% or 80%.

This calculus is performed regularly, with confidence, and from it stems important decisions. The uninitiated could assume that it is based upon a reliable scientific formula. In fact it is not. It is a skill developed with experience - and even then may be of questionable reliability. The Institute for Law and Social Research discovered that estimates of the probability of conviction by less experienced prosecutors in the Superior Court of the District of Columbia were unreliable.[63/]

Accurately estimating the strength of the case is more than a function of having sufficient experience. It is also a function of that point in the process at which the prediction is made -- the earlier the less accurate. The strength of the case is not a fixed judgment that can be determined at any one moment in time. It may be modified from the time of arrest up to jury deliberations at the end

of the trial. At the earliest time a prosecutor must evaluate the victim, witnesses, the defendant, and the ability of defense counsel. These early estimates of the strength of the case may,however, be unreliable. Witnesses may prove to be unconvincing, unsympathetic, uncooperative, or they may change their mind. Early eyewitness identifications may not hold up. The victim may lose all desire to prosecute.

In several jurisdictions prosecutors described cases which appeared strong and which had gone to trial. After presentation to the jury the facts of the case no longer seemed as strong. Consequently, they were willing to offer deals to the defense.

There are other reasons for being skeptical about estimates of the strength of the case. These estimates are grounded on prior experience with jury trials in the particular jurisdiction. They operate on a kind of informal, unscientific base expectancy table. The calculation goes like this. Juries in this jurisdictions are usually of a certain demographic composition; juries typically respond harshly or leniently to certain kinds of offenses and to certain kinds of offenders. Therefore given the particulars in this case the jury is likely to do X.

One source of error in this line of reasoning is the bias or inadequate nature of the experience base on which these predictions are made. In some jurisdictions the base of experience with trials is in effect rigged by the prosecutor. In Henrico County, Virginia for example,

the prosecutor carefully selects the first case that he is going to take to the jury every time a new jury pool has been selected. He chooses the strongest case, one certain to result in conviction, and one in which the the jury will probably impose a stiff sentence.[64/] The prosecutor explained that once a stiff sentence is imposed in the first case of the term,the word spreads "like wildfire" among the local defense bar that the current jury pool are hanging jurors. This in turn affects the willingness of defense counsel to negotiate with the prosecutor on terms set by the prosecutor. In effect the prosecutor is rigging the defense bar's estimate of that jury pool during that term. However, as the prosecutor pointed out, if more attorneys went to trial the base of experience for predicting jury behavior would be altered by the inclusion of less certain cases.

In addition to deliberately rigging the base of experience, the adequacy of the sample of cases upon which base of experience is grounded may naturally be limited. Where trials are a rarity it is difficult to understand how prosecutors and defense counsel can predict jury verdicts. Even where trials are more frequent the base of experience can be biased in unknown ways. Assume, for example, that 10% of the cases go to trial. The base of experience for jury prediction is grounded on that particular 10% sample. Since a complex selection procedure has considered many variables in arriving at the first 10% sample the

pattern of jury verdicts for the second 10% may not be identical to that of the first 10%. Thus using cases selected for trial as a basis for predicting the jury outcome in cases that did not go to trial is questionable. In fact, one would argue that the estimate of conviction probabilities may be part of a self-fulfilling prophecy. At a minimum it might be subject to change in unknown directions if more cases went to trial. Cases with apparently lower probability of conviction are ones in which there might be a higher probability of success if more of them went to trial rather than being settled through plea bargaining.

Returning to our main point, in addition to recognizing the complexity of what is meant by the strength of a case, it is important to distinguish the different situations which give rise to cases regarded as "weak." Five situations can be usefully distinguished. They are: (1) the evidence linking the defendant to the crime is weak; (2) the evidence establishing that the defendant did the criminal act is strong but there is some doubt about whether he had the requisite intent or whether he could successfully argue self-defense or provocation or avail himself of some legal defense; (3) the defendant committed the act and has no chance of availing himself of the defense of provocations self defense, or other defenses, but there is some legal flaw in the case which may result in the suppression of

evidence that is needed to obtain a conviction; (4) regardless of whether the case was weak or strong initially, at the time of plea negotiations the evidence necessary to at least go to trial is absolutely unavailable or (5) theoretically unavailable.

These five situations are "pure" types used here for purposes of illustration. In reality cases may have one or more of the weaknesses mentioned. Moreover, the strength or weakness of a case is always a matter of degree. Thus, in regard to type 1, the evidence linking the defendant to the criminal act may be more or less weak; and in type 3 the possibility that the evidence will be suppressed could be more or less strong.

Most prosecutors appear willing to plea bargain in all five situations. But there are differences in tactics between the five types, as well as differences in rationale and acceptable ethical procedures.

Generally prosecutors see nothing wrong, unethical, or improper about offering "sweet deals" (i.e. high discount rates) in very weak cases. But their grounds for holding this position differ. Some prosecutors, even senior ones, simply have not realized there is any ethical issue here. The chief prosecutor in one jurisdiction who had specifically directed his assistant to plea negotiate these weak cases was perplexed when the Alschuler and Moley type criticisms of bargaining were brought to his attention. When he began

to see that offering the sweetest deals in the weakest cases may be in a sense subverting the doctrine of legal guilt he asked for guidance in revising his policy.

On the other hand, a hard line chief prosecutor in another jurisdiction vehemently denied the validity of the doctrine of legal guilt and argued that the law was to protect only the factually innocent. If a person did the act then he should be punished and "legal technicalities" should not stand in the way. He tended to identify the doctrine of legal guilt with the exclusionary rule. But it was clear that he was aware that that doctrine also included the requirements of probable cause before a prosecutor proceeds with prosecution.

Still other prosecutors admit the validity of the doctrine of legal guilt and agree that it may be wrong for them to seek a half loaf if they could not otherwise secure a conviction at trial. They explained this practice in terms of the attitude they develop on the job. As a young assistant prosecutor in New Orleans stated: "On this job you see a lot of people (victims) who have been messed over badly. You want to do something for them. You want to have justice done." Doing justice frequently means choosing between a concrete reality and an abstract ideal. The concrete reality is to punish somebody who has injured another party. The abstract ideal is to insure that the punishment is meted out lawfully. For the working prosecutor who hears of the injuries and damages to victims

every day the choice is not difficult. Securing a half loaf at the expense of upholding the pure ideals of the law is a "natural" choice.[65]

Another rationale for taking the half loaf is the argument that the practice is neither coercive or wrong because it is not black and white. The weakest case may result in a jury conviction. Thus a prosecutor may become convinced that defendants are never convicted through plea bargaining in cases where an acquittal would be reasonably certain.[66]

The main difference between the five types of weak cases described above is between the first three types and the last two. In regard to the first three, plea bargaining can revolve around honest differences of opinion between the prosecution and the defense regarding the strength of the case. A key prosecution tactic in these cases involves the issue of discovery, the extent to which the prosecution case is made available to defense counsel. Some prosecutors provide defense counsel with extensive discovery privileges, frequently more than required by law. The rationale underlying this practice is that counsel will convince the defendant to plead guilty where the case is strong. Some prosecutors, however, are reluctant to let the defense know the true strength of the case. Unwillingness to go beyond the legally required disclosure is not regarded as improper although it is sometimes seen as inefficient.

In reference to the last two kinds of weak cases the prosecution tactic at issue is no longer the matter of unwillingness to give discovery. Rather, it becomes the question of the propriety of bluffing. As with other terms, the term "bluffing" has multiple references in practice. When asked if they engage in bluffing, some prosecutors interpret that question to mean whether or not they would try to convict a person whom they knew was factually innocent by trumping up evidence that did not exist; or, to use the Miami expression, "making up bullets for an empty gun." This practice is universally condemned.

Other prosecutors take the term "bluffing" to mean the practice of refusing to give discovery and then "puffing" about the strength of one's case the way a gambler might claim he has a strong hand in order to outwit his opponent. Such practice is regarded as just a form of hard bargaining and skillful negotiations. Provided there are no deliberate lies about the evidence in a case, this kind of bluffing is generally regarded by prosecutors as acceptable.

A third use of the term refers to the practice of leading the defense counsel to believe that the prosecution has a case it could take to trial when in fact this is not true. This is the kind of situation which Alschuler describes as "the ultimate in a weak case -- that is, no case at all."[67/] This is the situation described in weak case types four and five. The weakness of these cases

lies in the fact that whatever evidence was at one time available (no matter whether it was strong or weak), is no longer available absolutely or theoretically. Thus if an essential witness dies before the trial date the testimony that that witness would give is absolutely unavailable. On the other hand, if an essential witness happens to be on a trip around the world at the time the case is set for trial, then his testimony is not absolutely unavailable but theoretically unavailable.

Alschuler's condemnation of bluffing refers to bluffing in these cases. His objection is that these defendants are being convicted through plea bargaining when they could not have been convicted had they gone to trial. This kind of situation is the clearest example of the subversion of the doctrine of legal guilt through the practice of plea negotiation.

There are considerable differences as to how prosecutors view this practice. It is utilized in some jurisdictions visited and is not regarded as improper provided that certain "ethical" bluffing practices are followed.

Among those prosecutors who have developed an ethical code with respect to bluffing, the line is drawn at responding "ready for trial" when the clerk of the court calls the calendar. Even though they will not answer in the affirmative these prosecutors do not believe they are obligated to inform defense counsel that the prosecution no longer has a case. If the defense agrees to a deal,

these prosecutors will accept it even though they know that they had to go to trial with a case they could not get to a jury. The judge would direct a verdict of not guilty.

It appears that the prosecutors who use the "calling ready" standards of ethics were in the majority. There are, however, two other groups of prosecutors. These include prosecutors who feel no restrictions whatever as to the extent to which they can go in bluffing cases, and conversely, those who feel that bluffing of any kind is improper and that they must inform defense counsel when the case folds. For example, in Dade County, Florida one assistant prosecutor reported a split between prosecutors who felt obligated to inform defense counsel when the prosecution's case had collapsed and those who did not feel so obliged. He was of the latter group and a subscriber to the don't-call-ready school of bluffing ethics. He reported that the ethics of bluffing is a topic of regular discussion among the staff. These discussions have made him aware that some assistants believe that prosecutors must inform the defense when the case has collapsed. Such prosecutors understand that their obligation is to prevent the conviction of a factually and legally innocent person. Other prosecutors believe that obligation means the prevention of factually innocent defendants being convicted.

Prosecutors justify the conviction of legally innocent defendants by bluffing in various ways. First

there is the distinction between the theoretical and the absolute unavailability of the evidence for trial. Of the two situations the former apparently is more common. That is, it is more common, for example, that a witness has moved to a distant jurisdiction or is unlocatable in the local jurisdiction than for him to have died.

In the theoretically unavailable case the prosecutor's rationale for bluffing is that the doctrine of legal guilt has not been subverted because the prosecution could theoretically have gone to trial if it had wanted to go to the time, effort, and expense. Rejecting the Alschuler criticism of plea bargaining in these cases, a prosecutor in Dade County, Florida said he once remembered a case where a key witness was not available because he was half-way around the world. However, the state wanted to try that case so badly it paid the expenses of flying the witness back for trial. On the basis of this incident the prosecutor reasoned that in similar cases it would not be improper to bluff. If the state wanted it could spend the money to locate and bring the witness back for trial. This was not considered subversion of the doctrine of legal guilt.

Some prosecutors are unwilling to accept dismissal of a case when they are certain of factual guilt. It is offensive to their sense of substantive justice to dismiss an auto theft case because the owner of the automobile

lives on the other side of the country and is not being transported to the trial to answer one question: "Did you give this defendant permission to use your automobile?" They do not believe bluffing in this situation is improper.

Some prosecutors are convinced of the propriety of bluffing because they have successfully gained convictions at trial when bluffing did not work. An assistant prosecutor in New Orleans cited cases where he obtained convictions without the presence of the victim. In auto theft cases, for example, he placed arresting officers on the stand. He asked questions so the jury could infer that the defendant had no right to be in the automobile. This tactic may take such cases our of the bluffing category.

Where the evidence is absolutely unavailable some prosecutors, even those who believe in ethical bluffing, are reluctant to see the defendant go free. Bluffing these defendants into plea bargains is more difficult to rationalize. Some prosecutors deny that this kind of situation occurs with any frequency. Others contest that claim. One former prosecutor reported that local procedures for maintaining the custody of evidence were so inefficient and unreliable that in almost 90% of the cases the prosecution would not even be able to put on a prima facie case for the jury to consider.

Some prosecutors admit that bluffing occurs where the evidence or witness is absolutely unavailable. Some felt that even though the crucial witness was dead

or the police had lost the physical evidence, they might still be able to convince a jury at trial. Others felt that the death of the key witness or the loss of key evidence was just a "technicality"; it would be substantive injustice if this prevented them from obtaining a conviction.

Among the prosecutors who have no reservations about bluffing there seems to be little articulated justification for their practice. They seem to just regard it as a part of the "gamesmanship" of plea bargaining. One assistant prosecutor in St. Louis,Missouri said "I do it because defense counsel do it."

The extent to which bluffing occurs is difficult to estimate. No jurisdiction seems to be without any bluffing; but the extent of it varies, apparently based on three factors: (1) the quality of the procedures in the jurisdiction for maintaining proper custody of physical evidence; (2) the availability of funds for the prosecutors office to be spent for locating and transporting witnesses; (3) and the transiency of the victim/witness population in the jurisdiction. In jurisdictions where the procedures for handling evidence are inadequate, bluffing will probably be more frequent. Where funds for locating and transporting witnesses are limited, bluffing may be used as a substitute.

Judicial Supervision of Legal Innocence and Bluffing

Compared to the level of effort by the judiciary to determine whether a defendant is factually innocent the

effort to determine whether he is legally innocent appears to be somewhat less. There appears to be little effort by the judiciary to prevent bluffing.

When establishing the factual basis of the plea some judges also establish the "legal" basis of the plea. In Washington, D.C. a defendant pled guilty to the charge of possession of dangerous drugs. The drugs had been found in a metal box under the seat of his truck when he had been stopped for a traffic offense. The judge asked whether the defendant was in fact driving the truck at the time of the arrest, whether it was his truck and whether he knew the drugs were in the metal box. The defendant answered yes to the first two questions but was reluctant to admit to the last. The judge threatened to set the case for trial. After reflection and some discussion with his attorney, the defendant admitted that he had known the drugs were in the metal box. Most judges are not as diligent in inquiring into the legal basis of a case.

Judges have not seen the supervision of bluffing as falling within the purview of their function. They are aware that bluffing occurs. Cases are called for trial in their courtrooms and dismissed before selection of a jury. Some judges do not want responsibility for supervising bluffing. Yet others felt that if bluffing could convict the otherwise unconvictable they should prove more carefully as to the nature of the state's case. As one judge put it, "Maybe I should start Boykinizing the state." [68]

Evaluating a Case

While the strength of a case is a critical factor used by prosecutors in weighing plea bargaining decisions, two other factors are also frequently cited: (1) the seriousness of the offense and (2) the seriousness of the offender. In assessing the crime's seriousness prosecutors go beyond the required elements of the offense and examine the actual behavior involved. For example, the crime of armed robbery evokes images of a very serious crime involving extremely aggressive and dangerous behavior by the defendant. This may be true. But in some cases the actual behavior is less serious than it appears. If a teenager threatens a child with a stick and runs off with his baseball glove he might technically be charged with armed robbery. Prosecutors see this incident as far less serious than a robbery in which an adult held up a grocery store with a gun.

Virtually all definitions of crimes may include a wide range of human behavior. Thus the offense category alone does not automatically inform the prosecutor of the seriousness of the offense. The facts involved must be examined and judgments made about the "real" seriousness of the crime. This may require making fine distinctions which might elude the layman or young prosecutor. One young prosecutor recalled a case which in retrospect was evaluated improperly. The defendant had broken into his estranged girlfriend's apartment and shot up the place

with a shotgun. The prosecutor had demanded stiff terms during the plea negotiations. He now believed he had been too demanding, that he had been too heavily influenced by the offense charged. He would now be more flexible. It was not really attempted murder. The man never pointed the gun at the woman. It was similar to domestic disturbance-type offense and should have been so negotiated.

In examining actual behavior the case may be seen as more serious. A prosecutor may learn from a victim that an embezzlement was particularly treacherous (e.g. an employer had been especially good to this employee), or that it resulted in bankrputcy for the employer (even though the amount taken was not excessive). In such cases actual harm done may determine the seriousness of the offense.

In assessing the seriousness of the offender the most frequently used information is the defendant's prior criminal record. A recent study by the Institute for Law and Social Research (Inslaw), however, found that the prior criminal record did not play a key role in the prosecutor's plea bargaining decisions.[69/] Prior criminal record is frequently mentioned by prosecutors and defense attorneys as a key factor in plea decisions. But it may not be the sole or even the major basis upon which seriousness of the offender is determined. Other cues may be used. These can include pieces of information from which inferences are

drawn about the seriousness of the defendant. Included may be the defendant's demeanor, where he lives, and with whom he associates and where. The question is more than the prior record, but whether the defendant is a "bad person". The information used to make that inference can be sketchy. The police may be relied upon to help make this judgment about the defendant's character. Their criteria are much the same as those used by prosecutors.[70/] One experienced prosecutor cited the following factors:

> "I've got the police department record. I can see where the kid lives, what kind of neighborhood it is. I find out the place where the guy is hanging around and whether there are other scum in the area. I've got his prior arrests and their dispositions. Plus I have all the information from the policeman who made the arrest or brought the defendant's records over to the DA. You can always ask the police officer whether this guy is trouble. Sometimes the police tell you that although he looks like trouble, he's really not a bad guy, or vice versa. Sometimes they tell you he is a known troublemaker."

Prosecutors do not look at seriousness of the offender, offense and strength of the case separately. These factors are balanced against each other. If the case is weak but the offense or the offender (or both) is serious the prosecutor will be more likely to follow the "half-loaf" philosophy. If the offense or offender (or both) is less serious and the case is weak the prosecutor may be more willing to nolle the case.

Prosecutors attitudes about bluffing may depend upon their view of case seriousness. One prosecutor dismissed a pornograpy distribution case when the evidence was taken

from his desk despite his belief that a guilty plea could have been obtained. He indicated that missing evidence in a murder, drug or robbery would not be dismissed. These approaches were based on his view of the seriousness of the offense, and distribution of pornography did not meet his seriousness standard.

The interaction between the three factors (strength of the case, seriousness of the offense and the offender) has been noted and described by other researchers. Mather's analysis is particularly systematic. She approaches the topic from the defense perspective and finds the same general relationship between the three factors prevails. 71/

A more controversial position on this matter is taken by Daudistel. He goes further than mere interaction, stating that the strength of a case and the seriousness of the offender are not two separate matters!

> "I found that determining whether there is sufficient evidence and making character evaluations are not two separate matters. Many times. . . a district attorney refused to file charges against a citizen because as he said, 'the case is weak'. But weakness or strength of evidence were significantly influenced by evaluations of character.
>
> Evidence and character evaluations are so bound together that to consider one independently of the other destroys the sensible quality of both." 72/

As Daudistel notes there is nothing in physical evidence itself which gives it a particular meaning. Meaning is established by the context in which the item is placed. He supports this point with numerous examples of how evidence

might be assessed. Broken windows in a home alleged to have been burglarized may not be regarded by police and prosecutors as evidence of a crime depending upon the context of its occurrence and the character of the offender. A negative assessment of the defendant's character may result in a finding of strong evidence. A positive assessment of character could diminish the strength of the evidence in their eyes.

In our view Daudistel's and Mather's positions may both be correct. The major difference between the two views is that under "interaction" the prosecutor or police officer may consider one aspect (strength of case, seriousness of offender or offense) and then the other -- thus resulting in a modification as a result of the interaction. Daudistel's point is that in some cases the factors are so intertwined that consciously or subconsciously the actor considers them at the same time in making the decision. Under this assessment the strength of certain evidence may be colored by knowledge or perceptions of the defendant's or victim's character.

These approaches seem to be intuitively understood by defense counsel, although not expressed in these terms. If either analysis is correct, one can perceive defense counsel's actions in a new light. When in plea negotiations defense counsel introduce information about the character of their client they are in effect trying to affect the prosecutor's assessment of the strength of the evidence at the same time.

III. Prosecutorial Policies And Plea Bargaining

As noted above, the prosecutor's role in plea bargaining must be discussed from two perspectives: The case specific situation where decisions are based on factors indigenous to that case; and from the broader system perspective involving prosecutorial office policies and leadership in the criminal justice system. This section discusses the findings with respect to this second, broader perspective.

There are two areas where office policies may exercise control over prosecutorial discretion in plea negotiations. The first has to do with establishing the market value of an individual case and whether this is guided by explicit policies. That is, to what extent do chief prosecutors provide their assistants with formula or other guidelines to help them properly evaluate and establish the true market value of a case? Our findings are that this is not done in most prosecutors' offices.

There are substitutes for such policy guidelines which attempt to approximate the consistency that more explicit guidelines would serve to achieve. A common substitute, especially in smaller jurisdictions, is to require that in all "difficult cases" (sometimes more explicitly defined in terms of types of offenders or types of offenses) the assistant prosecutor clear the bargain with the chief prosecutor. In Kalamazoo, Michigan and St. Louis City, Missouri, a senior, experienced prosecutor

sets the "floor" or "true market value" or "the bottom offer" for each case.

In some jurisdictions guidance has been provided to assistant prosecutors through explicit policies relating to certain specific offenses or offenders. In King County (Seattle), Washington "Filing and Disposition Standards" have been promulgated in writing. They provide a specific range of penalties for "high impact crimes" (mostly violent crime) and mitigating or aggravating factors which can be considered. Any deviation must be cleared with one of two senior deputies. This type of direction exists in few jurisdictions.

A second area for control through office policy is that of accountability for plea decisions. That is, to what extent are assistant prosecutors held accountable within their own office for their plea bargaining (as well as other discretionary) decisions? Prosecutors' offices differ in this respect but the degree of accountability required in most offices is not great. A strictly enforced, systematic procedure for internal review of decisions, meaning written documentation as to who authorized the decision, and the grounds for it, is a rarity.

More common are systems with partial internal review and control, or minimal review and control. In some large jurisdictions there is a system of decentralized supervisory review and control. In such systems an experienced prosecutor will be in charge of a team of less

experienced prosecutors. They must receive approval for plea bargains before agreeing to them. In other systems senior prosecutors establish a floor value on a case. To go beneath that floor the assistant prosecutor must obtain the permission of an appropriate supervisor. In these systems of "moderate" levels of internal control the required clearances may not be obtained. Prosecutors in several of these jurisdictions indicated that they frequently decided first and then notified their superior.

In still other jurisdictions there is minimal review and control. The attitude of the chief prosecutor may be that his assistants are professional people who do not need close review, guidance, and control. In this situation assistants are given virtually free reign in their decision making with the possible exception of very serious or complex cases.

The prosecutor's role in plea bargaining on a system-wide basis may involve a leadership role in the system. This includes the extent to which the chief prosecutor attempts to operationalize office policies and influence the plea negotiation process in the jurisdiction. These two approaches are not entirely separate matters. In attempting to establish office policies prosecutors may have to contend with other criminal justice actors. The chief prosecutor in one jurisdiction had written policies regulating plea bargaining. But they were not always followed by his assistants because "the judges won't let them."

In another jurisdiction a new chief prosecutor decided to establish strong and thorough accountability to control the exercise of discretion by assistants. His predecessor had operated the office by permitting all assistants a free hand in decision making. The new prosecutor ran into resistance from judges and defense counsel. Defense counsel teased assistant prosecutors, joking that they were only "clerks" because they didn't exercise discretion.

Judges expressed their irritation at having to wait for the assistant prosecutor in the courtroom to clear a plea deal with a supervisory member of the staff. This delay may only have amounted to a few minutes, but judges nevertheless expressed their dissatisfaction with this "inefficiency".

In other jurisdictions efforts have been made by prosecutors to establish procedures for plea bargaining to make the bargaining process more efficient from the policy perspective. As Jacoby has correctly pointed out, the point in the criminal justice process at which the bargain is struck is important from the policy point of view.[73/] A guilty plea early in the process has greater "pay-off" than a late plea because of greater savings to the criminal justice system.

With savings in mind some prosecutors have attempted to establish a cut-off date prior to trial. After this date they refuse to bargain with defense counsel.

In one jurisdiction this approach was defeated by judges and defense counsel acting together. Counsel would not enter a plea by the cut-off date, but thereafter offer to enter a plea at a later point. The prosecutor would not accept the offer and set the case for trial. The judges were unwilling to have cases tried where defendants were willing to plead guilty. Consequently, they subverted the policy by accepting pleas after the cut-off point over the objection of the prosecutor. In another jurisdiction with the same prosecutorial policy, the prosecutor has prevailed upon the judges to bear with the policy. Our findings suggest that in most jurisdictions prosecutors are willing to negotiate guilty pleas up to and including the time when the jury is deliberating.

There are certain noteworthy functions, particularly that of charging which are controlled exclusively by the prosecutor (in a limited number of jurisdictions around the country, police may play a significant role in charging. This is more likely to occur in misdemeanor offenses however). In this area the prosecutor's policy will have a significant effect on the kind of plea bargaining which occurs.[74/] In this respect, a strong screening policy which requires cases to be reasonably strong will reduce the possibility of factually and legally innocent defendants being convicted through plea bargaining.

A strong screening policy may ultimately shift the impact of the criminal justice system of the existing criminal population. In New Orleans, for example, the current prosecutor made dramatic changes in the operation of that office from the practices

of his predecessor. The operation involves intense screening at the initial charging stage and reluctance by the prosecutor to authorize plea bargaining. The cases he accepts are considered strong and he is prepared to try them in court. There has, in fact, been a substantial increase in the number of trials in that jurisdiction.[75/] The office also invokes sentencing enhancement provisions which require that repeat offenders be sentenced more severely. Indeed, the prosecutor reports that defendants being convicted now are receiving longer sentences than they were in the past.

Other observers of the new regime in New Orleans have commented that the overall effect of the change can be summarized as follows: Under the old regime the prosecutor gave a lot of people a little punishment. Under the new regime the prosecutor is giving a few people a lot of punishment.

The most striking examples of chief prosecutors attempting to influence the plea negotiation process, however, have occurred where prosecutors have inaugurated partial or full "no plea bargaining" policies. These efforts have met with considerable resistance by their assistants and other actors in the system, namely the judges and defense counsel. In Alaska the Attorney General placed a ban on plea bargaining for his assistants. One reaction from defense counsel was to begin negotiating pleas directly with the judiciary. As one counsel put it, "we made the prosecutor irrelevant." When the Attorney General learned of this flanking movement he redoubled his efforts to achieve the no plea bargaining policy. He criticized the judiciary for their actions and issued formal instructions to his

assistants not to participate in such bargaining.

What was most interesting was the reaction of some experienced assistants who were used to exercising discretion. They became confused as to what role they could now play in a system where screening, charging and trying cases were the basic functions of the prosecutor. The range of decisions previously available under plea bargaining could no longer be considered. They obviously felt that something had been taken from them.

The Alaska example illustrates the difficulties a chief prosecutor may have in establishing a new policy to control or abolish plea bargaining. The separation of powers between the three branches of government as well as the divided powers within the executive branch and court system prevent even the powerful prosecutors from exercising total control over the system. It is in this sense that the criminal justice system can be described as a "non-system" of justice. It is not similar to a business organization under the unilateral control of one chief. The prosecutor cannot dictate policy to the judges; he cannot fully control how police agencies operate in his jurisdiction; and he cannot dictate how defense attorneys conduct themselves.

Despite these significant limitations, however, determined prosecutors can establish policies and provide leadership for system-wide procedures and policies which can have a major effect on plea bargaining. The full

extent of this role has not yet been established. It is clear, however, that as jurisdictions increase in size, the prosecutor emerges as potentially the dominant force in shaping how and when cases are ultimately disposed.

1/ The Cleveland Foundation, Criminal Justice in Cleveland (1922); Illinois Association for Criminal Justice, The Illinois Crime Survey (1929); National Commission on Law Observance and Enforcement, Report on Prosecution (1931).

2/ S. J. Cox, "Prosecutorial Discretion: An Overview," 13 Am. Crim. L. Rev. 383-434 (1976).

3/ R. Pound, "Discretion, Dispensation and Mitigation: The Problem of the Individual's Special Case," 35 N.Y.U.L. Rev. 925,926 (1960).

4/ K. C. Davis, Discretionary Justice (1969). As LaFave points out under this definition, discretion may be exercised simply by doing nothing and may exist even without express recognition in law. (W. R. LaFave, "The Prosecutor's Discretion in the United States," 18 Am. J. Comp. L., 532, fn. 1 (1970)).

5/ Davis, op. cit., at 190.

6/ Id. at 144.

7/ Id. at 143.

8/ L. A. Emery, "The Nolle Prosequi in Criminal Cases," 6 Me. L. Rev. 199-204 (1913).

9/ Cox, op. cit.; Davis, op. cit.; Note, "Prosecutor's Discretion," 103 Penn. L. Rev. 1057-1087 (1955). Some states attempted to control plea bargaining by requiring the district attorney to submit his reasons for recommending a lesser plea to the court. Minn. Stat. Ann. §630.30 (West 1947); N.Y. Crim. Code §342(a). Also, a minority of jurisdictions abridged the prosecutor's power to a nolle prosequi by requiring court permission to make it final. E.g., People ex rel Hayne v. Newcomer, 284 Ill. 315, 120 N. E. 244 (1918); Halloran v. State, 80 Ind. 586 (1881). In both situations this approach appeared to be a failure. Court approval became a mere formality. In Report on Prosecution, op. cit., supra note 1, at 19, the role of the courts in supervising the nolle prosequi was found to be perfunctory and achieving little. More recently Weintraub and Tough, "Lesser Pleas Considered," 32 J. Crim.

L. & Criminol. 506, 518-21 (1942), reported their detailed study of the New York law requiring the prosecutor to submit his reasons and receive court approval before entering a plea bargain. For the most part routine reasons were given and in many cases no reason at all. The authors concluded that the judiciary played an insignificant role in the regulation of plea bargaining.

10/ The Cleveland Foundation Survey, op. cit. at 328. Three states allow a private attorney acting on behalf of a victim or other interested party to force a full hearing of the public prosecutor's decision to dismiss a case with final determination reserved for the court. Kan. Gen. Stat. §19-717 (1949); Minn. Stat. Ann. §211.33 (West 1947); N. J. Stat. Ann. §19:34-63 (1949).

11/ Note, "Private Prosecution: A Remedy for District Attorneys' Unwarranted Inaction," 65 Yale L. J. 209-234 (1955).

12/ Davis, op. cit.; C. B. Bubany and F. F. Skillern, "Taming the Dragon: An Administrative Law for Prosecutorial Decision Making,: 13 Am. Crim. L. Rev. 473-552; LaFave, op. cit.; National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts 243 (1973); American Bar Association Project on Standards for Criminal Justice, Standards Relating to the Prosecution Functionand the Defense Function 28 (1970); C. T. Bayley, "Plea Bargaining: An O--fer A Prosecutor Can Refuse," 60 Jud. 229-232 (1976); R. Kuh, "Plea Copping," 24 N.Y. B. Bull. 160 (1966-67).

13/ Illinois Association for Criminal Justice, op. cit. 269-72; Missouri Association for Criminal Justice, Missouri Crime Survey 274-276 (1926); "Crime and the Georgia Courts," 16 J. Crim. L. and Criminol. 169 (1925); Cleveland Foundation Survey, op. cit. 142-46; U.S. National Commission on Law Observance and Enforcement, op. cit. at 100.

14/ W. Hamilton & C. Work, "The Prosecutor's Role in the Urban Court System: A Case for Management Consciousness," 64 J. Crim. L. C. & P. S. 183 (1973); J. Jacoby, The Prosecutor's Charging Decision: A Policy Perspective, (1977).

15/ See also, Jacoby, op. cit. 11.

16/ It should be noted, for example, that the ABA Standards Relating to the Prosecution Function and the Defense Function attempt to provide prosecutors with guidance regarding the former but not for the latter. ABA Project on Criminal Justice Standards Relating to the Prosecution and Defense Function 1971.

17/ See generally, W. F. McDonald, "Towards a Bicentennial Revolution in Criminal Justice: The Return of the Victim," 13 Am. Crim. L. Rev. 649-673 (1976).

18/ M. F. Baker, "The Prosecutor -- Initiation of Prosecution," 23 J. Crim. L. & Criminol. 786-7 (1933).

19/ D. Newman, Conviction (1956).

20/ D. W. Neubauer, Criminal Justice in Middle America 218 (1974).

21/ A. W. Alschuler, "The Prosecutor's Role in Plea Bargaining, " 36 U. Chi. L. Rev. 50-112 (1968-69).

22/ Id. at 58.

23/ Note, "Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas," 112 U. Pa. L. Rev. 865,901 (1964). Cited by Alschuler at Alschuler, op. cit., 59.

24/ S. P. LaGoy, J. J. Senna, and L. J. Siegel, "An Empirical Study on Information Usage for Prosecutorial Decision Making in Plea Negotiation," 13 Am. Crim. L. Rev. 435-472 (1967). It is to be noted at the time of the LeGoy study, the Georgetown Institute of Criminal Law and Procedure had independently proposed to LEAA to use exactly the same technique for the analysis of plea bargaining in the present study of plea bargaining in the United States. That analysis is scheduled to be done in the second stage of this research. It will differ from the LaGoy study both in terms of the kind of fact patterns presented and the size of the respondent population.

25/ L. Wilkins, Social Deviance: Social Policy, Action and Research 294 (1964).

26/ Id. at 446. The number in the parenthesis is the number of prosecutors selecting the item. On the 25 items of information to choose from the ones which most prosecutors wanted to look at first were: "Defendant's criminal record" (8) and "police account of incident" (7).

27/ Id. at 449 and Table 3.

28/ It may well be that plea bargaining in large urban courts is dictated by the overcrowded docket. But that just means that the docket conditions in large urban areas may give both prosecutors a legitimate excuse for doing what they would have been doing if those dockets were not overcrowded.

29/ Our elements agree with and extend those described by Jacoby (op. cit., at 5) in her analysis of the charging decision.

30/ Personal communication to the Plea Bargaining Project staff.

31/ In misdemeanor courts there may not be a prosecutor present so the policeman presents his information directly to the judge.

32/ LaGoy, et. al. op. cit. 446 ff.

33/ Our findings in this regard are in basic agreement with those of Howard Daudistel (H. Daudistel, Deciding What the Law Means: An Examination of Police Prosecutor Discretion (unpublished doctral dissertation, University of California, Santa Barbara, August, 1976) (See especially Chapter XI, "Character Assessment.")

34/ Of course, the defense counsel plays other roles as well. He may argue over the interpretation of the available information. Of he may threaten to go to trial with a case -- which constitutes a new piece of information which the prosecutor must take into account. However, for the moment we will refer only to the defense counsel's role in managing the production or suppression of information about the defendant.

35/

Daudistel op. cit. at 163. In our own research we did not observe instances of this type of assessement of the victim's character that illustrate the point as well as this particular example does. But, our failure to observe any such incidents is probably due to our methodology. Our visits to individual jurisdictions were for short periods of time and were spent mostly in interviews. Thus we did not have the long-term time for observation that Daudistel had.

However we believe that the assessment of character of the victims and witnesses is a factor in establishing credibility. This assumption has been supported by a growing body of social psychological experimentation (see W. F. McDonald, "Criminal Justice and the Victim: An Introduction" in Criminal Justice and the Victim, W. F. McDonald, ed., Ch. 1 (1976).) Furthermore, in interviews with prosecutors we were told that the personal characteristics of the victim or witness (if not the "moral character" as Daudistel calls it) can have an influence on their decision making regardless of the merits of a case. One former assistant U.S. Attorney explained it is difficult not to want to help a polite, sympathetic victim even if the merits of the case do not warrant action. On the other hand it is sometimes hard to go forward with a meritorious case when one developes a personal distaste for the victim. He did not say that he had ever prosecuted a meritless case or dropped a meritorious case on that grounds alone. But he believed that the temptation was strong.

36/

A judge in New Orleans, Louisiana pointed out another important use of the pre-sentence report having to do with its usefulness in defusing the judge's responsibility for the sentencing decision. He referred to this as his "umbrella theory" of the use of pre-sentence reports. When judges are inclined to give probation to a defendant in a case that may "backfire" (get into the newspapers), they order a pre-sentence investigation. Pre-sentence investigations are not required for all cases in Louisiana. This is done, as the judge explained, so that "in case it rains the judge can take the pre-sentence report out and hold it over his head".

37/ See generally, Jacoby, op. cit.

38/ E.g., D. Neubauer, Criminal Justice in Middle America (197), and L. Mather, "The Outsider in the Courtroom" in The Potential for the Reform of the Criminal Justice System, H. Jacob, ed. (197).

39/ By advising the assistant to be "a lawyer first" the senior prosecutor was referring to his entire future career, after he left the prosecutor's office.

40/ H. L. Packer, The Limits of the Criminal Sanction 149-173 (1968).

41/ Id. at 161.

42/ Id. at 166.

43/ A.B.A. Code of Professional Responsibility, Disciplinary Rule DR 7-103 (Final Draft, July 1, 1969); and ABA Project on Standards for Criminal Justice, The Prosecution Function and The Defense Function §1.1(c) (Approved Draft, 1971).

44/ The question by the project interviewer pertained to factual innocence or guilt. The statement by the senior prosecutor, however, could easily include legal innocence or guilt.

45/ A local defense attorney did not feel this was a viable option because the test was administered in a manner which could cause the defendant to fail.

46/ D. Newman, Conviction 1 (1966); Note, "The Trial Judge's Satisfaction as to the Factual Basis of Guilty Pleas," Wash. U. L. Q. June 1966, 306-320.

47/ See Table 2, Chapter Four, "Judicial Role in Plea Bargaining," infra.

48/ Id.

49/ While it would be desirable that all judicial inquiries into the factual basis of pleas occur in all crimes, it would seem that it is even more important that they be done in misdemeanors. Police and prosecutorial screening of misdemeanors tends to be less adequate than for felonies. Furthermore, defendants charged with misdemeanors may be more likely to plead guilty even though they are factually innocent because doing so would appear to be the lesser of two evils. Yet it is precisely in these kinds of cases of less serious crimes that the criminal justice system tends to take shortcuts. (See for example, John Robertson, Rough Justice, 1974; M. Mileski, Courtroom Encounters: An Observation Study of a Lower Criminal Court, 5 L. & Soc'y. Rev. 473 (1971).

50/ It is possible that a judge could actively encourage guilty pleas and also regularly engage in the practice of sentencing defendants more severely for going to trial than for pleading guilty, and also make a thorough inquiry into the factual basis of the plea. He may on the basis of such an inquiry decide not to accept a plea but force the defendant to go to trial. However, under such circumstances it is not likely that the defendant would maintain his factual innocence. Also, given what is known about how human beings selectively perceive the world in a way that fits their predispositions (see generally, social psychological study), such judges are unlikely to "see" the lack of a factual basis for the plea is one were presented to them.

51/ J. Miller, "The Compromise of Criminal Cases," 1 S. Cal. L. Rev. 1 (1927).

52/ R. Moley, Politics and Criminal Prosecution 185 (1929).

53/ Id. at 187.

54/ A. Enker, "Perspectives on Plea Bargaining" in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 113-4 (1967). (Hereinafter Enker, Perspectives on Plea Bargaining.)

55/ A. Spector, Book Review, 76 Yale L. J. 604, 606-7 (1967).

56/ A.W. Alschuler, "The Prosecutor's Role in Plea Bargaining." 36 U. Chi. L. Rev. 50-112 (1968-69).

57/ Id. at 72.

58/ M. Berger, "The Case Against Plea Bargaining", 62 A.B.A. J., 621 (1976). Most perplexing about Berger's position is his inconsistency. First, he says bargaining weak cases is necessary in the interests of justice. Later he says he has eliminated all other plea bargaining because the system is unnecessary and corrputing. One part of the corruption that he, himself, complains about is bargaining in weak cases. ". . .[I]t permits a prosecutor to avoid making decisions in the system of justice he is morally and legally obligated to make as a prosecutor. Imagine a case in which a defendant claims he is innocent or murder. If the case is weak or if there is some doubt in the prosecutor's mind, he may offer to plea bargain the case to a lesser charge. . . . No one will ever know if [the defendant] pleaded because he was guilty or because he was afraid of getting the death sentence if he went to trial. The prosecutor is happy because he has been relieved of the extra work and effort required in finding out if the man is innocent or guilty. But was justice done? No one will ever know." Id., 622. Berger is no longer district attorney and we do not know whether his policies are being followed by his successor.

59/ It is possible that through such negotiations a factually innocent defendant may be induced to plead guilty. But, as far as prosecutors are concerned, such an eventuality does not detract from their assertion that they would never intentionally convict an innocent man. Prosecutors give that assertion a narrow reading. If a factually innocent man chooses to plead guilty, then he has convicted himself. The fact that the prosecutor may have enticed him with an exceptionally good plea offer is irrelevant. The final responsibility for making the choice lay with the defendant. Since he accepted the deal the prosecutor can continue to maintain that he has met his ethical responsibility of not convicting an innocent defendant.

60/ While they may not have ethical objections to plead such cases they sometimes have other reasons for not seeking a conviction through plea negotiation. For example, they may dislike the particular law that the defendant violated and are happy to have a reason for dropping the prosecution; they may choose not to plea bargain because of the possible adverse publicity that would result or they may choose to drop the case as a way of reducing the case backlog.

61/ See e.g. M. Berger, op. cit.

62/ Memorandum on Policy on Plea Negotiations, from William W. Wilkins, Jr., Circuit Solicitor, to all Assistant Solicitors, dated February 3, 1975.

63/ This finding was based on an in-house, unpublished study of PROMIS by the Institute for Law and Social Research. PROMIS stands for Prosecutorial Management Information System. One part of that system was designed to prioritize cases. Originally there were three criteria which were used together to set priorities. They were the seriousness of the defendant, the seriousness of the offense, and the probability of conviction. However, the last criterion was dropped because it was found to be unreliable.

64/ Juries impose the sentences in Virginia.

65/ There is a similarity here from the prosecutor's thinking to the thinking of the policeman on the beat. When faced with the choice between preventing a real harm in a concrete situation with a real live victim and maintaining the abstract ideal of the rule of law by waiting until he has the necessary legal grounds for taking preventive action, the policeman finds little difficulty in choosing the former. See generally, W.F. McDonald, "Stop and Frisk: An Historical and Empirical Assessment" mimeograph, 1976.

66/ There is an interesting double standard at work in the criminal justice process when it comes to the use of statistically rare events as a justification for actions. Some prosecutors use the improbable conviction as their grounds for arguing that plea bargaining in very weak cases is proper. But, on the other hand, some of the same prosecutors do not allow defendants to use this same line of reasoning. That is, some defendants go to trial in "dead bang" cases with the idea that even though acquittal is improbable there is at least some chance that they might beat the rap. Both prosecutors and judges get irritated by this kind of behavior. One Miami assistant prosecutor said he "hates defendants who just want to roll the dice. Who want to go to trial when the case is stacked against him. I want to hang those guys."

67/ A.W. Alschuler, op.cit., at 65.

68/ Boykin v. Alabama, 395 U.S. 238 (1969), held that the validity of a state guilty plea could not be pressured from a silent record.

69/ Curbing the Repeat Offender: A Strategy for Prosecutors, Institute for Law and Social Research, 19 Publications 2 (1977).

70/ For an excellent and comprehensive analysis of the criteria used by the police, see H. Daudistel, op. cit. at Ch. 6.

71/ L. Mather, "The Outsider in the Courtroom," in The Potential For Reform of the Criminal Justice System, H. Jacob, ed., (1974).

72/ Daudistel, op. cit. at 162-4.

73/ Jacoby, op. cit.

74/ See Jacoby, op. cit. for a full discussion of the policy implications of the charging decision.

75/ For some reason the increases in 1974 and 1975 were not continued in 1976. We do not know the reason.

Chapter Three

EFFECTIVE AND COMPETENT DEFENSE COUNSEL

Introduction

In our system of criminal justice the decisions made by defense counsel are important to the defendant and the administration of justice. They may be strategic or tactical in nature. Of necessity defense counsel reacts to initial decisions made by others, i.e. the charging decision of the prosecutor. But he may at the same time attempt to influence prosecutorial discretion as to the charge and sentencing recommendation or the sentencing decision of the judge. The most important role is to provide effective assistance to the defendant by advising this client of the implications and consequences of alternative options which may be available. The most critical advice relates to the plea, both as to its type and timing.

The prosecutor has the sole discretion, usually subject to no review, to assess the evidence available from the police and make the initial screening, diversion or charge decision. The defense attorney, acting with the consent of the client, can intervene in this process and attempt to persuade the prosecutor to drop charges, divert the case out, or reduce charges so that a plea of guilty may be entered. Upon a plea of guilty or conviction through trial, the focus of attention shifts to the courts where the sentencing authority generally resides.[1/]

In dealing with the plea decision, defense counsel is supposed to act in an advisory capacity. The decision as to whether

or not to plead guilty, under what circumstances and at what stage in the proceedings, should rest with the defendant. At the trial stage of the proceedings, decisions rest with counsel after discussion with the defendant.

Bench and Bar on Defense Counsel's Role and Competence

The duties and role of defense counsel in the criminal process have been spelled out by the American Bar Association and the United States Supreme Court in varying degree. The ABA has stated its position in several volumes of criminal justice standards.[2/] Its fundamental position is that a defendant should not be called upon to plead until counsel is available or has been waived by the defendant. A defendant without counsel should be allowed a reasonable time to consider the plea, particularly where there is a serious offense charged. The court may not accept such a plea unless it is reaffirmed by the defendant after a reasonable time for deliberation.[3/]

The ABA defines the relationship between defense counsel and client by explicitly holding that a plea agreement can be concluded by defense counsel "only with the consent of the defendant." The decision must be made ultimately by the defendant. Defense counsel is urged to act in an advisory capacity, after appropriate investigation, by informing the defendant of the alternatives available and the considerations which are important.[4/]

Defense counsel should become fully informed on the facts and law and advise the defendant with "complete candor

concerning all aspects of the case, including a candid estimate of the probable outcome." To understate or overstate risks, or exert "undue influence on the accused's decision as to the plea" is unprofessional conduct.[5/]

The ABA is explicit as to which decisions are ultimately the defendant's and which are reserved to counsel. Those made by the defendant after full consultation with defense counsel are what plea to enter, whether to waive jury trial, and whether to testify at the trial. The conduct of the trial itself "and all other strategic and tactical decisions" are considered the exclusive province of the lawyer after consultation with the client. Finally, counsel should make a record of differences on other tactical or strategic matters.[6/]

The ABA places upon the defense counsel a positive duty to explore the possibility of an early diversion of the case from the criminal process through the use of other community agencies where appropriate. Moreover, defense counsel must make a full investigation and study of the controlling law and evidence. If counsel concludes that a conviction is probable the defendant should be so advised and the defendant's consent sought "to engage in plea discussions with the prosecutor, if such appears desirable." The ABA believes that ordinarily such consent should be obtained before engaging in plea discussions.[7/]

Defense counsel has a duty to keep the defendant advised of all developments and all proposals made by the

prosecutor. Counsel may not knowingly misrepresent evidence in the course of plea discussions. Finally, defense counsel may not seek or accept concessions favorable to one client by any agreement which is detrimental to the interests of any other client. To misrepresent evidence or favor one client over another is considered unprofessional conduct.[8/]

Should a defendant disclose facts which negate guilt defense counsel must investigate. If these facts are not contravened but the defendant persists in pleading guilty, counsel may not participant in this guilty plea without disclosure to the court.[9/] A similar obligation is placed upon the prosecutor.[10/]

The above roles and obligations of defense counsel must be read in the context of the ABA position that it is proper for the court to grant charge and sentence concessions to defendants who plead guilty "when the interest of the public in the effective administration of criminal justice would thereby be served."[11/] Thus has the ABA approved of differential sentencing as between those who plead and those who go to trial.[12/] This policy places heavy burdens upon defense counsel to conform to ABA standards. The pressure to plead, documented elsewhere in this report, becomes considerably heavier when the actors believe that the sentence imposed may be dependent on whether the defendant pleads guilty or goes to trial.

The United States Supreme Court has commented frequently on the implementation of the Sixth Amendment right to competent counsel and counsel's role. This study concentrates on those decisions commenting on counsel's position in plea bargaining.

One opinion defines a plea of guilty in a manner which underscores the importance of defense counsel as the protagonist for an accused.

> A plea of guilty is more than a confession which admits that the accused did various acts; it is itself a conviction; nothing remains but to give judgment and determine punishment. Boykin v. Alabama, 395 U.S. 238 (1969).

Another opinion highlights counsel's importance by delineating the rights one waives on pleading guilty.

> A defendant who enters such a plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers." McCarthy v. United States, 394 U.S. 459 (1969).

Yet another opinion emphasizes counsel's role by stressing the defendant's ability to make viable choices.

> The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. North Carolina v. Alford, 400 U.S. 25 (1970).

Several other Supreme Court opinions stress counsel's importance in enabling the choice of plea to be made by the defendant with full knowledge, as well as the need for counsel

to have no interests which would conflict with those of the defendant.

> Only the presence of counsel could have enabled this accused to know all the defenses available to him and to plead intelligently. Hamilton v. Alabama, 368 U.S. 52 (1961). . . .Waivers of constitutional rights not only must be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. Brady v. United States, 397 U.S. 747, 748 (1970). . . . A waiver of the constitutional right to assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial, VonMoltke v. Gillies, 332 U.S. 708, 721 (1948). . . .The right to counsel guaranteed by the Constitution contemplates the services of an attorney devoted solely to the interests of his client. VonMoltke v. Gillies at 725. . . .

A clear but general outline of counsel's role in permitting a defendant to make an intelligent choice among available options has thus been delineated. In slightly less general terms, VonMoltke began to delineate the specifics of counsels' obligations. A defendant is entitled to rely upon counsel to make independent examination of the facts, circumstances, pleadings and laws involved and then offer an informed opinion as to what plea should be entered. "Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman, even though acutely intelligent." At 721. Moreover, hollow compliance

or indifference to the appointment of counsel at arraignment might be enough to convince a defendant, particularly one who had never set foot in an American courtroom, "that a waiver of this right to counsel was no great loss -- just another legalistic formality." At 723. VonMoltke goes even further regarding arraignment as such an important stage that waiver of counsel must be severely controlled.

> To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all of the facts essential to a broad understanding of the whole matter. A judge can make certain than an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tentered. At 724.

In McMann v. Richardson, 397 U.S. 759 (1970), the court acknowledged that counsel may have difficult judgments to make before advising the defendant. All pertinent facts may not be known unless witnesses are examined and cross-examined in court. Even then the truth may be in dispute. Faced with this unavoidable uncertainty defendant and counsel must make a judgment as to the weight of the state's case.

> Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of a defendant's guilt? On those facts would evidence seized without a warrant be admissible? Would the tryer of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel's answers, uncertain as they may be. Waiving trial entails the inherent risk that the good faith evaluations of a reasonably competent attorney will turn out to be mistaken either as to the facts or to what a court's judgment might be on given facts. . . . In our view a defendant's plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant's confession. At 770-771.

Yet one may ask, what is competent advice? How is the assessment of competency arrived at? And by whom? The court barely answers these questions in McMann. It acknowledges that uncertainty is inherent in predicting how courts may decide admissibility of confessions or other evidence. But it also asserts that defendants facing felony charges are entitled to the effective assistance of competent counsel.

> Beyond this we think the matter, for the most part, should be left to the good sense and discretion of the trial courts with the admonition that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courtroom. At 771.

As McMann indicates, the phrase "competent counsel" is used by the courts when discussing counsel's role in the plea negotiation process. However, judges have experienced problems of precision in attempting to define its meaning. In Brady v. United States, the court held that advice given to the defendant by counsel "with respect to the then existing law as to possible penalties would not be regarded as incompetent if later pronouncements of the courts held that the maximum penalty for the crime in question was less than was reasonably assumed at the time the plea was entered." At 757. Thus a defense attorney does not have to predict how future changes in the law, particularly via the courts, may impact the defendant's decision as to the plea.

An interesting case involving Federal Habeas Corpus attempted to define "the range of competence demanded of attorneys in criminal cases." Tollett v. Henderson, 411 U.S. 258, 266 (1973). The court had to decide whether a state prisoner who pled guilty on advice of counsel could be released by proving only that the indictment was returned by an unconstitutionally selected grand jury. The court concluded that a voluntary guilty plea forecloses independent inquiry into the claim of discrimination in grand jury selection.

> We hold that after a criminal defendant pleads guilty, on the advice of counsel, he is not automatically entitled to Federal collateral relief on proof that the indicting grand jury was unconstitutionally selected. The focus of Federal Habeas inquiry is the nature of the advice and the voluntariness of the plea, not the existence as such of an antecedent

> constitutional infirmity. A state prisoner must, of course, prove that some constitutional infirmity occurred in the proceedings. But the inquiry does not end at that point. . . If a prisoner pleads guilty on the advice of counsel, he must demonstrate that the advice was not "within the range of competence demanded of attorneys in criminal cases." At 266.

This approach places a difficult burden on state prisoners. Tollett attempted to outline counsel's role by saying that claims of prior constitutional deprivation might be important in evaluating the competence of advice rendered by counsel, but are not in themselves independent grounds for federal collateral relief.

> And just as it is not sufficient for the criminal defendant seeking to set aside such a plea to show that his counsel in retrospect may not have correctly appraised the constitutional significance of certain historical facts. . . it is likewise not sufficient that he show if counsel had pursued a certain factual inquiry such a pursuit would have uncovered a possible constitutional infirmity in the proceedings. At 264.

This holding means that a defense attorney does not have to inform the defendant of defenses or challenges which only delay the proceedings. For example, should a successful challenge to unconstitutional grand jury selection be made, a properly chosen grand jury could re-indict. The decision as to the plea would have been delayed, not avoided. The court enjoined counsel to deal with practical considerations.

> A prospect of plea bargaining, the expectation or hope of a lesser sentence or the convincing nature of the evidence against the accused are considerations that might well suggest the advisability of a guilty plea without elaborate consideration of whether pleas in abatement, such as unconstitutional grand jury selection procedures, might be factually supported. At 267

Thus, Tollett requires the establishment of more than constitutional discrimination in the selection of grand juries. It would also require than an attorney's advice to plead guilty without ever having made inquiry into the composition of that grand jury be outside the "range of competence demanded of attorneys in criminal cases."

> ...A guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in McMann. At 263.

Alschuler has strongly criticized this approach, characterizing the rulings as "essentially hypocritical."

> These opinions disregard both recent and long-standing precedent, pervert or ignore the records in the cases before the Court, and degrade the right to trial by treating the waiver of this right in a manner that cannot be reconciled with the Supreme Court's treatment of other waiver problems. . . . One can hope that a bolder Supreme Court will someday tire of elaborate rationalization for a lawless regime of criminal justice and will rule that principles of constitutional fairness extend even to guilty plea cases.[13]

A later case relied on Tollett and earlier cases in holding that a "guilty plea is a complete ban to habeas relief grounded in grand jury discrimination." Winters v. Cook, 489 F.2d 174, 180 (5th Cir. 1973). A minority in the case said the defendant was entitled to the advice of counsel, not his virtual dictation by advising his client to plead guilty without informing him of his right to challenge racial composition of the grand jury. At 184.

Still other courts have attempted to come to grips with the real nature of counsel's role and obligations. One court described the ABA Standards as "relevant guide-posts in this largely unchartered area" as they provide criteria for judicial evaluation of the effectiveness of counsel. United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973), footnote 25. The court felt this way because the ABA Standards represent the legal profession's own articulation of guidelines for the defense of criminal cases.

Using the ABA Standards as a base the court spelled out specifics of counsel's role: 1) There should be early and frequent conferences to elicit matters of defense or ascertain their unavailability; 2) There should be full discussion of potential strategies and tactical choices; 3) Counsel should advise on all rights and actions necessary to preserve them, "because many rights may only be protected by prompt legal action." (The right against self-incrimination, rights at a line-up, the right to be considered for pretrial release and motions involving pretrial psychiatric examinations or the supression of evidence); and 4) Counsel should conduct a thorough factual and legal investigation to determine appropriate defenses. As part of the investigation witnesses should be interviewed, both defense and prosecution, and an attempt should be made to obtain information in the possession of the police and the prosecutor. At 1204.

Another court held that a substantial violation of any of the above requirements would be deemed a denial of effective representation unless the government "on which is placed the burden of proof once a violation of these precepts is shown, can establish lack of prejudice thereby." Coles v. Peyton, 389 F.2d 244, 266 (4th Cir), cert. denied 393 U.S. 849 (1968).

The difficulty in judicial evaluation of counsel's effectiveness and competency is underscored by the statement in DeCoster concerning the techniques which the court may use.

> Much of the evidence of counsel's ineffectiveness is frequently not reflected in the trial record. . . As a result, ineffectiveness cases have often evolved into tests of whether appellate judges can hypothesize a rational explanation for the apparent errors in the conduct of a trial. At 1204.

If a trial record shows so little then the usual nonexistent record of plea negotiations would provide even less information. As indicated in many parts of this report plea discussions rarely take place in open court on the record; they most frequently occur in judicial chambers, the prosecutor's office, or in the back of the courtroom or just outside it. In only one instance did we see such discussions recorded or any extensive minutes kept. At the most some jurisdictions provide a form which outlines the agreement but not the reasons therefore.

One analyst of plea bargaining extensively reviewed the literature and case law relating to the responsibilities of defense counsel.[14] He defined various court tests in two ways: (1) the voluntary-intelligent test; and (2) the mockery-of-justice standard. He concluded:

> Neither test has produced a very detailed checklist of duties which counsel must discharge, much less develop a refined set of criteria for measuring whether counsel has adequately discharged those duties. The allegations, . . .defendants must make. . . are difficult to sustain and. . .easily rebutted.
>
> The cases. . .do, however, establish a guide to. . .minimal responsibilities. . . . Beyond that, the responsible lawyer must look to his own conscience and experience for guidance in the performance of his defense duties.[15]

The above outline of the role of defense counsel emphasizes the weakness of judicial supervision of defense counsel's role even when elicited from records at the trial court level. It illustrates judicial unwillingness or difficulty in grappling effectively with a variety of issues in the real world of criminal justice. It may illustrate the legal profession's reluctance or inability to deal openly with fundamental issues directly affecting the outcome of criminal cases.[16]

Other analyses of plea bargaining and of defense counsel have assessed the gap between legal structure and criminal justice

actualities. These studies indicate that many criminal justice actors are aware of these gaps, yet do little more than agree with the generalized standards enunciated by the courts and the ABA.

It is obvious that advice given by counsel to a defendant is critical. The attorney's assessment of the likely outcome of alternative options may have controlling influence on the plea decision made by the defendant. In this respect, defense counsel's interpretation and evaluation of all factors is a major contribution.[17] In one survey, actors in the system believed it was the public defender's duty to help the defendant understand the legal process.[18] To effectively explain the process, Newman believes a lawyer should have "intimate knowledge of sentencing provisions and procedures, correctional programs, and parole procedures. . . ."[19] Defense counsel's obligation is to keep the defendant fully informed throughout all stages of the process so the client doesn't reach a "critical decision in complete ignorance."[20]

Finding the Right Forum, Time and Participant

The defense attorney's role should go beyond knowledge of and advice about legal and evidentiary matters germane to the plea. A knowledge of the idiosyncrasies of local court practices and policies is also necessary for effective representation. Only an experienced actor could know and understand judicial

sentencing practices. Thus one function of counsel may be to arrange the timing of a guilty plea so the case may be assigned to a favorable judge.[21]

The importance of understanding how judges are chosen and the sentencing proclivities of different judges was underscored in our visits to a number of jurisdictions. In King County, (Seattle) Washington, one does not learn the identity of the sentencing judge until after entering a plea of guilty. The judge is assigned in court immediately after a plea of guilty.

To avoid a premature plea, many defendants plead not guilty at this stage. But they are not informed of the trial judge's identity until very shortly before the trial. As a result, a substantial number of pleas are changed just prior to trial. If the defendant is not satisfied with the assigned judge, one mandatory change to another judge is permitted without cause. The identity of that judge is unknown until the selection is made, thus reducing "judge shopping" and timing of the plea to a form of "Russian Roulette."

In New Orleans, Louisiana, different procedures and practices require defense counsel to make timing decisions on a different basis. Unlike Seattle, where the prosecutor refuses to charge in only about 10% of the cases referred by the police, New Orleans is characterized by a very high rate of prosecutorial refusals. About 45% of all cases brought to the district attorney's office by the police are

screened out as unworthy of prosecution. The district attorney in New Orleans has between seven and ten days after the arrest to make the basic charging decision.

Knowledgeable defense attorneys may contact the district attorney's office early in an attempt to effect the initial charge. Conversely, knowledgeable defendants may not want counsel prior to the charge because the case may be screened out without counsel's involvement (and thus without any attorneys fees).

In most jurisdictions project staff found that experienced actors believed they could predict the sentence a judge might impose for a particular crime given the circumstances of the offense and the background of the defendant. In some jurisdictions judges were open about their sentences for particular crimes. In New Orleans one judge sentenced all residential burglars to imprisonment. Other judges had more flexible approaches. Thus when this crime was charged avoidance of this particular judge was attempted. This is difficult given the "bingo" system of selecting judges. Judges are given numbers and the clerk chooses numbered cubes from a bingo like apparatus which throws them up at random.

If a judge before whom a case is scheduled happens to be on leave, trying a case elsewhere, or on some other special assignment, an attorney may shift the case to another

willing judge during that absence. The judge with incarceration proclivities for residential burglaries indicated that he informed defense attorneys of scheduled absences. Knowledgeable defense attorneys use this information in advising their client as to the plea and when a change might occur.

In Alaska yet other idiosyncracies may guide the calculations of a defense attorney. The Attorney General is the chief state prosecutor and appoints local district attorneys. He has mandated an end to plea bargaining, whether it be charge or sentence bargaining. Here again one key to a defense attorney's role is knowledge of judicial sentencing practices. Yet there is a master calendaring of cases and judges are chosen from a list in the clerk's office.

In theory there can be no judge shopping. But knowledgeable defense attorneys may attempt to approach the clerk to find out what judge is next on the list if they have been assigned a judge considered unfavorable. And they may be helped in this endeavor by an assistant district attorney. Added to this factor is the right of the prosecution or the defense to ask for one change of judge without cause. But as in Seattle this is a form of "Russian Roulette;" the next judge is not known til chosen.

The combination of restricted plea bargaining and limited judge shopping in Alaska and New Orleans has caused some defense attorneys to approach the judge in

chambers, with or without the presence of the prosecutor. They ask the judge what sentence might be imposed should the defendant plead to the charge. Different judges in a jurisdiction react differently. Some will be very specific; others will give upper and lower ranges; and yet others will refuse to indicate the sentence. In Seattle some judges indicated that such a practice is unacceptable.

In Alaska the ban on plea negotiations caused some defense attorneys to approach judges and inquire as to the possible sentence. Upon learning of this practice the Attorney General issued an order instructing his assistants not to participate in such a conference, and if ordered to participate by the judge,to protest vigorously.

Getting to know judges and their biases may be accomplished in a variety of ways.[22/] Courtroom regulars exchange experiences. In time a pattern may appear. One Municipal Court Judge in Oakland, California stated that as a defense attorney he used tactics against which he now guards. As a lawyer he made sure he knew personal things about a judge so that he could have easy and comfortable discussions with him during plea bargaining sessions. By becoming familiar with the judge he could strike up better conversations and thus in turn get a better bargain. He called this "back dooring the judge."

The practice of defense counsel shopping for the best deal is not limited to picking judges. It also includes

prosecutors. In Dallas, Texas, prosecutor shopping occurs because cases are assigned to particular courts. A limitation exists because only two or three prosecutors may be present in a court at one time. Several defense attorneys indicated they could work better with some prosecutors than with others. (Shopping was not always based on specific differences in the sentence recommended, but on a preference regarding the personal relationships which might affect the nature of the bargain.)

Several experienced defense attorneys in Henrico County, Virginia, reported that they shopped for prosecutors by looking for certain assistants in particular courts. One concerned judge attempted to switch the calendar posted in the courtroom to a different courtroom at the last minute to prevent this kind of shopping. This created complicated administrative problems and was not repeated.

Shopping may also mean recognizing which participant is the key to getting a favorable deal. Sometimes this is the police. One experienced defense attorney in Henrico County, Virginia, invariably approaches the police officer before discussing a plea agreement with the assistant prosecutor. He felt that getting a policeman to go along with a plea bargain or at least not to oppose it may be most important. He indicated that within the first few months after an offense the police are usually "down

on a defendant." He attempts to continue the case long enough to allow police animosity towards the defendant to dissipate.

These examples merely highlight a major behavorial fact, namely, that statuses and roles, while providing a framework for interaction between actors, do not preclude wide latitude in how these are carried out. There is enormous discretion exercised by the police, prosecutor and judge. Combined with evidence of many biases, the effective defense attorney must include in advice to a defendant the predictions of behavior and timing which will affect the outcome as to the charge or sentence. In his classic work, "Discretionary Justice," Kenneth Davis encapsulates the dilemma of a defense attorney faced with advising a client correctly.

> The inescapable reality, insufficiently appreciated, is that the discretionary power of public officers to confer privilege or to be lenient is always intrinsically a discretionary power not to confer a privilege or not to be lenient and is susceptible to many kinds of abuse, including the worst sort of discrimination, favoritism, or caprice, and may be extremely damaging to private interests.[23/]

Given these realities, effective assistance of counsel should include the ability to thread one's way through a labyrinth of interrelationships and practices. But these issues are not commented on directly by the courts or the ABA. The ABA standards only inferentially speak to these matters.[24/] A conscientious lawyer could

meet the legal standards and be in fact less than effective.[25/] So long as those with great discretionary power abuse or misuse this power it is incumbent upon defense counsel to become that "attorney devoted solely to the interests of his client". Von Moltke v. Gillies at 725. And before waiving constitutional rights voluntarily and intelligently, the defendant must know and be aware "of the relevant circumstances and likely consequences." Brady v. United States at 248. Certainly the inside realities of a particular jurisdiction are relevant if they affect the outcome.

Defense Counsel's Effectivness -- Relationship with Other Actors

The criminal law revolution and its aftermath has included within it key cases fleshing out the Sixth Amendment right to counsel.[26/] The cases cited here, together with the cases spelling out the importance of counsel in plea negotiations, clearly mandate the presence of counsel for an accused who could be punished by imprisonment from the time of arrest through the final appeal. These cases have placed a heavy burden on defense counsel. One observer of the criminal justice system has characterized the concept of the defense attorney's role as encompassing a "sphere of obligations. . .performed by a person who is provided with the necessary means and authority to carry out his task.[27/] The ABA has recognized these obligations and the corresponding need for adequate supporting services.[28/]

Despite these views of the bench and bar concerning counsel's role, there is a residue of confusion as to the nature of this role and some evidence that defendants may be reluctant about exercising their right to counsel vigorously. A decade ago, Newman noted that experienced defendants believed defense counsel could be a disadvantage in the negotiation process. A request for counsel could indicate potential "trouble making" on their part, whereas declining legal assistance demonstrated cooperation with the authorities.[29] The defendant's attitude towards counsel may also be contingent upon the tone, context and environment in which the warnings and information concerning right to counsel are given.

This ambivalent attitude of defendants, whether or not they should have defense counsel, may have some basis in fact, a finding based upon empirical studies and observations of some actors in the system.[30] An important consideration for defendants is the relationships built up by actors within the system and their attitudes toward one another. Blumberg has described the criminal justice system as based upon a network of symbiotic relationships between the actors in the system.[31] Because of these relationships, a defendant may have the least to say about what actually goes on although he is the most affected by the eventual bargaining decisions. The high percentage of case settlements via pleas of guilty in

part reflects the defense attorney's realization of the importance of cooperation with other actors. "This serves the administrative purposes of saving time, effort, and. . . 'getting a better deal for the accused'."[32/] Indeed any stance which is not ultimately cooperative may be viewed by the actors as being "counterproductive."[33/] Thus dealing with the prosecutor on a favorable personal level may be viewed as more productive.

Blumberg's findings in New York City were corroborated in our national sample of jurisdictions. Personal relationships between defense attorneys and other actors in the court system can be an important determinant in plea bargaining. One defense attorney in Colorado Springs, Colorado, characterized excellent working relationships as a benefit to his clients, saying, "Personality conflicts hurt the defendant." He stressed that defense attorneys should think of their clients and not themselves when building special relationships because clients are profoundly affected by these relationships. This attorney placed so much emphasis on personal relationships that before accepting a client he would check to see which prosecutor and judge were involved in the case. If either were an individual with whom he had poor personal relations, he would refuse to represent that client. However, this attorney may not have been typical in the extreme lengths to which he took such precautions.[34/]

One defense attorney in Virginia reported that practitioners in the field "don't rock the boat." In order to survive in the practice, one had to maintain working relationships with other practitioners. He had had a personal falling out with a prosecutor in a local jurisdiction. As a result, the prosecutor would no longer deal with him, necessitating a process of what he called "rehabilitating himself" with that prosecutor. That is, he made it a point to be friendly with the prosecutor in order to get back in his good graces. He felt he could no longer defend cases in that jurisdiction because of this tense relationship. As a result, he referred his clients to other attorneys on the grounds that his representation would be detrimental to their interests.

Even judges are affected by the views of defense attorneys and others as to their performance. In some jurisdictions, judges were meticulous in determining the factual basis and ascertaining a defendant's understanding and knowledge of a guilty plea. Defense attorneys and prosecutors alike complained about the time used by such judges. For other judges the "litany" was pro forma and took only several minutes. In one jurisdiction a judge took what was described as an inordinately long period of time in handling negotiated cases. Several actors in the system noted that he was merely following the statutes and rules. But there was an undercurrent of criticism directed at him for creating a case backlog.

The picture of shared relationships and goals as being paramount in how a criminal justice system operates has been observed by Jacob and Eisenstein. They found that in most courtrooms a stable work group developed a method of operation and that plea bargaining is a necessary consequences of this "social organization."[35/] Another study found a correlation between the nature of the relationships and the severity of the charge or sentence. It found no correlation between plea rates and size of jurisdiction, but emphasized work group relationships as the dominant factor in plea bargaining.[36/] Defendants, however inarticulately, are aware that factors unrelated to their case may affect the outcome. Casper noted this: "As many of the defendants notice and resent, the factors that produce the outcome in their cases -- what deal the prosecutor decides to make -- seem in large part to have little to do with them."[37/] Some Public Defenders indicated that defendants often want to handle the case because of their belief that they are being coerced into pleading guilty.[38/]

The National Advisory Commission on Criminal Justice Standards and Goals, which recommended the abolition of plea bargaining, concluded that "the plea bargaining system is characterized by deception and hypocrisy which divorce the [defendant] from the reality of his crime."[39/] Other observors believe that defendant resentment towards defense counsel is overstated. Enker states that the defendant cannot help but feel that he consented and participated in bringing about the result even if he resents the process that induced his consent.[40/]

Blumberg reports that when defendants are asked to withdraw their plea and stand trial on the original charges after their assertions of innocence, the great majority ask that their exclamations of innocence be ignored.[41]

The defendants' suspicions about the process and who is being served thereby are shared to some extent by the public. Many prosecutors believe this and it is a primary reason for attempts by many of them to restrict or prohibit plea bargaining. In our view the suspicions held by defendants and the public are bottomed on the secrecy with which the negotiations are conducted.

Defense Counsel's Effectiveness -- The Presumption of Innocence

Added to the pressure of the court "bureaucracy" on defense counsel and other actors are attitudes held by private defense counsel and public defenders. It is assumed by both that the client is guilty of something. This attitude enhances the rate of guilty pleas as well as reinforcing "the presumption of guilt throughout the system."[42] The positive duty of defense counsel to make an investigation upon which viable options can be discussed with the defendant may be distorted by attorney-client relationships. One candid defense attorney admitted in an interview that he devotes little effort towards determining the guilt of his client. Undue probing into that question by defense counsel, he insisted, "will usually result in the loss of the client's confidence."[43]

The notion that defendants are probably guilty of some crime (even if not the specific crime charged) was expressed by defense attorneys in several jurisdictions. Several public defenders in Alameda County believed the District Attorney would probably dismiss any case that he couldn't win or that he felt was too weak to go to the case processing system. In New Orleans, where the District Attorney conducts a rigorous screening procedure, most defense attorneys expressed confidence in the procedure and felt that weak cases were generally being screened out. Where defense counsel have a presumption of guilt concerning their clients, and there is a relationship involving shared goals, the additional factor of confidence in prosecutorial screening could have a profound impact on counsels' view of a case. It is possible that their diligence in pursuing possible defenses would be adversely affected by this congruence of factors.

All defense attorneys verbally endorsed the idea that the final plea decision is the defendant's. Yet both public defenders and private defense counsel in some jurisdictions indicated that they "leaned" on some defendants to plead guilty, thus giving credence to the presumption of guilt. On the other hand, one defense attorney indicated that he would not accept a client unless that client indicated a willingness from the very beginning to plead guilty. His cases would go to trial after he accepted them only if subsequent investigation by him uncovered prosecutorial weaknesses or other evidence which indicated that a trial would be viable.

Other factors may further distort the basic philosophic underpinning of our criminal justice system, that an accused is presumed to be innocent. The pressures upon all actors to keep cases moving can induce prosecutors to offer "sweet deals" which the defendant may find difficult to refuse.

The syndrome of "burning out" on the part of defense attorneys, primarily public defenders, has also been observed. "The public defender learns to view most of his clients as wrongdoers who should be convicted of some crime and punished, rather than as presumably innocent men who should be defended."[44/] This can lead to the danger of "innocent" defendants pleading guilty to crimes they did not commit. A defense attorney who believes a client to be innocent may justify acceptance of a plea to a reduced charge to insure a lenient sentence, rather than risk a trial in which the defendant may receive a much longer prison term.[45/]

The problem is that defense counsel, as well as the prosecutor, must make a judgment call as to the probable outcome. It can be a difficult estimate, dependent on a variety of factors. The advice may be given to the defendant on the basis of sketchy information; the client may not be cooperative; and diverse pressures from other actors in the system may have tangible impact. And the nature of such advice is not subject to adequate review at any hearing or appellate proceeding.

Not all defense attorneys lean on clients or pressure them to plead guilty. Some defense attorneys and public defender agencies will not plead a client guilty if that client asserts innocence. Moreover, other actors have taken steps to minimize less than diligent representation by defense counsel. In the Minneapolis District Court, for example, judges were critical of "informal efforts" such as plea bargaining and judge shopping. They discouraged the defense from pursuing th se efforts by taking a firm stance in their refusal to reduce changes to avoid a trial.[46/] Finally, in some jurisdictions where district attorneys have either attempted to restrict plea bargaining or prohibit it for certain crimes, there has been an increase in the number of cases tried.[47/]

The claims and counterclaims do not permit easy conclusions as to the role of defense counsel and whether or not counsel is meeting the obligations set forth by the bench and bar. We have already commented on the limited efforts by the courts to define and supervise the role of effective and competent counsel. Others have commented on the court's inability or unwillingness to come to grips with counsel's role. According to Vetri, erroneous advice by counsel that a more lenient sentence would be imposed via a guilty plea is not held to be grounds for withdrawal of a guilty plea.[48/] Alschuler has noted that many courts have questioned the assumption that an effective defense attorney must research and consider possible defenses before entering a plea of guilty for his client.[49/]

But defense attorneys in several jurisdictions told project staff that post conviction remedies being sought by defendants on the basis of ineffective assistance of counsel were having an impact on how they viewed their role. They did not want to be subject to such litigation. One commentator has noted that the increasing number of habeas corpus petitions claiming attorney incompetence may be motivating defense counsel to consider alternative disposition possibilities before pleading defendants guilty.[50/]

The accountability of defense counsel in this area may be more difficult than others discussed in this chapter. And the informality and relative secrecy with which plea negotiations are conducted only furthers this pattern which is developed in an environment of coziness and "getting along."

Defense Counsel's Effectiveness -- Use and Misuse of Delay

The timing of a plea or a defense attorney's approach to a key action in the process may assist or work against a defendant's interests. Some defense attorneys indicated that early bargaining may not serve their clients' best interests since time usually helps the defense. The victim may cool down or something may happen to cause witnesses to modify testimony. One attorney who indicated the advantages of slowness and delay also indicated that as to fees he takes a slow fee, not demanding all the money at once initially.

In New York City lengthy delays before a trial commences are a fact of life. One recent analysis stated that prosecutors want earlier trials, believing the delay to represent a substantial barrier to effective prosecution (Witnesses become hard to

find and memories fade.) On the other hand, the report added, delay may be detrimental to the defendant for the same reasons. Those on pretrial detention suffer inordinately. The study points out that the real beneficiary of delay is the guilty defendant against whom the state has a strong case. If such defendant is out on bail it "further enhances his power to negotiate a favorable solution to his case since those in jail must legitimately be given preference on the trial calendar."[51/]

The advantages of delay may blend into the financial pressures on retained or court appointed defense attorneys. One study of felony cases in New York City noted that differences in the plea bargaining approach as to public defenders and private defense attorneys were partly related to fees. Participants interviewed in this study said it "doesn't pay" for a private attorney to go to trial because of the length of time added to the case. Moving cases is important for the legal aid attorney as time for processing is limited. Therefore such cases are settled earlier in the proceedings. On the other hand, the fee for private attorneys is often collected in stages. Therefore it was felt advantageous to leave a case open longer so that the private attorney would appear to be rendering more service to the client.[52/]

In another study Levin insists that the primary goals of a private defense attorney fix upon the fee and the amount of time devoted to a case. In reaching these goals such private attorneys rely upon general strategies which involve manipulation of the defendant's desires and increase delay in case processing.[53/]

In yet other jurisdictions many private defense attorneys attempt to collect their fees in advance rather than waiting until the service has been rendered and then submitting the bill. For instance, only 13 of 311 defense attorneys responding to a survey on fee collection practices in Texas said that they ever base their fees on an hourly rate.[54/] Other popular fee collection strategies include pay-as-you-go services (establishing a hierarchy of fee requirements according to the number of stages a case is carried through); the setting of a single fee at the outset of each case; or varying initial requirements depending on whether the attorney thinks the final disposition will be a trial or a guilty plea.[55/]

But a number of observers have found the use of delay to be advantageous, sometimes for the defendant and sometimes for the prosecution. According to Rosett and Cressey, "once the formal charge is filed, time is a major weapon used by both sides to bring about the settlement of cases without trial."[56/] To whose advantage delay accrues may depend on whether or not a defendant is on some form of pretrial release or awaiting further proceedings in jail. In some cases a defendant in jail may want a quicker settlement so the matter can be resolved, whereas a defendant on release in the community may feel no pressure to resolve the issues. One might think that defense attorneys would make every attempt to get their clients out on pretrial release.[57/] Yet some defense attorneys in Northern Virginia indicated that having served some time while awaiting disposition of the case was a benefit because a usual sentence

(except for very serious crimes) is the time already served; the rest of the sentence is usually suspended. On the other hand studies have shown that there is a high degree of correlation between pretrial release and the disposition or sentence imposed (higher percentages of cases are dismissed and more suspended sentences are imposed for those out on pretrial release).[58/]

There remains a general belief that a defense attorney usually improves the defendant's bargaining position by delaying the disposition of cases as long as possible.[59/] One examination of the criminal justice system in Chicago showed that the "conviction rate declined from 92% in cases that were tried promptly to 48% in cases that were substantially delayed."[60/]

It is difficult, if not impossible, to determine in a given case whether defense maneuvers for delay may be in the defendants' or attorneys' interest, or both. The willingness of judges to grant routine continuances, and the readiness of the prosecutor to demand a speedy resolution varies from jurisdiction to jurisdiction, and even from courtroom to courtroom within a jurisdiction. Again, the atmosphere of the work group in a courtroom may contribute to an attitude of tolerance towards delay so long as cases move via the guilty plea route and no backlog of cases for trial develops.

Defense Counsel's Effectiveness -- Public vs. Private Counsel

The confusion and conflict as to defense counsel's role extends into comparisons of the private defense attorney and public defenders. Both appear to have advantages and disadvantages

and the perceptions of the actors and defendants vary widely.

One private defense attorney felt that the public defender is at a disadvantage because of the volume of cases he may be forced to handle -- whereas a private attorney can regulate the volume. He added that public defenders may be forced to deal with one particular assistant district attorney for a long time, day in and day out, a circumstance he felt was a burden which private defense attorneys do not have to face. His advantage as a private attorney is in being able to speak to the assistant D.A. about one case only and "not be caught going into the courtroom with a stack of files or a number of cases to be covered." Yet he recognized that if a public defender has good working relationships with the district attorney's office it might be more advantageous.

An assistant district attorney in another jurisdiction indicated that public defenders, because of their daily experience in working with the system, know local judges and what their sentencing pattern will be in given cases. He indicated that the private bar does not always know the judge, thus placing the district attorney's office in a stronger bargaining position with private counsel.

Observations by project staff in proceedings involving misdemeanors indicate that these cases are handled in a fairly routine manner. The demeanor of both the assistant district attorney and public defender assigned to a particular misdemeanor court made it obvious that cases were being processed on an

almost rote basis frequently neither the assistant district attorney or public defender had examined the case jacket prior to appearing in the courtroom and very little time was expended on these misdemeanor cases.

In Alaska an opportunity was present for a sharp contrast to be observed in cases between individuals charged with misdemeanors and represented by privately retained counsel and those receiving representation from the public defender. Because of oil pipeline construction in Alaska employment boomed and the membership of the Teamsters swelled. The Teamsters contracted with a major law firm to provide complete legal services for Teamsters in civil and criminal cases. The fee arrangements for all criminal cases, including misdemeanors, was for the firm to receive its regularly hourly fee with no top limit on the number of hours. As a result, the firm had no financial constraints in representing Teamsters at any level.

The assistant district attorney in charge of misdemeanor court operations in Anchorage, Alaska complained that his office was "being papered to death" (this involved the filing of voluminous motions by the firm representing the Teamsters). He also indicated that a much larger number of misdemeanor cases involving Teamsters were being brought to trial and that a substantial percentage of these were being acquitted.

At the opposite extreme was a case in which a 19 year old defendant at arraignment received the "litany" of the court along with other defendants sitting in the jury box concerning their right to counsel, their right to waive counsel and other rights. It took a few minutes. There was no public defender in the

courtroom. The youth waived counsel and pled guilty. The assistant attorney made an impassioned plea for jail time (it was a misdemeanor charge). The judge imposed a two-month jail sentence.

The attorney-client relationship is considered extremely important in our criminal justice system and most influential in the plea bargaining process. The relationship between public defenders and indigent defendants is particularly unique because choice of counsel is not available to the defendant. Moreover, many actors in the system believe defendants should not be allowed to change public defenders.[61/]

Defendant's themselves have varied impressions of different kinds of defense representation. Casper reports that most defendants represented by public defenders view them as agents of the state -- "a surrogate of the prosecutor" -- who only discusses potential deals a defendant could have upon entering a guilty plea. Defendants represented by private attorneys were unanimous in believing that their attorney was on their side although nine of the twelve interviewed were eventually incarcerated. Unlike public defenders, private attorneys apparently spend some time discussing the case with their clients, and in turn their clients felt they had some leverage over what their attorneys could do since they were financing their efforts.[62/]

The lack of time for public defenders was affirmed by one public defender in the misdemeanor court in Alameda County, California. He cited his biggest problem as not having enough contact with the defendant. This was because of an extremely

high caseload. He said that "he hardly sees his defendant and rarely is able to have a long, intimate discussion with him about his case, about his problems and about what the defendant ultimately wants to have happen." Clients become depersonalized because of numbers and because of the need for quick processing. He and the misdemeanor court judge agreed that having a private defender program would be better and that more time would be spent on each case by such private defenders.

Views of public defenders and the private bar frequently depend on the nature of the relationship between the public defender's office and the prosecutor. In one jurisdiction the public defender had established a policy of not pleading a legally or factually innocent person guilty. We found substantial tension and hostility between that public defender's office and the district attorney. In yet another large jurisdiction the public defender and his assistants made it clear that they expected most of their clients to plead guilty and in fact "leaned" on their clients to persuade them to plead guilty. In this jurisdiction the relationships between the public defender and the district attorney's office were more amicable.

Are there actual differences in representation given by public defenders as opposed to private attorneys? Or does the nature of the courtroom organization socialize all actors to pursue the same basic goals? As in other areas involving plea bargaining the answers are mixed, frequently being in conflict. Alschuler believes public defenders have a particular threat

over prosecutors:

> "The most spectacular form of bargaining leverage that a public defender office can exert is 'the general strike' in which all the defenders' clients insist upon exercising the right to trial." 63/

We found that where juries sentence this is not a viable option for any defense attorneys because of the harshness of sentencing by juries. Public defenders in jurisdictions where juries did not sentence indicated that district attorneys may be forced to plead cases because of the known leniency of the juries in convicting defendants on trial. One assistant public defender cited this as a plus because they know they can get a good deal and the prosecutor has to "sell the shop". Finally, some public defenders stress the importance of trust between the actors as a primary professional asset. Threats of "court busting" would tend to destroy the atmosphere of trust.

Some feel that because of the number of cases involved, a public defender's office is in a "structurally advantageous" bargaining position as compared to the individual private defense attorney.64/ According to one scholar, the public defender's office may nurture the use of these tactics and learn "to identify the cases that create heavy burdens for the district attorney. . . "65/ One well known public defender believed that the power to create severe problems for the criminal justice system lay with the defendants themselves.66/

The advantages cited for the public defender in using caseload as leverage may become an obstacle when seeking continuances for certain cases. With only a few cases to handle

a private attorney's rationale for delay may be found more acceptable by the court than for the public defender. Obviously, a public defender assigned to one courtroom becomes the suspect if he offers a scheduling conflict as a reason for delay, or more elaborate excuses, in too many cases.[67/]

Project staff found frequent reference to court busting in literature and the field. It seems to be a perennial threat which has never really been implemented. In general, defense attorneys want to bargain. Prosecutors and some judges usually lead the way in restricting or attempting to abolish plea bargaining. We are unable to assess the reality of a threat to "court bust". Certainly it could raise professional and ethical questions for a public defender if such a blanket policy worked against the interest of some defendants.

Project staff heard of the "plead 'em guilty" and "cop-out" bar in several large jurisdictions. Lawyers identified as members of this group specialized in criminal cases as court-appointed defense counsel and rarely tried a case before a judge or jury.[68/] Most prosecutors had contempt for this segment of the defense bar. Members of the defense bar were less clear in their attitudes.

Where a public defender handled most indigent cases the position of these lawyers was less prominent. And where the prosecutor adopted policies which severely restricted plea bargaining the size of this bar shrunk noticeably. In New Orleans the shrinkage was commented on by many actors in the system as having begun with rigorous screening policies adopted by the new District Attorney in 1974, followed by a decrease in

the numbers and kinds of cases in which plea bargaining could occur.

We also found a high degree of sensitivity about plea bargaining which reflects professional and public concern over the impact of plea bargaining and its allegedly corrupting effect on the criminal justice system. This sensitivity was present in all actors to some degree. This factor, plus the increasing willingness of the actors to publicly discuss the problems of plea bargaining, may be contributing to an atmosphere in which the "cop-out" specialist will be in an increasingly difficult position.

Defense Counsel's Effectiveness -- Resources

The courts make frequent reference to the duty of defense counsel to investigate the facts and the law prior to advising the client on the probable outcome should one of several options be chosen. The presumption underlying this primary responsibility is that counsel make a proper investigation prior to giving the advice. In project staff visits to different jurisdictions we found that defense attorneys generally had inadequate resources of their own to conduct the required investigation. Court appointed attorneys received fees which did not permit the hiring of investigators. Privately retained counsel could hire investigators only in certain kinds of cases where the clients had the needed fiscal resources. Public defenders usually had a limited investigative support service which could only be used on a selective basis. Where investigations occurred they were restricted to felony cases. With the

exception of the Teamsters in Alaska (through their legal services contract with a law firm) and certain drunk driving cases we saw little attempt by defense attorneys to conduct any investigation into routine misdemeanor cases.

The American Bar Association has taken cognizance of this phenomenon and called for adequate supporting services for defense attorneys.[69/] The ABA has also placed great emphasis on discovery procedures prior to trial. The ABA requires procedures to promote expeditious and fair determination of the charges, whether by plea or trial. These involve providing the accused sufficient information to make an informed plea.[70/] The scope of the discovery so that informed pleas may be made, according to the ABA, should be as full and free as possible consistent with protection of persons, effective law enforcement, the adversary system, and national security.[71/] The trial court has the obligation to provide for the exercise of discovery automatically and supervise its exercise to ensure proper and expeditious proceedings.[72/]

Both the prosecution and defense counsel should take the initiative and conduct required discovery willingly and expeditiously. The prosecutor is obligated to provide a wide range of information which would assist the defense attorney in making the informed judgments upon which to base advice to the defendant.[73/] The ABA explained its insistence on such discovery:

> ". . . [p]roceedings prior to trial should serve the needs of cases where the accused pleads guilty as well as those cases which ultimately go to trial. The bulk of criminal cases are determined by guilty pleas. . . and it is becoming recognized that plea discussions and agreements are a legitimate and important part of the criminal process, a part that requires certain procedural regularity. . . Generally, an accused is bound by his guilty plea only when he has the information available that is relevant to that decision. Accordingly, procedure prior to trial should provide for such discovery as will make that information available when needed. It should also be noted that many prosecutors have customarily opened their files to defense counsel in selected cases in order to encourage guilty pleas. Discovery thus motivated is entirely proper." 74/

It is interesting to note the statement in the above commentary that generally an accused is not bound by the guilty plea when information relevant to the guilty plea decision is not available. The ABA offers no documentation on that point and we have found nothing in case law, statute or rule which provides a legal standard for enforcing such a rule. The questions asked by judges in determining the voluntary and intelligent nature of the plea and the defendants' understanding of the consequences do not address whether or not a proper decision has been made on the basis of all the evidence available. The obligation to establish a factual basis for the plea doesn't address the judgmental decisions which have to be made by the prosecutor and the defense attorney. In most jurisdictions it is a purely pro forma proceeding. In our judgment the courts appear unwilling to second guess the determination as to probable guilt or the effect of an insider's knowledge (or lack of it) unless their appears to be gross error.

We found great variety in discovery proceedings, formal and informal, in the jurisdictions visited. Some form of

informal discovery appeared to take place in most jurisdictions. However, the nature and scope of that discovery varied widely, not only from jurisdiction to jurisdiction, but frequently within one jurisdiction. Relationships between the prosecutors and defense attorneys frequently exercised a major influence on the type of discovery and whether or not the defense attorney was required to make formal discovery motions.

The nature and extent of the discovery depends on a variety of factors: 1) formal discovery rules; 2) case law; 3) prosecutor's policies; and 4) relations between individual prosecutors and defense attorneys. Underlying these factors is the amount and quality of information available to the prosecutor, usually the result of police investigations.

Perhaps the fullest discovery found was in Black Hawk County, Iowa (Waterloo). In State v. Peterson, 219 N.W. 2d 665 (1974), the Iowa Supreme Court held that civil discovery proceedings were applicable to criminal actions. This meant that the proceedings of the grand jury were available to the defense attorney and that pretrial interrogatories could be conducted and depositions obtained just as in civil proceedings. The procedure was used by defense attorneys and court transcript costs had risen substantially since the Supreme Court decision.

In other jurisdictions pretrial discovery was limited. Defense attorneys complained about the lack of discovery and how it affected their capabilities in advising their clients. One experienced defense attorney in Dallas, Texas, stressed certainty as the most favorable attribute of plea bargaining.

But he said the reduction of uncertainty was dependent upon the information obtained from the prosecutor. He said he must have information about case strength to render effective legal counsel. Another defense attorney in Dallas cited the discovery problem as the most troublesome, saying that adequate discovery would enable him to deal with the client. She cited the client as frequently being more of a problem than the prosecutor. She indicated that defense attorneys could detect lies by their clients if they had adequate information.

It is obvious that the effectiveness of defense counsel is affected by the nature of the information available about the case. Counsel cannot meet the standards of competency without full discovery or the capability of conducting an investigation. The situation is analogous to the role of the defense attorney at sentencing. Some courts have declared that without access to the presentence report defense counsel cannot meet the responsibilities imposed on them by the courts and the statutes regarding the effective assistance of counsel.[75/]

Closely connected to the question of resources are the criteria used by defense attorneys upon which they base their advice to defendants as to the plea. One study of public defenders in Los Angeles found two major factors: 1) the strength of the prosecutor's case, and 2) the seriousness of the crime in terms of probable punishment.[76/] In most jurisdictions visited both private and public defenders indicated that strength of the prosecution case was a prime factor controlling the advice given to defendants. The prior record was the second most frequently mentioned factor. The seriousness

of the offense and whether or not there were mitigating circumstances was a factor with some defense attorneys. Other factors mentioned by a few defense attorneys included the caseload, age of the defendant, available sentencing options, public opinion, relationships with key actors, the defendant's work record, and the estimate of one's own ability and willingness to try the case.

There did not appear to be any differences between public and private defenders. It is interesting to note that the most frequently mentioned factors: 1) strength of case, 2) prior record, 3) seriousness of the crime, and 4) mitigating circumstances, require the defense attorney to have information which must be supplied by independent investigation, discovery, or both. It is difficult to see how the factors considered important could be rationally considered without an adequate information base.

Defense Counsel's Effectiveness -- Is Defense Counsel Necessary?

One allegation raised questions about the value of defense counsel. It was the finding that in certain types of situations in certain jurisdictions a defendant would fare better without counsel. In New Orleans the District Attorney has 7 to 10 days to screen cases before filing charges. Ordinarily during that time defense attorneys are not involved in the cases. But some privately attained attorneys are now entering a case at this early stage as a means of trying to outflank the restrictive plea-bargaining policy of the prosecutor. They hope to do this by influencing the initial charging decision.

While this apparently succeeds in a few cases, it can also backfire in others. The New Orleans Prosecutor's office screens out a substantial number of cases.[77/] A primary reason for screening out cases is that they are weak and are not likely to result in a conviction if they were to go to trial. Ordinarily in these cases charges would not be filed by the prosecutor. But one senior prosecutor said that if defense counsel were present when certain weak cases were about to be screened out, the prosecutor might first offer a plea deal to the attorney.[78/] Evidently some defendants know about this and deliberately do not want an attorney involved at the screening stage.

In Dallas, Texas, charged misdemeanants in pretrial detention formed a "jail chain" as they were processed through court. Most of them dealt directly with prosecutors. If they pled guilty at the first court appearance, the usual punishment was a suspended sentence.[79/] Some obtained counsel and pled guilty at the second court appearance. Several judges indicated that sentences imposed on these defendants would be harsher.

Defendants interviewed felt they were getting a better deal by having no defense attorney. Some defense attorneys also felt that many defendants were better off dealing directly with the prosecutors.

In Trumbull County, Ohio, a prosecutor noted that in some cases he had to play the defense counsel even when defense counsel had been appointed. He gave an example of a

case where a young man had stolen about $160 worth of tires. He said that the grand theft statute is anything over $150 and that the defense counsel didn't even raise the issue of the value of the tires. He felt that a competent attorney would not have allowed that to go through as a grand theft. Therefore he had to intervene on behalf of a young, first-time offender, who should have been better served by the defense attorney.

One study confirms the attitudes expressed above. In the lower courts in Boston statistics for one period indicated that defendants with no counsel who pled not guilty were found not guilty 37% of the time. Only 17% of those represented by assigned counsel were found not guilty.[80/]

The presumption of guilt referred to above provides a clue as to why some actors in the system believe no counsel may be advantageous to the defendant. A study of Fulton County, Georgia, found attitudes towards pressuring pleas and beliefs about guilt rather strong.[81/] Even actors in the system may recognize that the pressures and their attitudes may endanger defendants.

When one speaks of the right to counsel one must specify the right to competent and effective counsel. To achieve this, defense attorneys must have the time and resources to meet their obligations to the defendant. Our criminal justice

system is replete with documentation as to the lack of time and resources, most notably in lower courts, but also abundantly evident in felony cases. Should this lack continue, shall we be forced to say that effective assistance of counsel is not possible? The legal profession and the courts have not yet addressed this problem.

Another way of approaching the question of whether effective counsel can be provided in the above context is to compare the adversary model with the existing reality. Blumberg and Skolnick have noted that the network of relationships and pressures observed in the system have corrupted and perverted the adversary roles mandated by our traditions and constitution.[82/] Most of the pressures observed and reported by others contradict the tensions which should be present in an adversary system. To act adversarial is to forfeit favors made available to more cooperative defense counsel. The defendant is punished for the actions of counsel.

The heart of the matter is that the cozy fellowship on which many actors appear to dote can occur only so long as the plea negotiation process remains invisible. The publishing of the agreement and no more does not raise the visibility of the process and its underlying dynamic. The ability of counsel to effectively represent a defendant is conditioned on the freedom to act as an adversary without fear that the client, and thus the attorney in a long range sense, will be punished. In

most jurisdictions today defense counsel may feel constrained to go along with the system because of potential retaliation should accepted norms be breached. Until counsel feels free to play an adversarial role in all cases, the ability to act effectively cannot be attained.

1/ In some states juries sentence and in many states only juries may impose a death penalty. A.B.A. Commission on Correctional Facilities and Services, Resource Center on Correctional Law and Legal Services (January 1974), Sentencing Computation Laws and Practice. Even in jurisdictions with jury sentencing a residual authority may rest with the judge.

2/ ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty (approved draft 1968), hereafter cited as Pleas of Guilty; Standards Relating to the Prosecution Function and the Defense Function (approved draft 1971) hereafter cited as The Defense Function or The Prosecution Function.

3/ Pleas of Guilty, Supra Note 2, §1.3.

4/ Pleas of Guilty, Supra Note 2, §3.2.

5/ The Defense Function, Supra Note 2, §5.1.

6/ The Defense Function, Supra Note 2, §5.2.

7/ The Defense Function, Supra Note 2, §6.1.

8/ The Defense Function, Supra Note 2, §6.2. See also Disciplinary Rule 1-102(4) &(5), Prohibiting deceit or misrepresentation and conduct "prejudicial to the administration of justice." ABA Code of Professional Responsibility 8 (Final Draft 1969).

9/ The Defense Function, Supra Note 2, §5.3.

10/ The Prosecution Function, Supra Note 2, §4.2. The situation in North Carolina v. Alford, 400 U.S. 25 (1970) is not analogous. Despite protestations of innocence by the defendant, the evidence "substantially negated his innocence and. . .provided a means by which the judge could test whether the plea was being intelligently entered. . . ." at 31.

11/ Pleas of Guilty, Supra Note 2, §1.8.

12/ See Chapter Four , infra. The Role of the Judge for a full discussion of differential sentencing.

13/ A.W. Alschuler, "The Supreme Court, The Defense Attorney, and the Guilty Plea," 47 U. Colo. L. Rev. 1, 71 (1975).

14/ J. E. Bond, Plea Bargaining and Guilty Pleas 173-222 (1975).

15/ Id. at 222.

16/ See Miller, "The Lawyer's Hang-up: Due Process Versus the Real Issue," 11 Am. Crim. L. Rev. 197 (1972).

17/ See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 226 (1966); Comment, "Guilty Plea is Not Invalid Because it is the Product of a Plea Bargain," 2 Loyola U.L. J. 346 (1971).

18/ D.C. Dahlin, The Public Defender's Office in San Bernardino County, California: A Role Analysis. 156-159 (unpublished Ph.D. thesis in Claremont Graduate School Library 1969). Forty respondents were interviewed (public defenders, judges, district attorneys, probation officers, private attorneys). Thirty-eight felt the duty to help the defendant understand the legal process is very important.

19/ Newman, op. cit. 208-210.

20/ G. Hobbs, "Judicial Supervision Over California Plea Bargaining: Regulating the Trade," 59 Calif. L. Rev. 989, 990 (1971). This repeats in stronger language the obligation placed on defense counsel by the American Bar Association, Pleas of Guilty, Supra Note 2, § 3.2.

21/ Newman, 210-215. Three methods are outlined: (1) adjournments (so a case can be held over for another judge); (2) maneuvering a case to a particular judge by "bargaining" with the case assignment clerk through acknowledging that if a case is sent to a particular judge, jury trial will be waived or a plea of guilty entered; and (3) pleading

not guilty before a harsh judge in order to go before a sympathetic judge for trial, at which time the plea is changed to guilty.

22/ See W. Gaylin, Partial Justice (1974). Subtitled, "A Study of Bias in Sentencing," this perceptive and in-depth analysis of judicial approaches to sentencing affirms observed irrationalities in sentencing; See also J. Hogarth, Sentencing As a Human Process (1971).

23/ K.C. Davis, Discretionary Justice 231-232 (1969).

24/ The Defense Function, Supra Note 2, §5.1.

25/ To paraphrase the concepts of legal and factual innocence, a lawyer could be legally competent, but factually incompetent.

26/ See Argersinger v. Hamlin, 402 U.S. 25 (1972); Mempa v. Rhay, 389 U.S. 128 (1967); Miranda v. Arizona, 386 U.S. 436 (1966); Gideon v. Wainwright, 372 U.S. 335 (1963). The term "Criminal Law Revolution" is used in connection with many decisions of the Supreme Court while Earl Warren was Chief Justice.

27/ M. Feeley,"Two Models of the Criminal Justice System: An Organizational Perspective," 7 L. & Soc'y Rev. 409 (1973).

28/ See ABA Project on Standards for Criminal Justice, Standards Relating to Providing Defense Services, §1.1, 1.5, (Approved Draft 1968).

29/ Newman, 215-217.

30/ See L. Zeitz, R. Medalie, and P. Alexander, "Anomie, Powerlessness and Police Interrogation," 60 J. Crim. L. C. & P. S. 314 (1969). See also pp. 185-189 infra.

31/ A. Blumberg, Criminal Justice 181 (1968). Webster's dictionary defines symbiosis as "1. The living together in a more or less intimate association or close union of two dissimilar organisms."

32/ M. Feeley,"Two Models of the Criminal Justice System: An Organizational Perspective,"op. cit., 416-419.

33/ M. Feeley, The Effects of Heavy Caseloads (unpublished paper delivered at the 1975 Annual Meeting of the American Political Science Association).

34/ One study of relationships between defense counsel and key actors in the system reported mixed responses by defense attorneys. Not all felt that friendly relationships were essential to their functioning effectively. A.L. Wood, Criminal Lawyer, 154-160 (1967).

35/ H. Jacob & J. Eisenstein, Felony Justice: An Organizational Analysis of Criminal Courts, Chapter 3 (1976).

36/ M. C. Gertz, Impact of the Prosecutor -- Public Defender Relationships: An Organizational View of Sentence Determinations (Paper presented at the 1977 Annual Meeting of the American Society for Public Administration, Atlanta, Georgia, March 30-April 2, 1977). This finding was also made in A.L. Wood, Criminal Lawyer, 160-161 (1967).

37/ J. Casper Criminal Justice: The Consumer's Perspective 46 (National Institute of Law Enforcement and Criminal Justice, LEAA 1972).

38/ D. C. Dahlin, op. cit. 140-141.

39/ 44 National Advisory Commission on Criminal Justice Standards and Goals, Task Force Report on Courts (1973).

40/ A. Enker, Perspectives on Plea Bargaining, in Task Force Report: The Courts, President's Commission on Law Enforcement and Administration of Justice, (1967).

41/ A. Blumberg, Criminal Justice 89-90(1968).

42/ J. H. Skolnick, Social Control in the Adversary System, 11 J. Conflict Resolution 60-62 (1967).

43/ H.B. Steinberg, and M.G. Paulsen,"A Conversation With Defense Counsel on Problems of a Criminal Defense," 7 Prac. Law 25, 33 (1961).

44/ A. Rosett and D.R. Cressey, Justice by Consent: Plea Bargains in the American Courthouse, 126-127 (1976).

45/ W. White,"A Proposal for Reform of the Plea Bargaining Process," 119 U. Pa. L. Rev. 451, 452 (1970). The games lawyers play in having the court accept guilty pleas from clients who may be innocent are described by Alschuler in,"The Defense Attorney's Role in Plea Bargaining," 84 Yale L.J. 1305-1306 (1975).

46/ M. Levin, Delay and Related Policy Topics in Five Criminal Courts (unpublished paper delivered at the 1973 Annual Meeting of the American Political Science Association).

47/ Statistics available from New Orleans, for example, indicate an increase in trials during the first two years of heavy screening and restrictions on bargaining. However, in 1976 the number of trials decreased, as did the number of cases brought to the District Attorney's office by the police. We do not know the reason for this change in the trend.

48/ D. R. Vetri,"Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas," 112 U. Pa. L. Rev. 889, 890 (1964).

49/ Alschuler,"The Defense Attorney's Role in Plea Bargaining," 84 Yale L.J. 1179, 1265-1267 (1975).

50/ Comment, "Plea Bargaining in Washington," 16 Gonz. L. Rev. 269 (1971).

51/ 17 Temporary Commission of Investigation of the State of New York,Ann. Rep. 204,205 (1975), Leg. Doc. No. 92.

52/ R. Pieczenik, Urban Justice: Understanding the Adjudication of Felony Cases in an Urban Criminal Court (unpublished Ph.D. dissertation available from Xerox University Microfilms 1974).

53/ M. Levin, Delay and Related Policy Topics in Five Criminal Courts (unpublished paper prepared for delivery at the 1973 Annual Meeting of the American Political Science Association). The strategies described by Levin are as follows: (1) the defense attorney never allows a case to be terminated until he has received his fee and delays the case via continuances to guarantee payment; (2) to maximize the size and minimize work effort, the attorney "puffs" or "boasts" his efforts made on a defendant's behalf; (3) knowing that in the short-run many of his actions will make the defendant hostile the attorney may try to mullify the defendant or manipulate so that he feels satisfied; and (4) to ensure receiving a fee, the attorney may fail to act so that the defendant is more likely to wait disposition in jail thereby causing a defendant to use what money he does have for a defense fee rather than for a bail bondsman.

54/ R. Petty, Fee Setting and Fee Collection Practices Among Criminal Defense Attorneys in the State of Texas (unpublished paper on file at the Univ. of Texas Law School Library 1973).

55/ Alschuler,"The Defense Attorney's Role," op.cit. 1199-1203.

56/ Justice by Consent 21-22.

57/ Despite the obvious need for pretrial release and the fact that a heavy percentage of those in jail include defendants who cannot afford bail, the promise of bail reform has become stultified. See P. Wald, "The Right to Bail Revisited: A Decade of Promise Without Fulfillment", in The Rights of Accused 177, S. Nagel, ed., (1972).

58/ Rankin,"The Effect of Pretrial Detention,"39 N.Y. U. L. Rev. 641 (1964).

59/ Alschuler,"The Defense Attorney's Role," op.cit. 1230-1235.

60/ L. Banfield and D. C. Anderson,"Continuances in Cook County Criminal Courts,"35 U. Chi. L. Rev. 259 (1968).

61/ D. C. Dahlin, The Public Defender's Role in San Bernardino County, California: A Role Analysis (unpublished Ph.D. dissertation in Claremont Graduate School Library 1969). Of 40 participants in the criminal justice system 32 refused to concede the defendant the right to change public defenders, 3 conceded that right in theory but not in practice, and only 5 thought the defendant should have this right.

62/ J. Casper, Criminal Justice - The Consumer's Perspective 29-32 (National Institute of Law Enforcement and Criminal Justice, LEAA 1972). The findings of Dahlin and Casper are confirmed by Alschuler, The Defense Attorney's Role 1242-1246.

63/ Alschuler,"The Defense Attorney's Role," op.cit. 1252.

64/ Skolnick, Social Control in the Adversary System 63. Under this approach public defenders have the option of relying upon mechanisms of concerted action such as organizing all defendants so that they refused to plead guilty.

65/ J. Daray, Plea Bargaining in a California Legal System: A Case Study 16-17, (unpublished Ph.D. dissertation in Claremont Graduate School and University Library 1971).

66/ J. Mills, I Have Nothing to do With Justice, Life Magazine, March 12, 1972; in Before the Law, J. J. Bonsignore, et. al., ed. at 312 (1974).

> "If the defendants really get together, they've got the system by the balls. If they all decide to plead not guilty, and keep on pleading not guilty, then what will happen. The offered pleas will get lower and lower -- six months, three months. If that doesn't work, and they still plead not guilty, maybe the court will take 15 or 20 and try them and give them the maximum sentences. And if that doesn't work I don't know. I don't know. They have the power, and when they find out, you're in trouble." at 317.

67/ Alschuler,"The Defense Attorney's Role," op.cit. 1232-1235.

68/ These members of the defense bar turn automatically to "dealing" their cases without researching them or counseling their clients in a professional manner. G. Hobbs,"Judicial Supervision over California Plea Bargaining: Regulating the Trade,"59 Cal. L. Rev.967, 968 (1971).

69/ See ABA Project on Standards for Criminal Justice. Standards Relating to Providing Defense Services §1.5. (Approved Draft 1968).

70/ ABA Project on Standards for Criminal Justice, Standards Relating to Discovery and Procedure Before Trial §1.1, (Approved Draft 1970).

71/ Id. § 1.2.

72/ Id. § 1.4.

73/ Id. § 2.1.

74/ Id. at 30-31.

75/ One well-documented opinion held the following:

> "It is indeed difficult to see how there can be meaningful representation by counsel at sentencing time when there is no disclosure to him of the pre-sentence materials on which the sentence is being based. And surely without such materials he is in no fair position to determine whether an appeal should be taken from the sentence or how to prosecute it if it is taken. . . We are not now prepared to find that it [pre-sentence report disclosure] is of constitutional dimension under our state Constitution. It is being taken as a matter of rudimentary fairness and though it may entail some administrative difficulties they can relatively be minimized by proper handling." State v. Kunz, 55 N.J. 128, 138, 144,259 A. 2d 895 (1969).

76/ L. Mather, "Some Determinants of the Method of Case Disposition: Decision Making by Public Defenders in Los Angeles," 8L. & Soc'y. Rev. 187 (1973). For a full discussion of the factors see pp. 117-121 of the study.

77/ Figures from the District Attorney's Office indicate that since instituting the screening in 1974 the percentage of cases screened have been - 1974 (41%), 1975 (40%), and 1976 (44%).

78/ We have not analyzed the reason why a prosecutor would bargain out a case with defense counsel when that case would be screened out in the absence of counsel. There may be an analogy in the situation of mountaineers who climb difficult peaks because "they are there". It takes two to bargain. An ethical prosecutor will not bargain with a defendant unless proper waiver has occurred. No such waiver could have occurred prior to arraignment, so a prosecutor could only deal with a defense attorney at screening, presumably because "he was there".

79/ This practice is directly contrary to the holding in Argersinger. Defense attorneys interviewed on this procedure recognized it as unconstitutional. There was no evidence that as individuals or members of the bar any attempt was being made to rectify the situation.

80/ S. R. Bing & S.S. Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston 53-55, A Report by the Lawyers Committee for Civil Rights Under Law (1970).

81/ H. Ridley, Plea Bargaining: An Analysis of the Procedure from the Perspective of the Participants 90-92 (unpublished Ph.D. dissertation at the Emory University Library 1975).

82/ A. Blumberg, Criminal Justice; J. Skolnick, Social Control in the Adversary System.

Chapter Four
THE ROLE OF THE JUDGE

One of the most troublesome issues in plea bargaining has been that of the proper role of the judge as a participant in or supervisory official over the negotiation process. Although the issue may be addressed from a number of vantage points, it appears that most of the discussions center around two major questions. First, to what extent, if any, should a judge participate in the plea bargaining process? Included in this question are numerous issues such as the propriety of a judge plea bargaining, the degree of coercion inherent in the process, and the judge assuming an adversarial position. The second, and related question is, what is, or should be, entailed in the judge's role as a supervisor in plea bargaining? Accordingly, the focus of this question is the extent to which a judge should ensure that (1) the negotiation process was conducted fairly and according to due process, and (2) the necessary elements of a conviction are present for each use.

Although these two questions do not exhaust the many possible issues related to the judicial function in plea bargaining, they do provide a clear focus for what appear to be the major issues at the heart of the judicial role in plea bargaining.

The nature of the literature and discussion of these two general questions appear to differ considerably. In regard to judicial supervision of plea bargaining there seems to be a

general consensus that the judge must be responsible for insuring due process and that the rights of the state, as well as of the defendant are honored. The major differences that do exist are not centered on whether the judge should supervise plea bargaining but rather, the extent to which the supervisory effort should extend. Thus, for example, there seems to be little question that the judge should insure that a factual basis exists for a plea. The issue is the extent to which the judge must delve into the facts of the case and the guilty plea itself to determine that the factual basis exists.

The issue of judicial participation, however, is quite another matter. Here the question is not only the extent to which a judge should participate in the plea bargaining process, but, indeed, whether he should become involved at all.

In addition to the two major issues outlined above, a third, and related issue will also be explored in this section, that of sentencing differentials which may or may not exist between those convicted via the guilty plea versus those found guilty after trial.

Judicial Participation in Plea Bargaining

Existing literature suggests a clear split in the proposed role of a judge in plea bargaining. The American Bar Association and the National Advisory Commission, while differing widely on their respective views regarding the advisability of plea bargaining, share markedly similar views as to what role the judge should play

if plea bargaining does exist. The American Bar Association, in its Standards Relating to the Pleas of Guilty, suggest that the judge should play a supervisory rather than a participatory role in the plea negotiation process.[1/] The ABA's objection to judicial participation in the negotiation process is that, rather than being an overseer of the process, the participating judge may become an adversary in the proceeding. He would thus have difficulty in presiding impartially.[2/] Similarly, the National Advisory Commission on Standards and Goals takes the position that, while plea bargaining should be abolished by 1978, in the interim the judge should not be an active participant in the proceeding.[3/] But the NAC does not address the issue of whether or not a judge who participates in plea discussions should preside over a trial in the event no agreement is reached. The commission recommends that if a plea is not accepted, any statements of the defendant concerning the commission of the offense and evidence obtained through the use of the statement "not be admissible against the defendant in any subsequent criminal prosecution."[4/]

The most definitive statement in prohibiting judges from participating in plea negotiations is contained in the Federal Rules of Criminal Procedure.[5/] The pertinent rule (11(e)(10) was firmly interpreted in U.S. v. Werker, 535 F.2d 98 (1976).

The Werker decision stemmed from a refusal by a U.S. Attorney to agree to recommend ten years as a maximum sentence in a pending case. The district judge was aware of the U.S. Attorney's unwillingness to plea bargain. He inspected a presentence report on the defendant and indicated that he would inform the defendant of the sentence to be imposed if he were to plead guilty. The U.S. Attorney opposed this action.

The Second Circuit upheld the U.S. Attorney on two grounds: first, "the promise by a judge of a specific sentence for a subsequent plea of guilty falls within the explicit proscriptions of Rule 11(e);" and second, "that such a judicial intervention is inconsistent with the proper administration of criminal justice."

The court took a literal view of the Rule 11(e) wording:

> [I]ts purpose and meaning are that the sentencing judge should take no part whatever in any discussion or communication regarding the sentence to be imposed prior to the entry of a plea of guilty or conviction, or submission to him of a plea agreement... . Rule 11 is obviously intended totally to eliminate pressures emanating from judicial involvement in the plea bargaining process, and this necessarily includes any involvement of the court in divulging pre-plea sentence proposals which are equally likely to generate such pressures. 6/

This exposition of the clear intent of Rule 11(e) may affect the ability of the defendant to predict the sentence he will receive and could have important ramifications for judicial participation in plea bargaining outside the federal courts if a rule similar to 11(e) is adopted.

It has been pointed out elsewhere that the power of the judge is so inherently coercive that a plea bargain suggested by a judge cannot be voluntarily entered by the defendant.[7] Others have seen the pressure exerted on the defendant as "all pervasive and compelling."[8]

Despite these arguments, there are those who believe it is necessary and desirable for the judge to participate in plea discussions. A major rationale offered for this position is that only through an actively participating judge can a certain amount of predictability in the sentence be insured. Whether or not a defendant accepts or rejects a certain negotiated plea, for example, depends to a large degree on how actively the prosecutor and defense attorney are able to predict the probable case disposition. If a judge does not participate or routinely follow sentence recommendations, then other means of arriving at predictability may be attempted.[9]

In a study of dispositional felony arrests in New York City, it was reported that in 72% of the guilty pleas the defendant had assurances of what the sentence would be as part of the plea bargain.[10] Although the defendant did not have this assurance in the other 28% of the cases, it was stated that the upper limit of this sentence was known as well as the fact that sentences rarely ever reach this upper range.[11]

One argument for the judicial participation in plea bargaining is related to the alleged benefits of plea bargaining and sentence predictability.[12] Considerable weight may be given to a prosecutor's sentencing recommendation since the judge realizes that if he in fact rejects recommendations too often, defendants will be reluctant to negotiate the guilty plea. Defendants may feel more certain if the judge is actively involved.[13] Nevertheless, some judges insist that sentencing should be a completely separate function devoid of any effect upon entering a plea of guilty.[14]

Those favoring judicial participation in plea bargaining differ with those who believe judicial participation unfairly pushes a defendant into pleading guilty. Judge Lambros suggests that the judge has a responsibility to provide a general atmosphere of frankness and sincerity.[15] Lauding the character of the American judiciary, he states that standards prohibiting judicial involvement in plea bargaining carry with it an assumption that if it were to be otherwise, judicial impropriety would occur. Lambros then suggests several reasons why judicial participation should be encouraged.

1. It is unrealistic to say that judicial involvement of plea discussions does not occur. This is well documented by the case law and the common practive in some jurisdictions.

2. It allows for a more meaningful and informed plea because: (1) judicial participation invariably causes the prosecutor to open his file and freely discuss the strengths and weaknesses of a case. Therefore, a defendant does not plead in the dark; (b) it allows for a more meaningful and informed understanding as to plea alternatives. In many cases counsel do not know the vast array of sentencing possibilities, especially in the federal system.

3. It will expedite litigation and in turn reduce the backlog of cases. By removing the uncertainty as to the prosecutors cases and sentence to be given a sense of uncertainty which preoccupies the accused and his counsel will be removed. Therefore, there will be no reason to undergo the "full ritual of technical and procedural machinery" which often amounts to nothing more than a delaying tactic. If the backlog of cases is reduced it would free the resources of the court to devote time to the "hard core" cases which are eared for trial.

4. It will provide a judge "a vehicle through which to acquire additional information so as to supplement the report of the probation department." Judicial involvement in plea negotiations, where information is freely exchanged, can provide another tool to be used by the judge to obtain additional facts and information relevant to sentencing. 16/

In a similar vein it has been suggested that the trial judge should play a more direct and active role in the plea negotiation process than is specified by the ABA Standards. It is maintained that the court might be of help to the defendant regarding his understanding of the guilty plea process, and explaining the potential long range effects of the guilty plea. 17/ The following specific provisions were noted: (1) The court should go beyond the statement of the fact that a defendant is entitled to an attorney, and that he will be given one without cost when necessary. The role of a lawyer in the criminal defense and the possible use of an attorney in the defendant's

particular case should also be explained to the defendant; (2) The court should examine the evidence relied upon by the prosecutor. In those instances where the state has problems of proof the defendant should be informed that he has a reasonable chance of acquittal if he elects to have the state prove its case. The court must make it clear that this is true even if a defendant is in fact guilty; and (3) The court should inform the defendant of the implications of the guilty plea which go beyond the sentence length. For example, defendants should be told that ex-convicts have serious problems adjusting to society and holding jobs, and that he would lose certain civil rights may be lost and that a sentence to over three years proves a wife with grounds for divorce. 18/

One proposal would formalize the judge's participation in the plea bargaining process.19/ In addition to requirements suggested in most guidelines for plea bargaining, the judge should participate in the negotiations to the extent of having the terms of the agreement disclosed to him. The judge may adhere to the agreement or find it unacceptable. If the latter, the judge should inform the defendant what sentence will be imposed. If the sentence is less severe than that agreed upon, the defendant must accept the sentence. If greater the defendant must either accept the sentence of the court or withdraw the plea within five days and go to trial. This would avoid the many guilty plea appeals which result from disappointment with the sentence imposed. According to this

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analysis the five day period for withdrawal may result in fewer such defendants and hence fewer guilty plea appeals.

Other research into judicial attitudes and behavior suggest a mixed pattern of judicial participation in plea bargaining. The research points to the conclusion that although certain forms of judicial participation seem to predominate, there is no clear pattern which has emerged.

The often polar types of participation of the judge have been outlined by White.[20/] He has observed that judicial involvement tends to be "one of two undesirable models: either the trial judge actively participates in the bargaining process, or he blinds himself towards the realities of plea bargaining and engages in the ritual of asking the defendant whether the prosecutorial concessions have played a part in inducing the guilty plea."[21/] White suggests that the judge should impose safeguards which protect defendants without unreasonably jeopardizing the prosecutor's efficiency in disposing of cases. Further, in an effort to place a limitation on the sentencing discretion in cases involving plea bargaining, he recommends that the trial judge should be bound "either to impose a sentence no greater than that recommended by the prosecutor or to permit the defendant to withdraw his plea."[22/]

Carstarphen, in her study of judicial attitudes toward plea bargaining, found that three major attitudes could be identified: (1) those who supported it, (2) those who were against it, and (3) those who had ambivalent feelings about

it.[23] Similarly, a study of a municipal court in New Jersey where there had been a temporary ban on plea bargaining in DWI cases indicated a mixed judicial response.[24] Several judges who were in favor of plea bargaining indicated that in misdemeanor courts judges often felt compelled to enter into plea bargaining due to the absence of prosecutors available for processing cases. In general, the judicial attitudes toward plea bargaining were related directly to their confidence in the system. Those with greater confidence in the municipal court opposed the prohibition; those less optimistic were more likely to be in favor of the prohibition. This type of reaction suggests that the actors' attitudes toward plea bargaining is linked strongly to their perceptions of other elements in the system.[25]

Vetri examined prosecutors in 43 states in a study focused on the extent to which judges participate in plea bargaining sessions.[26] Prosecutors did not feel that judges should be present; only 19% answered affirmatively.

Eisenstein and Jacob noted that in Chicago the entire courtroom organization was involved in plea bargaining. They observed that the plea negotiations usually took place in the judge's chambers with the judge himself playing a significant role. In some cases judges initiated plea bargaining by suggesting that a conference be held between the parties.[27]

For those judges who support an active judicial role in plea bargaining, several incentives for such participation

have been noted. These include efficiency, rapid case processing, realization by the defendant of his wrongdoing and avoidance of the need to impose harsh statutory punishments.[28] While many would no doubt concur that the above reasons may be used in support of plea bargaining as a particular form of case disposition, not all would agree that it is necessary to include the judge as an active participant in the process in order to achieve fairness and efficiency.

The debate regarding the role of the judge in plea bargaining continues unabated. But the rhetoric used in this debate often obscures the various types of participation and the actual impact of these various forms of judicial involvement. The differing forms of judicial participation in plea bargaining, their strengths and disadvantages, must be considered on their own merit rather than dealing with the various forms as a homogeneous behavior pattern. One frequently mentioned fear of judges is that they will dominate the process in extracting pleas of guilty. Rosett and Cressey state that the judge is in such a strong position to offer a "take it or leave it proposition" -- that either the deal is accepted or the defendant gets hammered more severely if convicted after a trial.[29] They also suggest that the judge might do this with the awareness that a constant flow of guilty pleas is necessary for the administrative functioning of his court.

The participation of the judge in plea bargaining creates a potential for judicial dominance of the process. Carstarphen for example, observed judicial dominance of plea bargaining in systems where the judges participate in pretrial conferences and noted that they relinquished their powers and became dependent upon the recommendation of the prosecutor when they were not involved in a pretrial conference.[30] She also observed a variance in judicial participation in plea bargaining sessions, with some participating actively while others voiced the opinion that it was improper. A similar response pattern among judges has been observed by others.[31]

Considerable legislation and case law has been generated concerning judicial participation in plea bargaining. Of the 50 states and the District of Columbia 28 have criminal procedure rules or statutes paralleling parts of Rule 11 or the ABA Standards Relating to Pleas of Guilty.[32] Only eight states have adopted the specific prohibition on judicial participation found in F. R. Cr. P. 11(e) and Section 3.3(a) of the ABA Standards Relating to Pleas of Guilty.[33] Some states have adopted the proscription via court opinion.[34] Thus, it is apparent the prohibitions in the ABA standards and Federal Rule 11(e) on judicial participation have had limited impact on the states' criminal procedure. One state court, for example, has held that federal interpretations of federal rules which are paralelled by the state are conclusive

on the state courts.[35/] Most states have a statute, rule or case on judicial role, but the primary focus has been on matters other than limiting judicial participation in plea bargaining.

In some states, there has been opposition to a complete prohibition on judicial participation in plea discussions. For example, the Minnesota, Maine, Alaska and Florida Rules of Criminal Procedure, which include most of the ABA provisions on plea bargaining, conspicuously omit the key phrase barring judicial participation.[36/] Illinois Supreme Court Rule 402(d)(1) alters the absolute stricture, stating that "the trial judge shall not initiate plea discussions." This alteration seems intended to allow judges some flexibility and discretion in playing a participant's role in plea discussions.

North Carolina has adopted a position diametrically opposed to that of the ABA and Federal Rule 11 on this point. The North Carolina statutory position governing plea conferences states:

> 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 solicitor will not charge, will dismiss, or will move for dismissal of other charges, or recommend or not oppose a particular sentence. If a defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions. 37/

The information in Table 1 presented below, indicates that in 12 of 25 states visited by project staff there is reference to bargained participation by the judge (10 prohibited

and 2 permitted). Only four states address the issue of sentence revelation by the judge before a bargain has been struck. In only two states is reference made to the initiation of plea bargaining by judges. Finally, in 12 states there is mention of the approval or disapproval by the judge after a tentative bargain has been reached.

This brief examination of current law on judicial participation in plea negotiations suggests that the push toward "judicial neutrality" urged by the ABA and Rule 11 has not been accepted in all jurisdictions.

TABLE 1 -- JUDICIAL INTERVENTION OR PARTICIPATION

	ALA.		ALASKA		ARIZ.		CALIF.		COLORADO		CONN.		FLORIDA		ILLINOIS	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
1. Bargaining participation. [ABA 3.3(a)]	NS	NS	NS	NS	P	NS	NS*	*	P	P	NS	NS	NS	A	NS	A
2. Sentence revelation before bargain.	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS
3. Initiation of bargaining.	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	A	P	P
4. Approval/disapproval after tentative bargain struck.	NS	NS	A	NS	A	A	NS	NS	A	NS	NS	NS	A	A	A	A

R = required
NR = not required
NS = no statement on this issue
P = prohibited
A = allowed or suggested
* = see textual commentary to clarify or avoid misinterpretation which is located in Appendix .

A = statute or rules
B = state case

TABLE 1 -- JUDICIAL INTERVENTION OR PARTICIPATION (contd.)

	IND.		IOWA		LOUIS.		MASS.		MICH.		MO.		NEV.		N. JERSEY		N. MEXICO		N. YORK		OHIO		OREGON	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
1.	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	P*	NS	NS	P	P	P	NS	NS	*	NS	P*	P	NS
2.	NS	NS	NS	NS	NS	NS	NS	NS	NS	A	NS	NS	NS	NS	P	NS	NS	NS	NS*	*	NS	NS	NS	NS
3.	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS
4.	NS	A	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS	A	A	A	NS	NS	A	NS	NS	A	NS

R = required
NR = not required
NS = no statement on this issue
P = prohibited
A = allowed or suggested
* = see textual commentary to clarify or avoid misinterpretation which is located in Appendix .

A = statute or rules
B = state case

TABLE 1-- JUDICIAL INTERVENTION OR PARTICIPATION (contd.)

	PENN.		S. CAR.		TENN.		TEXAS		VIR.	
	A	B	A	B	A	B	A	B	A	B
1.	P	P*	NS	NS	NS	P	NS	P	NS	NS
2.	NS	P	NS	NS	NS	NS	NS	P	NS	NS
3.	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS
4.	A	NS	NS	NS	NS	A	NS	NS	NS	NS

R = required
NR = not required
NS = no statement on this issue
P = prohibited
A = allowed or suggested
* = see textual commentary to clarify or avoid misinterpretation which is located in Appendix .

A = statute or rules
B = state case

Sentencing Differential Between Guilty Plea and Trial

A central issue in plea bargaining is that of differential sentencing practices. Stated bluntly it has been alleged that the major tool of the court for inducing guilty pleas is the threat of imposing a more severe sentence if the case should go to trial rather than be terminated via a guilty plea.[38/]

One study suggests that the vast discretionary sentencing power of judges enables them to punish defendants who put the state to the expense of a jury trial.[39/] It cited a case where an attorney protested that a five year prison term for a guilty plea was too severe. The judge stated that a jury conviction would result in 20 years. His philosophy was "he takes some of my time and I'll take some of his."[40/]

Ohlin and Remington have noted that it is important for a trial judge to avoid court congestion, even if it requires the long term incarceration of some defendants awaiting trial.[41/] The other side in this equation is the major inducement of a more lenient sentence for a plea of guilty. Many judges make explicit their view that it is appropriate to reduce the sentence in return for a plea of guilty because of the resulting contribution to the efficient and economical administration of the law. Because the problem of calendar congestion appears to be more serious in urban than in rural areas, the pressure to make concessions in the former is greater. Ohlin and Remington suggest this may account in part for what they

characterize as a widely recognized fact that sentences imposed by rural judges typically are more severe than those imposed by urban judges.[42]

Others point out that courts "almost invariably do reward guilty pleas with leniency, even without looking for evidence of actual remorse or any other mitigating factor."[43] The fear expressed by many scholars is that the inducement of a lighter sentence for a guilty plea may encourage a guilty plea from defendants who are not guilty.[44]

The sentencing differential has in some cases been incorporated into the daily routine of the court's operations. A major goal of the plea negotiation process has become that of achieving a balance between appropriate punishment while at the same lessening the sentence to the extent of encouraging guilty pleas.[45]

Existing research indicates a divergence of opinion on the part of judges regarding sentencing differentials between guilty plea and trial. At least three major views have surfaced. They are: (1) the guilty plea should have no independent significance in the sentencing decision; (2) the willingness of the defendant to plead guilty may have sentencing significance, depending on circumstances in the case; and (3) awarding more lenient sentences to those pleading guilty as opposed to those demanding trial is appropriate and necessary for the proper administration of justice.[46]

Although rarely stated plainly Newman believes the courts have taken the position that sentence leniency after a

plea of guilty is proper, but additional severity after trial is not.[47] In United States v. Wiley,[48] it was held that a defendant cannot be sentenced more severely for exercising his constitutional right to trial. In Scott v. United States,[49] the sentence was not upheld because the trial judge indicated that the sentence would have been lighter if the defendant had pled guilty. A similar pattern can be seen on the state level.[50]

The most explicit statement in opposition to sentencing differentials has been articulated by the National Advisory Commission on Criminal Justice Standards and Goals.

> (Standard 3.8): Effect of the method of disposition on sentencing. The fact that a defendant has entered a plea of guilty to the charge or to a lesser offense than that initially charged should not be considered in determining sentence.
>
> (Commentary): The decision to plead guilty often is a practical one, made with the view toward minimizing the impact of what is seen as inevitable conviction. Although such pleas assist the criminal justice system, they have no direct relevance to the appropriate disposition of an offender. 51/

The most explicit statement endorsing sentence differentials has been articulated by the American Bar Association.

> §1.8. Consideration of Plea in Final Disposition.
> (a) It is proper for the court to grant charge and sentence concessions to defendants who enter a plea of guilty or nolo contendere when the interest of the public in the effective administration of criminal justice would thereby be served. . .
> (b) The court should not impose upon a defendant any sentence in excess of that which would be justified by any of the rehabilitative, protective, deterrent or other purposes of the criminal law because the defendant has chosen to require the prosecution to prove his guilt at trial rather than to enter a plea of guilty or nolo contendere.

> (Commentary): It is apparent that a plea discussion-plea agreement system cannot operate effectively unless trial judges in fact grant charge and sentence concessions to most defendants who enter a plea of guilty of nolo contendere. It does not follow, however, that the trial judge should perfunctorily or routinely grant all concessions sought by the prosecutor. Nor does it follow that every defendant who decides not to demand trial should receive concessions. Under the standards, it is necessary the the trial judge determine that "the interest of the public in the effective administration of criminal justice" would be served by a granting of the charge or sentence concessions. 52/

A survey of the attitudes of judges toward plea bargaining and the sentence found that 66% of the federal judges surveyed considered the plea as a relevant factor in the sentencing procedure.[53] Another study found that judges, district attorneys, public defenders and private attorneys felt it was proper to give lesser sentences for guilty pleas.[54] The percentages are presented below.

PERCENT WHO BELIEVE IT IS PROPER TO GIVE LESSER SENTENCES FOR GUILTY PLEAS

	Respondent Groups				
Responses	Judges	District Attorneys	Public Defenders	Private Attorneys	Total
Yes	67%	86%	86%	57%	71% (36)
No	33	14	14	43	29% (15)
Total (N)	100% (9)	100% (14)	100% (7)	100% (21)	100% (51)

In one survey a majority of prosecutors polled indicated that a defendant pleading guilty received a lesser sentence than one who demanded trial.[55] Most of these prosecutors believed that such a procedure was proper, as the following table indicates.

(a) *Does a defendant who pleads guilty generally receive a lesser sentence than a defendant who pleads not guilty and goes to trial and is found guilty?*

	Number of Prosecutors		*Percent of Prosecutors*	
	Yes	*No*	*Yes*	*No*
Definitely Plea Bargain Group (52 prosecutors)	32	20	61.6%	38.4%
Probably Plea Bargain Group (7 prosecutors)	4	3	57.1%	42.9%
Do Not Plea Bargain Group (6 prosecutors)	—	6	—	100.0%
All Groups (65 prosecutors)	36	29	55.4%	44.6%

Number of prosecutors not responding and answers disqualified because of inconsistency with comments: 11.

(b) *All other things being equal, should a defendant who pleads guilty receive a lesser sentence than a defendant who pleas not guilty and goes to trial and is found guilty?*

	Number of Prosecutors		*Percent of Prosecutors*	
	Yes 200	*No*	*Yes*	*No*
Definitely Plea Bargain Group (55 prosecutors)	39	16	70.9%	29.1%
Probably Plea Bargain Group (8 prosecutors)	5	3	62.5%	37.5%
Do Not Plea Bargain Group (7 prosecutors)	3	4	42.9%	57.1%
All Groups (70 prosecutors)	47	23	67.1%	32.9%

Number of prosecutors not responding and answers disqualified because of inconsistency with comments: 6.

In a major study involving over 1,200 cases in Philadelphia, Constant compared sentence patterns on the basis of guilty pleas, trial by judge, and jury trials.[56] Six offenses were selected for analysis. In general defendants in jury trials received more severe sentences. But there were exceptions. In larceny offenses, the average sentence for guilty pleas was higher than that imposed after trial.

For burglary, defendants pleading guilty received an average of 4.8 months; those choosing bench trials received 7 months; and defendants going to jury trial had an average of 20.8 months. In cases of aggravated robbery, a similar pattern was found with guilty pleas averaging 10.2 months, bench

trials 11.7 and jury trials 74.2. The same relationship, although to a lesser extent, was observed in cases of aggravated assault and battery.

For three other offenses the relationsip changed. In cases involving possession of narcotics, defendants pleading guilty averaged 9.8 months while those going before a trial judge averaged only 2.8 months per offense. There was only one jury trial and thus no comparison could be made on this category. In larceny cases, guilty pleas averaged 8.1 months, trial by judge 5.3 months, and jury trials 6.4 months per offense. Finally, for cases of receiving stolen goods, the sentences were 6.8 months for guilty pleas, 4.1 months for trial by judge and 5.2 months for jury trials.

In the three offense categories where sentences were lighter for those pleading guilty. Constant suggests that the type of case and pretrial release status may account for the differences. He found that most serious cases are disposed of by plea, and that those incarcerated before trial are more likely to plead guilty. Constant believes they receive a lesser sentence because a judge will invariably consider the amount of time which has been served awaiting trial. But neither the statistics or explanations support a clear picture of the nature and extent of differential sentencing based on disposition alone.

From other sources, however, a clear picture of differential sentecning emerges. Data supplied to the American Friends Service Committee by the Administrative Office of the United States Courts produced the following figures.[57]

IMPRISONMENT BY DISPOSITION

Year	Plea	Changed Plea*	Trial-Judge	Trial-Jury
1963 Percent rate of Imprisonment	43%	38%	54%	72%
1965 Average Number of Years of Imprisonment Sentenced	5	5.6	5.6	11.4

* Changed Plea means that the defendant originally entered a not guilty plea but changed the plea to guilty at a later stage in the system.

A study conducted at Berkeley produced similar results.[58]

SENTENCE BY DISPOSITION METHOD

	Guilty Plea	Jury Trial Conviction
Straight Probation	49.1%	14.7%
Jail Term	39.0%	18.6%
Prison Term	11.9%	66.7%
	100.0%	100.0%
	(1154 cases)	(103 cases)

In yet another study, evidence was presented which strongly supports the existence of a differential sentence policy.[59] "Across all categories of offense and prior record, defendants who plead guilty or SOT are sentenced more leniently

than defendants who are convicted by trial. Defendants convicted in jury trial are sentenced much more harshly than any others. This finding supports the general accepted theory that the court system extracts a greater price from defendants who refuse to cooperate."[60] The authors of the same study found that disparity existed not only across jurisdictions, but within jurisdictions as well. In one particular district, the felony sentence rate for possession of dangerous drugs varied among judges from 8% (plea) to 53% (trial), and in another district 17% to 48%.

It was found in another jurisdiction that not only judges, but district attorneys and public defenders felt it was proper to give lesser sentences for guilty pleas. Sixty-seven percent of the judges interviewed felt that it was appropriate to give a lesser sentence for a guilty plea. Eighty-six percent of the district attorneys interviewed indicated that it was proper. More surprising, however, was the fact that 86% of the public defenders also agreed that it was proper. Only the private defense attorneys were fairly evenly split on the issue, with 57% approving.[61]

In the Yale study researchers found that 87% of the judges (federal district court judges) who acknowledged that the plea was germane, indicated that a defendant pleading guilty to a crime was given a more lenient punishment than a defendant who pleaded not guilty.[62] The estimates of the extent to which a fine or prison term was diminished for a defendant pleading guilty varied from 10% to 95% of the

punishment which would ordinarily be given after trial. The judges indicated that, among other things, a defendant pleading not guilty may incur additional punishment because he displays a noncooperative attitude, commits perjury, asserts a frivolous defense at trial, reveals the circumstances of his crime, or does not contribute to the efficient administration of justice.

In addition to differentially sentencing as a matter of judicial policy, there is also some evidence that the court organization itself may be arranged to maximize the flow of guilty pleas through an institutional policy which results in harsher sentences after trial. One study examined the effect of judge assignment to criminal cases on plea bargaining and guilty plea inducement.[63/]

The study suggested that the flow of guilty pleas could be attributed to the deliberate policy of assigning the more lenient judges to handle the non-jury trial work. When selecting judges for "judge pools" both harsh and lenient judges are included. If the defendant waives his right to a jury trial by pleading guilty the calendar judge normally assigns him to a lenient judge. The court administrator makes a conscious and continuing effort to ensure that a majority of "waiver judges" are more lenient than the judges assigned to jury cases. In the summer, because of vacations, the system appears to break down. The desired combination of pool judges is difficult to attain and the harsher judges outnumber the more lenient ones. Thus

there are more jury trials and an increase in the case backlog because of continuances requested by defense attorneys.

The above data supports the contention that a major lever of the court is the threat of the imposition of a more severe sentence if a defendant decides to go to trial rather than pleading guilty. Some believe that despite the reluctance of the courts to admit that they reward those who plead guilty by giving them a lighter sentence, it is the quid pro quo for the plea.[64/]

This clear view, however, is clouded by the findings of Eisenstein and Jacob. They suggest that the conventional wisdom and belief -- that there is a sentence differential based on guilty plea versus trial -- is not supportable. They acknowledge that defendants pleading guilty do receive lighter sentences than those demanding trial. But in their view the demand for trial is not what causes the sentencing differential. They emphasize the type of offense, personal characteristics of the offender, the strength of the case, and the identity of the courtroom work group involved in the sentencing. Thus, the dispositional mode (plea or trial) plays an insignificant role in accounting for the variance in sentence length.[65/]

The authors believe that subjective impressions are the significant factor in the general belief that harsher sentences are imposed for going to trial.

> What is important is the impression which is left with court officials and defendants alike -- that they give a premium for guilty pleas and impose the risk of a heavier sentence if defendants insist on a trial and are convicted. Court participants perceived that impression as instrumental in promoting a steady flow of guilty pleas. Many of them believed that a contrary perception might substantially reduce the number of guilty pleas. Although empirically false, this impression was nurtured by the occasionaly heavy sentence after a jury trial or an exceptionally light sentence after a guilty plea. 66/

The research outlined above, including both attitudes of the actors and actual case dispositons, evidences substantial patterns of sentencing disparity apparently based on type of disposition (guilty plea vs. trial). But there are other findings and views which indicate that the differential may be based on other factors or does not always occur.

Forms of Judicial Participation - General

Relatively few attempts have been made to attempt a typology regarding the judge's specific roles in plea bargaining. Perhaps the most notable attempt to date has been that of Alschuler.[67] He outlined four types of systems in which the judge assumes a different role: (1) Systems in which judges do not engage in plea bargaining and in which the task of bargaining belongs exclusively to prosecutors. (2) Systems in which neither judges nor prosecutors bargain explicitly with defense attorneys but in which judges encourage guilty pleas by sentencing defendants who are convicted at trial more severely than those who plead guilty. (3) Systems in which judges participate actively in pretrial negotiations

and offer specific benefits in exchange for guilty pleas. (4) Systems in which judges participate in the negotiation process but avoid specific pretrial promises.[68] In his observations, which serve as the basis for his typology, Alschuler notes that in only one jurisdiction did he find that judicial plea bargaining was uncommon. It was noted, however, that even if those judges as a rule did not participate, it was possible for defense attorneys who had close relationships to judges to "learn their thinking" as to what to do in a troublesome case.[69]

The data collected by this project study suggest several general findings and a typology based on the judge's behavior rather than the type of plea bargaining system. Thus it is necessary to caution the reader regarding the units of analysis contained in this discussion.[70] The unit of analysis is the judge, not the jurisdiction in which the judge sits. Thus, statements such as "in X% of the jurisdictions the judges did Y" are generally avoided. This is necessary for at least two reasons. First, all jurisdictions observed in the study were multi-judge jurisdictions. It was not possible to interview, observe or otherwise learn about the practices of all the judges due to the limitations imposed by time. Secondly, a consistent finding of our study was that judges do not agree on, nor perform their judicial role uniformly. In most jurisdictions one heard the same refrain when inquiring as to the judge's role in plea negotiations and related matters. "It depends on the judge."

In short, the ways in which judges participate or supervise in plea bargaining differ measurably by individual judge.

A final reason for insuring that there is no confusion over the units of analysis is that the term "typical" may have two or more substantially different meanings. It can refer to what most judges (or prosecutors or defense counsel) do with respect to plea bargaining. It can also refer to how most guilty pleas are obtained. These are quite different questions as the following hypothetical example illustrates. A jurisdiction may have 20 judges. Two of them may actively participate in obtaining guilty pleas and may account for the disposition of 80% of the caseload in that jurisdiction. The remaining 18 judges may refuse to participate in plea negotiations but only account for 20% of the caseload. What is a typical form of bargaining in that jurisdiction?

From the point of view of the proportion of the judges involved, the "typical" form may be one of non-judicial participation. But, from a point of view of the proportion of cases disposed, the "typical" form may be one of active judicial participation in the bargaining.

For purposes of definition, we state that when a judge becomes involved in pre-plea discussions between the prosecution or defense, or discusses the plea and any possible disposition with either the prosecution or the defense, the judge is engaging in explicit plea bargaining. Moreover, if a judge routinely engages in differential

sentencing between convictions by plea and convictions by trial, this can be termed participation via implicit plea bargaining.

Judicial pressure may also force parties to reach an agreement. There is some question as to whether or not this constitutes judicial participation. Some have voiced the opinion that it depends on the nature and scope of the pressure exerted by the judge. Thus, "encouraging" prosecutors and defense attorneys to arrive at a plea may not be participation, while "leaning heavily" on these participants might be defined as such. The line of demarcation drawn in this study is that when the judge becomes actively involved in the disposition by plea of an individual case it should be considered plea bargaining. The fact that as a policy he encourages plea bargaining by the prosecutor and defense counsel does not in and of itself constitute judicial participation.

On-Site Observations of the Judicial Role

From our observations of judges, as well as interviews with other actors, we found a wide variance in the forms of judicial participation in plea bargaining. The degree of variance is so wide, in fact, that the use of the term judicial participation as a class of behavior, if not reasonably explicated and divided into degrees, can be extremely misleading. Thus, an attempt will be made in this report, when using the term judicial participation, to indicate the specific type being addressed.

Before discussing the particular types of plea bargaining observed, several more general observations may be stated. First, the extent and degree of judicial participation in plea bargaining may not necessarily be related to professed judicial attitudes or the general approach taken to plea bargaining in a specific jurisdiction. For example, judges obviously participate in jurisdictions which utilize regular pre-plea conferences which include the judge, district attorney, and defense attorney. However, even where typical judicial action involves mere ratification of an agreement between the district attorney and the defense attorney, a more extensive form of judicial participation may occur under certain circumstances than in a system where the judge regularly participates. For example, in Jefferson County, Alabama, a felony court judge indicated that "if you buy a plea bargain agreement, then you've got to get in it." If a judge remained totally apart from the negotiation process he stated, "you don't get a feel for what they are really doing." Where the district attorney and defense counsel hit a snag and bog down, they retreat to the judge's chambers and work something out. Thus, although the judge does not regularly participate in the plea bargaining sessions in specific cases he may be the most active participant in determining that (1) plea bargaining takes place, and (2) the type of disposition would most likely result in satisfaction for both parties.

We found general judicial support for the concept of plea bargaining in all except one jurisdiction, El Paso, Texas. This was found to hold true in both the misdemeanor and felony courts. Those favoring plea bargaining, however, did not agree with all forms of negotiation or negotiation in all situations. They simply did not see the process as inherently evil or corrupt. The general feeling was that inequities in the system were not due to the "nature of the beast itself."

By far, the most common rationale favoring plea bargaining was the need to move the caseload. In the larger jurisdictions statistics were offered to indicate the tremendous number of cases filed for disposition each month. Some judges opposed to plea bargaining grudgingly admitted the necessity of living with it. We were told repeatedly that without plea bargaining the system would break down and "justice" would collapse.

A related judicial rationale for plea bargaining was that it disposed of cases which shouldn't be tried. As noted earlier there is a belief that certain kinds of cases don't belong in trial. The judicial attitude toward these cases seems to be that they are not worthy of court time and that their appearance in court should be discouraged. Depending on the judge, this is usually accomplished by "encouraging pleas," "facilitating an agreement," "helping the attorneys comes to terms," "arranging a meeting of the

minds," and "forcing a plea." This range of terms appears to cover anything from a gentle nudge to the judge leaning heavily on the other participants and requiring a plea.

A third rationale for plea negotiation was that it helped to achieve substantive justice and mitigate the harshness of the law. A number of judges mentioned specific cases where adherence to the letter of the law would have resulted in an unduly long sentence. Through plea negotiation the punishment can more directly fit the true nature of the crime and the defendant. As one judge put it, "there are robberies and then there are robberies."

Some judges objected to plea bargaining because of their belief that the prosecutor, through plea negotiation, had encroached on the judicial function. In El Paso, Texas, where the felony court operates under a point system to determine the sentence, judges indicated that the prosecutor had gained too much power through plea bargaining. They also felt that plea bargaining resulted in "uneven justice" because practices vary from court to court, thus resulting in variations in the disposition of similar cases. A less frequent criticism contended that plea bargaining gives the court the appearance of a market place and thus is dehumanizing and degrading to the concept of justice.

In Black Hawk County, Iowa, where the prosecutor has attempted to abolish plea bargaining, some judges wanted the prosecutor to exercise his power in recommending sentences.

A daily newspaper reports on sentences, particularly those involving probation, sometimes to the judges' discomfort. These judges face a nonpartisan reelection every six years and do not want the burden of sentencing decisions to rest solely on them. Some felt the prosecutor was politically motivated in not sharing the burden.

There is a split among judges regarding the role of the prosecutor in plea bargaining, particularly as it relates to the sentence. Judges break it down along two major lines. The first and minority opinion is that prosecutors should not be involved in the sentencing process; that it is a judicial function. Proponents of this position believe some prosecutors are trying to usurp judicial power, with judges rubber stamping the plea agreement between the prosecutor and defense attorney. Our interviews, however, suggest that these very judges ratify these agreements overwhelmingly.

A considerably more common position is that prosecutors should be involved in the sentencing because they are familiar with the facts of the case and are in a position to present information useful in the determination of the sentence. In at least three jurisdictions a major source of friction between the prosecutor's office and the judges concerned the role of the prosecutor in sentencing. The prosecutor's policy was noninvolvement in sentencing because it was entirely a judicial function. Judges believed the prosecutor took this position because

of adverse publicity should he recommend a light sentence. To the judges, the prosecutor's only interest was in obtaining a felony conviction and maneuvering himself into a position where he was not responsible for the sentence. They felt he was remiss in his responsibilities as a prosecutor in not sharing the sentencing responsibilities with the judge.

In other jurisdictions, a sentiment commonly echoed was that of "we really don't like plea bargaining and would prefer to try all the cases, but unfortunately the heavy caseload just doesn't allow that so we have to get involved." In one particular case, a judge in an apparent effort to move his plea bargaining behavior in line with his unfavorable attitude towards plea bargaining, indicated he would not engage in plea bargaining. However, if someone presented a hypothetical case he would not be averse to offering a hypothetical sentence.

A second noticeable pattern in judicial involvement in plea bargaining was the variance of judges' behavior within a given jurisdiction. This occurred both within the same level of trial court (misdemeanor or felony) and between levels of courts. A misdemeanor level judge in Kalamazoo, Michigan reported that he actively participated in the plea bargaining process. But his brethern at the felony level did not. In Greenville, South Carolina, some judges bargain directly with defense counsel in chambers. But one particular judge never participates in the bargaining process. In Pima County, Arizona, while a general rule is

for judges not to participate in plea bargaining, it was reported by other participants that at least two felony judges would frequently engage in plea bargaining in the form of a specific sentence promise.

Finally, in Dade County, Florida, at least four different forms of judicial participation were identified. Two judges never participate in explicit bargaining. Others avoid direct participation in the actual negotiations but exert pressure on attorneys to arrive at some agreement. The pressure was usually applied in one of two ways. Either the judge would throw the case out or he would "push you to trial". In the latter case the judge calls the prosecutor to determine his readiness for trial. He then schedules a case to force a decision to plead or try the case. A third approach combines patterns one and two. This involves judges who ordinarily do not participate in plea bargaining unless their calendars become crowded. When that occurs they force a participant to plea bargain or directly engage in the negotiation process -- by telling the defendant what sentence they are willing to give in exchange for a plea of guilty. The fourth style consists of participation of the judge in pre-plea discussions followed by his informing the defendant of the bargain he is willing to accept.

In relation to judicial relations with other actors, we found a varied pattern of judicial interaction. It would be difficult, as well as misleading, to categorize any single form of judicial interaction with prosecutors or

defense attorneys as being typical. Four major factors appear to shape the form of interaction between judges and other participants: (1) The level of the court (felony vs. misdemeanor); (2) The method of assigning DAs and public defenders to the court; (3) The dominant type of plea bargaining arrangement; and (4) The size of the judicial operation. This list is by no means exhaustive. But it points to some of the more important structural arrangements which govern the actors' behavior.

The felony operation is seen by the actors on all levels in the system as being considerably more important than misdemeanor proceedings. In one jurisdiction a felony court judge inquired of a project staffer as to other people with whom he had spoken during his site visit. A response that he has spoken with two judges on the misdemeanor level elicited this reaction: "Oh, they don't count." In another jurisdiction the DA said "nobody gives a shit about misdemeanors." In yet other jurisdictions, where the misdemeanor court conducts preliminary hearings, and where felony charges may be broken down to misdemeanors on a plea, the lower court is regarded with somewhat more esteem. In some jurisdictions there are no separate courts and trial judges handle misdemeanors and felonies as assigned or on a rotation basis. Attitudes are mixed.

Where prosecutors or public defenders were assigned to a particular judge, the relationships between the actors tended to be somewhat less structured and informal. Those

who worked with particular judges indicated they had a greater feeling as to what a judge would do in any given case. They believed this predictability made it easier to work out cases in an open and candid fashion. Adjustments could be made to idosyncratic behavior or special procedural demands of a judge, thus resulting in greater efficiency. Practicing criminal lawyers familiar with the prosecutor and judges seemed able to approach a judge more informally.

There also appears to be a relationship between the dominant forms of plea bargaining and the inter-relationship of courtroom actors. When the pretrial conference is the dominant form there appears to be a great deal of openness and interaction among the participants. If the dominant form is that of the judge ratifying a sentence agreement or recommendation of the DA the actors less frequently speak to the judge out of the courtroom setting.

The magnitude of the courthouse operation appears to influence the interaction between participants. Size alone does not appear to play a major role in the degree of formality or informality of the relationship between actors. Indeed, in many of the larger jurisdictions, due to the large number of actors and cases to be processed, the informality reaches its greatest height. But the number of people in the process appeared in some instances to operate as a constraint on the overall relationship between the participants.

In the smaller jurisdictions, where all the participants know each other, there appeared to be a greater requirement for each of the actors to view themselves as "an officer of the court." The tolerance for not adhering to the expected behavorial norms was small, and the penalty sometimes great. In one small jurisdiction several judges indicated that there were a couple of defense attorneys who were "scallywags and carpet baggers." Everyone knew them and were familiar with their tactics. Judges had ways of making sure that deviant behavior didn't spread. In one instance one of these "scallywags" was held in contempt of court on a civil matter. The "scallywag" attorney indicated that he also had a large number of motions denied. As one judge said with a smile, "A lot of things can happen in the course of a trial."

Another area of significance is that of case docketing and judge shopping. Researchers have commented on the use of continuances to achieve individual goals. Levin, for example, has noted that judges routinely grant continuances without explanations, and rarely interfere with the attorney's pursuit of his own goals.[71/]

Our data suggests a pattern of judge shopping which takes two major approaches: (1) The selection of a judge as the sole or major part of the plea bargain; and (2) Finding a judge who sentences leniently or follows the sentence recommendation.

The reason for judge shopping by the defense attorney relates to his effort to obtain a lighter disposition for the defendant. To achieve this end a common form of shopping involves the continuance. In Rockland County, New York, defense attorneys and prosecutors indicated that one judge consistently sentenced more lightly than others. This judge was the only one before whom bench trials occurred. Defense attorneys indicated they would not permit their clients to be tried before other judges. We found a similar pattern of continuance usage in Henrico County, Virginia; Hamilton County, Tennessee and in Fairbanks, Alaska.

A second form of judge shopping involves initial case assignment before a more favorable judge. One defense attorney indicated they could project when certain judges would take pleas and have their cases scheduled for those days. Defense attorneys in some jurisdictions indicated their primary purpose was avoidance of a particular judge, a process which they described as not too difficult to achieve.

One method of scheduling a case before a particular judge was to establish "good relations" with the clerk's office. In several jurisdictions defense attorneys indicated that if you "sweet talk" an assistant clerk or secretary they might be helpful in scheduling the case. The extent to which this type of manipulation exists was not determined.

Another form of judge shopping took place through a change of plea. If the judge taking the plea was "an undesirable one" the defendant, who would otherwise plead guilty, would offer a not guilty plea. The case could then be reassigned. In one jurisdiction this was particularly noticeable in felony cases which could be broken down to a misdemeanor. An initial plea of not guilty before a lower court would move the case to a felony court.

A form of judge shopping in Alaska permits the defense attorney to preempt one judge for any reason. Defense attorneys and prosecutors noted that certain judges were preempted more frequently than others. This was also the case in Pima County, Arizona. To avoid playing Russian roulette defense attorneys in Alaska would attempt to find out which judge was next on the list before preempting. Since the Alaska prosecutor has a no plea bargaining policy the attempt to find a favorable judge was the essence of the bargain. The assistant DA would occasionally work with the defense attorney in attempting to find the right judge. But this is apparently not common because of a master calendaring system which attempts to hide the judge next in line from the eyes of the prosecutor and defense attorney.

In jurisdictions where no judge shopping occurred it appeared to be due to a system of random assignment of judges to cases. In Clark County, Nevada the clerk or one of his assistants draws a judge's name out of a box which contains the names of all the judges. A second system which

may have eliminated some judge shopping is the individual calendaring system, such as used in Dallas County, Texas. Cases are assigned to a judge from start to final disposition. Thus, continuances will not bring a different judge. In Hackensack, New Jersey a public defender indicated that he and the prosecutor usually agree to have a guilty plea accepted before a specific judge as part of the bargaining agreement. He indicated they can "juggle" calendar calls to delay processing of a case when this is advantageous.

The form of docketing of cases may also play an important role in the degree of flexibility judges have in conducting their business. In some systems of calendaring, where judges may be assigned a different number of cases, it is possible for one or two judges to dispose of a greater number of cases through plea bargaining, while other judges go to trial a greater percentage of time without having to deal with the problem of case backlog. In a system of individual calendaring, however, each judge is assigned an equal number of cases. Therefore, if a judge implements a change in procedure for disposing of cases, it must be done with a realization that, whatever else may happen, all assigned cases must have a disposition.

In New Orleans, for example, one particular judge has a very high percentage of trials. He does not differentially sentence, and indicates to the defendant before pleading that the same sentence would be imposed if the conviction occurred

after trial. More defendants demand trial in his court, yet he is the only judge who maintains a zero docket. This is indicative of his willingness to spend a greater number of working hours in court. Another judge, regarded as harsh in sentencing, lets attorneys know when he will be away (vacation, special assignment, etc.), thus affording them an opportunity to find another judge during that period. His docket is also relatively current.

Forms of Judicial Participation - Specific

The data collected in this report suggest that judicial participation in plea bargaining may be divided along two major dimensions. First, a judge's role may be assessed in terms of whether or not he participates in explicit plea negotiations and to what extent. Secondly, judicial behavior may be gauged in terms of the extent to which differential sentencing is practiced as a means of inducing pleas.

Using the above criteria as a basis for classification, our data suggest six major types of judicial participation in plea bargaining. These may be identified as follows:

(1) No explicit or implicit bargaining; and no "leaning" on other participants to plea bargain.

(2) No explicit bargaining; may or may not bargain implicitly; and "leans on" or "facilitates" bargaining by other participants.

(3) No explicit bargaining; may or may not bargain implicitly, and "forces" pleas through pressure on other actors.

(4) Explicit bargaining with a specific sentence recommendation; may or may not bargain implicitly.

(5) Explicit bargaining with a general sentence recommendation; may or may not bargain implicitly.

(6) Implicit bargaining only.

Type (1): No Explicit or Implicit Bargaining; and No "Leaning" on Other Participants to Plea Bargain.

This category of judges comprised what appears to be the "purest" form of judicial behavior in regard to plea bargaining. We found evidence of this approach in at least nine jurisdictions, including Dade County, Florida; Allen County, Indiana; Black Hawk County, Iowa; Kalamazoo County, Michigan; Bergen County, New Jersey; Bernalillo County, New Mexico; Multnomah County, Oregon; Dallas County, Texas; Henrico County, Virginia; and King County, Washington.

In these jurisdictions, the major form of plea bargaining appears to be that of charge and/or sentencing bargaining between the assistant district attorney and defense counsel. The most frequent statement offered by judges regarding their role in the plea bargaining system was that the judge should engage in a supervisory and not participatory role in overseeing the process. It was also commonly asserted that one can not oversee a system of plea bargaining when playing a direct participatory role in it.

In the situations where judges totally remove themselves from the plea bargaining situation, there appear to be a greater reliance on the prosecutor to keep the system moving.

That is, the responsibility for obtaining guilty pleas and maximizing case flow appears to be placed on the shoulders of the prosecutor. The judges usually made this possible by seldom second guessing the prosecutors on any form of sentence recommendation that they would make. Stated otherwise, in this type of plea bargaining arrangement, the judge appears to relinquish most of his sentencing powers to the prosecutor. Some judges, however, explain this by saying that indications to the prosecutor as to proper sentences as a policy will lead to prosecutorial recommendations which the judge can accept. Therefore, one would expect to see a great deal of agreement on the part of the judge to the prosecutor's recommendations.

The extent of agreement between the sentence recommendation of the prosecutor and the judge was stated to be as high as 100%, and usually not below 95%. One particular judge indicated that he had never gone back on a prosecutor's recommendation. When queried as to what he would do if he thought the recommendation were improper, he stated that after the plea was taken he might call the prosecutor into his chambers and indicate that perhaps the sentence was a little low or perhaps was too severe. He expressed the belief that the prosecutor could not negotiate in good faith if the judge were to undercut his position at the time of sentencing.

In a sense these judges have placed most of the responsibility for charging and sentencing defendants on the prosecutors. Yet they seem to be the least concerned about

the encroachment of the prosecutor into the judicial realm of sentencing. We received complaints from some judges that prosecutors were attempting to encroach on their function. It was seldom heard from a judge who was reliant on the prosecutor for a sentencing recommendation. Some of these judges indicated that they felt free to move beyond the recommendation. In fact they rarely did. This may be a function of an understanding reached over a period of time.

Another characteristic of the judges who take this approach is that there appears to be little implicit bargaining on their part. We found no evidence that they were punishing defendants for exercising their right to trial. Occasionally, however, a judge did state that in the past he would have taken a plea at a given sentence and then levied a heavier sentence at trial. But they attributed this to one of two related issues. First, either the defendant was tried on a greater number of charges or counts than would have been the case had a guilty plea been entered, or a particularly aggravated aspect of the case came out during the trial, thus affecting the sentence.

Overall, we found this type to exist only in the felony courts. Most judges interviewed in the misdemeanor courts indicated that the sheer number of cases necessitated some form of involvement or at least "encouragement" on their parts for parties to arrive at a plea agreement.

Type (2): No Explicit Bargaining; May or May Not Bargain Implicitly; and "Leans On" Or "Facilitates" Bargaining By Other Participants.

In this form of judicial behavior the general philosophy of plea bargaining and the judge's role appears to be similar to the type outlined above. Yet there is a significant difference. Judges endorsing this position feel an obligation to keep the flow of cases moving at an acceptable pace. The judge feels an obligation to ensure that those cases which can be pled out do not go to trial. We found evidence of this type in the following jurisdictions: Alaska; Jefferson County, Alabama; Pima County, Arizona; El Paso County, Colorado; Dade County, Florida; Multnomah County, Oregon; Hamilton County, Tennessee; and Dallas County, Texas.

In Fairbanks, Alaska one judge indicated there were certain types of cases that should not ever reach the trial stage. These were cases in which there is obviously no legal defense for the defendant and on which there are no questions of factual or legal guilt. The judge believes these cases waste the court's time, the prosecutor's time, and the time of the defendant and counsel as well. As a result, this judge would encourage or facilitate pleas by speaking with defense attorneys or prosecutors regarding the case. If a particular prosecutor insisted on trying such cases the judge would in various informal ways indicate displeasure and would even go so far as to question why the case was in trial at all.

In another jurisdiction a judge indicated that he would not participate but that he indirectly or directly pushed defendants to plead. He would first evaluate the case, determine that a plea should be entered, and then prod attorneys and defendants into pleading.

The most common rationale offered by such judges is that this is necessary to achieve justice in these cases where there are difficult questions. A judge in Colorado Springs, Colorado indicated that if he had several difficult and several "easy" cases regarding guilt, he felt obligated to make time for the troublesome cases by clearing out those where there was little question as to guilt.

It was not uncommon to find two or more judges in one jurisdiction who disagreed on the extent to which they should encourage pleas. In Multnomah County, Oregon, one judge indicated that when he was in charge of arraignments and taking pleas, a position which was rotated every two months, he felt an obligation to "keep the pleas coming in." Another judge indicated that he would never lean on anyone to render a guilty plea. Still yet another judge said he would never lean on a defendant to plead guilty, but would sometimes point out things to prosecutors and defense counsel or public defenders which might make a guilty plea more likely.

Finally, with regard to the frequency with which the judges in this group encourage pleas, it should be noted that some do so only in particular types of cases or when the docket becomes crowded. Others appear to exert some pressure

in most cases that would otherwise bog down. Thus, there may be considerable variance as to the frequency and intensity with which the judges encourage or facilitate pleas.

Type (3): No Explicit Bargaining: May or May Not Bargain Implicitly, and "Forces" Pleas Through Pressure On Other Actors.

One could argue that this category might well be combined with the previous one. It is set aside because there appears to be a significant qualitative difference between judges who encourage or facilitate pleas and those who exert harsh pressure on defendants and their attorneys to plead guilty. We found evidence of this form of judicial behavior in at least three jurisdictions, including Alameda County, California; El Paso County, Colorado and Dade County, Florida.

In each of these jurisdictions caseload was the single reason given by these judges for applying pressure to defense attorneys and prosecutors to arrive at an agreement. These judges thought it was incumbent upon them to see that "no stone was left unturned" to arrive at a plea of guilty. This included arm twisting, forcing, jerking the defense attorney around and coming down on the defendant. Going beyond facilitating pleas, these judges appear to demand a certain number of pleas of guilty. Conversations with defense attorneys in these jurisdictions affirmed that there was a great deal of judicial pressure on a defense attorney to plead his client guilty. Assigning defense attorneys to tough judges, denying continuances, overruling motions,

and other judicial techniques were cited as means by which judges get defense attorneys and prosecutors to comply with their wishes.

Although our observations point to heavy judicial pressure, they did not indicate that defendants were punished for not pleading guilty. None of these judges admitted that defendants were punished more harshly for going to trial. They all indicated, however, that a trial raised the risk of having adverse information surface which might affect the sentencing decision of the judge.

Type (4): Explicit Bargaining With a Specific Sentence Recommendation; May or May Not Bargain Implicitly.

This form of judicial participation was quite common and was found in at least 10 jurisdictions. These may be further divided into those conducting a formal pretrial conference and those which bargain informally in chambers or (rarely) in court. The former type includes Alameda County, California; San Bernardino County, California; Cook County, Illinois; St. Louis, Missouri and Trumbull County, Ohio. Thus those which did not use a formal pretrial conference include Jefferson County, Alabama; El Paso County, Colorado; Dade County, Florida; New Orleans Parish, Louisiana; and Greenville County, South Carolina.

In these type (4) jurisdictions it is common for both charge and sentence bargaining to occur. Where formal pre-trial conferences are held the prosecutor usually negotiates

an appropriate charge and, at times, recommends possible sentences. The pretrial conferences almost invariably involve the judge, prosecutor and defense attorney. Occasionally, the defendant appears at one of these conferences.

As indicated earlier there appear to be two major rationales for the judge's participation in plea bargaining sessions -- the increased ability to effectively supervise plea bargaining and the ability to be instrumental in the rapid disposition of cases. In some instances, judges indicated that they became partially involved in plea bargaining sessions when the pressure became severe. At that point they would participate as necessary. A Berkeley, California judge, for example, indicated that he had to pressure attorneys into plea bargaining to get rid of cases. He stated that if he had several cases scheduled he would pressure the attorneys to dispose of the less troublesome routine cases.

Judicial perceptions of their future caseload impacts judicial behavior. "Getting rid" of cases serves as a rationale favoring plea bargaining. It also determines to some extent which particular role a judge assumes. In Rockland County, New York a felony court judge stated that he regularly participated in plea bargaining in a pretrial conference and would offer specific sentence concessions for guilty pleas. If the negotiations broke down he would in effect force a plea if the attorneys could not reach an

agreement. He added that once the parties were close to agreement, he felt obligated to oversee a fair and expeditious disposition, i.e., to see that not all cases went to trial.

In a somewhat different situation in Hartford, Connecticut, a judge reflected on his "experimentation with plea bargaining." He admitted that he became in fact a prosecutor when 835 cases were backlogged. He reduced the backlog to 299 cases by ordering the prosecuting attorney to select his two best assistants and setting up conferences at 5-minute intervals day and night for six days. He enforced attendance of the prosecutor and defense attorney under threat of an arrest warrant. Under these conditions defense attorneys went to the prosecutors and disposed of easy cases. The judge then ordered them into his chambers to discuss "sticky cases" and make a plea recommendation. They then marched back into court to recite the recommended disposition onto the record. He observed, somewhat ironically, that this practice "stinks" because a judge becomes a prosecutor. He did, however, indicate pleasure with the results.

In Alameda County, California one of the project researchers made the following observations:

> Judge _____ was very active at the pretrial conference -- often suggesting or nearly twisting arms of the attorneys into accepting certain bargains which he wanted. Oftentimes if an attorney presented him with a bargain, the judge would say "How about this instead". He also had no qualms about telling attorneys that he thought that the bargain they suggested was a bad one or inadequate for the defendant. In fact, the judge at times was almost more active than the D.A. in suggestions

for bargains and I could tell that the D.A. often asked the judge's advice as to what he felt was proper. If the judge had to leave the room for any length of time and if a defense attorney tried to move in and get a bargain conducted without the judge being present, the D.A. would always insist they wait until he returned to discuss the bargain then.

The next case brought before the judge reflected the extent to which he participated in the sentence and charge bargain. In this case he openly initiated the bargain and offered the defense attorney a deal before he or the D.A. could say anything. After the judge offered the deal the D.A. then turned to the public defender saying "I think you'd better jump at that deal. It's very sweet." The judge nodded in agreement. The deal given for this particular defendant was a very definite sentence bargain and would provide a great deal of certainty for the defendant involved. The judge commented after the D.A.'s statement that "Tell the defendant to plead to this when you go out there to talk to him. Then we'll just send him on to the youth authority." There appeared to be no assumption that the defendant would even disagree to the deal being offered to him. After about 3 minutes, the defense attorney came in stating that his defendant decided to go along. When the defense attorney left the room to discuss the deal with the defendant, the D.A. looked at me (the researcher) and winked saying that "As you can see, the judge and I have a very good relationship." Then he just laughed. Later on, when the judge was not present, the D.A. also added that the judge was much more active than most judges and "clearly understands our office policy for certain cases".

In another case involving this same judge the defendant did not want to agree to any bargain. The public defender (who had a broken arm in a sling) traveled back and forth between the judge's chambers and the room where his client was waiting. He said he could not convince his client to plead guilty, and that the defendant's friends were unsuccessful as well. He suggested that the judge talk to the defendant to provide enough pressure to bring about a plea of guilty. The judge asked the public defender to bring

the defendant into his chambers, stating: "I'll twist his arm so hard that you'll both be going out of here with a sling."

One defense attorney commented that this particular judge was a good judge, although he really pressured defendants into pleading guilty. Defendants already on probation were threatened by this judge to influence their plea decision. This attorney characterized this threat as the judge's biggest hammer in such cases.

This example illustrates an unusually forceful type of participation by a judge in plea bargaining. We found numerous examples of participation at a more moderate level. In Rockland County, New York and Trumbull County, Ohio the judge participates in the pretrial conference with the prosecutor and defense attorney. As a rule, the judge exerts little if any pressure in forcing a defendant to plead guilty. Nor does there appear to be any great pressure on the attorneys to arrive at a disposition. Only one judge in Rockland County attempted to put pressure on the attorneys to arrive at a plea. Because he was a lenient sentencer, this was infrequently necessary.

In Jefferson County, Alabama, several judges indicated their feeling that they had to participate in plea bargaining if they were to supervise it properly. One judge stated that

"If you buy plea bargaining, then you've got to get down in it." He felt that by talking to the attorneys and discussing the nature of the case he could arrive at a fair sentence. He also believed he could tell if a prosecutor was bluffing or if the defense attorney was adequately representing his client. Another judge in the same jurisdiction talked with the proseuctor and defense attorney regarding the sentence recommendation. From this discussion he could often tell if a prosecutor had a weak case or perhaps no case at all. For example, if the normal recommendation for a particular type of crime was two years imprisonment and the prosecutor recommended probation, he became suspicious. He would delve into the factual basis of the plea and look at the strength of the state's evidence.

There is considerable variance in the form and extent of explicit judicial participation in plea negotiations. Most encourage the prosecutor to make some form of sentence recommendation. But as noted earlier, in three jurisdictions we found that judges became upset because prosecutors refused to make sentence recommendations, thus leaving the judge with total sentencing responsibility.[72/] In each of these jurisdictions the judges claimed that the DA was trying to avoid public pressure and responsibility for sentencing. In one jurisdiction the chief judge complained that the prosecutor's only concern was obtaining a felony conviction on paper. He

He felt that the prosecutor did not care about the sentence once the felony conviction became a statistic.

Where the judge participates in a non-conference arrangement, a wide variation in the type of participation was observed. In some instances the prosecutor would approach the judge in chambers or off the record in court with or without the presence of the defense attorney and ascertain the judge's "feelings" about a particular case. The judge might ask a few questions regarding the case and then specify what particular sentence was appropriate. Conversely, another judge in the same jurisdiction said if the pros-cutor appeared nervous about the guilty plea, he assumed that a bad deal had been made. As judge he would be alerted to reject the agreement if he felt the state's case was inadequate.

Most judges participating in the plea bargaining process do so only in the presence of attorneys for both sides. Yet there were instances where they would speak to a prosecutor or defense attorney privately about a particular case. For example, in Alameda County, California the defense attorney

first indicated that he would not accept a particular offer made by an assistant district attorney. During the pretrial conference in the judge's chambers, the assistant district attorney was called out for some reason. In his absence the defense attorney informed the judge of the offer. The judge examined the file quickly (the researcher noted that it was apparently the first time the judge had seen it). After a few moments she looked at the defense attorney and said, "I think you had better accept the deal." The defense attorney promptly complied.

Our observations on the different styles of judicial imposition or acceptance of specific sentence recommendations point to considerable variance within particular jurisdictions. For example, in Alameda County, California, two judges indicated that they usually hold the pretrials in their chambers. Conversely another judge indicated that he always held the pretrial in open court where everything was on the record. The following account recorded by a project researcher illustrates the clear differences.

> Judge ____ only handles pretrial conferences in his chambers and conducts no discussion whatsoever out in open court. The DA introduced me to Judge ____ and I took one of the five chairs in his office which I was later to find out, are nearly fought over by attorneys trying to get into his office to discuss a problem. Although the judge announced at the beginning of the pretrial conferences in open court that he only allowed two defense attorneys to discuss their clients in his chambers at one time, I later found out that this "policy" which was held for the first half hour did not apply later on during the day as the caseload increased and as defense attorneys got more anxious to get their case discussion over with. Gradually the judge would change his policy, stating that as many attorneys could fit into his office as there were chairs, so that my chair, after a while, became a very valuable object to the attorneys.

> Yet another judge, when asked why he never had pretrial conferences in open court indicated that he would not ever think of doing so. Indicating that he would only hold it in chambers, the judge said that there were too many things that he would never say in open court that he would feel comfortable in saying behind chambers doors. For example, he could never say in open court to a defense attorney, "you must be retarded if you don't take this deal I am offering you." He said that just wouldn't be the acceptable thing for the public to hear. That sort of thing you must have in chambers. He said that he must develop a role when he is out in the court -- the role of the judge -- the role that everyone expects to see. "I don't have to play a role here in chambers. I don't have to wear a black robe. I don't have to play any games." He said that he felt much more comfortable in chambers because of the informality of the proceeding and the quality of the individuals that he was dealing with. He added further that in chambers, he could feel out how much work attorneys had done on the particular case and exactly what type of people they were. "I know the ones who are brighter and the ones who did their homework." He said finally that the law is, and should be, a very intimate practice, and that conducting a pretrial conference our in open court prevented any true intimacy.

By way of constrast, another judge in what appears to be untypical for a California court, holds everything entirely in open court. This particular judge insisted that if a client is talked about, he should hear exactly what is going on and know exactly what is being said about him among the attorneys and the judge. Additionally, the judge felt that discussion in chambers was more informal and a hindrance to the defendant who was not generally present. Informality was helpful in some respects but it appeared to allow lawyers to say certain things about the defendant and the case they would not normally say in court. He felt this was unfair and improper. The judge's major argument, however, was that in his experience

cases moved faster if held in open court. Informality allows for a certain slowdown among attorneys which they wouldn't show in open court. In chambers a great deal of external, social discussion goes on between attorneys that would not occur in open court.

Where judges participate actively and involve themselves in specific sentence recommendations there appears to be a feeling that sentence predictability is both necessary and proper. It increases the likelihood of getting a guilty plea early. Some also feel that greater predictability enables the state to give up less in terms of sentence concessions. A defendant may be willing to take a harsher sentence in exchange for the certain knowledge that a particular sentence would be imposed. As to fairness, many judges believe that a defendant is entitled to know what the sentence will be in exchange for a plea of guilty.

Type (5); Explicit Bargaining With A General Sentence Recommendation; May or May Not Bargain Implicitly.

Evidence of this type of plea bargaining was found in the same jurisdictions where specific recommendations are the mode. In these jurisdictions judges have a great deal of flexibility in determining the degree of specificity in the sentence indication given to the defendant. A common form is for the judge to specify time in prison as opposed to probation, or if prison time is to be given, the lower and upper range of the sentence.

A less frequent method deals in hypothetical cases. In discussing a general or a specific sentence the judge avoids talking about the case in hand. For example, a prosecutor or defense attorney might ask the judge "what the sentence would be if a defendant had a prior felony and was pleading guilty to such and such a charge?" The judge would respond as follows: "If I were to have a case in which the defendant had a prior felony and was pleading guilty to such and such an event I would probably give him three to five years." In one particular jurisdiction a judge offered specific sentences by making the following kind of statement: "If he wants to know how many years I will give him, ask him how many holes there are in a golf course."

The views of these judges contrast with those who believe that predictability is essential for guilty pleas and that it is only fair for a defendant to know what is being offered in return for the waiver of constitutional rights. Judges endorsing a more general sentence indication feel this retains greater flexibility for them in disposing of the case. As one judge put it, "If they know exactly what they are going to get what in hell good am I?" These judges seemed concerned about retaining judicial independence from the prosecutor in determining the sentence.

We found no evidence to support the allegation that where judges give general indications of the sentence, guilty pleas are less likely to occur; or that the price extracted for the greater flexibility is a larger concession by the state. This is so because most attorneys in a jurisdiction come to recognize the sentencing proclivities of different judges. Thus, the sentence indication may be of lesser importance in connection with the flow of guilty pleas.

Type (6): Implicit Bargaining Only. [73/]

Under this plea bargaining arrangement the judge does not participate in explicit negotiations regarding sentence, but systematically awards a heavier sentence after a trial and conviction. We found evidence of this form of plea bargaining with one or more judges in Cook County, Illinois; New Orleans Parish, Louisiana; Greenville County, South Carolina; and the misdemeanor courts of Dallas County, Texas (in Dallas the prosecutor plays the dominant role).

In only one jurisdiction did implicit bargaining appear to be the dominant form for both a particular judge and the entire jurisdiction. In the county court (misdemeanor) of Greenville County, South Carolina, most plea negotiations are carried out on an implicit level. We were told that in 95 of 100 guilty pleas the defendant pleads as charged with the understanding that the judge will sentence more leniently than if a trial occurred.

It is virtually impossible to determine what proportion of pleas are entered as a result of explicit or implicit bargaining. But for felonies we were given estimates of explicit bargaining from 25-40% of all guilty pleas. A majority appears to result from an implicit bargaining arrangement.

The key to implicit bargaining is judicial attitudes and sentencing practices. Some judges believe that by pleading guilty a defendant takes the first step towards rehabilitation. One judge in Greenville, South Carolina is believed to dispose of all guilty pleas through differential sentencing based on this approach. He said: "I don't punish defendants for going to trial but I do agree with the ABA Standards on Guilty Pleas.[74/] It may be twiddle dee dum and twiddle dee dee but I do give concessions to people who plead guilty because it is a sign of taking the first step towards rehabilitation; and I don't give concessions to those people who do not plead guilty."

Another common rationale among judges is that they do not punish a defendant for going to trial as long as he has a "good legal defense." This can mean judicial punishment for going to trial, taking the stand and committing perjury or inducing others to perjure themselves. One judge in New Orleans has a formula: If the defendant is involved in perjury during the trial he will receive a nine

year sentence; six years for the offense and three years for lying in the courtroom. This judge would not admit to punishing the defendant for going to trial. Conversely, another New Orleans judge doubted that he could evaluate every defendant as to whether or not he committed perjury. To do so might require another trial.

There is some evidence that judges may punish defendants who go to trial despite a strong case against them. The defendant may not commit perjury, but merely require the state to go prove its case. One judicial attitude is summed up by a slogan subscribed to in more than one jurisdiction: "If you want to win big, you'd better be prepared to lose big." A defense attorney in Delaware County, Pennsylvania, reported that several years ago "you didn't dare go to trial unless you had a real issue to contest. Now it's not so bad. The newer judges try not to punish you just for forcing the state to prove its case."

In Cook County, Illinois one judge felt that a defendant who insists on a trial has wasted the court's time and the taxpayer's money. For this judge the defendant deserves more time in jail for the problems he has created. Another judge in Cook County believed differential sentencing was essential for expediting the flow of cases.

A prosecutor in Alameda County, California suggested that the sentencing differential was due to other

factors. He maintained that the judge at the trial is in a considerably tougher situation than where plea bargaining has occurred. After a jury trial there may be more pressure on him to impose a stiffer sentence. The judge may also find out more about the offender at trial. Finally, a defendant rarely pleads to all of the charges or counts, whereas there may be jury conviction on several charges or counts, thus authorizing longer sentences.

An assistant public defender in Alaska mentioned two factors in explaining sentencing differentials. First, defense counsel may desire a plea to minimize judicial knowledge about the crime and the victim. Second, if you take a "garbage" case to trial, it may anger the judge and affect the sentence. Thus there is an assumption that certain types of cases and offenders should not reach the trial level.

Some judges said sentence differentials were the result of facts in the case -- not a deliberate attempt to sentence more severely after a trial. "We do not punish people for demanding trial, it's just that very often during the course of a trial information comes to light which casts the defendant in a more unfavorable light than if a plea of guilty had been entered." This raises an important issue. If judges do obtain information during a trial which may alter their view on the sentence, should

they not inquire more directly and thoroughly as to the circumstances of the case when accepting a guilty plea? If, for example, harm to the victim affects the severity of the sentence, is it not incumbent upon a judge to determine the amount of harm in all cases? Or does the fact that a defendant had pled guilty make such a determination unnecessary? Does the guilty plea system provide a method which means that important information will not become known? If particular information is critical to the sentence, should it not be equally critical whether or not the defendant pleads guilty or goes to trial?

Formal Judicial Supervision in Court[75/]

Between and within jurisdictions there are wide variations in how individual judges comply with federal and state guidelines regarding the supervision of guilty pleas and plea bargaining practices. In Table 2 below, it can be seen that of the 25 states mentioned, 21 have adopted a statute or criminal rule pertaining to some judicial supervision of the guilty plea process. All states have cases which require some of these responsibilities to be fulfilled.

TABLE 2 -- JUDICIAL SUPERVISION

	ALABAMA		ALASKA		ARIZONA		CALIF.		COLORADO		CONN.	
	A	B	A	B	A	B	A	B	A	B	A	B
1. Ascertaining defendant's knowledge/ understanding of nature (elements) of the charge. [ABA 1.4]	NS	NS	R	R	R	R*	NS	R	R	R	NS	NS*
2. Ascertaining defendant's knowledge/ understanding of sentence possiblities. [ABA 1.4]	NS	NS	R	R	R	R	NS	?	R	R	NS	NS*
3. Ascertaining defendant's knowledge/ understanding of collateral consequences.	NS	NS	NS	NR	NS	NS	NS	NS	NS	NS	NS	NS
4. Ascertaining defendant's knowledge/ understanding of constitutional rights waiver. [ABA 1.4]	NS	NS	R	R	R	R	NS	R	R	R	NS	R
5. Ascertaining plea voluntariness. [ABA 1.5]	NS	R	R	R	R	R	R	R	R	R	NS	R
6. Ascertaining factual basis/accuracy of the plea. [ABA 1.6]	R	NS	R	NS	R	R	R	NS	R	R	NS	R
7. Procedural adequacy of the record. [ABA 1.7]	NS	R	R	NS	R	R	NS	R	R	R	NS	R

R = required
NR = not required
NS = no statement on this issue
P = prohibited
A = allowed or suggested
* = see textual commentary to clarify or avoid misinterpretation which is located in Appendix .

A = statute or rules
B = state case

TABLE 2 -- JUDICIAL SUPERVISION (contd.)

	FLORIDA		ILL.		IND.		IOWA		LOUIS.		MASS.		MICH.		MISSOURI		NEVADA		N. JERSEY		N. MEXICO	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
1.	NS	R	R	NR*	R	R	NS	R	R	NS	R	NS	R	*	R	R	R	R	R	R	R	R
2.	NS	NR*	R	NR*	R	R	NS	R	NS	NS	R	NS	R	NS	NS	R	NS	R	R	R	R	R
3.	NS	NR	NS	NR	NS	NS	NS	NS	NS	NS	NS	NR	NS	NS	NS	NS	NS	NR	NS	NS	NS	NS
4.	NS	R	R	R	R	R	NS	R	NS	R	R	R	R	R	NS	R	NS	R	R	R	R	R
5.	R	R	R	R	R	R	NS	R	R	R	R	R	R	R	R	R	R	R	R	R	R	R
6.	R	R*	R	R	R	R	NS	R	NS	NS	NS	R*	R	R	NS	NS	NS	NS	R	R	R	NS
7.	R	NR	R	R	R	R	R	R	NS	NR	NS	R	R	R	NS	NS	NS	NS	R	R	R	NS

R = required
NR = not required
NS = no statement on this issue
P = prohibited
A = allowed or suggested
* = see textual commentary to clarify or avoid misinterpretation which is located in Appendix .

A = statute or rules
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TABLE 2 -- JUDICIAL SUPERVISION (contd.)

	N.Y.		OHIO		ORE.		PENN.		S. CAR.		TENN.		TEXAS		VIRGINIA	
	A	B	A	B	A	B	A	B	A	B	A	B	A	B	A	B
1.	NS	R	R	R	R	R	NS	R	NS	R	NS	R	NS	NS	R	NS
2.	NS	R	R	R	R	R	NS	R	NS	R	NS	R	R	R*	R	NS
3.	NS	R	R	R	R*	NS	NS	NS	NS	NS	NS	NS	NS	NS	NS*	NS
4.	NS	R	R	R	R	R	NS	R	NS	R	NS	R	NS	R	NS	NS
5.	NS	R	R	R	R	R	R	R	NS	R	NS	R	R	R	R	R
6.	NS	NR	NS	NS	R	NS	NS	R	NS	R	NS	R	NS	R	R	NS
7.	NS	NS	R	R	R	NS	R	R	NS	NS	NS	R	NS	R	NS	NS

R = required
NR = not required
NS = no statement on this issue
P = prohibited
A = allowed or suggested
* = see textual commentary to clarify or avoid misinterpretation which is located in Appendix .

A = statute or rules
B = state case

A considerable body of case law and literature has developed regarding the specific elements of judicial supervision of guilty pleas and plea bargaining. Newman stated that in practice, the form and content of the average questions asked by most judges during the arraignment are related, as a rule, to the situation and condition which were antecedent to the defendant's decision to enter a guilty plea than to the truthfulness and accuracy of the plea.[76] He also makes a useful distinction between a confession and a plea of guilty, stating that "a confession relates a set of facts, (i.e., I shot him), whereas a plea is an admission of all the elements of a criminal charge, (i.e., 'guilty for murder in the second degree.') The confession requires knowledge of a factual situation; the plea, however, implies a sophisticated knowledge of the law in relation to the facts."[77]

As a rule, the aspects of supervision which have attracted the greatest deal of attention in the courts have been that: (1) The plea entered by the defendant is both a knowing and voluntary one; (2) There is a factual basis for the plea; (3) The defendant be informed of the consequences of his plea; and (4) The defendant be allowed to withdraw the plea where there has been violation of due process.

Existing research points to a variable pattern of the type and extent of judicial supervision of the guilty plea and plea bargaining process. Newman, in reference to

explaining the consequences of the plea to the defendant, stated that in the three states in which he studied, judges routinely indicated to defendants the maximum penalties for their particular crimes and whether the sentences were mandatory. He indicated also, however, that most judges did not go much beyond that point.[78] This may be due, in part, to the approach taken by appellate courts.

In State v. Turner, the court held there is no need for the trial court to advise each defendant of each constitutional right or to obtain a separate waiver of each right before accepting a guilty plea.[79] In State v. Berch the court placed a greater amount of emphasis on the defense counsel's role in aiding the accused's understanding of the proceeding rather than emphasizing judicial supervision.[80] Some courts have held that counsel may waive the constitutional rights of clients without their consent. Only if there are exceptional circumstances, gross incompetence, or neglect combined with the waiver of a right so fundamental that only a defendant could waive it, will the proceeding be held invalid.[81] One court has held that failure of a judge to inquire as to the existence of a plea bargain would not by itself render a plea involuntary.[82]

Hedblom believes there should be one primary rule: If a defendant has entered a plea of guilty without representation and without having knowingly and voluntarily waived

right to counsel, the plea should be invalid.[83] The U.S. Supreme Court has held that ineffective assistance of counsel may be a basis for attacking the plea, but that only gross error would be grounds for a collateral attack.[84]

One commentary on judicial supervision notes that the defendant must make the plea decision. Thus the judge must determine whether or not the decision is intelligent, and that the defendant knew and understood his rights, the nature of the offense charged, and the consequences flowing from the conviction. These consequences include collateral effects such as eligibility for correctional programs, and the fact that certain proceedings, e.g., mental competency can be initiated. Not until these ramifications are made clear can a defendant intelligently make a decision as to whether or not he wishes to forego a trial.[85]

There is no systematic analysis of the types of judicial supervision over guilty pleas. But some attempts have been made. Mileski observed defendants in lower court cases, and found that 25% of the time the presiding judge did not apprise the defendants of their constitutional rights. Defendants were warned in groups of one type or another in half of all the cases; as individuals in 22% of the cases. Thus most defendants who are apprised of their rights receive the word in groups.[86]

Mileski noted changes in the judge's demeanor towards defendants. She observed that some judges change their

manner after the initial statement on rights, that only after this routine did the judge pause and direct full attention to the defendant.[87]

Mileski found that the seriousness of the charge affected the nature of the apprisal. More serious offenders were more likely to be apprised of their rights, generally as individuals rather than in a group. She notes that in minor misdemeanors, defendants were not apprised 35% of the time; in serious misdemeanors this occurred only 6% of the time; and it never occurred in a felony case. She suggests that individual warnings for each case would alter the judicial work style in two-thirds of the cases.[88]

Mileski classified four forms of apprising the defendants of their rights -- (1) in a group and out in the audience; (2) in a group before the bench; (3) in a group before the bench with the individual followup; and (4) individually before the bench. She believes each method is progressively more effective. "Defendants immediately before the judge have a license to speak, a license that audience members lack; a defendant on stage before the judge may say that he does not understand, may ask for elaboration, and so on."[89] She believes that defendants apprised of their rights as individuals have a better understanding than those warned in a group. Conversely, the collective method contributes to the operation of a more efficient bureaucracy. She concludes that the norms of justice and the demands of the organization are contrary to one another.[90]

The obligation of the judge to make a structured and intensive effort during the inquiry into the plea is obvious. Should the judge participate in plea discussions the obligation may become more critical. This is primarily due to the tremendous differential in power between the judge and the defendant, even when represented by an attorney. If the judge's participation involves elements of coercion the judge may diminish the judicial oversight role unless special efforts are made. If the judge becomes openly coercive the oversight role may not be possible because of the unequal bargaining position. In this situation the problem of contracts of adhesion may come to the fore. Williamson defines contracts of adhesion as those formed by parties in grossly unequal bargaining positions.[91] He suggests that the weaker party typically agrees to disadvantageous terms as a consequence of his diminished bargaining position.

> "Unlike the normal party to a contract the defendant does not appear voluntarily in the prosecutor's [or judge's] office to negotiate a deal. He appears because he has been indicted and because he fears maximum punishment will follow from a jury verdict against him. . . [92]

Most recommendations for increased judicial supervision appear to be based on the assumption that a knowing and voluntary plea is possible if the court takes the time and trouble to engage in a fuller inquiry. A notable exception, however, has been voiced by Goldstein.[93] He

maintains that the courts mistakenly focus on the conduct and mind of the accused rather than the behavior of the prosecutor and defense attorney in their attempts to obtain a guilty plea. He argues that the consent of the accused to a conviction without trial is a waiver of the Fifth and Sixth Amendment. Goldstein suggests that the test should be whether the prosecutor, trial judge and defense attorney offer the defendant an opportunity to informed by them of what should be known before making the plea decision.[94/]

In the jurisdictions visited by project staff in all courts provided some explanation or warning to the defendant before a plea of guilty was accepted. The degree of specificity and comprehensiveness varied considerably both within and between jurisdictions, but we found no instance where no attempt was made to inform the defendant of the implications of his plea. The greatest variation occurred at the misdemeanor level, where we observed the explanation being given by court personnel other than the judge.[95/]

Within a jurisdiction it was not uncommon to see some judges using a standard written warning, while others varied the length depending on the defendant. In St. Louis, judges indicated that they exchanged litanies in order to arrive at the most comprehensive and useful one available. Some indicated that there might be differing degrees of judicial inquiry, depending on the ability of the defendant to understand the proceeding.

Judicial attitudes toward the explanation and warning are not homogeneous. In one jursidction two judges could not understand why it took a federal judge 45 minutes to take a plea of guilty when they could do the same in three minutes. In Black Hawk County, Iowa (Waterloo), the explanation may literally be read to the defendant concerning the nature of the charge, the right to trial by jury and the implications of a guilty plea.

In Dallas County, Texas those defendants charged with misdemeanors who are awaiting disposition in confinement are brought before the judge in a "jail chain." In one court these defendants sign a form indicating they are not indigent and will not voluntarily accept state appointed counsel. A brief litany is often started before the defendants leave their seats. It is not uncommon for 70 or more defendants to be disposed of within a matter of two hours or less.

In Seattle (King County), Washington, the judge merely asked the defendant if his defense attorney had explained his rights as set forth in a STATEMENT OF DEFENDANT ON PLEA OF GUILTY which was signed by all parties. Despite the phrase in the STATEMENT that the STATEMENT was read by or to the defendant in open court, this did not occur.

At the other end of the continuum a judge in San Bernardino County, California expressed a belief that the court should take time to explain the defendant's rights. It took on the average of a half hour to accept each guilty plea.[96/] In yet another jurisdiction the type of explanation

depended on the seriousness of the charge. Thus a felony judge said the explanation was given with more emphasis as the cases became more serious. He also indicated that it was given in a more sophisticated fashion in the suburbs than in the city. Within the jurisdiction two opposite approaches were noted: (1) The warning should be standardized and read verbatim; and (2) Every case is different and different questions should be stressed or expanded at different times.

In Chicago, after an agreed upon sentencing bargain was presented to the court, the judge gave an involved speech expressing outrage at the crime. He repeatedly stated that he was not a party to the bargain reached between the prosecutor and defense attorney and therefore was not bound by it.[97/] He said the defendant was liable to a sentence ranging from one to ten years imprisonment. This was followed by an extended lecture on probation responsibilities and the fact that a violation of probation conditions would be treated harshly by the court. The time spent in explaining the possible consequences of the plea took less than two minutes. The judge spoke so rapidly that if one were not familiar with the criminal justice system it would have been virtually impossible to understand. Observations in Chicago suggest that as much time was spent on misdemeanor explanations as on felonies.

The data in Table 2 (page 266)suggests that there are guidelines for judicial supervision over the plea bargaining process. But it is not always possible to

determine what is an "adequate warning" regarding the defendant's waiver of rights or the establishment of a factual basis for a plea. The courts have fashioned their own systems for meeting these case law and statutory requirements. And even though the explanation is an integral part of the procedure in all jurisdictions, judges may not go beyond certain minimal efforts in terms of their supervisory role.

Our data suggests that the procedure is primarily concerned with establishing that the plea is made knowingly and voluntarily. Issues involving collateral consequences, the procedural adequacy of the record and ascertaining a factual basis for the plea are included less often or are deemphasized.

In no jurisdiction did we find any explicit judicial effort to explain the collateral consequences of a plea of guilty. We found considerable variance between jurisdictions as to the formalization of the guilty plea and the placement of its specific provisions on the record. Some jurisdictions state on the record only that the guilty plea was submitted on a given date and to a specific charge. Others have developed a comprehensive statement outlining the rights of the defendant, the charge and the applicable sentences.

The more comprehensive statements are found in Dallas County, Texas; Hamilton County, Tennessee; El Paso County, Colorado; Alameda County, California, San Bernardino

County, California; and Portland, Oregon. For example, Hamilton County, Tennessee (Chattanooga) goes into depth on its petition to enter a plea of guilty in such matters as the voluntariness of the plea and understanding of what the plea entails. It also includes the following:

> "I declare that no officer or agent of any branch of government (federal, state or local), nor any other person, has made any promise or suggestion of any kind to me, or within my knowledge to anyone else, that I would receive a lighter sentence or probation, or any other form of leniency, if I would plead 'GUILTY'. I hope to receive probation, but I am prepared to accept any punishment permitted by law which the court may see fit to impose. However, I respectfully request that the Court consider a mitigation of punishment at the time of sentence the fact that by voluntarily pleading 'GUILTY' I have saved the Court the expense and inconvenience of a trial." 98/

In over two-thirds of the jurisdictions visited there was no explicit statement indicating the guilty plea was the result of a plea negotiation. Where the policy is followed procedures vary.

In El Paso County, Colorado (Colorado Springs) the court explicitly records the fact that a plea agreement took place. The following is a common exchange:

> "(Prosecutor to the Court) Your honor, we would ask leave of the court to deal with case #____. We have entered into an agreement approximately two weeks prior to this date. The people at this time would file an amended information. It is my understanding that the defendant will plead guilty. If the Court accepts a plea of guilty on the amended information, the people have nolle prosequi typed and filed which we would submit to the court at that time."

(The Court) And what is the agreement as you understand it?

(Defense Counsel) The agreement is that upon the acceptance by the Court of pleas of guilty to counts 1,2,3, of the amended information, that a nolle prosequi would be submitted and the court would dismiss case #___.

(The Court) Anything as to sentencing:

(Defense Counsel) No, your honor.

(The Court) Is that the way you understand it?

(Prosecutor) That's correct, your honor."

After this exchange the judge examined the defendant as to his understanding of the plea and determined if there was a knowing waiver of the defendant's constitutional rights.

In Dallas County, Texas an entry is made on the form when the prosecutor makes a sentence recommendation to the court. In the misdemeanor division, if a recommendation for sentence has been made by the district attorney, then the type of recommendation, the specific sentence and the signatures of the assistant prosecutor and defense counsel are entered. In at least one felony court, a form entitled "Agreed Recommendation" is attached to the record of the proceedings. This form specifies the details of an agreement reached as a result of the plea negotiation, and is signed by the parties involved. San Bernardino, California also uses an explicit form entitled, Plea Bargain Agreement.

Finally, in Multnomah County, Oregon, in all cases involving plea bargains, a form is inserted into the case

file which states: (1) the charges to which the defendant will plead guilty; (2) the charges the state will move to dismiss upon sentencing of defendant; (3) whether or not the state will make a sentence recommendation and if so, what it will be; (4) whether or not the state will request the court to order restitution; and (5) the date after which the plea offer is withdrawn. The statement is signed by both the defense counsel and deputy district attorney. Copies of all of the above-mentioned forms are contained in Appendix B .

Factual Basis of the Plea

Although a number of courts require the establishment of a factual basis for a plea of guilty, there is considerable variance in both legislative and case law regarding the extent to which the court must inquire to satisfy the requirement of due process. It may be noted in Table 1 (page 214) that 21 of the 25 states listed require that this determination be made.

The ABA requires the following:

> "Notwithstanding the acceptance of the guilty plea, the court should not enter a judgment upon such a plea without making such inquiry as may satisfy it that there is a factual basis for the plea." 99/

The ABA makes no effort to indicate a specific probability-of-guilt standard for the inquiry as to the factual basis. They note that this matter is left to the discretion of the judge, stating that "the circumstances of the case will often dictate the kind and amount of inquiry which is necessary." 100/

State courts have tended to parallel the above reasoning. There has been little effort to establish a definitive level of probability of guilt, or for that matter, to delineate specific procedures for determining factual basis.

One court held that it was not necessary for the trial judge to interrogate a defendant in determining the factual basis.[101] Another said the purpose of a factual basis inquiry was to determine that the defendant committed a crime at least as serious as that to which he was going to plead.[102] The tone of these decisions suggests that the court is not required to make an indepth inquiry. A three page confession was deemed sufficient to satisfy the factual basis requirement.[103] Another court held it to be a sufficient inquiry if a judge requests the prosecutor to set forth the facts and subsequently draws the attention of the defendant to the prosecutor's statement before accepting the plea.[104] In yet another case it was acceptable for the trial judge to ask the defendant leading and suggestive questions requiring only a yes or no answer.[105]

In establishing the accuracy of the plea and its factual basis we found a wide variation. In Henrico County, Virginia, the rule is that evidence is taken in felony and misdemeanor cases and at least one state's witness is also heard.[106] In Rockland County, New York and Trumbull County, Ohio, where pretrial conferences involving judicial participation are common, facts of the case are discussed directly with the judge where a felony is involved.

On the basis of judges interviewed in approximately three-fourths of the jurisdictions visited, judges determined the factual basis and accuracy of the plea by simply asking the defendant if he had committed the offense to which he had pled. But in Clark County, Nevada one judge indicated that he routinely asked each defendant to tell him specifically what he did. He then determined if it was sufficient to indicate the defendant's complicity in the crime. The judge said if he merely asked the defendant whether he had committed the crime it would be too easy for him to say "yes" after having been coached by his counsel or other offenders in jail.

In Jefferson County, Alabama, judges on both the misdemeanor and felony level indicated that they were concerned with not only the factual basis, but also the strength of the states case. If it appeared to be too weak to proceed to trial, they dismissed the charge.

Most judges indicated they would delve into the facts of the case in an Alford plea situation.[107/] Many judges said they would refuse to accept the plea; others indicated they would accept it if there were strong evidence. In El Paso County, Colorado one judge indicated that he was not familiar with any Alford cases in the jurisdiction. The probation officer in the same jurisdiction indicated that when a defendant proclaims his innocence other judges would refuse to accept the plea and would set a trial date.

In San Bernardino County, California, one judge indicated that if the defendant maintained innocence, a factual finding would be made to determine if there was evidence to confirm the guilty plea. But in a non-Alford plea bargaining situation, state law did not require an inquiry into the factual basis. If, however, no negotiation had occurred and the defendant maintained innocence a not guilty plea was automatically entered.

In Alameda County, California we found instances where the routine was altered to accommodate a plea to a misdemeanor rather than a felony. In one instance a defendant pled to a misdemeanor which was not a lesser included offense. For this reason, among others, the judge did not include questions relating to the factual basis of the charge. Another judge in Alameda County indicated that he would accept a plea of guilty to a lesser included offense from a defendant who asserted innocence in court. He indicated that he would do so as long as he felt the defendant was factually guilty of the offense. From case files he felt there was usually a factual basis for every offense brought through the court.

The data, then, point to a wide range of attitudes and behavior on the part of the judges regarding the determination of a factual basis and accuracy of a plea of guilty. Existing guidelines are quite general, as are the ABA Standards, and require little more of the judge than a cursory inquiry of the defendant.

Withdrawal of Guilty Pleas

Judicial behavior in the area of allowing the withdrawal of the guilty plea represents an example of where the behavior is more rigorous than the dictates of case and legislative law. The ABA Standards relating to the withdrawal of the plea suggest basically that the plea should be withdrawn when it is necessary to correct manifest injustice.[108] It is suggested also that the court may, before sentence allow the defendant to withdraw his plea for "any fair and just reason."[109]

Case law is somewhat variable. The Iowa code allows withdrawal at any time before judgment, but the court may refuse to permit the defendant's withdrawal of the plea if it was made knowingly and voluntarily.[110] Bishop noted that allowing plea withdrawal before sentence is discretionary in Oregon, and is reversible only for an abuse of discretion. A disappointed expectation of leniency by the defendant is not grounds for withdrawal.[111] However, if a judge offers a specific sentence it must be honored or an opportunity offered for the plea to be withdrawn.[112]

We found a consensus with regard to allowing withdrawal of pleas. Judges interviewed on the misdemeanor and felony level in all jurisdictions indicated they would allow withdrawal of a plea if the sentence to be imposed was greater than that agreed to in the plea bargain. In jurisdictions where specific sentence recommendations

are made by the prosecutor, many judges indicated that even though they were not bound by the agreement, they allowed withdrawal of the plea if they could not go along with the prosecutor's recommendation. Discussions with presecutors and defense attorneys indicated that judges generally went along with the recommendation or were more lenient. Where plea negotiations involved a pretrial conference with judicial involvement, judges indicated that the defendants obviously knew what their sentence would be before they pled guilty. They indicated that if information in the presentence report made it impossible for them to adhere to the agreement, they allowed the plea of guilty to be withdrawn. In only one instance did a judge take issue with allowing the defendant to withdraw his plea if the sentence did not meet the latter's expectations.

Throughout the jurisdictions there appeared to be two major rationales for allowing plea withdrawal in situations where the agreement between the defense attorney and prosecuting attorney was not binding on the judge. Judges indicated that prosecutors had a very good idea of what judges feel is an appropriate sentence in any given case. Consequently the prosecutor is likely to make a recommendation with which the judge can live.

Where new prosecutors are being worked into the system, or when a prosecutor makes a "bad recommendation," one judicial response is to notify the prosecutor if the recommendation

is not acceptable. Many said they would do this before the plea was entered. Some judges said they would do this at the bench during the trial, while others said that they would speak with the prosecuting attorney "very candidly" in chambers.

One judge indicated that in twelve years of sitting on felony courts he had never once refused a sentencing recommendation by a prosecutor. He said on one or two occasions he had spoken to the prosecutor or an assistant about a recommendation.

A second reason why judges allow plea withdrawal stems from a sense of fairness. Some judges indicated that prosecutors make offers in good faith knowing that judges will most often adhere to the recommendations because the recommendation is fair. One judge said it would be difficult for prosecutors to conduct their work if judges did not allow withdrawal if they didn't agree with the recommendation. There appeared to be an underlying belief that if withdrawal were not allowed the system of plea negotiation and the flow of guilty pleas would slow down and cases would clog up the courts.

In summary, then, the withdrawal of guilty pleas arising out of plea negotiations does not appear to be a significant problem in the jurisdictions visited.. The courts go considerably beyond the requirements of Santobello,[113] the state rules of criminal procedure and

case law under which they operate. This is worthy of note since over half the states in our sample have no standard on this issue. (See Table 2, page 266).

THE ROLE OF THE JUDGE

1/ ABA Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty, §3.3(a) (1968).

2/ Id. at 72-73.

3/ National Advisory Commission on Criminal Justice Standards and Goals, Task Force Report on Courts, §§3.1,3.7 (1973).

4/ Id. at §3.7.

5/ Fed. R. Crim. P. 11(e)(1).

6/ U.S. v. Werker, at 201,203.

7/ Note: Plea Bargaining - Proposed Amendments to Federal Criminal Rule 11, 56 Minn. L. Rev. 718 (1972).

8/ Recent Development: "Judicial Plea Bargaining," 19 Stan. L. Rev. 1082 (1967). See Baker v. State, 1259 So. 2d 200 (Fla. 1972), where the court outlined the problems when a judge participates in the process 1) defendant fear of harsher sanctions, 2)judicial difficulty in determining voluntariness of plea, and 3) defendant's fear of not receiving a fair trial if the trial judge is the same.

9/ These include among others judge shopping and attempts at charge reduction.

10/ H. Zeisel, J. DeGrazia and L. Friedman, Criminal Justice System Under Stress: A Study of the Disposition of Felony Arrests in New York City, 84-88, August 15, 1975 (unpublished manuscript). Reports are based on interviews conducted with a judge, prosecutor and defense counsel in a sample of 369 cases studied. Of the 369 cases, 98% pled guilty.

11/ Id. Specifically, in 22% of the cases in which a defendant pled guilty to a misdemeanor, he knew that the upper limit was one year imprisonment.

12/ Comment,"Restructuring the Plea Bargain," 82 Yale L.J. 296-298 (1972).

13/ Zeisel, op cit., found that the defendant's certainty as to the sentence when pleading guilty resulted from the judge accepting the plea bargain in 15% of the cases and taking an active part in negotiation in 57% of the cases.

14/ Note,"The Influence of the Defendant's Plea on Judicial Determination of Sentence," 66 Yale L.J. 204 (1956).

15/ J. Lambros,"Plea Bargaining and the Sentencing Process," 63 F. R. D. 509 (1972).

16/ Id.

17/ "Criminal Law - Pleas of Guilty - Plea Bargaining - The American Bar Association's Standards on Criminal Justice and Wisc. Stat. Section 971.08, 1971," Wisc. L. Rev. 583 (1971) at 587-88.

18/ Id. at 587, 588.

19/ "Profile of a Guilty Plea: A Proposed Trial Court Procedure for Accepting Guilty Pleas," 17 Wayne L. Rev. 1194 (1971).

20/ W. White, "A Proposal For Reform of the Plea Bargaining Process," 119 U. Pa. L. Rev. 439 (1970).

21/ Id. at 262

22/ Id.

23/ L. A. Carstarphen, Sentence Bargaining at the Local Level: Perceptions and Attitudes of Judges, Prosecutors, and Defense Attorneys, May 23, 1970 (unpublished Ph.D. dissertation, The University of Georgia).

24/ National Center for State Courts of New Jersey, A Study of Plea Bargaining in Municipal Courts of the State of New Jersey, August 31, 1974 (unpublished project manuscript). DWI - Driving while intoxicated.

25/ In a theoretical sense, the possibility exists that the judges form general impressions of the criminal justice process based on their own experiences. If the attitudinal framework is generally favorable, then a more favorable disposition toward any specific element in the system is more likely.

26/ D.R. Vetri, "Guilty Plea Bargaining: Compromises By Prosecutors to Secure Guilty Pleas," 112 U. Pa. L. Rev. 896, 907, 908 (1963-64).

27/ J. Eisenstein and H. Jacob, Felony Justice: An Organizational Analysis of Criminal Courts, forthcoming manuscript.

28/ A. Kalmanoff, et. al., Plea Bargaining: Structure and Process (1975).

29/ A. Rosett and D. R. Cressey, Justice By Consent: Plea Bargains in the American Courthouse (1976), p. 80.

30/ Carstarphen, op. cit.

31/ See, e.g., National Center for the State Courts of New Jersey, op. cit.; Eisenstein and Jacob, op. cit.; and A. Alschuler, The Trial Judge's Role in Plea Bargaining, forthcoming manuscript.

32/ These states are Alaska, Arizona, Arkansas, Colorado, District of Columbia, Delaware, Florida, Indiana, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, North Carolina, North Dakota, Ohio,

32/ (continued)

Oregon, Pennsylvania, Rhode Island, Washington, Wsiconsin, and Wyoming.

33/ Ariz. R. Crim. P. 17.14(a); Ark. R. Crim. P. 25; Col. Rev. Stat. §16-7-302 (1973); N.Y. Directive 5-70; N.M. R. Crim. P. 21(g); N. Dak. R. Crim. P. 11(d); Ore. Rev. Stat. §315.432 (1974); Pa. R. Crim. 319(b).

34/ See, e.g., Ex Parte Shuflin, 528 S.W. 2d 617 (Tex. Crim. App. 1975); Seaton v. State, 472 S.W. 2d 905 (Tenn. Crim. App. 1971).

35/ See Robinson v. State, 291 A. 2d 279 (Del. Sup. Ct. 1972).

36/ Alaska R. Crim. P. 11(e); Fla. R. Crim. P. 3.171; Minn. R. Crim. P. 15.04; Maine R. Crim. P. 11(b).

37/ North Carolina Criminal Procedure Act, §15a-1021. The specific authorization for judicial participation was made by 1975 amendment to this statute, which deleted the original word "not" from between "may" and "participate". The original official commentary made clear that the original provision was intended to curtail the judge's participation. Said the commentary following the section:

> "Subsection (a) is basic. It legitimates plea negotiations, prohibits the judge from taking an active role in the actual striking of any bargain. . . " (emphasis added.)

38/ J. Dean, "The Illegitimacy of Plea Bargaining," Federal Probation 38: 1974,at 18-23.

39/ American Friends Service Committee, Sturggle for Justice (1971).

40/ Id. at 138-139.

41/ L. E. Ohlin and F. J. Remington,"Sentencing Structure: Its Affect Upon Systems for the Administration of Criminal Justice," 23 L. and Cont. Prob. 495 (1958) at 502, 503.

42/ Id.

43/ A. Davis,"Sentences for Sale: A New Look at Plea Bargaining in England and America," 10 Am. Crim. L. Rev. 153 (1971).

44/ D. J. Newman, Conviction: The Determination of Guilt or Innocence Without Trial,66 (1966). See Chapter IV for a discussion of "legal" and "factual" guilt.

45/ D. Sudnow,"Normal Crimes: Sociological Features of the Penal Code in the Public Defender's Office, 12 Soc. Prob. 255 (1965).

46/ Note, "The Influence of the Defendant's Plea on Judicial Determination of Sentence," 66 Yale L. J. 204 (1956).

47/ Newman, op. cit. at 64.

48/ United States v. Wiley, 278 F.2d 500 (7th Cir. 1960).

49/ Scott v. United States, 419 F. 2d 264 (D.C. Cir. 1969).

50/ See, e.g., People v. Snow, 182 N.W. 2d 820, 26 Mich. App. 510)1970).

51/ National Advisory Commission on Criminal Justice Standards and Goals, Standards on Plea Bargaining, Report on Courts at 64 (1973).

52/ A.B.A. Project on Standards for Criminal Justice, Standards Relating to Pleas of Guilty 36-38 (1968).

53/ Note, "The Influence on the Defendant's Plea on Judicial Determination of Sentence," 66 Yale L.J. 204 (1956), page 206-209.

54/ H. Ridley, Plea Bargaining: An Analysis of the Procedure From the Perspective of the Participant (1975). (Unpublished Ph.D. dissertation, Emory University).

55/ D. R. Vetri, "Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas," 112 U. Pa. L. Rev. 896, 907, 908 (1963-64).

56/ A. Constant, Determination of Sentence in Criminal Cases: The Guilty Plea and Related Factors, April 21, 1971 (unpublished paper in the University of Texas Law School Library) at 25-27.

57/ American Friends Service Committee, Struggle for Justice 138, 139 (1971).

58/ University of California, Berkeley, College of Engineering, Plea Bargaining: Structure and Process, August 15, 1975 (a report to the District Attorney of Alameda County) at D-8.

59/ P. Greenwood, et. al, Prosecution of Adult Felony Defendants in Los Angeles County: A Policy Perspective, March, 1973 (prepared by Rand, Inc. R-1127-DOJ).

60/ Id. at 11.

61/ Ridley, op. cit. at 84.

62/ Note, "The Influence of the Defendant's Plea on Judicial Determination of Sentence," 66 Yale L. J. 204 (1956), page 206-209.

63/ J. M. Renfro, Judge Maneuvering in an Urban Court: The Philadelphia System, February 26, 1971 (unpublished paper in the University of Texas Law School Library).

64/ National District Attorneys Association, Plea Bargaining: The Prosecutor's Perspective (1973 NDAA Manual).

65/ Eisenstein and Jacob, op. cit. (unpublished manuscript).

66/ Id.

67/ Alschuler, The Judge's Role, op. cit.

68/ Id.

69/ Id.

70/ For an excellent discussion of the problems of units of analysis in theory construction, see R. Dubin, Theory Building (1969).

71/ M. Levin, Delay and Related Policy Topics in Five Criminal Courts, September 1973 (unpublished paper delivered at the 1973 Annual Meeting of the American Political Science Association in New Orleans, Louisiana).

72/ See 234, supra.

73/ See Chapter I for a discussion of "explicit" and "implicit" plea bargaining.

74/ A.B.A. Standards Relating to Pleas of Guilty, Supra Note 1 §1.8.

75/ We distinguish this type of supervision from that which may occur if the judge participates in plea discussions.

76/ D. Newman, op. cit. at 22 - 24.

77/ Id. at 23.

78/ Id. at 48-50.

79/ State v. Turner, 183 N.W. 2d 763, 186 Neb. 424 (1971).

80/ State v. Brech, S. D. 169 N.W. 2d 242 (1969).

81/ Winters v. Cook, 489 F. 2d 174 (5th Cir. 1973).

82/ State v. Warner, 229 N.W. 2d 776 (Iowa 1975).

83/ P.B. Hedblom, "Criminal Law - Guilty Pleas" 3 St. Mary's L. J. 127 (1971).

84/ See Brady v. United States, 397 U.S. 742 (1970); and McMann v. Richardson, 397 U.S. 759 (1970).

85/ Comment: "Judicial Supervision Over California Plea Bargaining: Regulating the Trade," 59 Cal. L. Rev. 962, 977-980 (1971).

86/ M. Mileski, "Courtroom Encounters: An Observation Study of a Lower Criminal Court," 5 L. and Soc'y Rev. 473 (1971).

87/ Id. at 484-486.

88/ Id.

89/ Id. at 481-482.

90/ Id. at 489.

91/ T. S. Williamson, Jr., "The Constitutionality of Reindiciting Successful Plea Bargain Appellants on the Original Higher Charges," 62 Cal. L. Rev. 258 (1974).

92/ Id. at 270.

93/ J. Goldstein, "For Harold Lasswell: Some Reflections on Human Dignity, Entrapment, Informed Consent and the Plea Bargain," 84 Yale L.J. 683 (1975).

94/ Id. at 702.

95/ There were instances where the litany was recited by the judge to the entire group of defendants whose cases were to be heard on a particular day (Alaska, Texas). The key features of the litany involved a judicial determination of the defendant's understanding of the charge, the rights to be waived, the sentences he may receive, the voluntariness of the plea, its accuracy and the adequacy of the factual basis, the right to counsel and the right to represent oneself.

96/ The bailiff of this particular judge indicated that the latter is not very well liked, particularly by defense counsel, because he takes so much time and frequently gives them a hard time in court.

97/ The agreement called for suspended sentence and probation.

98/ Form for Petition to Enter Plea of Guilty, Criminal Court, Hamilton County, Tennessee. It does not state whether a plea negotiation was an integral part of the guilty plea.

99/ ABA Standards Relating to Pleas of Guilty, Supra Note 1, 30.

100/ Id. at 35.

101/ State v. Daniels, 190 Neb. 602, 211 N.W. 2d 127 (1973).

102/ State v. Gusfason, 214 N.W. 2d 341 (Minn. 1974).

103/ State v. Wayne, 193 Neb. 833, 229 N.W. 2d 64 (1975).

104/ People v. Williams, 386 Mich. 277, 192 N.W. 2d 466 ( ).

105/ State v. Warner, 229 N.W. 2d 776 (Iowa 1975).

106/ This is required by the constitution of the state.

107/ North Carolina v. Alford, 400 U.S. 25 (1970). The case held that under appropriate circumstances, with a strong case against him and advice from counsel that he plead guilty, not even a defendant's protestations of innocence would invalidate his guilty plea.

108/ ABA Standards, Supra Note 1, §2.1, manifest injustice could involve ineffective assistance of counsel, an unauthorized plea, an involuntary plea or broken agreement.

109/ Id.

110/ Ryan v. Iowa State Penitentiary, Fort Madison, 218 N.W. 2d 616 (Iowa 1974).

111/ A. Bishop, "Guilty Pleas in the Pacific West," 51 J. Urban L. 171 (1974).

112/ People v. Riebe, 40 Ill. 2d 565, 241 N.E. 2d 313 (1968).

113/ Santobello v. New York, 404 U.S. 257 (1971).

Chapter Five

COST ANALYSIS

A major rationale for plea bargaining is that it saves time and cost. Thus, it is believed that plea bargaining is "an essential component of the administration of justice."[1/] Because little data is available as to what costs would be involved should plea bargaining be lessened or abolished, a key aspect of the project involved an attempt to determine the feasibility of a cost analysis of plea bargaining. The objective was that of trying to determine what costs changes, if any, could be identified and measured if a change in plea bargaining policy occurred.

To conduct the feasibility study, the Institute commissioned Joan E. Jacoby of the Bureau of Social Science Research and Edward C. Ratledge, an economist at the University of Delaware. In August, 1976, their study and recommendations were presented to the Institute. What follows is a brief summation of their findings and recommendations and the Institute's response.

The researchers had two objectives: (1) Specify the factors involved and methodologies available in forming a cost analysis of plea bargaining, and (2) validate the existence of these specified factors and assess the anticipated cost of

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1/ Santobello v. New York, 414 U.S. 257, 260 (1971).

obtaining them through on-site visits. The focus was on costs in the office of the prosecutor. 2/

Following is an abbreviated version of the study:

(1). Plea bargaining is defined as defendant's acceptance of an offer from a prosecutor or judge to plead guilty to a criminal charge for a consideration. We narrowed the scope of the definition so that only dispositions resulting in a guilty plea based on a bargain were examined. We chose to recognize but exclude from this study other dispositions arising from a bargain because they could have moved the study out of the criminal justice field into civil or social justice systems.

(2). We examined the various forms of prosecution systems that we were familiar with to see if any were so structured that they could not be costable. We concluded that, all are potentially costable with varying degrees of complexity primarily resulting from size of the organization.

(3). Cost analysis of plea bargaining should focus on the processing points where cases may exist. In this manner costs avoided by early exits due to plea bargaining can be measured.

(4). There is a difference between costing a system as summarized in (3) above and evaluating the impact of change in plea bargaining policy and procedure. Three methodologies were examined for their ability to measure the impact of a change in plea bargaining policy. The quasi-experimental, before/after model that collects data before and after a change has been made was deemed to be the most suitable for analysis even with its limitations. This decision was rezched because of our limited capability to compare like offices. We believe that the chance of locating comparable offices operating within a similar external environment and differing only in plea bargaining policy is highly unlikely. Thus, until more knowledge accumulates, we have rejected the comparison of like offices, a far more preferable methodology. The technique simulating a prosecutorial procedure to test hypothesis and assumptions is believed worthy of use both to support the before/after model and to provide an economical way to test hypotheses even though the results may be distorted by measurement error or limited by the simulated range.

(5). Our examination showed that it is possible to develop costs and measurements within an operating unit that

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2/ The researchers assumed that if feasible in a prosecutor's office, the methodologies could be applied to public defenders and the courts.

meet the requirements of scope and evaluation. The primary measurement is man hours and evaluation is mostly in terms of wages, salaries, and overhead.

(6). The results of the on-site visits (Kansas City, and Kalamazoo) indicate that if the office is amenable and data are available, empirical cost estimates can be obtained with a reasonable amount of effort in a short period of time (1-2 analysts, 2-3 weeks).

(7). Because of the interactive nature of the criminal justice system, one may derive costs from an operating unit, e.g. the prosecutor, but one should not assess the impact within this narrow scope. . . . At a minimum, we believe that the study of plea bargaining costs should be performed within the court nexus (prosecutor, public defender and court). A cost analysis for each operating unit should be performed and the costs summed so that a full effect within this nexus could be calculated.

(8). The ripple effect of plea bargaining as it affects probation, corrections, parole and the community is recognized. Whether the effects are the result of transfer costs or whether they result from factors operating independently has not been determined. The measures become more difficult to identify and quantify as the ripples spread. We believe that by reducing the scope and assessing the impact in the court nexus more reliable data can be obtained as well as better insights into the dynamics of the interaction.

On the basis of these findings and conclusions, the following recommendations were made. It was suggested that the Institute work with a few selected offices to:

(1). Implement and test the cost procedures under different conditions and analyze the data for cost implications within an operating unit.

(2). Analyze transfer cost data to obtain insights into the interactive characteristics of the system and identify most areas susceptible to transfer.

(3). Test the various evaluation methodologies to determine the extent of their limitations and/or power. Particular attention should be placed on the problems of capacity and maturation. Special emphasis could be placed on the development of simulated models.

(4). Examine the possibility of developing and testing a survey instrument that could provide self-reported cost data for a comparative analysis and be used on a nation-wide basis.

(5). Develop a manual for the operating units in the court nexus that shows them (1) how to perform their own cost analysis, and (2) how to interpret the results for operating and planning purposes.

(6). Finally, produce a report examining in detail the cost implications of plea bargaining based on the results of the work above as well as other work in the field. This report should not only provide a comprehensive source of information in this field but should also be the basis upon which decisions for further work can be made.

The plea bargaining staff evaluated the findings and recommendations and met with Ms. Jacoby. After extensive discussion we agreed on the general outlines of further action.

It was decided that the before/after experimental design, which was a key component of the feasibility study, could not be used in a cost analysis study at this time. There are serious questions as to the ability of any research organization to obtain the permission and cooperation of prosecutors, judges and public defenders to agree to drastically change plea bargaining in whole or in part so that a research design concerning costs could be met. Additionally, the necessary controls to implement such a design would be difficult to achieve.

Project staff members visited jurisdictions where attempts are currently being made to abolish plea bargaining either totally or in part. They found difficulties in achieving the "no bargaining" state, even when the prosecutor favored it. Resistance from other segments of the system (the courts, public defender and defense bar and often from within a prosecutor's office itself) raised obstacles which resulted in an indeterminate

shakedown period. In Alaska, for example, after a year of no plea bargaining (at the direction of the Attorney General -- who is Chief Prosecutor) the system was still in a state of transition. The time constraints of the Phase II portion of this study (15 months) would render it difficult for a valid before/after experimental design to be implemented with sufficient comprehensiveness to validate the data.

There are other problems which have not been resolved: (1) The exclusion of dispositions not involving a guilty plea and the total exclusion of implicit bargains in the cases to be costed out; (2) potentially negative attitudes of the prosecutor's office as to the purpose and use of what are essentially time sheets; (3) the amount of time necessary for staff members to remain in the jurisdiction in preparation for the collection of data, monitoring it, and thereafter analyzing the data; and (4) the use of exit points in the system as having a clear and identifiable relationship to costs. In fact, under some circumstances, it is conceivable that the costs might be inversely related, thus creating problems in the assumption underlying Ms. Jacoby's proposal. If extensive screening is undertaken, it may require substantial investment of manpower and time, thus requiring substantial cost to be placed on that particular exit point. Under a system where there is minimal screening and where plea bargaining is endemic, the amount of time spent by the actors in the earlier processes might be minimal. Thus the exit of the case through a plea bargain at a

later stage could conceivably be less costly than the intensive screening stage which occurs at the earliest point in the prosecutor's connection with the case.

As an alternative to the before/after design, we have tentatively proposed that a "before" only design be used. Under this approach we would develop an instrument for participants in the court system to use for recording the man hours spent on a given case as it moved through the system. Accordingly, we endorse recommendation (4) of the feasibility study which calls for the development and testing of the survey instrument that would provide self-reported cost data which would be suitable for comparative analysis with other jurisdictions. In a related fashion, we also endorse recommendation (5) which calls for the development of a manual for the operating units in the court which specifies both how to perform a cost analysis and how to interpret the results for operating and planning purposes.

Given the current state of knowledge regarding plea bargaining and cost analysis of the courts, it is our belief that the approach at this point should be modest and fairly narrow in scope. Assuming that an instrument for recording man hours for participants can be developed, jurisdictions will be selected to determine if participants can fill them out accurately. This would be followed by the development of a manual, as outlined above, which would assist the jurisdictions in their own cost accounting procedures. With such a manual

available, LEAA would then be in a position to offer technical assistance to any jurisdiction wishing to institute such procedures, along with possible changes in existing plea bargaining policies.

This approach has the added advantage of providing assistance to prosecutors with a minimum of potential threats. Further, they may be encouraged from the initial findings to request assistance in expanding the cost analysis program. The results may also serve as an impetus for reviewing their plea bargaining policies.

In conclusion, then, the project staff endorses recommendations (4) and (5) of the Jacoby report in an effort to undertake a preliminary step towards a more comprehensive cost analysis of plea bargaining.

Chapter Six

METHODOLOGY

Approach to Data Collection and Analysis

In attempting to gather data on plea bargaining, one is beset with hard choices regarding the type of data and the most appropriate techniques for collecting such data. Further, as with other research, the most appropriate means of data collection are not always possible, due to such problems as access, budgetary constraints and limitations imposed by time.

In the present research, our objective was that of examining the extent and nature of plea bargaining on a national level. Thus, the very scope of the problem necessitated a research strategy which would insure a reasonable representation of plea bargaining as it existed throughout the country. Specifically, we wanted to assess different types of plea bargaining systems, gain some understanding as to how they operate and identify the significant similarities and differences which characterized them.

To achieve the above, three major approaches were explored: (1) a national mail survey; (2) telephone interviews; and (3) on-site visits.

The initial strategy was that of a national mail survey. A sample of 350 out of a population of 3,500 jurisdictions was to be randomly selected, stratified by population. The questionnaire was to be mailed to the major figures in the criminal justice system who were directly involved in plea negotiation. Specifically, this included judges in both misdemeanor and felony

courts, the district attorney, the public defender (where applicable), courts, and defense attorneys. It was deemed essential that information be collected from the judicial, prosecutorial and defense positions in order to achieve the most valid and reliable data, and in addition, to illuminate the areas which were characterized by the greatest divergencies in the actors' perceptions.

As we progressed on the compilation of the questionnaire, however, and began to assess the utility of this approach, a number of critical questions arose. First, we examined other national surveys which addressed the issue of plea bargaining. It became clear that in addition to the inherent problems associated with mail surveys, such as response rates and its attendant non-response bias, a set of additional problems existed.

The problem of definition was paramount. We sifted through a voluminous amount of literature and consulted with researchers and practitioners in the field. A number of definitions of plea bargaining surfaced. There is little consensus as to what plea bargaining means generally and what are its necessary elements. For example, terms used include plea bargaining, plea negotiation, dealing, pretrial discussion, sentence bargaining or charge bargaining. Even if the researcher happened to choose the "correct" or most suitable term, there is little assurance that it will be construed similarly by actors in the field.

There are additional problems of terminology. The following terms have variable meaning; case, initial appearance, arraignment, referral, formal charge, pretrial conference,

judicial participation, screening and dismissal. Arriving at a set of definitions which would be understood and internalized across the country by criminal justice practitioners in a mail survey was determined by the staff to be hazardous. This was a critical factor in light of the necessity of obtaining valid and reliable data suitable for a comparative analysis.

The problem of definition extends into counting. The unit of analysis is difficult to establish. Some jurisdictions use the defendant as a unit of analysis or "case", while others use number of charges or counts. In one jurisdiction which we visited three different sets of statistics were collected by the chief judge, district attorney and public defender. In each instance the unit of count was tailored to make the respective office appear most favorable in terms of work load and success in their efforts to dispose of or win cases.

A second problem with the use of mail surveys was that of having the intended person respond. Survey research has proliferated in the last decade. Thus, responding to a questionnaire has become for some a timely and undesirable task. Rather than judges and district attorneys, one runs the risk of receiving the impressions of clerks and 1st year assistants. The problem also extends to the necessity of making a determination as to whether the unit of observation (the specific respondent) can provide valid data on the unit of analysis (jurisdiction).

A third and crucial problem is that data obtained via mail surveys do not adequately describe either how or when plea

negotiation takes place. We examined instruments used to collect data for other projects and talked with consultants and our Advisory Board. It became clear that plea bargaining was comprised of different actions, many of which were not recorded or even visible in some cases. It became equally clear that plea negotiation is a dynamic process. It is not a set of static occurrences easily amenable to conventional modes of quantification.

In light of the above problems the question became: Could the plea bargaining process be understood through responses from a mail survey? After examining several existing mail survey instruments and beginning the construction of one for our specific use, it was determined that such an instrument could not satisfactorily address the questions most central to our study. Even without problems of feasibility, response rate, definitions and comparability of data, the mail survey could not give us the data which would indicate how the plea negotiation process worked as one means of case disposition within a jurisdiction. Nor could it offer insight into who dominates the bargaining procedure or the ways that agreements are reached, particularly where the system is informal and unwritten. Systematic information regarding the relationship of plea negotiation to other phases in the flow of cases from arrest to final disposition would not be readily obtainable. Thus, although the mail survey would have provided us with the largest number of jurisdictions for analysis for our purposes, the quality and overall utility of the data would have been poor.

The second alternative was a national telephone survey. It would have diminished the size of the sample, but it would have allowed for a greater degree of control over which actors we interviewed in the various jurisdictions, the type of information obtained, as well as insuring definitional consistency. Moreover, this approach would have provided an opportunity to inquire of the actors as to any special or unique characteristics of their system which had an affect on plea bargaining.

However, serious doubts arose as to the utility of this technique. Access to and availability of actors proved to be considerably more difficult than anticipated. Since it was necessary to speak with specific persons, and because many interviews would be lengthy, this method would have been considerably less cost efficient than originally conceived. The barrier of distance, of the coldness of such an interview, and the attendant difficulties in building sufficient rapport for respondents to answer candidly and confidently loomed as problems. Added to this is the political sensitivity of plea bargaining, an obstacle which we did not feel could be overcome by phone conversations.

Given these limitations the third alternative considered was selection of a much smaller sample of jurisdictions in order to speak directly with the actors. We believed the type and quality of data gained by direct interviews would more than compensate for the reduced sample.

Project staff felt that on-site interviews would provide the greatest control over definitional problems. Equally as important it would permit first hand observation of plea negotiations. The staff could also check out specific leads in a particular jurisdiction, thus aiding in the verification of interview data. In retrospect, this was a major advantage of site visits. Finally, this approach facilitated the comparison of the existing statistical data with the actors' impressions and assessment of how the system worked.

Sampling

Determining the sampling techniques to be employed involved a number of factors. We wanted to focus on the area where plea bargaining appeared to be of the greatest concern. We also desired to obtain a representative picture of the extent and nature of plea bargaining across the country. One course of action was that of attempting to achieve a substantive representation of plea bargaining through the specific selection of certain jurisdictions. We rejected this approach as being unsystematic and incompatible with the idea of representativeness.

It was determined that the sampling procedure which would be most appropriate was that of a stratified random selection. The universe of 3,500 jurisdictions in the country was narrowed down to a population of all jurisdictions over 100,000 population. The exclusion of jurisdictions under 100,000 was not meant to imply that plea bargaining does not exist in these jurisdictions.

Rather that the issue is most pressing in more urbanized jurisdictions, and therefore our study would be of the greatest utility in focusing on those areas.

A 10% random sample of all jurisdictions over 100,000 was selected. The sample was stratified on the basis of population. Thus a proportional representation of those jurisdictions from 100 to 500,000 population and jurisdictions of 500,000 and over were selected. This resulted in 13 and 7 jurisdictions respectively.

We wished to examine other jurisdictions which had unique or special characteristics regarding plea bargaining. We compiled a list of those jurisdictions and selected 6 for inclusion in the study. Each of the 6 had either attempted to eliminate plea bargaining partially or totally or had implemented a system which was unique.

Those randomly selected included the following: Alameda County, California; Allen County, Indiana; Bergen County, New Jersey; Bernalillo County, New Mexico; Clark County, Nevada; Cook County, Illinois; Dallas County, Texas, El Paso County, Colorado; El Paso County, Texas; Greenville County, South Carolina; Hamilton County, Tennessee; Hartford County, Connecticut; Henrico County, Virginia; Kalamazoo County, Michigan; Pima County, Arizona; Plymouth County, Massachusetts; Richmond County, New York; Rockland County, New York; San Bernardino County, California; and Trumbull County, Ohio. The special purpose jurisdictions included the State of Alaska, Black Hawk County, Iowa; Dade County,

Florida; New Orleans Parish, Louisiana; Multnomah County, Oregon and Philadelphia County, Pennsylvania.

Development of Field Procedures

An open-ended, unstructured interview schedule was selected as a major data collection instrument. It was determined that such an instrument would afford us the flexibility necessary to obtain data from a number of different practitioners with different functions, while at the same time providing the structure necessary for the collection of data suitable for a comparative analysis.

To insure maximum standardization within this approach a corroborative field checklist was developed. The checklist included the essential items of information which were to be gathered from each jurisdiction.

The interviewees in each jurisdiction were selected on the basis of their role and function in the criminal justice system. Included in each jurisdiction were the chief or presiding judge, district attorney, public defender (where applicable) and defense counsel. Some assistant district attorneys, clerks of the court, felony and misdemeanor judges, probation officers, and police were included in the list.

Before visiting each jurisdiction, a letter was sent to the above-mentioned actors indicating the nature of the study and our desire to speak with them regarding plea bargaining in their jurisdiction. It was indicated that a staff member would

call them within a two-week period to arrange for an interview. If an interview could not be arranged for some reason an alternate interviewee was selected and notified.

To familiarize the staff with the basic structure and nature of the jurisdiction to be visited, a jurisdictional profile was compiled. Included in the profile were data extracted from the Uniform FBI Crime Reports, demographic data, information on the local court structure, the existence of legal aid and public defender offices, and any special directives or executive orders which would have an affect on the judicial system. A legal analysis of relevant cases was also compiled. Added to this was a comparative analysis of the state rules relating to the guilty pleas as they related to the ABA Standards.

On-Site Visits to Jurisdictions

The data to be obtained from the on-site visits were to be of three major types: (1) interview data, (2) statistical data, and (3) observational data on negotiating practices. The focus was on interviews with the actors. We determined that statistical data regarding case flow through the jurisdictions, rates of guilty pleas vs. trials, or other relevant information would be obtained if possible to provide a source of cross validation with our interview data. Given the variance in the types and quality of data available in the courts and prosecutors' offices we did not want to rely too heavily upon statistical data for the compilation of our report. Similarly, non-participant

observational data of negotiating practices were to illuminate and verify data collected from the interviews. Thus, the triangulation of data collection was designed to maximize the types and quality of data we would gather, as well as providing some index of the reliability and congruence of the different data sources.

Organization of Data

Upon the completion of the jurisdictional on-site visits, the information gathered was compiled in field note form. All efforts were made to record the interview data as quickly as possible upon returning from the visit in order to preserve the accuracy and completeness of interview information.

After compiling the initial reports a jurisdictional report package was developed for the purpose of systematically recording and analyzing the data from each jurisdiction. The report was organized to provide an overview of the respective systems, an analysis of the flow of cases through the system coupled with an explanation of such flow, and a discussion of the central issues in plea bargaining.

Appendix A

IDAHO

The data in the following table were extracted from the 1974 Annual Report of the Idaho Courts. The unit of count is the defendant. The cases include felonies only. The trial column includes cases disposed of by either trial judge or jury. No differentiation is made between convictions and acquittals. The guilty plea column includes all cases disposed of without trial and thus may include, in addition to guilty pleas, dismissals.

IDAHO

County	Population	Guilty Pleas	Trials
District 1:			
Benewah	6,230	(11) 78.6%	(3) 21.4%
Bonner	15,544	(32) 74.4%	(11) 25.6%
Boundary	6,371	(33) 82.5%	(7) 17.5%
Kootenai	35,332	(155) 87.6%	(22) 12.4%
Shoshone	19,718	(44) 95.7%	(2) 4.3%
District 2:			
Clearwater	10,913	(56) 75.7%	(18) 24.3%
Idaho	12,891	(36) 85.7%	(6) 14.3%
Latah	24,891	(11) 57.9%	(8) 42.1%
Lewis	3,867	(10) 90.9%	(1) 9.1%
Nez Perce	30,376	(95) 88%	(13) 12%
District 3:			
Adams	2,877	(19) 100%	(0)
Canyon	61,276	(146) 89.6%	(17) 10.4%
Gem	9,387	(24) 80%	(6) 20%
Owyhee	6,422	(9) 81.8%	(2) 18.2%
Payette	12,401	(22) 88%	(3) 12%
Washington	7,633	(14) 87.5%	(2) 12.5%
District 4:			
Ada	112,230	(497) 94.5%	(29) 5.5%
Boise	1,779	(3) 100%	(0)
Elmore	17,479	(23) 79.7%	(7) 23.3%
Valley	3,609	(4) 100%	(0)
District 5:			
Blaine	5,749	(13) 92.9%	(1) 7.1%
Camas	740	-	-
Cassia	17,017	(67) 100%	(0)
Gooding	8,645	(10) 100%	(0)
Jerome	10,253	(32) 100%	(0)
Lincoln	3,057	-	-
Minidoka	15,731	(95) 97.9%	(2) 2.1%
Twin Falls	41,874	(164) 95.9%	(7) 4.1%
District 6:			
Bannock	52,200	(141) 82.9%	(29) 17.1%
Bear Lake	5,801	-	-
Caribou	6,534	(17) 89.5%	(2) 10.5%
Franklin	7,373	(4) 100%	(0)
Oneida	2,864	(4) 100%	(0)
Power	4,864	(9) 100%	(0)
District 7:			
Bingham	29,167	(21) 46.7%	(24) 53.3%
Bonneville	51,250	(84) 94.4%	(5) 5.6%
Butte	2,925	(7) 87.5%	(1) 12.5%
Clark	699	-	-
Custer	2,967	-	-
Freemont	8,710	(3) 60%	(2) 40%
Jefferson	11,619	(30) 100%	(0)
Lemhi	5,566	(9) 81.8%	(2) 18.2%
Madison	13,452	(24) 96%	(1) 4%
Teton	2,284	-	-

ILLINOIS

The data in the following table were extracted from the 1973 Annual Report to the Supreme Court of Illinois, prepared by the Administrative Office of the Illinois Courts. The unit of count is the defendant. The cases include felonies only. The trials column includes those convicted by trial judge or jury. The guilty plea column includes only those cases disposed of through a plea of guilty.

ILLINOIS

County	Population	Guilty Pleas	Trials
1st Circuit:			
Alexander	12,015	(18) 100%	(0)
Jackson	55,008	(67) 93.1%	(5) 6.9%
Johnson	7,550	(5) 83.3%	(1) 16.7%
Massac	13,889	(13) 86.7%	(2) 13.3%
Pope	3,857	(1) 100%	(0)
Pulaski	8,741	(9) 100%	(0)
Saline	25,721	(38) 92.7%	(3) 7.3%
Union	16,071	(6) 100%	(0)
Williamson	49,021	(67) 98.5%	(1) 1.5%
2nd Circuit:			
Crawford	19,824	(6) 100%	(0)
Edwards	7,090	(2) 100%	(0)
Franklin	38,329	(1) 100%	(0)
Gallatin	7,418	(3) 100%	(0)
Hamilton	8,665	(2) 100%	(0)
Hardin	4,914	(5) 100%	(0)
Jefferson	31,446	(19) 79.2%	(5) 20.8%
Lawrence	17,522	(7) 87.5%	(1) 12.5%
Richland	16,829	(15) 93.8%	(1) 6.2%
Wabash	12,841	(11) 19.6%	(45) 80.4%
Wayne	17,004	(7) 100%	(0)
White	17,312	(13) 92.9%	(1) 7.1%
3rd Circuit:			
Bond	14,012	(11) 91.7%	(1) 8.3%
Madison	250,934	(191) 86.4%	(30) 13.6%
4th Circuit:			
Christian	35,948	(27) 93.1%	(2) 6.9%
Clay	14,735	(12) 100%	(0)
Clinton	28,315	(6) 66.7%	(3) 33.3%
Effingham	24,608	(16) 100%	(0)
Fayette	20,752	(10) 71.4%	(4) 28.6%
Jasper	10,741	(1) 100%	(0)
Marion	38,986	(37) 100%	(0)
Montgomery	30,260	(19) 82.6%	(4) 17.4%
Shelby	22,589	(2) 100%	(0)
5th Circuit:			
Clark	16,216	(2) 100%	(0)
Coles	47,815	(34) 100%	(0)
Cumberland	9,772	(4) 100%	(0)
Edgar	21,591	(3) 100%	(0)
Vermillion	97,047	(95) 81.2%	(22) 18.8%
6th Circuit:			
Champaign	163,281	(114) 89.8%	(13) 10.2%
DeWitt	16,975	(19) 65.5%	(10) 34.5%
Douglas	18,997	(9) 90%	(1) 10%
Macon	125,010	(169) 96%	(7) 4%
Moultrie	13,263	(3) 100%	(0)
Piatt	15,509	(13) 100%	(0)

ILLINOIS (contd.)

County	Population	Guilty Pleas		Trials	
7th Circuit:					
Greene	17,014	(1)	100%	(0)	
Jersey	18,492	(1)	100%	(0)	
Macoupin	44,557	(29)	100%	(0)	
Morgan	36,174	(10)	83.3%	(2)	16.7%
Sangamon	161,335	(143)	60.3%	(94)	39.7%
Scott	6,096	(4)	100%	(0)	
8th Circuit:					
Adams	70,861	(42)	95.5%	(2)	4.5%
Brown	5,586	(16)	100%	(0)	
Calhoun	5,675	(1)	100%	(0)	
Cass	14,219	(12)	100%	(0)	
Mason	16,161	(11)	100%	(0)	
Menard	9,685	(10)	100%	(0)	
Pike	19,185	(24)	100%	(0)	
Schuyler	8,135	(2)	100%	(0)	
9th Circuit:					
Fulton	41,890	(16)	94.1%	(1)	5.9%
Hancock	23,645	(14)	93.3%	(1)	6.7%
Henderson	8,451	(2)	100%	(0)	
Knox	61,280	(33)	97%	(1)	3%
McDonough	36,653	(36)	94.7%	(2)	5.3%
Warren	21,595	(16)	100%	(0)	
10th Circuit:					
Marshall	13,302	(6)	100%	(0)	
Peoria	195,318	(168)	91.8%	(15)	8.2%
Putnam	5,007		-		-
Stark	7,510	(0)		(1)	100%
Tazewell	118,649	(84)	87.5%	(12)	12.5%
11th Circuit:					
Ford	16,382		-		-
Livingston	40,690	(28)	100%	(0)	
Logan	33,538	(27)	75%	(9)	25%
McLean	104,389	(55)	80.9%	(13)	19.1%
Woodford	28,012	(22)	100%	(0)	
12th Circuit:					
Iroquois	33,532	(10)	90.9%	(1)	9.1%
Kankakee	97,250	(84)	92.3%	(7)	7.7%
Will	249,498	(55)	76.4%	(17)	23.6%
13th Circuit:					
Bureau	38,541	(11)	91.7%	(1)	8.3%
Grundy	26,535	(16)	100%	(0)	
LaSalle	111,409	(31)	96.9%	(1)	3.1%
14th Circuit:					
Henry	53,217	(20)	95.2%	(1)	4.8%
Mercer	17,294	(7)	100%	(0)	
Rock Island	166,734	(150)	90.4%	(16)	9.6%
Whiteside	62,877	(60)	89.6%	(7)	10.4%

ILLINOIS (contd.)

County	Population	Guilty Pleas	Trials
15th Circuit:			
Carroll	19,276	(4) 80%	(1) 20%
JoDaviess	21,766	(7) 100%	(0)
Lee	37,947	(35) 89.7%	(4) 10.3%
Ogle	42,867	(28) 90.3%	(3) 9.7%
Stephenson	48,861	(30) 88.2%	(4) 11.8%
16th Circuit:			
DeKalb	71,654	(47) 97.9%	(1) 2.1%
Kane	251,005	(133) 76%	(42) 24%
Kendall	26,374	(9) 81.8%	(2) 18.2%
17th Circuit:			
Boone	25,440	(6) 75%	(2) 25%
Winnebago	246,623	(204) 81%	(48) 19%
18th Circuit:			
DuPage	491,882	(173) 84%	(33) 16%
19th Circuit:			
Lake	382,638	(108) 82.4%	(23) 17.6%
McHenry	111,555	(100) 91.7%	(9) 8.3%
20th Circuit:			
Monroe	18,831	(8) 100%	(0)
Perry	19,757	(10) 100%	(0)
Randolph	31,379	(26) 100%	(0)
St. Clair	285,176	(278) 93.6%	(19) 6.4%
Washington	13,780	(9) 100%	(0)
Cook County	5,488,328	(4,385) 84.1%	(829) 15.4%

IOWA

The data in the following table were extracted from the 1975 report relating to the courts of the State of Iowa which was submitted to the Supreme Court of Iowa by the court administrator of the judicial department. The statistics contained in the table in this report are based on regular criminal cases. According to the Iowa report:

> "Regular criminal cases include all felony and indictable misdemeanor charges. A felony is a public offense which is, or in the discretion of the court may be, punished by imprisonment in the state penitentiary, men's reformatory, or women's reformatory. An indictable misdemeanor is a public offense, less than a felony, in which the punishment exceeds a fine of $100 or exceeds 30 days imprisonment in the county jail. An appeal from a decision or verdict in a non-indictable misdemeanor case becomes a regular criminal case upon being docketed by the clerk."

The unit of count is the defendant. And, the column of trials is based on cases that were disposed of by either a trial before a judge or a trial before a jury. It does not differentiate between those cases which were acquitted from those in which convictions were obtained. The "guilty plea" column is based on the cases which were disposed of without trial.

IOWA

County	Population	Guilty Pleas	Trials
District 1:	389,300	(988) 97.8%	(22) 2.2%
Allamakee			
Howard			
Chickasaw			
Winneshiek			
Fayette			
Clayton			
Grundy			
Black Hawk			
Buchanan			
Delaware			
Dubuque			
District 2:	499,300	(528) 91.7%	(48) 8.3%
Winnebago			
Worth			
Mitchell			
Hancock			
Cerro Gordo			
Floyd			
Pocahontas			
Humboldt			
Wright			
Franklin			
Butler			
Bremer			
Sac			
Calhoun			
Webster			
Hamilton			
Hardin			
Carroll			
Greene			
Boone			
Story			
Marshall			
District 3:	354,400	(1,031) 96.2%	(41) 3.8%
Lyon			
Osceola			
Dickinson			
Emmet			
Kossuth			
Sioux			
O'Brien			
Clay			
Palo Alto			
Plymouth			
Cherokee			
Buena Vista			
Woodbury			
Ida			
Monona			
Crawford			

IOWA (contd.)

County	Population	Guilty Pleas	Trials
District 4:	199,200	(10) 90.9%	(1) 9.1%
Harrison			
Shelby			
Audubon			
Pottawattamie			
Cass			
Mills			
Montgomery			
Fremont			
Page			
District 5:	523,700	(1,432) 98.1%	(28) 1.9%
Guthrie			
Dallas			
Polk			
Jasper			
Adair			
Madison			
Warren			
Marion			
Adams			
Union			
Clarke			
Lucas			
Taylor			
Ringgold			
Decatur			
Wayne			
District 6:	316,500	(974) 76.1%	(306) 23.9%
Tama			
Benton			
Linn			
Jones			
Iowa			
Johnson			
District 7:	282,500	(1,317) 85.4%	(226) 14.6%
Jackson			
Clinton			
Cedar			
Scott			
Muscatine			
District 8:	289,700	(369) 93.9%	(24) 6.1%
Poweshiek			
Mahaska			
Keokuk			
Washington			
Louisa			
Monroe			
Wapello			
Jefferson			

IOWA (contd.)

Henry
Des Moines
Appanoose
Davis
Van Buren
Lee

KANSAS

The data in the following table were extracted from the statistical report on the district courts of Kansas submitted by the Office of Judicial Administrators. The statistics cover a period of one year ending June 30, 1975. The cases included in the table in this report include all criminal offenses, both misdemeanors and felonies, and misdemeanor appeals. There is no indication as to what constitutes a "case" although it appears to be number of defendants as opposed to number of charges or counts. The trials column in the table presented in this report is comprised of cases terminated either by jury trial or trial before the court. No distinction is made between convictions and acquittals. The guilty plea column reflects only the number of guilty pleas rendered to the court.

KANSAS

County	Population	Guilty Pleas	Trials
District 1:			
Atchison	19,165	(38) 95%	(2) 5%
Leavenworth	53,340	(66) 77.6%	(19) 22.4%
District 2:			
Jackson	10,342	(9) 40.9%	(13) 59.1%
Jefferson	11,945	(13) 92.9%	(1) 7.1%
Pottawatomie	11,755	(19) 65.5%	(10) 34.5%
Wabaunsee	6,397	(9) 60%	(6) 40%
District 3:			
Shawnee	155,322	(230) 58.5%	(161) 41.2%
District 4:			
Allen	15,043	(14) 100%	(0)
Anderson	8,501	(1) 20%	(4) 80%
Coffey	7,397	(4) 40%	(6) 60%
Franklin	20,007	(49) 92.5%	(4) 7.5%
Osage	13,352	(6) 50%	(6) 50%
Woodson	4,789	(11) 100%	(0)
District 5:			
Chase	3,408	(4) 100%	(0)
Lyon	32,071	(41) 75.9%	(13) 24.1%
District 6:			
Bourbon	15,215	(12) 70.6%	(5) 29.4%
Linn	7,770	(7) 100%	(0)
Miami	19,254	(36) 100%	(0)
District 7:			
Douglas	57,932	(95) 88%	(13) 12%
District 8:			
Dickinson	19,993	(24) 82.8%	(5) 17.2%
Geary	28,111	(84) 79.2%	(22) 20.8%
Marion	13,935	(6) 85.7%	(1) 14.3%
Morris	6,432	(6) 66.7%	(3) 33.3%
District 9:			
Harvey	27,236	(88) 97.8%	(2) 2.2%
McPherson	24,778	(51) 91.1%	(5) 8.9%
District 10:			
Johnson	217,662	(304) 80%	(76) 20%
District 11:			
Cherokee	21,549	(11) 84.6%	(2) 15.4%
Crawford	37,850	(81) 95.3%	(4) 4.7%
Labette	25,775	(59) 92.2%	(5) 7.8%
Neosho	18,812	(17) 89.5%	(2) 10.5%
Wilson	11,317	(15) 78.9%	(4) 21.1%
District 12:			
Cloud	13,466	(18) 90%	(2) 10%
Jewell	6,009	(5) 100%	(0)
Lincoln	4,582	(2) 100%	(0)
Mitchell	8,010	(0)	(1) 100%
Republic	8,498	(1) 50%	(1) 50%
Washington	9,266	(4) 80%	(1) 20%

KANSAS (contd.)

County	Population	Guilty Pleas	Trials
District 13:			
Butler	36,658	(57) 89.1%	(7) 10.9%
Chautaugua	4,642	(0)	(5) 100%
Elk	3,858	(4) 66.7%	(2) 33.3%
Greenwood	8,916	(22) 88%	(3) 12%
District 14:			
Montgomery	39,949	(106) 91.4%	(10) 8.6%
District 15:			
Graham	4,751	(2) 66.7%	(1) 33.3%
Rooks	7,628	(4) 80%	(1) 20%
Sheridan	3,859	(0)	(0)
Sherman	7,792	(2) 100%	(0)
Thomas	7,501	(1) 50%	(1) 50%
District 16:			
Clark	2,896	(0)	(0)
Comanche	2,702	(1) 50%	(1) 50%
Ford	22,587	(38) 88.4%	(5) 11.6%
Gray	4,516	(6) 66.7%	(3) 33.3%
Kiowa	4,088	(8) 100%	(0)
Meade	4,912	(0)	(0)
District 17:			
Cheyenne	4,256	(0)	(0)
Decatur	4,988	(3) 50%	(3) 50%
Norton	7,279	(13) 68.4%	(6) 31.6%
Osborne	6,416	(2) 66.7%	(1) 33.3%
Phillips	7,999	(4) 100%	(0)
Rawlins	4,393	(2) 66.7%	(1) 33.3%
Smith	6,757	(2) 66.7%	(1) 33.3%
District 18:			
Sedgwick	350,694	(878) 69.8%	(380) 30.2%
District 19:			
Barber	7,016	(7) 87.5%	(1) 12.5%
Cowley	35,012	(62) 95.4%	(3) 4.6%
Harper	7,871	(1) 100%	(0)
Kingman	8,886	(10) 71.4%	(4) 28.6%
Pratt	10,056	(25) 92.6%	(2) 7.4%
Sumner	25,553	(24) 100%	(0)
District 20:			
Barton	30,663	(71) 78.9%	(19) 21.1%
Ellsworth	6,146	(7) 87.5%	(1) 12.5%
Rice	12,320	(14) 51.9%	(13) 48.1%
Russell	9,428	(11) 91.7%	(1) 8.3%
Stafford	5,943	(6) 100%	(0)
District 21:			
Clay	9,890	(15) 100%	(0)
Riley	56,788	(101) 92.7%	(8) 7.3%
District 22:			
Brown	11,685	(4) 66.7%	(2) 33.3%
Doniphan	9,107	(5) 71.4%	(2) 28.6%
Marshall	13,139	(6) 75%	(2) 25%
Nemaha	11,825	(1) 100%	(0)

KANSAS (contd.)

County	Population	Guilty Pleas	Trials
District 23:			
Ellis	24,730	(14) 93.3%	(1) 6.7%
Gove	3,940	(5) 83.3%	(1) 16.7%
Logan	3,814	(4) 80%	(1) 20%
Trego	4,436	(3) 75%	(1) 25%
Wallace	2,198	(4) 100%	(0)
District 24:			
Edwards	4,581	(8) 100%	(0)
Hodgeman	2,662	(2) 40%	(3) 60%
Lane	2,707	(1) 100%	(0)
Ness	4,791	(3) 100%	(0)
Pawnee	8,484	(11) 91.7%	(1) 8.3%
Rush	5,117	(8) 88.9%	(1) 11.1%
District 25:			
Finney	18,947	(46) 86.8%	(7) 13.2%
Greeley	2,044	(0)	(0)
Hamilton	2,747	(1) 100%	(0)
Kearney	3,047	(1) 100%	(0)
Scott	5,606	(2) 14.3%	(12) 85.7%
Wichita	3,274	(2) 66.7%	(1) 33.3%
District 26:			
Grant	5,961	(14) 77.8%	(4) 22.2%
Haskell	3,672	(5) 100%	(0)
Morton	3,576	(4) 80%	(1) 20%
Stanton	2,326	(0)	(2) 100%
Stevens	4,159	(2) 66.7%	(1) 33.3%
Seward	15,744	(46) 93.9%	(3) 6.1%
District 27:			
Reno	60,765	(171) 89.1%	(21) 10.9%
District 28:			
Ottawa	6,183	(0)	(1) 100%
Saline	46,592	(105) 76.6%	(32) 23.4%

LOUISIANA

The data in the following table were extracted from the Report of the Attorney General to the Governor and Members of the Legislature, Crimes Statistics Report for the year 1974. The unit of count is the defendant. The offenses include FBI index crimes only. The trial column includes cases disposed of by either judge or jury. No distinction is made between convictions and acquittals. The guilty plea column includes dispositions terminated by pleas of guilty only.

LOUISIANA

County	Population	Guilty Pleas	Trials
Acadia	52,109	(36) 60%	(24) 40%
Allen	20,794	(40) 93%	(3) 7%
Ascension	37,086	(23) 79.3%	(6) 20.7%
Assumption	19,654	(4) 66.7%	(2) 33.3%
Avoyelles	37,751	(56) 88.9%	(7) 11.1%
Beauregard	22,888	(9) 90%	(1) 10%
Bienville	16,024	(2) 66.7%	(1) 33.3%
Bossier	63,703	(69) 97.2%	(2) 2.8%
Caddo	230,184	(232) 86.9%	(35) 13.1%
Calcasieu	145,415	(305) 97.8%	(7) 2.2%
Caldwell	9,354	(5) 100%	(0)
Cameron	8,194	(8) 100%	(0)
Catahoula	11,769	(24) 96%	(1) 4%
Claiborne	17,024	(14) 93.3%	(1) 6.7%
Concordia	22,578	(16) 100%	(0)
Desota	22,764	(8) 66.7%	(4) 33.3%
E. Baton Rouge	285,167	(242) 82.6%	(51) 17.4%
East Carroll	12,884	(5) 100%	(0)
E. Feliciana	17,657	(12) 92.3%	(1) 7.7%
Evangeline	21,932	(46) 97.9%	(1) 2.1%
Franklin	23,946	(0)	(0)
Grant	13,671	(17) 58.6%	(12) 41.4%
Iberia	57,397	(42) 91.3%	(4) 8.7%
Iberville	30,746	(55) 96.5%	(2) 3.5%
Jackson	15,963	(0)	(0)
Jefferson	337,568	(184) 90.2%	(20) 9.8%
Jefferson Davis	29,554	(60) 90.9%	(6) 9.1%
Lafayette	109,716	(116) 93.5%	(8) 6.5%
Lafourche	68,941	(15) 100%	(0)
Lasalle	13,295	(15) 65.2%	(8) 34.8%
Lincoln	33,800	(88) 95.7%	(4) 4.3%
Livingston	36,511	(17) 42.5%	(23) 57.5%
Madison	15,065	(27) 100%	(0)
Morehouse	32,463	(42) 89.4%	(5) 10.6%
Natchitoches	35,219	(18) 81.8%	(4) 18.2%
Orleans	593,471	(405) 85.1%	(71) 14.9%
Ouachita	115,387	(40) 87%	(6) 13%
Plaquemines	25,225	(54) 93.1%	(4) 6.9%
Point Coupee	22,002	(48) 80%	(12) 20%
Rapides	118,078	(132) 99.2%	(1) .8%
Red River	9,226	(5) 83.3%	(1) 16.7%
Richland	21,774	(10) 100%	(0)
Sabine	18,638	(4) 66.7%	(2) 33.3%
St. Bernard	51,185	(82) 96.5%	(3) 3.5%
St. Charles	29,550	(13) 54.2%	(11) 45.8%
St. Helena	9,937	(11) 84.6%	(2) 15.4%
St. James	19,733	(2) 100%	(0)
St. John	23,813	(10) 76.9%	(3) 23.1%
St. Landry	80,364	-	-
St. Martin	32,453	(36) 87.8%	(5) 12.2%

LOUISIANA (contd.)

County	Population	Guilty Pleas	Trials
St. Mary	60,752	(73) 81.1%	(17) 18.9%
St. Tammany	63,585	(72) 88.9%	(9) 11.1%
Tangipahoa	65,875	(9) 90%	(1) 10%
Tensas	9,732	(4) 57.1%	(3) 42.9%
Terrebonne	76,049	(94) 89.5%	(11) 10.5%
Union	18,447	(26) 89.7%	(3) 10.3%
Vermilion	43,071	(38) 97.4%	(1) 2.6%
Vernon	53,794	(19) 100%	(0)
Washington	41,987	(34) 72.3%	(13) 27.7%
Webster	39,939	(36) 100%	(0)
W. Baton Rouge	16,864	(74) 86%	(12) 14%
West Carroll	13,028	(6) 100%	(0)
W Feliciana	11,376	(28) 84.8%	(5) 15.2%
Winn	16,369	(14) 58.3%	(10) 41.7%

MICHIGAN

The data in the following table were extracted from the 1974-75 report of the State Court Administrator of the State of Michigan. The unit of count is the defendant. The offenses included are felonies only. The trial column includes all cases which were disposed of by either trial judge or jury. No distinction is made between convictions and acquittals. The guilty plea column contains cases disposed of without trial. It is assumed that most, if not all, of these are guilty pleas.

MICHIGAN

County	Population	Guilty Pleas		Trials	
Alcona	7,113	(12)	100%	(0)	
Alger	8,568	(34)	87.2%	(5)	12.8%
Allegan	66,575	(134)	90.5%	(14)	9.5%
Alpena	30,708	(66)	91.7%	(6)	8.3%
Antrim	12,612	(44)	100%	(0)	
Arenac	11,149	(80)	96.4%	(3)	3.6%
Baraga	7,789	(8)	88.9%	(1)	11.1%
Barry	38,166	(73)	92.4%	(6)	7.6%
Bay	117,339	(214)	91.8%	(19)	8.2%
Benzie	8,593	(15)	48.4%	(16)	51.6%
Berrien	163,875	(433)	82%	(95)	18%
Branch	37,906	(92)	92%	(8)	8%
Calhoun	141,963	(421)	91.3%	(40)	8.7%
Cass	43,312	(125)	93.3%	(9)	6.7%
Charlevoix	16,541	(25)	96.2%	(1)	3.8%
Cheboygan	16,573	(16)	100%	(0)	
Chippewa	32,412	(58)	100%	(0)	
Clare	16,695	(92)	95.8%	(4)	4.2%
Clinton	48,492	(126)	90.6%	(13)	9.4%
Crawford	6,482	(58)	89.2%	(7)	10.8%
Delta	35,924	(62)	70.5%	(26)	29.5%
Dickinson	23,753	(29)	93.5%	(2)	6.5%
Eaton	68,892	(140)	80.9%	(33)	19.1%
Emmet	18,331	(47)	92.2%	(4)	7.8%
Genesee	444,341	(743)	87.9%	(102)	12.1%
Gladwin	13,471	(17)	26.6%	(47)	73.4%
Gogebic	20,676	(3)	15.8%	(16)	84.2%
Grand Traverse	39,175	(132)	86.3%	(21)	13.7%
Gratiot	39,246	(54)	90%	(6)	10%
Hillsdale	37,171	(99)	93.4%	(7)	6.6%
Houghton	34,652	(29)	82.9%	(6)	17.1%
Huron	34,083	(11)	31.4%	(24)	68.6%
Ingham	261,039	(674)	92.8%	(52)	7.2%
Ionia	45,848	(92)	80%	(23)	20%
Iosco	24,905	(104)	91.2%	(10)	8.8%
Iron	13,813	(4)	26.7%	(11)	73.3%
Isabella	44,594	(97)	96%	(4)	4%
Jackson	143,274	(329)	90.9%	(33)	9.1%
Kalamazoo	201,550	(237)	87.1%	(35)	12.9%
Kalkaska	5,272	(22)	91.7%	(2)	8.3%
Kent	411,044	(1,032)	91%	(102)	9%
Keweenaw	2,343	(0)		(0)	
Lake	5,582	(26)	96.3%	(1)	3.7%
Lapeer	52,317	(98)	83.8%	(19)	16.2%
Leelanau	10,872	(27)	93.1%	(2)	6.9%
Lenawee	81,609	(215)	80.8%	(51)	19.2%
Livingston	58,967	(83)	98.2%	(10)	10.8%
Luce	6,789	(2)	8.3%	(22)	91.7%
Mackinac	9,660	(1)	3.3%	(29)	96.7%
Macomb	625,309	(1,354)	94.6%	(78)	5.4%

MICHIGAN (contd.)

County	Population	Guilty Pleas		Trials	
Manistee	20,094	(41)	95.3%	(2)	4.7%
Marquette	64,686	(128)	92.1%	(11)	7.9%
Mason	22,612	(71)	95.9%	(3)	4.1%
Mecosta	27,992	(122)	100%	(0)	
Menominee	24,587	(35)	85.4%	(6)	14.6%
Midland	63,769	(183)	86.7%	(28)	13.3%
Missaukee	7,127	(7)	36.8%	(12)	63.2%
Monroe	118,479	(273)	86.9%	(41)	13.1%
Montcalm	39,660	(102)	90.3%	(11)	9.7%
Montmorency	5,247	(10)	90.9%	(1)	9.1%
Muskegon	157,426	(727)	89.9%	(82)	10.1%
Newaygo	27,992	(87)	98.9%	(1)	1.1%
Oakland	907,871	(3,858)	95%	(204)	5%
Oceana	17,984	(89)	100%	(0)	
Ogemaw	11,903	(43)	93.5%	(3)	6.5%
Ontonagon	10,548	(7)	53.8%	(6)	46.2%
Osceola	14,838	(55)	100%	(0)	
Oscoda	4,726	(0)		(11)	100%
Otsego	10,422	(28)	96.6%	(1)	3.4%
Ottawa	128,181	(284)	95.6%	(13)	4.4%
Presque Isle	12,836	(0)		(15)	100%
Roscommon	9,892	(97)	96%	(4)	4%
Saginaw	219,743	(602)	84.1%	(114)	15.9%
Sanilac	34,889	(81)	100%	(0)	
Schoolcraft	8,226	(28)	96.6%	(1)	3.4%
Shiawassee	63,075	(95)	88.8%	(12)	11.2%
St. Clair	120,175	-		-	
St. Joseph	47,392	(137)	81.5%	(31)	18.5%
Tuscola	48,603	(111)	88.1%	(15)	11.9%
Van Buren	56,173	(204)	94.4%	(12)	5.6%
Washtenaw	234,103	(1,115)	88.6%	(143)	11.4%
Wayne	2,666,751	(3,424)	91%	(337)	9%
Wexford	19,717	(48)	84.2%	(9)	15.8%

MINNESOTA

The data in the following table were extracted from the Eleventh Annual Report of the Minnesota Courts for the year 1974, prepared by the Office of the State Court Administrator for the Supreme Court of Minnesota. The unit of count is the defendant. The cases include felony offenses disposed of in the district courts of Minnesota. The trials column includes all cases disposed of either by trial judge or jury. No distinction is made between convictions and acquittals. The guilty plea column contains cases disposed of by pleas of guilty.

MINNESOTA

County	Population	Guilty Pleas		Trials	
District 1:					
Carver	28,310	(35)	89.7%	(4)	10.3%
Dakota	139,808	(142)	90.4%	(15)	9.6%
Goodhue	34,763	(24)	95%	(1)	4%
LeSueur	21,332	(16)	94.1%	(1)	5.9%
McLeod	27,662	(13)	86.7%	(2)	13.3%
Scott	32,423	(66)	97.1%	(2)	2.9%
Sibley	15,845	(8)	72.7%	(3)	27.3%
District 2:					
Ramsey	472,255	(588)	85.5%	(100)	14.5%
District 3:					
Dodge	13,037	(15)	88.2%	(2)	11.8%
Fillmore	21,916	(9)	90%	(1)	10%
Freeborn	38,064	(40)	93%	(3)	7%
Houston	17,556	(15)	88.2%	(2)	11.8%
Mower	43,783	(37)	90.2%	(4)	9.8%
Olmsted	84,104	(66)	83.5%	(13)	16.5%
Rice	41,582	(31)	93.9%	(2)	6.1%
Steele	26,931	(41)	97.6%	(1)	2.4%
Wabasha	17,224	(10)	71.4%	(4)	28.6%
Waseca	16,663	(23)	100%	(0)	
Winona	44,409	(54)	93.1%	(4)	6.9%
District 4:					
Hennepin	960,080	(1,310)	85.4%	(224)	14.6%
District 5:					
Blue Earth	52,322	(69)	84.5%	(9)	11.5%
Brown	28,887	(31)	81.6%	(7)	18.4%
Cottonwood	14,887	(1)	25%	(3)	75%
Faribault	20,896	(13)	72.2%	(5)	27.8%
Jackson	14,352	(4)	80%	(1)	20%
Lincoln	8,143	(2)	66.7%	(1)	33.3%
Lyon	24,273	(12)	100%	(0)	
Martin	24,316	(61)	84.6%	(11)	15.3%
Murray	12,508	(10)	40%	(15)	60%
Nicollet	24,518	(16)	66.7%	(8)	33.3%
Nobles	23,208	(14)	82.4%	(3)	17.6%
Pipestone	12,791	(4)	100%	(0)	
Redwood	20,024	(9)	75%	(3)	25%
Rock	11,346	(0)		(0)	
Watonwan	13,298	(14)	87.5%	(2)	12.5%
District 6:					
Carlton	28,072	(15)	83.3%	(3)	16.7%
Cook	3,423	(0)		(0)	
Lake	13,351	(15)	93.8%	(1)	6.2%
St. Louis	220,693	(213)	90.3%	(23)	9.7%
District 7:					
Becker	24,372	(35)	56.5%	(27)	43.5%
Benton	20,841	(21)	95.5%	(1)	4.5%
Clay	46,585	(20)	87%	(3)	13%
Douglas	22,892	(23)	92%	(2)	8%
Mille Lacs	15,703	(11)	100%	(0)	

MINNESOTA (contd.)

County	Population	Guilty Pleas	Trials
Morrison	26,949	(18) 100%	(0)
Otter Tail	46,097	(47) 94%	(3) 6%
Stearns	95,400	(44) 88%	(6) 12%
Todd	22,114	(10) 100%	(0)
Wadena	12,412	(9) 90%	(1) 10%
District 8:			
Big Stone	7,941	(1) 100%	(0)
Chippewa	15,109	(1) 12.5%	(7) 87.5%
Grant	7,462	(2) 50%	(2) 50%
Kandiyohi	30,548	(58) 93.5%	(4) 6.5%
LacQuiParle	11,164	(0)	(7) 100%
Meeker	18,810	(17) 94.4%	(1) 5.6%
Pope	11,107	(7) 63.6%	(4) 36.4%
Renville	21,139	(2) 100%	(0)
Stevens	11,218	(1) 9.1%	(10) 90.9%
Swift	13,177	(9) 90%	(1) 10%
Traverse	6,254	(1) 100%	(0)
Wilkin	9,389	(14) 93.3%	(1) 6.7%
Yellow Medicine	14,418	(9) 81.8%	(2) 18.2%
District 9:			
Aitkin	11,403	(18) 100%	(0)
Beltrami	26,373	(49) 89.1%	(6) 10.9%
Cass	17,323	(32) 88.9%	(4) 11.1%
Clearwater	8,013	(26) 96.3%	(1) 3.7%
Crow Wing	34,826	(47) 94%	(3) 6%
Hubbard	10,583	(12) 80%	(3) 20%
Itasca	35,530	(56) 71.8%	(22) 28.2%
Kittson	6,853	(4) 66.7%	(2) 33.3%
Koochiching	17,131	(88) 88.9%	(11) 11.1%
Lake of Woods	3,987	(12) 80%	(3) 20%
Mahnomen	5,638	(1) 25%	(3) 75%
Marshall	13,060	(0)	(0)
Norman	10,008	(5) 62.5%	(3) 37.5%
Pennington	13,266	(19) 95%	(1) 5%
Polk	34,435	(43) 95.6%	(2) 4.4%
Red Lake	5,388	(2) 66.7%	(1) 33.3%
Roseau	11,569	(11) 100%	(0)
District 10:			
Anoka	154,556	(110) 87.3%	(16) 12.7%
Chisago	17,492	(24) 96%	(1) 4%
Isanti	16,560	(14) 100%	(0)
Kanabec	9,775	(13) 100%	(0)
Pine	16,821	(39) 92.9%	(3) 7.1%
Sherburne	18,344	(25) 100%	(0)
Washington	82,948	(106) 93.8%	(7) 6.2%
Wright	38,933	(34) 100%	(0)

MISSOURI

The data in the following table were extracted from the Annual Statistical Report of the Judicial Department of Missouri compiled by the Office of the State Court Administrator for the year 1976. The unit of count is the defendant. The cases include felonies only. The trial column includes cases disposed of either by trial judge or jury. No distinction is made between acquittals and convictions. The guilty plea column contains cases disposed of by pleas of guilty only.

MISSOURI

County	Population	Guilty Pleas	Trials
1st Circuit:			
Clark	8,260	(18) 100%	(0)
Schuyler	4,665	(4) 100%	(0)
Scotland	5,499	(8) 88.9%	(1) 11.1%
2nd Circuit:			
Adair	22,472	(40) 95.2%	(2) 4.8%
Knox	5,692	(15) 100%	(0)
Lewis	10,993	(18) 64.3%	(10) 35.7%
3rd Circuit:			
Grundy	11,819	(13) 76.5%	(4) 23.5%
Harrison	10,257	(12) 92.3%	(1) 7.7%
Mercer	4,910	(4) 66.7%	(2) 33.3%
Putnam	5,916	(10) 52.6%	(9) 47.4%
4th Circuit:			
Atchison	9,240	(3) 50%	(3) 50%
Gentry	8,060	(0)	(1) 100%
Holt	6,654	(2) 66.7%	(1) 33.3%
Nodaway	22,467	(7) 70%	(3) 30%
5th Circuit:			
Andrew	11,913	(21) 100%	(0)
Buchanan	86,915	(66) 71.7%	(26) 28.3%
Clinton	12,462	(12) 85.7%	(2) 14.3%
6th Circuit:			
Platte	32,081	(109) 94%	(7) 6§
7th Circuit:			
Clay	123,322	(203) 92.3%	(17) 7.7%
8th Circuit:			
Carroll	12,565	(17) 94.4%	(1) 5.6%
Ray	17,599	(28) 100%	(0)
9th Circuit:			
Chariton	11,084	(10) 40%	(15) 60%
Linn	15,125	(0)	(9) 100%
Sullivan	7,572	(12) 92.3%	(1) 7.7%
10th Circuit:			
Marion	28,121	(24) 61.5%	(15) 38.5%
Monroe	9,542	(7) 87.5%	(1) 12.5%
Ralls	7,764	(7) 53.8%	(6) 46.2%
11th Circuit:			
Lincoln	18,041	(32) 74.4%	(11) 25.6%
Pike	16,928	(38) 97.4%	(1) 2.6%
St. Charles	92,954	(92) 89.3%	(11) 10.7%
12th Circuit:			
Audrain	25,362	(77) 93.9%	(5) 6.1%
Montgomery	11,000	(48) 90.6%	(5) 9.4%
Warren	9,699	(24) 85.7%	(4) 14.3%
13th Circuit:			
Boone	80,911	(258) 83%	(53) 17%
Callaway	25,850	(92) 86%	(15) 14%

MISSOURI (contd.)

County	Population	Guilty Pleas	Trials
14th Circuit:			
Howard	10,561	(22) 91.7%	(2) 8.3%
Randolph	22,434	(51) 96.2%	(2) 3.8%
15th Circuit:			
Layafette	26,626	(27) 87.1%	(4) 12.9%
Saline	24,633	(47) 95.9%	(2) 4.1%
16th Circuit:			
Jackson	654,558	(863) 84.4%	(160) 15.6%
17th Circuit:			
Cass	39,448	(76) 79.2%	(20) 20.8%
Johnson	34,172	(16) 48.5%	(17) 51.5%
18th Circuit:			
Cooper	14,732	(32) 86.5%	(5) 13.5%
Pettis	34,137	(39) 81.3%	(9) 18.7%
19th Circuit:			
Cole	46,228	(88) 86.3%	(14) 13.7%
20th Circuit:			
Franklin	55,116	(50) 86.2%	(8) 13.8%
Gasconade	11,878	(18) 80.8%	(4) 18.2%
Osage	10,994	(14) 100%	(0)
21st Circuit:			
St. Louis Co.	951,353	(1,642) 92.1%	(140) 7.9%
22nd Circuit:			
St. Louis City	622,236	(2,732) 86.2%	(437) 13.8%
23rd Circuit:			
Jefferson	105,248	(96) 70%	(41) 30%
Washington	15,086	(17) 77.3%	(5) 22.7%
24th Circuit:			
Madison	8,641	(19) 100%	(0)
Perry	14,393	(11) 78.6%	(3) 21.4%
St. Francois	36,818	(31) 100%	(0)
St. Genevieve	12,867	(10) 100%	(0)
25th Circuit:			
Maries	6,851	(9) 69.2%	(4) 30.8%
Phelps	29,481	(103) 93.6%	(7) 6.4%
Pulaski	53,781	(22) 61.1%	(14) 38.9%
Texas	18,320	(32) 91.4%	(3) 8.6%
26th Circuit:			
Camden	13,315	(11) 91.7%	(1) 8.3%
Laclede	19,944	(12) 92.3%	(1) 7.7%
Miller	15,026	(28) 82.4%	(6) 17.6%
Moniteau	10,742	(32) 97%	(1) 3%
Morgan	10,068	(0)	(6) 100%
27th Circuit:			
Bates	15,468	(12) 80%	(3) 20%
Henry	18,451	(17) 74%	(6) 26%
St. Clair	7,667	(12) 63.1%	(7) 36.9%
28th Circuit:			
Marion	28,121	(4) 44.4%	(5) 55.6%
Cedar	9,424	(0)	(8) 100%
Dade	6,850	(6) 85.7%	(1) 14.3%
Vernon	19,065	(27) 62.8%	(16) 37.2%

MISSOURI (contd.)

County	Population	Guilty Pleas	Trials
29th Circuit:			
Jasper	79,852	(235) 84.2%	(44) 15.8%
30th Circuit:			
Benton	9,695	(29) 100%	(0)
Dallas	10,054	(8) 66.7%	(4) 33.3%
Hickory	4,481	(5) 100%	(0)
Polk	15,415	(36) 83.7%	(7) 16.3%
Webster	15,562	(21) 91.3%	(2) 8.7%
31st Circuit:			
Greene	152,929	(211) 76.4%	(65) 23.6%
32nd Circuit:			
Bollinger	8,820	(12) 92.3%	(1) 7.7%
Cape Girardeau	49,350	(92) 69.2%	(41) 30.8%
33rd Circuit:			
Mississippi	16,647	(44) 86.3%	(7) 13.7%
Scott	33,250	(7) 7.3%	(89) 92.7%
34th Circuit:			
New Madrid	23,420	(109) 97.3%	(3) 2.7%
Pemiscot	26,373	(80) 94.1%	(5) 5.9%
35th Circuit:			
Dunklin	33,742	(83) 94.3%	(5) 5.7%
Stoddard	25,771	(47) 88.7%	(6) 11.3%
36th Circuit:			
Butler	33,529	(54) 87%	(8) 13%
Ripley	9,803	(36) 76.6%	(11) 23.4%
37th Circuit:			
Carter	3,878	(0)	(6) 100%
Howell	23,521	(60) 96.8%	(2) 3.2%
Oregon	9,180	(2) 66.7%	(1) 33.3$
Shannon	7,196	(18) 94.7%	(1) 5.3%
38th Circuit:			
Christian	15,124	(10) 83.3%	(2) 16.7%
Douglas	9,268	(1) 5.9%	(16) 94.1%
Ozark	6,226	(26) 100%	(0)
Taney	13,023	(11) 100%	(0)
Wright	13,667	(32) 76.2%	(10) 23.8%
39th Circuit:			
Barry	19,597	(20) 87%	(3) 13%
Lawrence	24,585	(6) 66.7%	(3) 33.3%
Stone	9,921	(20) 87%	(3) 13%
40th Circuit:			
McDonald	12,357	(0)	(9) 100%
Newton	32,901	(59) 62.1%	(36) 37.9%
41st Circuit:			
Macon	15,432	(54) 94.7%	(3) 5.3%
Shelby	7,906	(10) 83.3%	(2) 16.7%

MISSOURI (contd.)

County	Population	Guilty Pleas	Trials
42nd Circuit:			
Crawford	14,828	(14) 66.7%	(7) 33.3%
Dent	11,457	(43) 95.6%	(2) 4.4%
Iron	9,529	(16) 100%	(0)
Reynolds	6,106	(5) 45.5%	(6) 54.5%
Wayne	8,546	(16) 88.9%	(2) 11.1%
43rd Circuit:			
Caldwell	8,351	(4) 40%	(6) 60%
Daviess	8,420	(7) 100%	(0)
DeKalb	7,305	(1) 16.7%	(5) 83.3%
Livingston	15,368	(20) 76.9%	(6) 23.1%

NEW JERSEY

The data in the following report were extracted from the Annual Report of the Administrative Director of the Courts for the year September 1973 through August 1974. The unit of count is the number of indictments. The trial column includes all cases disposed of by either trial judge or jury. No distinction is made between conviction and acquittals. It should also be noted that in New Jersey, an indictment is considered disposed of by trial if the drawing of the jury is started or in a bench trial, if the first witness is sworn. This remains the case even if the defendant thereafter pleads guilty or the case is dismissed. The guilty plea column includes only those cases for which a plea of guilty was rendered before trial.

NEW JERSEY

County	Population	Guilty Pleas		Trials	
Atlantic	175,043	(457)	90.5%	(48)	9.5%
Bergen	898,012	(979)	91.4%	(92)	8.6%
Burlington	323,132	(720)	91.4%	(68)	8.5%
Camden	456,291	(1,050)	91.8%	(94)	8.2%
Cape May	59,554	(352)	97.2%	(10)	2.8%
Cumberland	121,374	(512)	97%	(16)	3%
Essex	929,986	(1,714)	77.1%	(510)	22.9%
Gloucester	172,681	(353)	96.4%	(13)	3.6%
Hudson	609,266	(872)	90%	(98)	10%
Hunterdon	69,718	(237)	98.9%	(3)	1.2%
Mercer	303,968	(1,115)	95.2%	(56)	4.8%
Middlesex	583,813	(969)	92.6%	(77)	7.4%
Monmouth	459,379	(826)	84.3%	(154)	15.7%
Morris	383,454	(383)	90.8%	(39)	9.2%
Ocean	208,470	(405)	88.8%	(51)	11.2%
Passaic	460,782	(701)	75.3%	(230)	24.7%
Salem	60,346	(194)	92.8%	(15)	7.2%
Somerset	198,372	(246)	88.8%	(31)	11.2%
Sussex	77,528	(155)	96.3%	(6)	3.7%
Union	543,116	(1,175)	90%	(134)	10%
Warren	73,879	(119)	96%	(5)	4%

NEW YORK

The data in the following table were extracted from the Twentieth Annual Report of the Judicial Conference and the Office of Court Administration for the State of New York, for the judicial year July 1, 1973 through June 30, 1974. The unit of count is the defendant. The cases include, for the City of New York, all cases disposed of by the criminal court of the City of New York, and for the jurisdictions outside the City of New York, all cases disposed of by the supreme court and county courts. The trial column includes all cases disposed of through conviction in a trial by judge or jury. Thus, acquittals are not included in this column. The guilty plea column includes only those cases which were disposed of by pleas of guilty.

NEW YORK

County	Population	Guilty Pleas		Trials	
District 1:					
New York	1,539,233	(32,100)	99.3%	(242)	.7%
Bronx	1,471,690	(11,059)	98.1%	(216)	1.9%
District 2:					
Kings	2,602,012	(19,806)	97.9%	(432)	2.1%
Richmond	295,443	(1,612)	95.8%	(70)	4.2%
District 3:					
Albany	286,742	(157)	98.7%	(2)	1.3%
Columbia	51,519	(73)	91.3%	(7)	8.7%
Greene	33,136	(57)	98.3%	(1)	1.7%
Rensselaer	152,510	(118)	96.7%	(4)	3.3%
Schoharie	24,750	(29)	93.5%	(2)	6.5%
Sullivan	52,580	(62)	96.9%	(2)	3.1%
Ulster	141,241	(64)	83.1%	(13)	16.9%
District 4:					
Clinton	72,934	(57)	90.5%	(6)	9.5%
Essex	34,631	(130)	99.2%	(1)	.8%
Franklin	43,931	(66)	94.3%	(4)	5.7%
Fulton	52,637	(50)	87.7%	(7)	12.3%
Hamilton	4,714	(5)	55.6%	(4)	44.4%
Montgomery	55,883	(52)	96.3%	(2)	3.7%
St. Lawrence	111,991	(72)	86.7%	(11)	13.3%
Saratoga	121,679	(67)	94.4%	(4)	5.6%
Schenectady	160,979	(87)	87%	(13)	13%
Warren	49,402	(108)	100%	(0)	
District 5:					
Herkimer	67,633	(20)	83.3%	(4)	16.7%
Jefferson	88,508	(85)	94.4%	(5)	5.6%
Lewis	23,644	(40)	97.6%	(1)	2.4%
Oneida	273,037	(253)	92%	(22)	8%
Onondaga	472,746	(389)	91.3%	(37)	8.7%
Oswego	100,897	(90)	85.7%	(15)	14.3%
District 6:					
Broome	221,815	(193)	93.7%	(13)	6.3%
Chemung	101,537	(213)	87.3%	(31)	12.7%
Chenango	46,368	(37)	92.5%	(3)	7.5%
Cortland	45,894	(39)	81.3%	(9)	18.7%
Delaware	44,718	(63)	92.6%	(5)	7.4%
Madison	62,864	(50)	90.9%	(5)	9.1%
Otsego	56,181	(39)	97.5%	(1)	2.5%
Schuyler	16,737	(16)	88.9%	(2)	11.1%
Tioga	46,513	(64)	97%	(2)	3%
Tompkins	76,879	(104)	83.9%	(20)	16.1%
District 7:					
Cayuga	77,439	(46)	86.8%	(7)	13.2%
Livingston	54,041	(56)	98.2%	(1)	1.8%
Monroe	711,917	(392)	85%	(69)	15%
Ontario	78,849	(55)	91.7%	(5)	8.3%
Seneca	35,083	(19)	86.4%	(3)	13.6%
Steuben	99,546	(88)	92.6%	(7)	7.4%
Wayne	79,404	(74)	93.7%	(5)	6.3%
Yates	19,831	(25)	96.2%	(1)	3.8%

NEW YORK (contd.)

County	Population	Guilty Pleas		Trials	
District 8:					
Allegany	46,458	(66)	97.1%	(2)	2.9%
Cattaraugus	81,666	(91)	98.9%	(1)	1.1%
Chautauqua	147,305	(107)	94.7%	(6)	5.3%
Erie	1,113,491	(771)	77.9%	(219)	22.1%
Genesee	58,722	(56)	94.9%	(3)	5.1%
Niagara	235,720	(106)	71.6%	(42)	23.4%
Orleans	37,305	(35)	85.4%	(6)	14.6%
Wyoming	37,688	(19)	100%	(0)	
District 9:					
Dutchess	222,295	(203)	91.4%	(19)	8.6%
Orange	221,657	(288)	96.3%	(11)	3.7%
Putnam	56,696	(51)	98.1%	(1)	1.9%
Rockland	229,903	(160)	97%	(5)	3%
Westchester	894,104	(893)	91.6%	(82)	8.4%
District 10:					
Nassau	1,428,075	(2,332)	94.3%	(142)	5.7%
Suffolk	1,124,950	(1,036)	94.4%	(61)	5.6%
District 11:					
Queens	1,986,473	(8,866)	95.6%	(404)	4.4%

NORTH DAKOTA

The statistics in the following table were extracted from the North Dakota Judicial Council's Statistical Compilation and Report for the period July through December 1974. The unit of count is the defendant. The cases included in the table presented in this report include felonies. The trials column is based upon convictions in both jury and nonjury trials. The guilty pleas column reflects the number of guilty pleas registered with the court.

NORTH DAKOTA

County	Population	Guilty Pleas	Trials
District 1: Barnes Cass Grand Forks Griggs Nelson Steele Traill	182,300	(159) 94.6%	(9) 5.4%
District 2: Benson Bottineau Cavalier McHenry Pembina Pierce Ramsey Renville Rolette Tower Walsh	108,377	(74) 91.4%	(7) 8.6%
District 3: Dickey Emmons LaMoure Logan McIntosh Ransom Richland Sargent	54,900	(26) 92.9%	(2) 7.1%
District 4: Burleigh Eddy Foster Kidder McLean Sheridan Stutsman Wells	102,600	(40) 97.6%	(1) 2.4%
District 5: Burke Divide McKenzie Mountrail Ward Williams	103,900	(55) 85.9%	(9) 14.1%

NORTH DAKOTA (contd.)

County	Population	Guilty Pleas	Trials
District 6:	81,100	(41) 75.9%	(13) 24.1%
Adams			
Billings			
Bowman			
Dunn			
Golden Valley			
Grant			
Hettinger			
Mercer			
Morton			
Oliver			
Sioux			
Slope			
Stark			

OHIO

The data in the following table were extracted from the Ohio Courts Summary 1975, published by the Office of the Administrative Director of Courts. The data cover the activities of the courts for the calendar year 1975. The unit of count is the defendant. The offenses included in the present table are felonies only. The trial column indicates all cases disposed of by either trial judge or jury. No differentiation is made between acquittals and convictions. The guilty plea column contains only cases completed by a plea of guilty.

OHIO

County	Population	Guilty Pleas		Trials	
Cuyahoga	1,721,300	(2,572)	69.9%	(1,110)	30.1%
Hamilton	924,018	(1,606)	61.7%	(998)	38.3%
Franklin	833,249	(1,872)	83.2%	(378)	16.8%
Montgomery	606,148	(1,301)	83.7%	(253)	16.3%
Summit	553,371	(1,056)	93.6%	(72)	6.4%
Lucas	484,370	(1,051)	88.8%	(133)	11.2%
Stark	372,210	(409)	82.1%	(89)	17.9%
Manhoning	303,424	(394)	92.7%	(31)	7.3%
Lorain	256,843	(354)	91.5%	(33)	8.5%
Trumbull	232,579	(300)	73.5%	(108)	26.5%
Butler	226,207	(419)	75.9%	(133)	24.1%
Lake	197,200	(287)	89.1%	(35)	10.9%
Clark	156,946	(228)	80.6%	(55)	19.4%
Richland	129,997	(133)	69.3%	(59)	30.7%
Portage	125,868	(134)	80.2%	(33)	19.8%
Greene	125,057	(94)	77.7%	(27)	22.3%
Allen	111,144	(253)	92%	(22)	8%
Columbiana	108,310	(128)	73.1%	(47)	26.9%
Licking	107,799	(248)	88.6%	(32)	11.4%
Ashtabula	98,237	(100)	84%	(19)	16%
Jefferson	96,193	(43)	82.7%	(9)	17.3%
Clermont	95,725	(185)	70%	(79)	30%
Wood	89,722	(98)	92.5%	(8)	7.5%
Wayne	87,123	(129)	84.2%	(8)	5.8%
Warren	84,925	(121)	75.6%	(39)	24.4%
Miami	84,342	(142)	81.1%	(33)	18.9%
Medina	82,717	(8)	3.7%	(209)	96.3%
Belmont	80,917	(59)	66.3%	(30)	33.7%
Muskingum	77,826	(156)	95.1%	(8)	4.9%
Tuscarawas	77,211	(98)	76%	(31)	24%
Scioto	76,951	(89)	66.4%	(45)	33.6%
Erie	75,909	(138)	89%	(17)	11%
Fairfield	73,301	(33)	91.7%	(3)	8.3%
Marion	64,724	(165)	91.2%	(16)	8.8%
Geauga	62,977	(97)	94.2%	(6)	5.8%
Hancock	61,217	(72)	82.8%	(15)	17.2%
Ross	61,211	(92)	44%	(117)	56%
Sandusky	60,983	(53)	61.6%	(33)	38.4%
Seneca	60,696	(88)	90.7%	(9)	9.3%
Washington	57,160	(86)	97.7%	(2)	2.3%
Lawrence	56,868	(0)		(16)	100%
Athens	54,889	(75)	79.8%	(19)	20.2%
Crawford	50,364	(38)	44.2%	(48)	55.8%
Huron	49,587	(110)	94.8%	(6)	5.2%
Darke	49,141	(85)	88.5%	(11)	11.5%
Ashland	43,303	(77)	87.5%	(11)	12.5%
Delaware	42,908	(83)	92.2%	(7)	7.8%
Knox	41,795	(16)	48.5%	(17)	51.5%

OHIO (contd.)

County	Population	Guilty Pleas		Trials	
Pickaway	40,071	(231)	91.3%	(22)	8.7%
Auglaize	38,602	(56)	98.2%	(1)	1.8%
Shelby	37,748	(80)	96.4%	(3)	3.6%
Guernsey	37,665	(76)	96.2%	(3)	3.8%
Ottawa	37,099	(35)	94.6%	(2)	5.4%
Defiance	36,949	(70)	88.6%	(9)	11.4%
Mercer	35,265	(12)	22.6%	(41)	77.4%
Logan	35,072	(3)	6.1%	(46)	93.9%
Preble	34,719	(28)	71.8%	(11)	28.2%
Williams	33,669	(46)	88.5%	(6)	11.5%
Coshocton	33,486	(0)		(85)	100%
Fulton	33,071	(12)	38.7%	(19)	61.3%
Clinton	31,464	(1)	1.3%	(75)	98.7%
Putnam	31,134	(10)	17.2%	(48)	82.8%
Hardin	30,813	(19)	76%	(6)	24%
Champaign	30,491	(63)	82.9%	(13)	17.1%
Van Wert	29,194	(73)	97.3%	(2)	2.7%
Highland	28,996	(0)		(53)	100%
Madison	28,318	(54)	68.4%	(25)	31.6%
Perry	27,434	(4)	10.5%	(34)	89.5%
Jackson	27,174	(41)	89.1%	(5)	10.9%
Henry	27,058	(54)	93.1%	(4)	6.9%
Brown	26,635	(13)	22.8%	(44)	77.2%
Fayette	25,461	(63)	78.8%	(17)	21.2%
Gallia	25,239	(25)	86.2%	(4)	13.8%
Union	23,786	(32)	97%	(1)	3%
Holmes	23,024	(38)	100%	(0)	
Wyandot	21,826	(1)	5.6%	(17)	94.4%
Carroll	21,579	(63)	96.9%	(2)	3.1%
Morrow	21,348	(34)	94.4%	(2)	5.6%
Hocking	20,322	(34)	89.5%	(4)	10.5%
Meigs	19,799	(27)	81.8%	(6)	18.2%
Paulding	19,329	(27)	65.9%	(14)	34.5%
Pike	19,114	(36)	94.7%	(2)	5.3%
Adams	18,957	(15)	71.4%	(6)	28.6%
Harrison	17,013	(5)	71.4%	(2)	28.6%
Monroe	15,739	(0)		(11)	100%
Morgan	12,375	(7)	63.6%	(4)	36.4%
Noble	10,428	(16)	100%	(0)	
Vinton	9,420	(14)	60.9%	(9)	39.1%

OKLAHOMA

The data presented in the following table were extracted from the Report on the Judiciary, 1974 for the State of Oklahoma, by the Administrative Director of the Courts. The unit of count is the defendant. The offenses includes felonies only. The trial column includes those cases disposed of by either trial judge or jury. No distinction is made between acquittals and convictions. The guilty plea column includes only those cases terminated by guilty pleas.

OKLAHOMA

County	Population	Guilty Pleas		Trials	
Adair	15,141	(0)		(34)	100%
Alfalfa	7,224	(0)		(18)	100%
Atoka	10,972	(0)		(59)	100%
Beaver	6,282	(8)	72.7%	(3)	27.3%
Beckham	15,754	(55)	98.2%	(1)	1.8%
Blaine	11,794	(21)	91.3%	(2)	8.7%
Bryan	25,552	(70)	86.4%	(11)	13.6%
Caddo	28,931	(30)	76.9%	(9)	23.1%
Canadian	32,245	(67)	98.5%	(1)	1.5%
Carter	37,349	(16)	14.2%	(97)	85.8%
Cherokee	23,174	(40)	95.2%	(2)	4.8%
Choctaw	15,141	(56)	87.5%	(8)	12.5%
Cimarron	4,145	(6)	85.7%	(1)	14.3%
Cleveland	81,839	(194)	56.2%	(151)	43.8%
Coal	5,525	(23)	100%	(0)	
Comanche	108,144	(274)	89%	(34)	11%
Cotton	6,832	(15)	100%	(0)	
Craig	14,722	(32)	100%	(0)	
Creek	45,532	(44)	93.6%	(3)	6.4%
Custer	22,665	(59)	93.7%	(4)	6.3%
Delaware	17,767	(16)	88.9%	(2)	11.1%
Dewey	5,656	(8)	66.7%	(4)	33.3%
Ellis	5,129	(2)	50%	(2)	50%
Garfield	55,365	(142)	94%	(9)	6%
Garvin	24,874	(33)	76.7%	(10)	23.3%
Grady	29,354	(78)	90.7%	(8)	9.3%
Grant	7,117	(6)	54.5%	(5)	45.5%
Greer	7,979	(15)	88.2%	(2)	11.8%
Harmon	5,136	(8)	88.9%	(1)	11.1%
Harper	5,151	(5)	71.4%	(2)	28.6%
Haskell	9,578	(22)	88%	(3)	12%
Hughes	13,228	(12)	34.4%	(23)	65.7%
Jackson	30,902	(70)	92.1%	(6)	7.9%
Jefferson	7,125	(21)	87.5%	(3)	12.5%
Johnston	7,870	(10)	90.9%	(1)	9.1%
Kay	48,791	(93)	92.1%	(8)	7.9%
Kingfisher	12,857	(24)	93.3%	(2)	7.7%
Kiowa	12,532	(15)	62.5%	(9)	37.5%
Latimer	8,601	(15)	62.5%	(9)	37.5%
Leflore	32,137	(45)	40.9%	(65)	59.1%
Lincoln	19,482	(30)	68.2%	(14)	31.8%
Logan	19,645	(29)	80.6%	(7)	19.4%
Love	5,637	(4)	80%	(1)	20%
McClain	14,157	(18)	51.4%	(17)	48.6%
McCurtain	28,642	(45)	63.4%	(26)	36.6%
McIntosh	12,472	(34)	85%	(6)	15%
Major	7,529	(4)	80%	(1)	20%
Marshall	7,682	(5)	100%	(0)	
Mayes	23,302	(88)	93.6%	(6)	6.4%

OKLAHOMA (contd.)

County	Population	Guilty Pleas	Trials
Murray	10,669	(20) 71.4%	(8) 28.6%
Muskogee	59,542	(79) 86.8%	(12) 13.2%
Noble	10,043	(0)	(19) 100%
Nowata	9,773	(0)	(20) 100%
Okfuskee	10,683	(0)	(31) 100%
Oklahoma	526,805	(1,553) 80.9%	(366) 19.1%
Okmulgee	35,358	(63) 72.4%	(24) 27.6%
Osage	29,750	(34) 60.7%	(22) 39.3%
Ottawa	29,800	(36) 97.3%	(1) 2.7%
Pawnee	11,338	(18) 85.7%	(3) 14.3%
Payne	50,654	(52) 85.2%	(9) 14.8%
Pittsburg	37,521	(60) 82.2%	(13) 17.8%
Pontotoc	27,867	(90) 88.2%	(12) 11.8%
Pottawatomie	43,134	(57) 43.5%	(74) 56.5%
Pushmataha	9,385	(14) 87.5%	(2) 12.5%
Roger Mills	4,452	(2) 50%	(2) 50%
Rogers	28,425	(57) 87.7%	(8) 12.3%
Seminole	25,144	(307) 85.5%	(52) 14.5%
Sequoyah	23,370	(34) 77.3%	(10) 22.7%
Stephens	35,902	(65) 89%	(8) 11%
Texas	16,352	(61) 82.4%	(13) 17.6%
Tillman	12,901	(32) 51.6%	(30) 48.4%
Tulsa	401,663	(1,377) 90.7%	(142) 9.3%
Wagoner	22,163	(30) 78.9%	(8) 21.1%
Washington	42,277	(66) 95.7%	(3) 4.3%
Washita	12,141	(14) 70%	(6) 30%
Woods	11,920	(5) 19.2%	(21) 80.8%
Woodward	15,537	(18) 94.7%	(1) 5.3%

PENNSYLVANIA

The data in the following table were extracted from the Fifth Annual Report on Judicial Case Volume as reported by the Courts of Common Pleas of the Commonwealth of Pennsylvania for 1974. The report was compiled by the Administrative Office of the Pennsylvania Courts. The unit of count is the defendant. The cases include all indictable offenses. The trials column includes those cases disposed of by either trial judge or jury. No distinction is made between convictions and acquittals. The guilty plea column contains only cases terminated by a plea of guilty.

PENNSYLVANIA

County	Population	Guilty Pleas		Trials	
Adams	56,937	(187)	80.3%	(46)	19.7%
Allegheny	1,605,016	(2,344)	46.1%	(2,740)	53.9%
Armstrong	75,590	(174)	85.7%	(29)	14.3%
Beaver	208,418	(264)	68.8%	(120)	31.2%
Bedford	42,353	(98)	72.1%	(38)	27.9%
Berks	296,382	(503)	82.9%	(104)	17.1%
Blair	135,356	(350)	75.6%	(113)	24.4%
Bradford	57,962	(136)	98.6%	(2)	1.4%
Bucks	415,056	(1,974)	88.3%	(261)	11.7%
Butler	127,941	(280)	87.5%	(40)	12.5%
Cambria	186,785	(404)	80.3%	(99)	19.7%
Cameron-Elk	44,866	(56)	84.8%	(10)	15.2%
Carbon	50,573	(53)	69.7%	(23)	30.3%
Centre	99,267	(319)	80.2%	(79)	19.8%
Chester	278,311	(602)	85.4%	(103)	14.6%
Clarion	38,414	(137)	92.6%	(11)	7.4%
Clearfield	74,619	(274)	92.9%	(21)	7.1%
Clinton	37,721	(128)	90.8%	(13)	9.2%
Columbia-Montour	71,622	(195)	89.4%	(23)	10.6%
Crawford	81,342	(286)	88%	(39)	12%
Cumberland	158,177	(559)	94.3%	(34)	5.7%
Dauphin	223,834	(948)	80.2%	(234)	19.8%
Delaware	600,035	(888)	78.1%	(249)	21.9%
Erie	263,654	(739)	90.9%	(74)	9.1%
Fayette	154,667	(321)	84.5%	(59)	15.5%
Forest-Warren	52,608	(184)	90.6%	(19)	9.4%
Franklin-Fulton	111,609	(345)	80.2%	(85)	19.8%
Greene	36,090	(139)	89.7%	(16)	10.3%
Huntingdon	39,108	(103)	80.5%	(25)	19.5%
Indiana	79,451	(149)	71.6%	(59)	28.4%
Jefferson	43,695	(99)	88.4%	(13)	11.6%
Juniata-Perry	45,327	(67)	57.3%	(50)	42.7%
Lackawanna	234,107	(292)	86.6%	(45)	13.4%
Lancaster	319,693	(1,788)	87.7%	(251)	12.3%
Lawrence	107,374	(190)	88%	(26)	12%
Lebanon	99,665	(357)	90.8%	(36)	9.2%
Lehigh	255,304	(637)	85.6%	(107)	14.4%
Luzerne	342,301	(432)	79.3%	(113)	20.7%
Lycoming	113,296	(336)	65.9%	(174)	34.1%
McKean	51,915	(126)	80.8%	(30)	19.2%
Mercer	127,175	(230)	70.8%	(95)	29.2%
Mifflin	45,268	(158)	84%	(30)	16%
Monroe-Pike	57,240	(182)	76.2%	(57)	23.8%
Montgomery	623,799	(2,028)	87.9%	(280)	12.1%
Northampton	214,368	(430)	78.2%	(120)	21.8%
Northumberland	99,190	(222)	93.3%	(16)	6.7%
Philadephhia Co.	1,948,609	(4,027)	50.1%	(4,011)	49.9%
Potter	16,395	(37)	84.1%	(7)	15.9%

PENNSYLVANIA (contd.)

County	Population	Guilty Pleas	Trials
Schuylkill	160,089	(402) 89.1%	(49) 10.9%
Snyder-Union	57,872	(82) 77.4%	(24) 22.6%
Somerset	76,037	(132) 84.1%	(25) 15.9%
Sullivan-Wyoming	25,043	(91) 77.1%	(27) 22.9%
Susquehanna	34,344	(63) 80.8%	(15) 19.2%
Tioga	36,691	(111) 82.8%	(23) 17.2%
Venango	62,353	(37) 56.9%	(28) 43.1%
Washington	210,876	(630) 90.8%	(64) 9.2%
Wayne	28,581	(94) 95.9%	(4) 4.1%
Westmoreland	376,935	(427) 80.1%	(106) 19.9%
York	272,603	(920) 82.8%	(191) 17.2%

SOUTH CAROLINA

The data in the following table were extracted from the Annual Report of the Attorney General for the State of South Carolina, Summary of Criminal Prosecutions for the calendar year 1974. The unit of count is the defendant. The cases include all indictable offenses. The trial column is comprised of defendants who were convicted by a trial judge or jury. The guilty plea column contains only those cases terminated by a plea of guilty.

SOUTH CAROLINA

County	Population	Guilty Pleas		Trials	
1st Circuit:					
Orangeburg	69,789	(376)	96.7%	(13)	3.3%
Calhoun	10,780	(51)	98.1%	(1)	1.9%
Dorchester	32,276	(142)	97.9%	(3)	2.1%
2nd Circuit:					
Aiken	91,023	(333)	92.2%	(28)	7.8%
Barnwell	17,176	(88)	91.7%	(8)	8.3%
Bamberg	15,950	(69)	97.2%	(2)	2.8%
3rd Circuit:					
Lee	18,323	(170)	93.4%	(12)	6.6%
Sumter	79,425	(368)	98.1%	(7)	1.9%
Clarendon	25,604	(132)	95%	(7)	5%
Williamsburg	34,243	(152)	98.1%	(3)	1.9%
4th Circuit:					
Chesterfield	33,667	(198)	98.5%	(3)	1.5%
Marlboro	27,151	(136)	95.1%	(7)	4.9%
Darlington	53,442	(375)	96.9%	(12)	3.1%
Dillon	28,838	(131)	95.6%	(6)	4.4%
5th Circuit:					
Richland	233,868	(912)	98.1%	(18)	1.9%
Kershaw	34,727	(132)	99.2%	(1)	.8%
6th Circuit:					
Chester	29,811	(143)	91.7%	(13)	8.3%
Fairfield	19,999	(104)	96.3%	(4)	3.7%
Lancaster	43,328	(248)	94.7%	(14)	5.3%
7th Circuit:					
Spartanburg	173,724	(852)	96.8%	(28)	3.2%
Cherokee	36,791	(347)	92.5%	(28)	7.5%
8th Circuit:					
Abbeville	21,112	(118)	89.4%	(14)	10.6%
Greenwood	49,686	(269)	97.6%	(9)	2.4%
Laurens	49,712	(276)	95.2%	(14)	4.8%
Newberry	29,273	(338)	98.5%	(5)	1.5%
9th Circuit:					
Berkeley	56,199	(133)	95%	(7)	5%
Charleston	247,650	(916)	98.3%	(16)	1.7%
10th Circuit:					
Oconee	40,728	(298)	95.2%	(15)	4.8%
Anderson	105,474	(740)	97.9%	(16)	2.1%
11th Circuit:					
McCormick	7,955	(38)	95%	(2)	5%
Edgefield	15,692	(127)	96.2%	(5)	3.8%
Saluda	14,528	(58)	98.3%	(1)	1.7%
Lexington	89,012	(315)	94.3%	(19)	5.7%
12th Circuit:					
Florence	89,636	(666)	92.9%	(51)	7.1%
Marion	30,270	(248)	94.3%	(15)	5.7%

SOUTH CAROLINA (contd.)

County	Population	Guilty Pleas		Trials	
13th Circuit:					
Pickens	58,956	(646)	96.4%	(24)	3.6%
Greenville	240,546	(951)	95.3%	(47)	4.7%
14th Circuit:					
Allendale	9,692	(96)	93.2%	(7)	6.8%
Colleton	27,622	(116)	86.6%	(18)	13.4%
Beuafort	51,136	(261)	95.6%	(12)	4.4%
Hampton	15,878	(102)	97.1%	(3)	2.9%
Jasper	11,885	(116)	95.1%	(6)	4.9%
15th Circuit:					
Horry	69,992	(1,436)	89.1%	(175)	10.9%
Georgetown	33,500	(185)	90.2%	(20)	9.8%
16th Circuit:					
Union	29,230	(169)	93.4%	(12)	6.6%
York	85,216	(738)	95.3%	(36)	4.7%

SOUTH DAKOTA

The data in the following table were extracted from the 1974 Annual Report on the Courts. The unit of count is the defendant. The cases include felonies only. The trial column contains only those cases which involve a conviction by a jury trial. Bench trials and acquittals are not included. The guilty plea column contains only those cases terminated by a plea of guilty.

SOUTH DAKOTA

County	Population	Guilty Pleas	Trials
1st Circuit:			
Bon Homme	8,577	(17) 94.4%	(1) 5.6%
Charles Mix	9,994	(15) 75%	(5) 25%
Clay	12,923	(10) 76.9%	(3) 23.1%
Douglas	4,569	(0)	(1) 100%
Hutchinson	10,379	(0)	(0)
Union	9,643	(2) 66.7%	(1) 33.3%
Yankton	18,696	(14) 87.5%	(2) 12.5%
2nd Circuit:			
Lincoln	11,761	(12) 85.7%	(2) 14.3%
Minnehaha	95,209	(109) 92.4%	(9) 7.6%
Turner	9,872	(3) 100%	(0)
3rd Circuit:			
Brookings	22,158	(13) 92.9%	(1) 7.1%
Clark	5,515	(5) 100%	(0)
Codington	19,140	(14) 87.5%	(2) 12.5%
Deuel	5,686	(2) 100%	(0)
Hamlin	5,172	(7) 100%	(0)
Kingsbury	7,746	(33) 97.1%	(1) 2.9%
Moody	7,622	(4) 100%	(0)
4th Circuit:			
Aurora	4,183	(3) 100%	(0)
Brule	5,870	(13) 100%	(0)
Davison	17,319	(17) 81%	(4) 19%
Hanson	3,781	(0)	(0)
Lake	11,456	(10) 100%	(0)
McCook	7,246	(6) 66.7%	(3) 33.3%
Miner	4,470	(6) 100%	(0)
Sanborn	3,697	(13) 100%	(0)
5th Circuit:			
Brown	36,920	(44) 97.8%	(1) 2.2%
Day	8,713	(13) 92.9%	(1) 7.1%
Grant	9,005	(4) 100%	(0)
Marshall	5,965	(18) 100%	(0)
Roberts	11,678	(8) 100%	(0)
6th Circuit:			
Campbell	2,866	(2) 100%	(0)
Haakon	2,802	(0)	(0)
Hughes	11,639	(25) 92.6%	(2) 7.4%
McPherson	5,022	(9) 100%	(0)
Potter	4,449	(5) 83.3%	(1) 16.7%
Stanley	2,443	(5) 83.3%	(1) 16.7%
Sully	2,376	(1) 100%	(0)
Walworth	7,842	(72) 97.3%	(2) 2.7%
7th Circuit:			
Custer	4,698	(13) 76.5%	(4) 23.5%
Fall River	7,505	(9) 81.8%	(12) 18.2%
Pennington	59,349	(100) 96.2%	(4) 3.8%

SOUTH DAKOTA (contd.)

County	Population	Guilty Pleas	Trials
8th Circuit:			
Butte	7,989	(15) 93.8%	(1) 6.2%
Corson	4,994	(3) 100%	(0)
Dewey	5,170	(0)	(0)
Harding	1,848	(2) 100%	(0)
Lawrence	17,453	(42) 82.4%	(9) 17.6%
Meade	16,618	(14) 93.3%	(1) 6.7%
Perkins	4,769	(35) 97.2%	(1) 3.8%
Ziebach	2,703	(0)	(0)
9th Circuit:			
Beadle	20,877	(9) 100%	(0)
Buffalo	1,575	(0)	(0)
Edmunds	5,548	(0)	(0)
Faulk	3,893	(19) 100%	(0)
Hand	5,883	(1) 100%	(0)
Hyde	2,515	(0)	(0)
Jerauld	3,270	(0)	(0)
Spink	10,595	(20) 100%	(0)
10th Circuit:			
Bennett	3,088	(3) 100%	(0)
Gregory	6,710	(6) 100%	(0)
Jackson	1,571	(24) 96%	(1) 4%
Jones	1,793	(9) 75%	(3) 25%
Lyman	4,060	(24) 96%	(1) 4%
Tripp & Todd	14,777	(7) 100%	(0)
Washabaugh	1,250	(0)	(0)

TEXAS

The data in the following table were extracted from the Forth-Sixth Annual Report of the Texas Judicial Council, Vol. II, 1974. The unit of count is "court filings" which is the total number of counts. The cases include felonies only. The trial column contains convictions by either trial judge or jury. The guilty plea column contains cases terminated by guilty plea only.

TEXAS

County	Population	Guilty Pleas	Trials
Anderson	27,789	(34) 97.1%	(1) 2.9%
Andrews	10,372	(9) 100%	(0)
Angelina	49,349	(136) 94.4%	(8) 5.6%
Aransas	8,902	(47) 98%	(1) 2%
Archer	5,759	(1) 100%	(0)
Armstrong	1,895	(0)	(0)
Atascosa	18,696	(27) 93.1%	(2) 6.9%
Austin	13,831	(8) 80%	(2) 20%
Bailey	8,487	(14) 93.3%	(1) 6.7%
Bandera	4,747	(4) 100%	(0)
Bastrop	17,297	(12) 100%	(0)
Baylor	5,221	(6) 100%	(0)
Bee	22,737	(21) 91.3%	(2) 8.7%
Bell	124,483	(323) 89%	(40) 11%
Bexar	830,460	(824) 89.5%	(97) 10.5%
Blanco	3,567	(5) 100%	(0)
Borden	888	(1) 100%	(0)
Bosque	10,966	(12) 85.7%	(2) 14.3%
Bowie	67,813	(86) 94.3%	(16) 15.7%
Brazoria	108,312	(168) 93.8%	(11) 6.2%
Brazos	57,978	(117) 97.5%	(3) 2.5%
Brewster	7,780	(5) 100%	(0)
Briscoe	2,794	(3) 100%	(0)
Brooks	8,005	(8) 100%	(0)
Brown	25,877	(80) 92%	(7) 8%
Burleson	9,999	(11) 84.6%	(2) 15.4%
Burnet	11,420	(32) 97%	(1) 3%
Caldwell	21,178	(27) 87.1%	(4) 12.9%
Calhoun	17,831	(69) 98.6%	(1) 1.4%
Callahan	8,205	(9) 81.1%	(2) 18.9%
Cameron	140,368	(121) 87.7%	(17) 12.3%
Camp	8,005	(5) 100%	(0)
Carson	6,358	(11) 100%	(0)
Cass	24,183	(58) 96.7%	(2) 3.3%
Castro	10,394	(9) 100%	(0)
Chambers	12,187	(44) 95.7%	(2) 4.3%
Cherokee	32,008	(34) 87.2%	(5) 12.8%
Childress	6,605	(9) 90%	(1) 10%
Clay	8,079	(9) 100%	(0)
Cochran	5,326	(1) 25%	(3) 75%
Coke	3,087	(3) 100%	(0)
Coleman	10,288	(16) 94.1%	(1) 5.9%
Collin	66,920	(179) 90.9%	(18) 9.1%
Collingsworth	4,755	(2) 100%	(0)
Colorado	17,638	(17) 94.4%	(1) 5.6%
Comal	24,165	(14) 77.8%	(4) 22.2%
Comanche	11,898	(20) 74.1%	(7) 25.9%
Concho	2,937	(5) 100%	(0)
Cooke	23,471	(18) 100%	(0)
Coryell	35,311	(46) 92%	(4) 8%

TEXAS (continued)

County	Population	Guilty Pleas		Trials	
Cottle	3,204	(3)	100%	(0)	
Crane	4,172	(5)	100%	(0)	
Crockett	3,885	(4)	100%	(0)	
Crosby	9,085	(3)	100%	(0)	
Culberson	3,429		no report		
Dallam	6,012	(8)	88.9%	(1)	11.1%
Dallas	1,327,321	(4,730)	90.4%	(505)	9.6%
Dawson	16,604	(29)	100%	(0)	
Deaf Smith	18,999	(52)	94.5%	(3)	5.5%
Delta	4,927	(20)	95.2%	(1)	4.8%
Denton	75,633	(137)	99.3%	(1)	.07%
Dewitt	18,660	(38)	92.7%	(3)	7.3%
Dickens	3,737	(5)	100%	(0)	
Dimmit	9,039	(4)	100%	(0)	
Donley	3,641	(7)	77.8%	(2)	22.3%
Duval	11,722	(2)	100%	(0)	
Eastland	18,092	(6)	75%	(2)	25%
Ector	91,805	(253)	95.8%	(11)	4.2%
Edwards	2,107	(0)		(0)	
Ellis	46,638	(77)	85.5%	(10)	11.5%
El Paso	359,291	(375)	88.4%	(49)	11.6%
Erath	18,141	(10)	52.6%	(9)	47.4%
Falls	17,300	(21)	95.5%	(1)	4.5%
Fannin	22,705	(18)	75%	(6)	25%
Fayette	17,650	(13)	81.3%	(3)	18.7%
Fisher	6,344	(12)	92.3%	(1)	7.7%
Floyd	11,044	(11)	100%	(0)	
Foard	2,211	(2)	50%	(2)	50%
Fort Bend	52,314	(48)	90.6%	(5)	9.4%
Franklin	5,291	(0)		(0)	
Freestone	11,116	(30)	96.8%	(1)	3.2%
Frio	11,159	(10)	83.3%	(2)	16.7%
Gaines	11,593	(12)	100%	(0)	
Galveston	169,812	(179)	86.9%	(27)	13.1%
Garza	5,289	(9)	100%	(0)	
Gillespie	10,553	(7)	87.5%	(1)	12.5%
Glasscock	1,155	(2)	100%	(0)	
Goliad	4,869	(2)	14.3%	(12)	85.7%
Gonzales	16,375	(41)	97.6%	(1)	2.4%
Gray	26,949	(24)	82.8%	(5)	17.2%
Grayson	83,225	(54)	91.5%	(5)	8.5%
Gregg	75,929	(170)	88.5%	(22)	11.5%
Grimes	11,855	(23)	92%	(2)	8%
Guadalupe	35,554	(50)	98%	(1)	2%
Hale	34,137	(42)	87.5%	(6)	12.5%
Hall	6,015	(10)	100%	(0)	
Hamilton	7,198	(8)	88.9%	(1)	11.1%
Hansford	6,351	(17)	100%	(0)	
Hardeman	6,795	(16)	100%	(0)	

TEXAS (continued)

County	Population	Guilty Pleas		Trials	
Hardin	29,996	(42)	89.4%	(5)	10.6%
Harris	1,741,912	(5,498)	93.5%	(385)	6.5%
Harrison	44,841	(61)	86%	(10)	14%
Hartley	2,782	(1)	100%	(0)	
Haskell	8,512	(21)	95.5%	(1)	4.5%
Hays	27,642	(8)	61.5%	(5)	38.5%
Hemphill	3,084	(6)	75%	(2)	25%
Henderson	26,466	(88)	95.7%	(3)	3.3%
Hidalgo	181,535	(127)	92.7%	(10)	7.3%
Hill	22,596	(43)	69.4%	(19)	30.6%
Hockley	20,396	(12)	80%	(3)	20%
Hood	6,368	(8)	50%	(8)	50%
Hopkins	20,710	(21)	91.3%	(2)	8.7%
Houston	17,855	(3)	75%	(1)	25%
Howard	27,796	(111)	100%	(0)	
Hudspeth	2,392	(4)	100%	(0)	
Hunt	47,948	(86)	95.6%	(4)	4.4%
Hutchinson	24,443	(34)	97.1%	(1)	2.9%
Irion	1,070	(0)		(0)	
Jack	6,711	(7)	100%	(0)	
Jackson	12,975	(37)	94.9%	(2)	5.1%
Jasper	24,692	(26)	96.3%	(1)	3.7%
Jeff Davis	1,527	(0)		(0)	
Jefferson	244,773	(287)	85.4%	(49)	14.6%
Jim Hogg	4,654	(0)		(0)	
Jim Wells	33,032	(37)	100%	(0)	
Johnson	45,769	(59)	98.3%	(1)	1.7%
Jones	16,106	(40)	95.2%	(2)	4.8%
Karnes	13,462	(28)	100%	(0)	
Kaufman	32,392	(46)	92%	(8)	
Kendall	6,964	(2)	100%	(0)	
Kenedy	678		-		-
Kent	1,434	(4)	100%	(0)	
Kerr	19,454	(23)	92%	(2)	8%
Kimble	3,904	(3)	100%	(0)	
King	464	(1)	100%	(0)	
Kinney	2,006	(4)	66.7%	(2)	33.3%
Kleberg	33,166	(35)	100%	(0)	
Knox	5,972	(1)	100%	(0)	
Lamar	36,062	(33)	100%	(0)	
Lamb	17,770	(20)	90.9%	(2)	9.1%
Lampasas	9,323	(9)	69.2%	(4)	30.8%
Lasalle	5,014	(7)	100%	(0)	
Lavaca	17,903	(16)	100%	(0)	
Lee	8,048	(3)	100%	(0)	
Leon	8,738		no report		
Liberty	33,104	(100)	98%	(2)	2%
Limestone	18,100	(23)	100%	(0)	
Lipscomb	3,486	(2)	66.7%	(1)	33.3%

TEXAS (continued)

County	Population	Guilty Pleas		Trials	
Live Oak	6,697	(14)	100%	(0)	
Llano	6,979	(9)	81.8%	(2)	18.2%
Loving	164		-		-
Lubbock	179,295	(168)	86.2%	(27)	13.8%
Lynn	9,107	(12)	92.3%	(1)	7.7%
McCulloch	8,571	(4)	6.7%	(2)	3.3%
McLennan	147,553	(170)	93%	(13)	7%
McMullen	1,095		-		-
Madison	7,693	(8)	88.9%	(1)	11.1%
Marion	8,517	(16)	80%	(4)	20%
Martin	4,774	(1)	100%	(0)	
Mason	3,356	(2)	100%	(0)	
Matagorda	27,913	(42)	97.7%	(1)	2.3%
Maverick	18,093	(19)	86.4%	(3)	13.6%
Medina	20,249	(19)	90.5%	(2)	9.5%
Menard	2,646	(9)	81.8%	(3)	27.2%
Midland	65,433	(52)	89.7%	(6)	10.3%
Milam	20,028	(17)	100%	(0)	
Mills	4,212	(1)	100%	(0)	
Mitchell	9,073	(36)	100%	(0)	
Montague	15,326	(23)	100%	(0)	
Montgomery	49,479	(125)	98.4%	(2)	1.6%
Moore	14,060	(10)	76.9%	(3)	23.1%
Morris	12,310	(9)	90%	(1)	10%
Motley	2,178	(5)	100%	(0)	
Nacogdoches	36,362	(63)	88.7%	(8)	11.3%
Navarro	31,150	(35)	60.3%	(23)	39.7%
Newton	11,657		-		-
Nolan	16,220	(37)	92.5%	(3)	7.5%
Nueces	237,544	(262)	91.9%	(23)	8.1%
Ochiltree	9,704	(11)	100%	(0)	
Oldham	2,258	(4)	100%		
Orange	71,170	(51)	81%	(12)	19%
Palo Pinto	28,962	(21)	72.4%	(8)	27.6%
Panola	15,894	(30)	90.9%	(3)	9.1%
Parker	33,888	(28)	75.7%	(9)	24.3%
Parmer	10,509	(16)	88.9%	(2)	11.1%
Pecos	13,748	(20)	87%	(3)	13%
Polk	14,457	(42)	98%	(1)	2%
Potter	90,511	(168)	87.5%	(24)	12.5%
Presidio	4,842	(6)	100%	(0)	
Rains	3,752	(4)	80%	(1)	20%
Randall	53,885	(47)	82.4%	(10)	17.6%
Reagan	3,239	(3)	100%	(0)	
Real	2,013		-		-
Red River	14,298	(5)	62.5%	(3)	37.5%
Reeves	16,526	(28)	96.6%	(1)	3.4%
Refugio	9,494	(24)	92.3%	(2)	7.7%

TEXAS (continued)

County	Population	Guilty Pleas		Trials	
Roberts	967	(2)	100%	(0)	
Robertson	14,389	(16)	100%	(0)	
Rockwall	7,046	(22)	95.7%	(1)	4.3%
Runnels	12,108	(24)	96%	(1)	4%
Rusk	34,102	(69)	97.2%	(2)	2.8%
Sabine	7,187	(18)	94.7%	(1)	5.3%
San Augustine	7,858	(3)	50%	(3)	50%
San Jacinto	6,702	-		-	
San Patricio	47,288	(65)	94.2%	(4)	5.8%
San Saba	5,520	(8)	100%	(0)	
Schleicher	2,277	(2)	66.7%	(1)	33.3%
Scurry	15,760	(67)	85.9%	(11)	14.1%
Shackelford	3,323	(5)	100%	(0)	
Shelby	19,672	(36)	90%	(4)	10%
Sherman	3,657	(5)	100%	(0)	
Smith	97,096	(80)	88.9%	(10)	11.1%
Somervell	2,793	-		-	
Starr	17,707	-		-	
Stephens	8,414	(9)	100%	(0)	
Sterling	1,056	(1)	100%	(0)	
Stonewall	2,397	(5)	100%	(0)	
Sutton	3,175	no report			
Swisher	10,373	(2)	50%	(2)	50%
Tarrant	716,317	(1,178)	93.1%	(87)	6.9%
Taylor	97,853	(172)	85.6%	(29)	14.4%
Terrell	1,940	no report			
Terry	14,118	(9)	60%	(6)	40%
Throckmorton	2,205	(5)	100%	(0)	
Titus	16,702	(25)	96.2%	(1)	3.8%
Tom Green	71,047	(64)	80%	(16)	20%
Travis	295,516	(801)	96.9%	(26)	3.1%
Trinity	7,628	(10)	100%	(0)	
Tyler	12,417	(32)	100%	(0)	
Upshur	20,976	(4)	100%	(0)	
Upton	4,697	(29)	100%	(0)	
Uvalde	17,348	(11)	84.6%	(2)	15.4%
Val Verde	27,471	(42)	93.3%	(3)	6.7%
Van Zandt	22,155	(27)	100%	(0)	
Victoria	53,766	(107)	96.4%	(4)	3.6%
Walker	27,680	(43)	97.7%	(1)	2.3%
Waller	14,285	(18)	94.7%	(1)	5.3%
Ward	13,019	(20)	95.2%	(1)	4.8%
Washington	18,842	(19)	95%	(1)	5%
Webb	72,859	(58)	70.7%	(24)	29.3%
Wharton	36,729	(35)	92.1%	(3)	7.9%
Wheeler	6,434	(2)	66.7%	(1)	33.3%
Wichita	121,862	(196)	89.9%	(22)	10.1%
Wilbarger	15,355	(38)	97.4%	(1)	2.6%
Willacy	15,570	(28)	93.3%	(2)	6.7%

TEXAS (continued)

County	Population	Guilty Pleas	Trials
Williamson	37,305	(44) 100%	(0)
Wilson	13,041	(37) 100%	(0)
Winkler	9,640	(3) 100%	(0)
Wise	19,687	(21) 95.5%	(1) 4.5%
Wood	18,589	(12) 92.3%	(1) 7.7%
Yoakum	7,344	(9) 90%	(1) 10%
Young	15,400	(19) 95%	(1) 5%
Zapata	4,352	-	-
Zavala	11,370	(2) 100%	(0)

UTAH

The data in the following table were extracted from the Annual Report on the Utah Courts, compiled by the Utah Judicial Council for the period July 1974 through June 1975. The unit of count appears to be the defendant, although it is not entirely clear from the basis of the report. The type of offenses include felonies and, to a very limited extent, serious misdemeanors and misdemeanor appeals. The trial column includes all cases disposed of by either trial judge or jury. No differentiation is made between convictions and acquittals. The pleas of guilty column includes cases terminated by a plea of guilty.

UTAH

County	Population	Guilty Pleas	Trials
District 1:			
Box Elder	28,129	(33) 73.3%	(12) 26.7%
Cache	42,331	(60) 80%	(15) 20%
Rich	1,595	(0)	(0)
District 2:			
Weber	126,123	(287) 87.2%	(42) 12.8%
Davis	99,128	(99) 90.8%	(10) 9.2%
Morgan	3,983	(1) 100%	(0)
District 3:			
Salt Lake	458,607	(627) 80.4%	(153) 19.6%
Tooele	21,545	(25) 69.4%	(11) 30.6%
Summit	5,879	(0)	(0)
District 4:			
Utah	137,776	(86) 58.5%	(61) 41.5%
Uintah	12,684	(6) 66.7%	(3) 33.3%
Wasatch	5,863	(4) 80%	(1) 20%
Duchesne	7,299	(1) 100%	(0)
Daggett	566	(0)	(1) 100%
District 5:			
Juab	4,574	(3) 100%	(0)
Millard	6,988	(8) 100%	(0)
Beaver	3,800	(4) 44.4%	(5) 55.6%
Iron	12,177	(13) 61.9%	(8) 38.1%
Washington	13,669	(14) 53.8%	(12) 46.2%
District 6:			
Sanpete	10,976	(16) 88.9%	(2) 11.1%
Sevier	10,103	(6) 66.7%	(3) 33.3%
Piute	1,184	(0)	(0)
Wayne	1,638	(4) 100%	(0)
Garfield	3,157	(4) 100%	(0)
Kane	2,421	(1) 100%	(0)
District 7:			
Carbon	15,647	(16) 76.2%	(5) 23.8%
Emery	5,137	(0)	(1) 100%
Grand	6,688	(5) 62.5%	(3) 37.5%
San Juan	9,606	(1) 50%	(1) 50%

VERMONT

The data in the following table were extracted from the Judicial Statistics for the State of Vermont, 1973 prepared by the Office of the Court Administrator. The unit of count is the defendant. The cases include felonies only. The trial column includes all cases disposed of by either trial judge or jury. No distinction is made between acquittals and convictions. The guilty plea column contains only those cases terminated by a guilty plea.

VERMONT

County	Population	Guilty Pleas	Trials
Addison	22,266	(2) 66.7%	(1) 33.3%
Bennington	29,282	(0)	(1) 100%
Caledonia	22,789	(1) 100%	(0)
Chittenden	99,131	(1) 100%	(0)
Essex	5,416	(0)	(1) 100%
Franklin	31,282	(0)	(1) 100%
Grand Isle	3,574	-	-
Lamoille	13,309	-	-
Orange	17,676	-	-
Orleans	20,153	-	-
Rutland	52,637	(2) 100%	(0)
Washington	47,659	-	-
Windham	33,074	(0)	(0)
Windsor	44,082	(1) 100%	(0)

WYOMING

The data in the following table were extracted from the Criminal Justice System Data Book 1974, compiled by the Governor's Planning Committee on Criminal Administration for the State of Wyoming. The unit of count is the defendant. The cases include felonies only. The trial column contains only those dispositions which resulted in a conviction after either a trial by judge or jury. The guilty plea column contains only those cases terminated by a plea of guilty.

WYOMING

County	Population	Guilty Pleas	Trials
Albany	26,431	(24) 80%	(6) 20%
Big Horn	10,202	(2) 66.7%	(1) 33.3%
Campbell	12,957	(22) 66.7%	(11) 33.3%
Carbon	13,354	(8) 61.5%	(5) 38.5%
Converse	5,938	(0)	(12) 100%
Crook	4,535	(0)	(1) 100%
Fremont	28,352	(23) 85.2%	(4) 14.8%
Goshen	10,885	(0)	(6) 100%
Hot Springs	4,952	(6) 100%	(0)
Johnson	5,587	(1) 50%	(1) 50%
Laramie	56,360	(36) 56.5%	(27) 43.5%
Lincoln	8,640	(1) 33.3%	(2) 66.7%
Natrona	51,264	(22) 66.7%	(11) 33.3%
Niobrara	2,924	(0)	(3) 100%
Park	17,752	(18) 81.8%	(4) 18.2%
Platte	6,486	(3) 50%	(3) 50%
Sheridan	17,852	(27) 93.1%	(2) 6.9%
Sublette	3,755	(0)	(2) 100%
Sweetwater	18,391	(17) 77.3%	(5) 22.7%
Teton	4,823	(11) 64.7%	(6) 35.3%
Vinta	7,100	(9) 69.2%	(4) 30.8%
Washakie	7,569	(2) 100%	(0)
Weston	6,307	(5) 71.4%	(2) 28.6%

Appendix B

IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR MULTNOMAH COUNTY

THE STATE OF OREGON,)
)
Plaintiff,) No. C _____
v.) DA _____
)
_____,)
)
Defendant.)

I. DISCLOSURE BY PLAINTIFF

A. Witness List: The plaintiff presently intends to call the following witnesses at trial:

1. _____ 5. _____

2. _____ 6. _____

3. _____ 7. _____

4. _____ 8. _____

The plaintiff does not presently intend to call at trial the following persons, who are known to the plaintiff as potential trial witnesses, but may subsequently decide to do so (at which time the plaintiff will notify the defense): (List informants either as "informants" or "confidential reliable informants," as appropriate)

1. _____ 4. _____

2. _____ 5. _____

3. _____ 6. _____

B. Defense counsel has been provided with the addresses of the above persons:
/ / yes / / no

C. Defense counsel has been provided with a copy of all police reports, presently known by the plaintiff, in this case: / /yes / /no
(If "no," list those reports not provided on reverse side.)

Defense counsel has been afforded the opportunity to verify his copy of police reports with plaintiff's copy: / / yes / / no

D. Defense counsel has been provided with copies of all written or recorded statements or memoranda of any oral statements of the above persons and of the defendant or codefendant: / / yes / / no (If "no," list those not provided on reverse side.)

E. The plaintiff intends to offer the following physical evidence, scientific reports and photographs:

1._____ 3._____

2._____ 4._____

(1)Defense counsel has been provided with a copy of all documents and reports pertaining to the above: /_/ yes /_/ no (If "no," list exceptions on reverse side.)

F. Defense counsel has been given rap sheets on the following persons:

1._____ 3._____

2._____ 4._____

II. DISCLOSURE BY DEFENSE

A. Witness List: (1) The defense intends to call the following witnesses at trial:

1._____ 5._____

2._____ 6._____

3._____ 7._____

4._____ 8._____

(2) The defense intends to call the defendant as a witness:
/_/ yes /_/ no

B. The plaintiff has been provided with the addresses of the above persons:
/_/ yes /_/ no

C. The plaintiff has been provided with copies of all written or recorded statements or memoranda of any oral statements of the above persons (other than the defendant): /_/ yes /_/ no
(If "no," list those provided on reverse side.)

D. The defense intends to offer the following physical evidence, scientific reports, photographs and/or other documents:

1._____ 3._____

2._____ 4._____

Copies of the above have been provided to the plaintiff: /_/ yes /_/ no
(If "no," list those not provided on reverse side.)

E. The defense intends to rely on the following defenses:

/_/ Alibi /_/ Diminished Responsibility /_/ Lack of Mental Responsibility

/_/ Entrapment /_/ Duress /_/ Self Defense

/_/ Justification /_/ Other: _____

F. The following motions will be filed:

/_/ (a) Motion to Controvert -- /_/ Dispositive

/_/ Nondispositive

/_/ (b) Motion to Suppress -- /_/ Dispositive

/_/ Nondispositive

/_/ Other:

III. PLEA NEGOTIATION

A. The following plea offer has been tendered by the plaintiff:

(1) List charge(s) to which defendant will plead guilty:

(2) List all charge(s) which plaintiff will move to dismiss upon sentence of defendant on above charge(s): (Those charges not listed are not included in the plea negotiation agreement.)

(3) Will plaintiff make a sentence recommendation: /__/ yes /__/ no (If "yes," state what the recommendation will be.)

(4) Will plaintiff request court to order restitution? /__/ yes /__/ no (If "yes," list amount and claimant.)

(5) The defense /__/ accepts /__/ rejects /__/ is considering the above plea offer.

(6) The above plea offer remains open until _____, at which time it is withdrawn.

I have reviewed the above entries. They are correct to the best of my knowledge. I will immediately notify opposing counsel of any change in the status of the above information.

_____ _____
Date Defense Counsel

_____ _____
Date Deputy District Attorney

Distribution:
1-Chief Criminal Clerk
1-District Attorney
1-Defense Atty.

Appendix B

COUNTY OF SAN BERNARDINO, STATE OF CALIFORNIA

_____COURT

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, vs. Defendant	PLEA BARGAIN AGREEMENT Case No._____

A plea bargain has been reached in this case between Deputy District Attorney _____ and Defendant.

PLEA: The Defendant pleads guilty to_____

TERMS:

I. A. _____withheld/suspended and probation for a period of _____

B. FINE_____ P.A./P.O.T._____ TOTAL_____

Payment Terms:_____

C. TRAFFIC SCHOOL: Notice of completion to be filed by_____

D. ALCOHOL PROGRAM: Defendant to attend_____

_____

E. JAIL TERM:_____. Defendant to appear at San Bernardino County Central Jail, 630 Cardiff, San Bernardino at _____ m. on _____

II. OTHER:_____

_____

_____

_____

I consent and agree to the terms of the PLEA BARGAIN and to the entry of same in the minutes of said Court, and acknowledge receipt of a copy of this document.

I realize that willful violation of the terms of this agreement may be a misdemeanor and therefore subject to Bench Warrant and further penalties.

Dated_____ District Attorney

_____ By_____

Attorney for Defendant Deputy District Attorney

APPROVED:

_____ _____

Defendant Judge

Appendix B

CONSTITUTIONAL RIGHTS

A defendant's rights include a speedy and public trial by jury. In addition, the defendant has a right to see, hear, and question all witnesses against him and the right to have the Judge order into Court all the evidence, and to order witnesses for his defense to attend the trial without any cost to the defendant. At the trial, the defendant has the right to present evidence in his favor and the right to remain silent or to testify in his own defense.

PROVISIONS OF PLEA BARGAIN

A defendant who agrees to a plea bargain has waived and given up each of the above constitutional rights. However, he will continue to have the right to the aid of an attorney at all further proceedings before the Court and, if the defendant cannot afford an attorney, the Court will appoint an attorney to represent him.

Another provision of this plea bargain is that the Court will not decide whether to impose sentence or extend probation until a probation officer makes an investigation and reports on the defendant's background, prior record (if any), and the circumstances of the case.

For this plea bargain to be valid, the defendant must not have pleaded guilty as indicated because he was promised or it was suggested to him that he would receive a lighter sentence, probation, reward or immunity, or because of some other persuasion. In addition, for this plea bargain to be valid, no force or violence or threats or menace or duress or undue influence of any kind was used on the defendant or anyone dear to him to get him to plead guilty as indicated.

For persons currently on probation, this plea bargain in no way limits the authority of the Court to revoke, modify or terminate the probation previously granted.

Finally, in the event the defendant fails to abide by all of the terms of any probation granted as a provision of this plea bargain, the Court retains full authority to modify, terminate or revoke that probation and sentence the defendant as provided by law.

Form No. 441 - Defendant's Request for Action

COUNTY CRIMINAL COURT NO.

OF

DALLAS COUNTY, TEXAS

Case No_____

Defendant:_____

DATE:_____, 19_____

To The Court: The State and Defendant request following action on this case (Check and Complete:)

- -

/ / Defendant in Court.

/ / Defendant not in Court.

- -

/ / Passed at Request of Defendant. State waives written motion.

/ / Passed at Request of State. Defendant waives written motion.

/ / Passed by Agreement of both Defendant and State.

/ / Pass to _____, 19 _____ to enter plea of guilty.

/ / Pass to _____, 19 _____ for Trial Before the Court.

/ / Pass to _____, 19 _____ for Trial by Jury.

/ / Pass generally.

/ / Passed Announcement

_____

- -

On plea District Attorney recommends:

_____ and $_____ with probation; or

_____ and $_____ without probation.

_____

Asst. Crim. District Attorney

/ / Defendant understands and agrees to accept the above recommendation of the State on a plea.

/ / Defendant does NOT agree to accept the above recommendation of the State on a plea.

- -

_____

ATTORNEY FOR THE DEFENDANT

_____

Address Telephone No.

AGREED RECOMMENDATION

DEFENDANT _____ NO. _____

OFFENSE _____

PENALTY _____

DATE OF OFFENSE _____ DATE OF ARREST _____

THE DETAILS OF ANY AGREEMENT REACHED AS A RESULT OF PLEA NEGOTIATIONS:

_____

_____

_____
DEFENDANT

_____
ATTORNEY FOR DEFENDANT

_____
ASSISTANT DISTRICT ATTORNEY
DALLAS COUNTY, TEXAS

Appendix B

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

STATE OF WASHINGTON,

Plaintiff,

v.

_____,

Defendant.

No.

STATEMENT OF DEFENDANT ON PLEA OF GUILTY

---

1. My true name is _____.

2. My age is _____.

3. My lawyer is _____.

4. The court has told me that I am charged with the crime of _____ _____, the maximum sentence for which is _____ _____.

5. The court has told me that:

(a) I have the right to have counsel (a lawyer) and that if I cannot afford to pay for counsel, one will be provided at no expense to me.

(b) I have the right to a trial by jury.

(c) I have the right to hear and question witnesses who testify against me.

(d) I have the right to have witnesses testify for me. These witnesses can be made to appear at no expense to me.

(e) The charge must be proved beyond a reasonable doubt.

(f) I have the right to appeal.

(g) By entering a plea of guilty, I give up the rights listed in (b) through (f) and I will be sentenced on the basis of my plea.

6. I plead _____ to the crime of _____ _____ as charged in the information, a copy of which I have received.

7. I make this plea freely and voluntarily.

8. No one has threatened harm of any kind to me or to any other person to cause me to make this plea.

9. No person has made promises of any kind to cause me to enter this plea except as set forth in this statement.

10. I have been told the prosecuting attorney will take the following action and make the following recommendation to the court:

11. I have been told and fully understand that the court does not have to follow the Prosecuting Attorney's recommendation as to sentence. The court is completely free to give me any sentence it sees fit no matter that the Prosecuting Attorney recommends.

12. The court has told me that if I am sentenced to prison the judge must sentence me to the maximum term required by the law, which in this case is _____. The minimum term of sentence is set by the Board of Prison Terms and Paroles. The judge and Prosecuting Attorney may recommend a minimum sentence to the board but the board does not have to follow their recommendations. I have been further advised that the crime with which I am charged carries a mandatory minimum of _____ years. If not applicable, this sentence shall be stricken and initialed by the defendant and the judge.

13. I understand that if I am on probation or parole, a plea of guilty to the present charge will be sufficient grounds for a judge or the parole board to revoke my probation or parole.

14. The court has asked me to state briefly in my own words what I did that resulted in my being charged with the crime in the information. This is my statement: _____

15. I have read or have had read to me all of the numbered sections above (1 through 15) and have received a copy of "Statement of Defendant on Plea of Guilty." I have no further questions to ask of the court.

Appendix B

The foregoing statement was read by or read to the defendant and signed by the defendant in the presence of his attorney _____ _____, Prosecuting Attorney _____ and the undersigned judge in open court.

DATED this _____ day of _____, 197_____.

_____

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