Plea Bargaining: A Model Court Rule

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PLEA BARGAINING: A MODEL COURT RULE

I. INTRODUCTION

Criminal law and punishment in America, so we are told, exist to serve the functions of rehabilitation, deterrence, incapacitation, and retribution.¹ The system of trial by jury has traditionally been the vehicle through which these goals are served.² In theory, trial by jury is an ideal system—the impartial jury of reasonable men find the truth, while the judge guarantees protection of the defendant's rights and the orderly process of the trial. In practice, with the aid of formal rules and procedures,³ it operates in a workable manner. However, trial by jury is not the predominant mode of trial in the criminal justice system today. A plea of guilty entered by the defendant, usually pursuant to an informal agreement or bargain with the prosecutor, constitutes the most frequent manner of disposition of criminal cases.⁴ Estimates of the number of defendants who are convicted after pleading guilty rather than submitting themselves to trial run from seventy-five percent to over ninety percent.⁵ It is also estimated that a very high propor-

² For history of the jury see M. Lesser, The Historical Development of the Jury System (1894); W. Forsyth, History of Trial by Jury (1852); regarding the jury in criminal cases see M. Lesser, id. 134-62, and W. Forsyth, id. 192-214.
³ E.g., Fed. R. Crim. P. and the various state criminal rules of procedure.
⁵ Eighty-two percent of the criminal cases adjudicated (not including those dismissed) and eighty-six percent of the defendants convicted and sentenced in eighty-nine U.S. District Courts during the fiscal year ending June 30, 1968, were the result of pleas of guilty—percentages derived by author from data provided in Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts Table D4, at 261; eighty percent in D.C. Court of General Sessions—H. Subin, supra note 4, at 12-13; eighty-seven percent for several state and federal jurisdictions in 1964—President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967) [hereinafter cited as Task Force Report]; eighty-three percent in Kansas district courts for the year ending June 30, 1969—Comment, Pleas of Guilty, Symposium: The American Bar Association Project On Minimum Standards For Criminal Justice and Selected Areas of Criminal Law Revision in Kansas, 18 Kan. L. Rev. 729 (1970); approximately eighty-four percent of felony convictions for Cook County, Ill. in 1967—The Role of Plea Negotiation in Modern Criminal
tion of the guilty pleas result from the informal negotiation process and a deal with the prosecutor, rather than from a simple guilty plea on the original charge at arraignment.6

Several reasons are advanced to explain the gross disparity between the number of criminal cases adjudicated by the constitutionally protected method of jury trial and the overwhelming majority determined by a plea bargain7 and guilty plea. Perhaps the most frequently stated rationale is that the large volume of cases8 entering the system would require an impossible aggregate of courtroom resources to provide trial by jury to each defendant; thus a quicker, more efficient method of case disposition is necessary.9 Plea bargaining, by facilitating the prompt disposition of a great number of cases, serves the purpose of efficiency.10

Another reason for the great number of guilty pleas following bargaining is the less severe sentence of which the defendant is generally assured.11 First, the charge has been lowered as a result of the bargain, and second, judges may tend to grant sentencing concessions to defendants who plead guilty and avoid the expense and delay of trial.12 Thus at one end of the scale is the need for

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6 H. SUBIN, supra note 4, at 49. Plea negotiation accounts for the majority of all felony convictions in Cook County, Ill.—The Role of Plea Negotiations in Modern Criminal Law, supra note 4, at 116. And 56.7 percent of the sample in Newman's survey admitted bargaining—Newman, Pleading Guilty for Considerations: A Study of Bargain Justice, supra note 4, at 789.

7 Because "bargain" connotes a shady or illicit deal, it may be preferable to refer to "plea negotiation," "plea discussion," or "plea agreement." The A.B.A. prefers use of the terms "plea discussions" and "plea agreements." See AMERICAN BAR ASSOCIATION ADVISORY COMMITTEE ON THE CRIMINAL TRIAL, AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY 3 (Approved Draft, 1968) [hereinafter cited as A.B.A. STANDARDS]. The bargain may sometimes occur during the trial, TASK FORCE REPORT 136.

8 E.g., District attorneys in New York City admit that they must bargain and offer pleas to lesser offenses "because the courts would collapse if they all insisted on jury trials." Whitney, supra note 5. See also Polstein, How to "Settle" a Criminal Case, 8 PRAC. LAW. 55, 37 (1962): "The widely held opinion that prosecutors never bargain is a myth. As a practical matter they must in order to stay in business."


10 PRESIDENT'S COMMISSION, THE CHALLENGE OF CRIME 135.

11 A Yale Law Journal survey of 140 federal district judges showed that eighty-seven percent of judges who acknowledged that the plea was germane indicated that a defendant
efficiency in the system, and at the other is the defendant who fears the vagaries of jury trial and the possibility of much longer sentences than the bargain has produced. Although these considerations explain the prevalence of plea bargaining today, they fail to provide convincing justification for the system.

Nevertheless, it is not the purpose of this note to discuss the justification for the plea bargaining process, for it is clear that this system will of necessity be continued in the foreseeable future. Instead, this analysis is designed first to present the functional role, constitutional status and existing abuses in the plea bargaining process, and then to discuss the goals and the proposed standards relevant to reform of the present plea bargaining procedures. The culmination of this analysis is the proposed Model Court Rule for Plea Agreements in part III.

II. FUNCTIONAL AND LEGAL STATUS OF PLEA BARGAINING

A. Role Within the Present System—Jurisdictional Variations

The two most common types of plea arrangements or agreements are the bargain concerning reduction of the charge (acceptance of plea to lesser included or related offense), and the bargain involving a promise of leniency as to sentence (sentence recommendations). However, because the process is informal and of low visibility, any deal that is agreeable to both sides may be utilized. Therefore, the scope of plea arrangements is broad and perhaps impossible to catalogue. No matter what particular form the agreement takes, however, the issue in a plea negotiation


14 Other types of informal conviction agreements include: reduction of charge; promise of leniency; bargain for concurrent charges; and bargain for dropped charges. Newman, Pleading Guilty for Consideration, supra note 4, at 787. In Bongiovanni, Guilty Plea Negotiation, 7 DUQUESNE L. REV. 542 (1969), the list includes an agreement not to seek conviction of a higher degree of crime in exchange for defendant's not seeking to reduce the degree. There also may be a "tacit bargain" (no negotiations) in which defendant pleads guilty because he is aware of an established practice in the court to show leniency to those who so plead, and he expects to be similarly treated. Enker, supra note 8, at 111. For a general discussion of forms and uses of pleas, see TASK FORCE REPORT 10–11.

15 Bongiovanni, supra note 14.
always is how much leniency an offender will be given in return for a plea of guilty.\textsuperscript{16} That issue forms the substantive matter of the plea bargaining process in all jurisdictions, although the factors which determine the result and the way in which it is reached are often tremendously different among the different jurisdictions.\textsuperscript{17} Since the practice of plea bargaining is intertwined with the phenomenon of prosecutor’s discretion, the variation of systems is to a great extent the result of variations in the policies and operating procedures of prosecutors’ offices. If a particular prosecutor’s office is quite selective and realistic in choosing whom to prosecute and what charges to bring, then there is less likelihood that either defense or prosecution will feel compelled to initiate bargaining. On the other hand, in jurisdictions where bargaining is the general rule, there is usually a corresponding, well-established practice of initial over-charging by prosecutors.\textsuperscript{18} In addition, an agreement is often made in order to avoid statutory minimum or mandatory sentences which may be present within the jurisdiction.\textsuperscript{19}

Another major point of difference—the extent of judicial participation in the process—may serve to illustrate these variations. In some jurisdictions such as the criminal courts of Philadelphia a judge will play a major role in the plea bargaining process.\textsuperscript{20} There, the two counsel go before a calendar judge the day before trial. The calendar judge often invites counsel to confer with each other and discuss the possibility of a plea with them. They report to him on the status of their negotiations, and he will indicate

\textsuperscript{16} President’s Commission, The Challenge of Crime 134.

\textsuperscript{17} D. Newman, supra note 4, at xiii, 79. Variations exist, for example, as to the power of the prosecutor to make bargains and as to the judge’s participation in the negotiations. McIntyre & Lippman, supra note 5, at 1157. “In form, a plea bargain can be anything from a series of careful conferences to a hurried consultation in a courthouse corridor. In content it can be anything from a conscientious exploration of the facts and dispositional alternatives available and appropriate to a defendant, to a perfunctory deal. . . .” President’s Commission, The Challenge of Crime 11.

\textsuperscript{18} H. Subin, supra note 4, at 34–36. This over-charging may consist of an initial felony charge which is later reduced to a misdemeanor, or an initial charge of several misdemeanors in order to obtain a guilty plea on one misdemeanor. See Coon, The Indictment Process and Reduced Charges, 40 N.Y.S. Bar J. 434 (1968), for a discussion of prosecutors’ practices of filing extra charges in anticipation of later bargaining, and a possible subversion of the grand jury process because of it.

\textsuperscript{19} D. Newman, supra note 4, at 76; Enker, supra note 8, at 109. For example, in those jurisdictions where possession of marijuana is a felony carrying a mandatory minimum sentence, the recent practice is to engage almost always in plea negotiation. (Author’s experience in criminal defense work in Cleveland, Ohio).

\textsuperscript{20} The description of the system in Philadelphia is found in Bongiovanni, supra note 14, at 547; Recent Decisions, Criminal Procedure—Plea Bargaining, 8 Duquesne L. Rev. 461, 468 (1970). Note that this judicial participation is contra to standard 3.3 in A.B.A. Standards, supra note 7, at 11–12. According to Thomas, An Exploration of Plea Bargaining, 1969 Crim. L. Rev. 69, 74, the judge plays a much more active role in bargaining in the United States than in England.
what he thinks is an appropriate disposition and sentence. If both
counsel and the defendant agree, then the calendar judge hears the
case; but if not, then the case is assigned to another judge for trial.
Similarly, in Chicago, a conference with the judge and prosecutor
is available on request; and in Brooklyn, cases are mandatorily
referred to a "Conference and Discussion Court" before docket-
ing. On the other hand, there are many courts in which no
judicial participation occurs in the bargaining process. In the
District of Columbia Court of General Sessions, serious criminal
cases are bargained in an almost formal plea-bargaining session
which operates as an informal prosecutor's hearing in the prose-
cutor's office. Other jurisdictions also avoid judicial in-
volve: in Los Angeles County there is little judicial participa-
tion in bargaining; in Harris County (Houston) there is heavy
emphasis on plea negotiations between prosecution and defense;
and in Detroit, negotiations are mandatory and include a pre-trial
conference without judicial participation.

A variety of factors may be considered and discussed between
the prosecutor and defense attorney (and sometimes judge) within
the frameworks for plea bargaining mentioned above. Such factors
include the nature and evidence of the crime alleged to have been
committed; various theories, and the strengths or weaknesses of
both sides; and the recommended sentence based on the defend-
ant's background (previous record, past employment, military ser-
vice and education).

Aside from these factors, the tactics and strategy involved in the informal bargaining process are also sig-
nificant considerations in determining what concessions are avail-

21 McIntyre & Lippman, supra note 5, at 1156-57.
"In Brooklyn and Chicago the courts participate in and sometimes preside
over the negotiation process, normally after the indictment is returned. Trial
judges in Chicago will listen to a summary of the facts of the case and
indicate to the defendant's counsel the kind of sentence that would be
imposed on a plea in order to give him a precise and realistic basis for
advising his client. In Brooklyn the negotiation process is centered in a
special court entitled the 'Conference and Discussion Court', whose sole
purpose is summarily to review both sides of felony cases at the time of
arraignment and to recommend reductions, concessions and settlements
where indicated."

22 H. Subin, supra note 4, at 42-48. This hearing is an integral part of the process in the
General Sessions Court. The defense argues its case, and the prosecutor decides on one of
the following: no deal, a felony reduced to a misdemeanor, some charges dropped in
exchange for a plea, or a case dismissed by a nolle prosequi. There is no sifting of the facts
in the courtroom. Id. Note that these hearings may serve as informal discovery devices for
both sides. Id. at 46.

23 McIntyre & Lippman, supra note 5, at 1156. For a description of the system in
Detroit, see generally Cahalan, Efficiency and Justice, 5 THE PROSECUTOR 330 (1969).

24 Notes and Comments, Criminal Law: Plea Agreements in Oklahoma, 22 OKLA. L.

25 Bongiovanni, supra note 14, at 546-48. For a general description of the way bargain-
ing discussions operate today see TASK FORCE REPORT 9-11.
able to defendants. Because of the high volume of cases, any strategies which might cause a burden on the court’s or prosecutor’s time would naturally be an effective bargaining tool for the defense attorney. Since the court and prosecutor know that they must dispose of a certain number of cases, time is critical to them. If any particular case is consuming too much time, then they may be forced to offer a greater leniency to the defendant in order to eliminate the case and make room for others. Although defense attorneys are encouraged to make sure that the defendant gets a fair deal, they may tend to overlook this responsibility if they can earn a quick fee by persuading a defendant to cop-out on a plea. Likewise, the prosecutor’s strategy may be to overstate his case against the defendant and thereby bluff him into a guilty plea.

Regardless of the nature of the process, once an agreement is reached, counsel recommends it to the defendant while the prosecutor recommends it to the court. At this point the defendant must weigh the risks of conviction on the charge as it stands against the certainty of a reduced penalty for a plea of guilty to a lesser charge. More often than not he will yield to the intense pressures brought to bear on him by the prosecutor and frequently an appointed counsel, and will agree to enter a plea of guilty in court.

B. Constitutionality of the Negotiated Plea

The courts have been hesitant to consider squarely the constitutional objections to plea bargaining—that it chills fifth and sixth amendment rights—and have successfully avoided direct discussions or analysis of the question. One logical reason for this judicial reluctance may be the judges’ awareness of the heavy caseload and knowledge that if plea bargaining were declared unconstitutional, it would have catastrophic results for the operation of the courts. Another reason may be their understanding of the difficulty involved in court enforcement of a constitutional rule against plea bargaining. Many appellate courts have implicitly

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26 Alschuler, *supra* note 13, at 56–57. *See generally* Polstein, *supra* note 9, as to strategy for defense counsel in negotiating a criminal case. His outline of defense counsel’s job includes the following: (1) obtain offer of an acceptable plea from prosecutor; (2) find a judge who will accept the plea; (3) persuade defendant to accept the plea offered; and (4) make sure the pre-sentence report has all complete and necessary information for sentencing.


28 *See generally* Note, *The Unconstitutionality of Plea Bargaining*, 83 *Harv. L. Rev.* 1387, 1395–1407 (1970), which discusses this judicial reluctance to approve explicitly the constitutionality of plea bargaining, and concludes that plea bargaining should be declared unconstitutional.

29 *Id.* at 1407–10.
approved the bargaining system by enforcing pleas made pursuant to bargaining and by stating that plea bargaining is not against public policy.\textsuperscript{30} The courts have hidden behind the voluntary and knowing tests for taking guilty pleas, implying that if these tests are met then pleas based upon bargains are acceptable.\textsuperscript{31} Occasionally a court may express the constitutional issue in terms of a defendant not being denied his due process of law as the result of his guilty plea pursuant to a bargain.\textsuperscript{32} Nevertheless, this prior, passive judicial acquiescence in the system not necessarily a judicial determination of constitutionality.

In \textit{United States v. Jackson},\textsuperscript{33} the United States Supreme Court considered a case involving what might be called statutory plea bargaining.\textsuperscript{34} This kind of bargaining occurs where the statute defining the crime includes inducement for the defendant to plead guilty rather than exercise his right to a trial. The Federal Kidnap- ping Act provides that interstate kidnappers shall be punished by death if the kidnapped person has not been liberated unharmed, and if the jury's verdict shall so recommend. However, there is no procedure for giving the death penalty to a defendant who pleads guilty. Since the statute makes the risk of death the price for asserting the right to trial by jury, the Court held that portion of the statute imposing the death penalty unconstitutional because it impaired the free exercise of that constitutional right.\textsuperscript{35} It is essential to note that the Court did not attack the bargaining process, nor in fact consider that question. Instead, the statute was struck down for inducing the defendant to waive jury trial.

The statutory inducement to plead guilty which was involved in \textit{Jackson} can be distinguished from prosecutorial plea bargaining, which also has the effect of inducing waiver of jury trial. In prosecutorial plea bargaining, the defendant can weigh the risks of going to trial, being convicted, and receiving the maximum sentence against the kinds of leniency which the prosecutor is offering him for a guilty plea. If the leniency being offered is insufficient from the defendant's point of view, then he can go to


\textsuperscript{31} Shelton v. United States, 242 F.2d 101 (5th Cir.), rev'd on rehearing, 246 F.2d 571 (5th Cir. 1957) (en banc), rev'd 356 U.S. 26 (1958) (\textit{per curiam} on confession of error).

\textsuperscript{32} State v. Johnson, 279 Minn. 209, 156 N.W.2d 218 (1968).

\textsuperscript{33} 390 U.S. 570 (1968).

\textsuperscript{34} \textit{See Comment, Constitutional Law—Plea Bargaining—New Jersey Statute Allowing a Defendant to Avoid the Death Penalty by Pleading Non Vult or Nolo Contendere held Valid}, 44 N.Y.U.L. Rev. 612, 619–22 (1969).

\textsuperscript{35} 390 U.S. at 571.
trial facing the same maximum sentence with which he was confronted when the bargaining began. The chilling effect on the defendant's right to trial by jury is at least of a different dimension from the situation in Jackson, where, under a statute, to demand a jury trial may cost the defendant his life. The defendant in Jackson was not confronted so much with incentives to plead guilty (as in prosecutorial plea bargaining), but rather with a major disincentive to exercise his right to jury trial. Where one of the choices is death, surely the choice is much less voluntary.\(^{36}\)

The holding in Jackson has not precluded the United States Supreme Court in several recent cases from implying that plea bargaining is a constitutionally permissible procedure. In Brady v. United States\(^{37}\) the United States Supreme Court held that a guilty plea in a Lindbergh Law\(^{38}\) prosecution was not inherently involuntary. The Court phrased petitioner's claim in terms "that it violates the Fifth Amendment to influence or encourage a guilty plea by opportunity or promise of leniency and that a guilty plea is coerced and invalid if influenced by the fear of a possibly higher penalty for the crime charged if a conviction is obtained after the State is put to its proof."\(^{39}\) After comparing Brady's case to others in which leniencies may be available to the defendant for a guilty plea, the Court characterized these situations as those where the "defendant might never plead guilty absent the possibility or certainty that the plea will result in a lesser penalty than the sentence that could be imposed after a trial and a verdict of guilty."\(^{40}\) Significantly, it concluded:

We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged.\(^{41}\)

\(^{36}\) Another consideration in Jackson may have been the seriousness of the statute which carries a death penalty with it, as a possible penalty for asserting one's constitutional rights. See generally the opinion of J. Brennan in Parker v. North Carolina, 397 U.S. 790, 809-10 (1970).

\(^{37}\) 397 U.S. 742 (1970). In Brady the defendant pleaded guilty and was sentenced before the intervening decision in Jackson was handed down. Jackson was decided while Brady's request for post-conviction relief was before the Court of Appeals for the Tenth Circuit, 404 F.2d 601 (1968), and then before its disposition in the United States Supreme Court.


\(^{39}\) 397 U.S. at 750-51.

\(^{40}\) Id. at 751. The Court specifically excluded situations in which the prosecutor threatens prosecution on a charge not justified by the evidence, or in which the trial judge threatens defendant with a harsher sentence if convicted after trial in order to induce him to plead guilty. Id. at 751 n. 8.

\(^{41}\) Id. at 751.
This conclusion would seem to constitute a judicial declaration of the constitutionality of plea bargaining, although it was stated in *dicta*. The Court in *Brady* also considered the prevalence of guilty pleas and, in what seems to be a defense of the system, discussed the advantages of plea bargaining both to the defendant and to the prosecution.\(^{42}\) The only qualification suggested by the Court was that a different view may be taken if innocent defendants were encouraged to plead guilty; but this would not be considered a problem so long as the voluntary and intelligent requirements for plea-taking are strictly followed.\(^{43}\)

The same reasoning applied in *Brady* was followed by the Court in *Parker v. North Carolina*,\(^ {44}\) which held that a defendant's guilty plea that was possibly motivated by a desire to avoid the death penalty is not inherently involuntary. The North Carolina statute provided a maximum penalty in the event of a plea of guilty lower than the penalty authorized after a verdict of guilty by a jury. The Court recognized that under *Jackson*, imposition of the death penalty in accord with the North Carolina statutory scheme might be unconstitutional; however, it could not find any way to distinguish the facts in *Parker* from *Brady* on the issue of the voluntariness of the plea in view of the statute.\(^ {45}\)

*North Carolina v. Alford*,\(^ {46}\) the most recent United States Supreme Court pronouncement in the area of plea bargaining, seems to reinforce the language of *Brady* and establish more securely the constitutionality of the procedure. The first part of the Court's holding states that a guilty plea which represented a voluntary and intelligent choice among alternatives available to the defendant, especially where he was represented by competent counsel, was not compelled within the meaning of the fifth amendment merely because the plea was entered to avoid the possibility of a death penalty.\(^ {47}\) The Court also held that, because of the substantial evidence indicating actual guilt in this case, the lower court committed no constitutional error in accepting a voluntary and intelligent guilty plea despite the defendant's claim of innocence.\(^ {48}\) In essence, then, the Court is ruling that: "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts

\(^{42}\) *Id.* at 752–53.
\(^{43}\) *Id.* at 758.
\(^{44}\) 397 U.S. 790 (1970).
\(^{45}\) *Id.* at 795.
\(^{47}\) *Id.* at 31.
\(^{48}\) *Id.* at 38.
constituting the crime.” While such action is constitutionally permissible, the Court qualified its ruling by stating that greater restrictions may be imposed by the states on acceptance of guilty pleas from defendants who assert their innocence.

In dicta the Court in Alford commented on bargaining for lesser included offenses:

The States in their wisdom may take this course by Statute or otherwise and may prohibit the practice of accepting pleas to lesser included offenses under any circumstances. But this is not the mandate of the Fourteenth Amendment and the Bill of Rights. The prohibition against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counter-productive and put in jeopardy the very human values they were meant to preserve. [Emphasis added].

This language may be interpreted as establishing or reinforcing three propositions. First, plea bargaining—at least bargaining for lesser included offenses—is acceptable under the Federal Constitution. Second, the Federal Constitution does not forbid the states, in their administration of criminal justice, from restricting the availability of plea bargaining. Finally, the Court reaffirms its requirements that a plea be taken voluntarily and intelligently. Thus, the trend emerging in recent United States Supreme Court cases seems to indicate the constitutionality of the plea bargaining system, under most, if not all, circumstances.

C. Voluntary and Understanding Requirement

All guilty pleas received in court, whether or not the result of bargaining, are subject to certain constitutional requirements. The primary rule is that a guilty plea, entered in either a state or federal court, must be both voluntarily and knowingly made.

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49 Id. at 37. Compare with McCoy v. United States, 124 U.S. App. D.C. 177, 363 F.2d 306 (D.C. Cir. 1966), holding that the court did not abuse its discretion in refusing to accept a plea, in view of the voluntary nature of the plea and defendant's understanding of the nature of the charge, despite the fact that the defendant in discussion with the court affirmatively stated that he was not guilty.

50 400 U.S. at 38 n.11.

51 Id. at 39.

52 Machibroda v. United States, 368 U.S. 487 (1962); Kercheval v. United States, 274 U.S. 220 (1927); Waley v. Johnston, 316 U.S. 101 (1942); United States ex rel. Rivera v. Follette, 395 F.2d 450 (2d Cir. 1968). The terms "understandingly" and "intelligently" are often substituted by the courts for "knowingly," and any one of the terms represents the same set of requirements to be used along with the test of voluntariness. Thus two separate requirements are involved: a plea must be voluntarily entered (without coercion); and it must also be understandingly entered (defendant must understand the nature of the charge, the law relating to his case, and the consequences of conviction). For a general summary of the constitutional requirements for the taking of a guilty plea, see Gentile, Fair Bargains and Accurate Pleas, 49 B.U.L. REV. 514-23 (1969). See also, Enker, supra note 8, at 116-17 for a discussion of a voluntary standard for pleas.
This constitutional requirement has been incorporated into the Federal Rules of Criminal Procedure and applied to the states in *Boykin v. Alabama*. The Supreme Court has held that a "defendant is entitled to plead anew if a United States district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." In the recent case of *Boykin*, the Court went further in its requirements by holding that for a valid conviction the record must disclose that the defendant voluntarily and understandingly entered his plea of guilty. The Court reasoned that since a plea of guilty is a conviction and thus effectively waives all of defendant's federal constitutional rights, such a waiver must be proper and affirmatively stated in the record. Thus, a guilty plea entered pursuant to a plea agreement has been held to be involuntary and therefore invalid where the defendant did not fully understand the plea agreement, where the defendant was too young and uneducated to enter properly a plea without counsel, and where the plea was induced by a consideration which was illegal under both state and federal law. In *United States ex rel. Thurmond v. Mancusi* involving a collateral attack on a guilty plea, the court held the plea involuntary and void where the defendant believed at the time he pleaded guilty that a coercive promise or threat had been made by either the court or prosecutor. In fact neither had been made; however, since defendant's plea was induced by this belief, the plea was held to be involuntary.

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53 FED. R. CRIM. P. 11.
54 395 U.S. 238 (1969). The Court's decision applied the requirements of FED. R. CRIM. P. 11 to the states as a matter of federal constitutional law. See generally Note, Criminal Procedure—Requirements for Acceptance of Guilty Pleas, 48 N.C.L. Rev. 352 (1970), which discusses the voluntary and knowing requirements under the FED. R. CRIM. P. and *Boykin*, as well as guilty plea acceptance safeguards.
55 McCarthy v. United States, 394 U.S. 459, 463-64 (1969). This decision was based solely upon the Court's construction of Rule 11 and was made pursuant to its supervisory power over the lower federal courts.
57 Right against self-incrimination; right to jury trial; and right to confront one's accusers.
58 395 U.S. at 242.
60 Lesley v. Oklahoma, 407 F.2d 543 (10th Cir. 1969).
61 Lassiter v. Turner, 423 F.2d 897 (4th Cir.) cert. denied, 400 U.S. 852 (1970). But cf. the following cases in which the courts have held that a plea is not involuntary or coerced just because a bargain was involved: Rogers v. Wainwright, 394 F.2d 492 (5th Cir. 1968); Ford v. United States, 295 F. Supp. 1180 (D.C. Mo. 1969); Hansen v. Mathews, 296 F. Supp. 1328 (D.C. Wis. 1969); State v. Olbeksen 7 Ariz. App. 474, 441 P.2d 71 (1968); or not unknowingly entered because a bargain was involved, Commissioner ex rel. Kerekes v. Maronez, 432 Pa. 337, 223 A.2d 699 (1966).
63 275 F. Supp. at 514-15. The court discussed the voluntary requirement in the context of a subjective test, inquiring into the state of the defendant's mind (what he believed) under the circumstances. A similar view is expressed in Comments and Notes, The Guilty
Although the courts have in several cases overturned the sentence derived from a plea bargain because the defendant had not voluntarily and knowingly accepted the bargain, in most cases the existence of bargaining and agreement is never brought out in open court. The usual practice is to conduct the on-the-record guilty plea proceedings as if there had been no negotiations or agreements. In the course of this procedure the defendant denies that any promises have been made to him, even though he has been promised concessions and has been told that the prosecutor will not grant such concessions unless he pleads guilty. To label such a procedure a "fairy tale script," as one commentator has, is being entirely too kind, for it is nothing less than perjury. Moreover, the effect of wide-spread non-recognition of plea bargaining by courts in the plea-taking proceedings has contributed to its low visibility, making the system susceptible to several abuses.

D. Abuses in the Present System

It is widely recognized that severe abuses often occur in the
process of plea bargaining. In fact, occasionally a court will admit that at least the potential for abuse is inherent in every plea agreement. The most frequently mentioned and potentially dangerous problem is an innocent person being induced to plead guilty. Innocent persons may be induced to plead guilty because of fear of damaging publicity surrounding a repugnant charge, or fear of a harsher sentence if convicted after trial. Although one might initially question the proposition that an innocent person would under any circumstances voluntarily subject himself to conviction and punishment, oftentimes the greatest pressures to plead guilty may be brought to bear on defendants who are possibly innocent. In these cases the prosecutor seeks a bargain to save a weak or difficult case, and the offer of leniency is likely to be excessive. The result is that a defendant must decide between his chances of acquittal at trial, regardless of guilt, and an ensured, comparatively light sentence. According to one commentator who studied the prosecutor’s role in bargaining: “When prosecutors respond to a likelihood of acquittal by magnifying the pressures to plead guilty, they seem to exhibit a remarkable disregard for the danger of false conviction.” Although there is no way of knowing how many innocent persons have been forced to plead guilty and perhaps pay a fine or serve a prison sentence because of plea bargaining, the structure of the present system creates a high potential for this kind of risk which may involve many defendants.

At the other end of the spectrum is the risk that habitual criminals and dangerous offenders may be able to manipulate the system to obtain excessively lenient treatment. In the prose-

69 TASK FORCE REPORT I-12; Folberg, supra note 13 at 205.
70 “When considering any case where 'plea bargaining' has been shown to occur, the Court is cognizant that abuses may result . . .” State v. Popejoy, 9 Ariz. App. 170, 450 P.2d 411, 412 (1969).
71 D. NEWMAN, supra note 4, at 38–39; Alschuler, supra note 13, at 64; The Influence of the Defendant’s Plea on Judicial Determination of Sentence, supra note 12, at 220–21.
72 TASK FORCE REPORT I-12.
73 Id.
74 Alschuler, supra note 13, at 60. See also Rossett, The Negotiated Guilty Plea, 374 ANNALS 70, 71–73 (1967), describing the tactical pressures involved in the bargaining, process between defense lawyer and prosecutor. 3 J. WIGMORE, EVIDENCE § 822, at 246 (3d ed. 1940):
under certain stresses a person, especially one of defective mentality or peculiar temperament, may falsely acknowledge guilt. This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledgment of guilt is at the time the more promising of two alternatives between which he is obliged to choose; that is, he chooses any risk that may be in falsely acknowledging guilt, in preference to some worse alternative associated with silence.
75 Gentile, supra note 52, at 550.
76 Alschuler, supra note 13, at 62.
77 TASK FORCE REPORT I-12.
cutor's quest to obtain guilty pleas, he may, when confronted with difficult cases, simply find it advantageous to offer excessive rewards to some defendants. To the extent that bargaining is concluded without an objective evaluation of the treatment and correctional needs of the defendant, the sentence which he receives for committing a crime is unrelated to what is required for his rehabilitation or what may be necessary to protect society.

Another area of abuse in plea bargaining results from the low visibility of the process. If threats are made by the prosecutor, since they are not recorded there is a difficult problem of proof. Often the defendant, defense attorney, and prosecutor will state in open court that no bargain or promises have been made, when in fact they know that the plea was arranged. If the court determines that the plea was voluntarily and knowingly given, then the matter of a bargain is substantially hidden from any judicial scrutiny. Since there is generally no record of what transpires at the bargaining session, the court is unable to judge the validity or fairness of the agreement. The lack of a record of the agreement also makes it difficult if not impossible for the defendant, on appeal or in a post-conviction proceeding, to show any irregularity or coercion which would make his plea involuntary or otherwise invalid. After having denied the existence of a bargain in court, the defendant who quietly accepts the judgment and sentence of the court cannot credibly assert on appeal that an agreement to which he was a party was not kept. Furthermore, an appellate court would have no criteria on which to decide whether a bargain had been properly performed, since there is no written record of the terms of the agreement. Only the potentially conflicting oral testimony under oath of defendant, defense attorney and prosecutor would be available to establish the precise terms of the agreement. Even with a record of the plea-taking proceedings, as required by Boykin, the court cannot know what transpired between the defendant and the prosecutor outside the courtroom.

79 Task Force Report 9; J. Skolnick, Justice Without Trial: Law Enforcement in Democratic Society 13 (1966). "Plea bargaining may be a useful procedure, especially in congested urban jurisdictions, but neither the dignity of the law, nor the quality of justice, nor the protection of society from dangerous criminals is enhanced by its being conducted covertly." President's Commission, The Challenge of Crime 11.
80 President's Commission, The Challenge of Crime 11.
81 Plea Bargaining—Justice Off The Record, supra note 4, at 435.
82 Id. See State v. Jennings, 104 Ariz. 3, 448 P.2d 59 (1968), modified on rehearing, 104 Ariz. 159, 449 P.2d 938 (1968), in which defendant, who had originally denied the existence of a bargain, failed to persuade the court that the prosecutor had coerced him into changing his plea from not guilty to guilty for dismissal of other charges.
83 See generally Comment, Guilty Pleas and the Concept of Waiver, 5 Willamette L. J. 575 (1969).
A third major problem with plea bargaining as it operates today is that jurisdictional differences may result in inequalities in the opportunity to bargain, and many defendants may receive unequal justice. A defendant who happens to be in a jurisdiction where there is a very heavy case load and a prosecutor's office which makes a high number of bargains, may get a much better deal than if he were charged in a rural area with a light case load. Even within the same jurisdiction, some judges are known to be more inclined to make liberal deals with defendants, and thus the practice of "judge-shopping" creates inequalities in treatment. One might make an equal protection argument that defendants charged with the same crime in the same jurisdiction should have an equal opportunity to plea bargain with the prosecutor. However, unless a purposeful scheme of discrimination on the part of a prosecutor's office can be proved, it is unlikely that such an argument could prevail. A stronger argument for equal opportunity to plea bargain could be made where several co-defendants in the same jurisdiction are not all allowed to bargain with the prosecutor. Yet, in view of the close relationship between bargaining and the prosecutor's discretion, the courts will undoubtedly be somewhat reluctant to interfere.

The widespread prosecutor's practice of over-charging to induce the defendants to plead guilty to a lesser offense presents another problem created by plea bargaining. Prior to any plea negotiations, a prosecutor may strengthen his bargaining position by charging the defendant with the most serious crime that an

84 Pleas of Guilty, Symposium, supra note 5, at 754; D. Newman, supra note 4, at 42-44. The sense of injustice among defendants is one of the abuses discussed in Task Force Report 11.
85 Task Force Report 11.
88 In Newman v. United States, 382 F.2d 479 (D.C. Cir. 1967), the court of appeals held that for the U.S. Attorney to consent to a guilty plea tendered by a co-defendant for the lesser included offense under the indictment, while refusing to grant the same plea for the other defendant, did not constitute a denial of defendant's constitutional rights. The court decided the case on the basis of prosecutor's discretion under the executive branch, and avoided the main issue of equal opportunity to bargain. The related issue of disparity of sentences between two co-defendants, one pleading guilty and one going to trial, was litigated in United States v. Wiley, 267 F.2d 453 (7th Cir. 1959), sentence set aside on remand, 278 F.2d 500 (7th Cir. 1960). The court held that where defendant's defense was not frivolous and was not presented in bad faith, the fact that he asked for trial could not justify the imposition of a harsher sentence upon him than upon other defendants who had pleaded guilty.
89 See H. Subin, supra note 4, at 47-48.
expansive reading of the evidence will permit. This practice invariably involves a certain amount of harassment.

III. REFORMING THE SYSTEM IN VIEW OF APPROPRIATE GOALS TO BE SERVED

A. Goals

The abuses and irregularities which occur in plea bargaining could be minimized by explicitly defining and formalizing the procedure of negotiation. The primary consideration in any situation involving plea bargaining is the constitutional requirement that any guilty plea be voluntarily and knowingly made. An initial safeguard would be the availability of counsel during the process of negotiation. In addition, the following four goals would seem to be critical elements in any system of plea negotiation; and may serve as criteria by which to judge the success of any new procedures.

First, guilty pleas based upon plea agreements should accurately reflect the approximate degree of the defendant's guilt and his personal and background characteristics. Thus, plea bargaining which induces an innocent person to plead guilty should not be sanctioned. Conversely, when there is substantial evidence indicating guilt of a certain offense, any reduction of the charge should be carefully scrutinized. One way to avoid fictitious pleas is to encourage the close, objective scrutiny of plea discussions and agreements. Accuracy of pleas would also be improved if the terms of plea agreements were carefully defined, stated in writing, and available for judicial evaluation.

Second, the criminal justice system should not only dispense justice but should provide the appearance of justice. Plea bargaining as part of this system presently falls short in both regards. Accounts of the practice in the media tend to emphasize its negative aspects. As a result an essential element in the proper functioning of the system of criminal justice—the public con-

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90 See text accompanying notes 52–68 supra.
91 This proposition should be distinguished from the situation in North Carolina v. Alford, 400 U.S. 25 (1970). Although the defendant in that case was asserting his innocence when he agreed to plead guilty to a lesser charge, there was strong factual evidence of his actual guilt which could support the guilty plea. The kinds of cases which are dangerous are those where an innocent defendant decides to plead guilty for leniency, he does not assert his innocence, and he is convicted even if there is great doubt as to the evidence surrounding his guilt.
92 One widely circulated newspaper article describes plea bargaining as “a universal courtroom practice that is paradoxically regarded as both indispensable and undesirable by judges, prosecutors and even some defendants.” Whitney, supra note 5, at col. 1. The same article emphasizes the light sentences handed out, a weakening of the deterrent effect of the laws, the low visibility of the system, and the hypocrisy of a defendant denying that any promises had been made to him. Id. at cols. 1, 2.
fidence—is diminished. This goal of legitimizing plea negotiations in the public conscience at the very least requires an increase in the visibility of the bargaining process. Courts should openly recognize that plea negotiation is a fundamental fact of the criminal process, and should scrutinize the bargaining process whenever it produces a negotiated plea. All of the bargaining procedures should be conducted in a visible, recorded procedure. In addition, the procedure should be sufficiently formalized so that some uniformity prevails in the treatment of various defendants. In this regard, there should be an equality of opportunity for defendants to negotiate a plea, and a uniformity in resulting sentences for defendants who are of similar backgrounds.

Another goal in improving the plea bargaining process should be the proper correctional disposition of the defendant. Plea bargaining is a method of case disposition in which conviction is contingent upon the prior selection of a particular sentence or selected range of punishments. The bargain therefore dictates the peno-correctional decision of the criminal system. Under the present system the bargains are not responsive to the defendant's proper correctional needs; for they often provide punishment which is either too harsh or too lenient for the defendant under the circumstances. When sentence concessions are the substance of an agreement the procedure should utilize the same preparation and considerations of a pre-sentence report which occur after conviction at trial.

A final consideration is the efficient administration of criminal justice. Any improved system of plea discussions and plea agreements must be responsive to the problem of already congested court dockets. The costs of the proceedings in terms of human resources and money must be weighed against the number of cases which may be processed.

B. A Model Court Rule for Plea Discussions and Agreements

DEFINITIONS:
1.1 For the purposes of this Rule the following definitions are applicable unless otherwise indicated:

94 See TASK FORCE REPORT 12; H. SUBIN, supra note 4, at 139.
95 Plea Bargaining—Justice Off the Record, supra note 4, at 436; Thomas, supra note 20, at 71.
96 The equal opportunity to bargain is discussed in The Unconstitutionality of Plea Bargaining, supra note 28, at 1394-95.
97 See text accompanying notes 77-79 supra.
98 This rule is offered merely as one suggested procedure for improving the present plea bargaining practices, especially those in state courts. As a model rule there might be any
(a) Criminal Cases—Criminal cases refers to all felony charges and all misdemeanor charges, with the exception of minor or petty traffic offenses.

(b) Participants—The participants are the prosecutor, defendant, and defense counsel. In any action involving the participants, if there is no defense counsel required by law or if the defendant knowingly and voluntarily waives his right to counsel, then he may proceed alone. Under no circumstances may the defense attorney bind the defendant to any agreement against his will.

(c) Defense—Defense refers to either the defendant or defense counsel where both are present, or just to the defendant if there is no defense counsel required by law or if the defendant knowingly and voluntarily waives his right to counsel. Under no circumstances may the defense attorney bind the defendant to any agreement against his will.

MANDATORY PRE-TRIAL HEARING:
2.1. As soon as possible after an information or indictment is handed down in every criminal case, but not earlier than when all participants are prepared, a pre-trial hearing is to be held, under the direction of a master (or judge) appointed by the court, and number of variations which would prove to be quite acceptable in practice. The form of a court rule, to be adopted by the supreme court in a state for all courts within the jurisdiction, was chosen rather than a legislative enactment for several reasons: A rule would be easier to initiate than the passage of a piece of legislation in a state legislature; and it would be flexible and easily adaptable to the reactions of participants and judges. Authority to promulgate such a rule in the federal system is found in the United States Supreme Court's power to make criminal rules for the federal courts pursuant to the enabling act of 18 U.S.C. § 3771 (1964), as amended. (Supp. IV, 1968). In the states, authority may be found in appropriate state constitutional provisions or enabling acts. In Michigan, e.g., the supreme court has rule-making power pursuant to an enabling act, Mich. Comp. Laws Ann. § 600.223 (1968). There is no doubt that plea discussions are properly a matter of practice and procedure under such statutes. See Mich. Gen. Ct. R. 11 and Author's Comments in Mich. Ct. R. Ann. (West, 1962). Regarding the rule-making power of the courts see generally 8 J. Moore, Federal Practice ¶ 1.02 (2d ed. 1970).

99 For the purposes of this Court Rule an alternative system substituting judges for masters would be equally feasible if judges were used in some type of rotating-docket system, so that the judge presiding at the hearing would not be the same judge who presides at trial. One might contend that a judge, with more trial experience than a master, would be better able to predict how a case might result at trial, and thus the judge would suggest a more realistic agreement. However, the relevance of this factor is diminished by the fact that the principal goal of the Model Court Rule is to bring case dispositions by plea agreement into line with the defendant's correctional needs, rather than mere predictions of the possibilities at trial. Another reason for preferring judicial supervision over plea negotiations and agreements may be that judges should possess sole discretion regarding sentences and that the Model Court Rule would in some instances give this authority to masters who have no sentencing experience. It is apparent, however, that under the proposed Model Court Rule it is the judge who makes the final decision on sentencing; although in the case of sentence concessions the master proposes the sentence. Moreover, under the present system in many jurisdictions, the prosecutor recommends a sentence which is accepted by the judge in most cases. In view of that practice it seems
attended by defense counsel, the defendant, the prosecutor and the court reporter for the purpose of engaging in plea discussions and reaching plea agreements.

2.2. If either the prosecution or defense indicates an unwillingness to seek a plea agreement, then the master shall obtain a signed statement from the parties stating only that no agreement is possible. The statement is to be signed by the master and then submitted to the judge, and the hearing shall be dismissed. At arraignment the defendant shall not be prejudiced in his pleading on the original charges.

2.3. If both prosecution and defense indicate a desire to enter into plea discussions and seek a fair plea agreement, then the hearing proceeds as follows:

(a) First the prosecutor and then the defense, separately and in turn, are to be given an opportunity to present any verbal or written information, not including witnesses and not subject to the normal rules of evidence, which includes any information relating to the crime or crimes charged, the evidence for or against the defendant, the defendant’s background and any other relevant facts.

(b) The master shall question first the prosecution and then the defense about the nature of any private discussions which have occurred between them, in regard to any matters which are unclear to him, and in order to elicit any relevant information which was previously omitted. He shall also inquire of the prosecution and defense individually about the range of terms of plea agreement which would be acceptable to them.

(c) On the basis of all admitted information, and either at the original hearing or within a period of no more than two days, the master shall recommend to the participants one of the following two alternatives:

(i) That under the circumstances no fair agreement is possible; and in this case the hearing is dismissed and the defendant at his scheduled arraignment shall not be prejudiced in his pleading on the original charges, or preferable to have an objective party—the Master—propose a recommended sentence, rather than the prosecutor who is also an adversary party with an interest in the outcome of the proceedings. Regardless of these objections to the use of judges, the alternative of using judges at the pre-trial hearing would basically preserve the goals and objectives of the Model Court Rule. Such a system would require a different judge at the arraignment or point of taking the plea in order to protect the defendant against any potential prejudicial effect. As a practical matter, it is highly unlikely that any judge at arraignment would reject his colleague’s recommended plea agreement even if it appears unjustified under the circumstances. Another problem might be that it will prove easier to find and hire masters than to find sufficient judges; and the costs of salaries would be considerably lower if masters were employed.
(ii) That an agreement is appropriate under the circumstances, and he shall state the terms of that recommended agreement. The structure of an agreement may take one of the following forms:

(A) The prosecutor agrees to make or not to oppose favorable recommendations as to the sentence which should be imposed if the defendant enters a plea of guilty or nolo contendere;

(B) The prosecutor agrees to seek or not to oppose dismissal of the offense charged if the defendant enters a plea of guilty or nolo contendere to another offense reasonably related to defendant's conduct; or

(C) The prosecutor agrees to seek or not to oppose dismissal of other charges or potential charges against the defendant if the defendant enters a plea of guilty or nolo contendere. 100

(d) If an agreement is recommended, then it is submitted to all the participants for their approval and signatures, with the following results:

(i) If either the prosecutor or defendant refuses to accept and sign the recommended agreement, then it shall go back to the master. He may continue the hearing discussions at his discretion, or he may directly proceed to propose a second recommended agreement. If the master fails to propose a second recommended agreement, or if the second recommended agreement is similarly rejected by the prosecutor or defendant, then the hearing is dismissed and the defendant shall not be prejudiced in his pleading on the original charges at his arraignment.

(ii) If the prosecution and the defense sign the recommended agreement then it shall become a valid recommended agreement.

(e) The master shall sign the valid recommended agreement, including a full transcript of the hearing proceedings and a report of reasons for the terms of the valid recommended agreement, and he shall prepare two copies: one to be filed in the office of the clerk of courts, and one to be sent to the judge for his consideration. The master must state and make clear to all participants that the agreement reached is not binding on them until the judge accepts and signs it in his discretion. The master's report of reasons for the terms of the valid recommended agreement shall include a discussion of the importance of these factors:

(i) Nature and circumstances of offense charged and arrest.

(ii) Weight of evidence against the defendant and weight of the defenses available to him.

(iii) Defendant's prior criminal record including arrests and convictions.

100 These forms are taken from § 3.1 of A.B.A. STANDARDS, supra note 7, at 11.
(iv) Defendant's past employment, military history, general background.
(v) Defendant's character and mental condition, both now and at the time of the alleged crime.
(vi) Defendant's family ties, ties in the community, and his financial situation.

(f) In the case of any hearing which is prematurely dismissed and where no valid recommended agreement is reached, the master and all participants shall sign a statement indicating only the final disposition of the hearing. The master shall prepare two copies of this statement: one to be filed in the office of the clerk of courts and one statement to be sent to the judge.

(g) The decisions of the master or results of the mandatory pre-trial hearing are not subject to any direct appellate review.

ARRAIGNMENT:
3.1 Where no valid recommended agreement has been sent to the judge from the master, then the defendant may plead guilty, nolo contendere, or not guilty only to the original charges against him; he may not plead guilty or nolo contendere to any reduced charges or to a fewer number of counts than were originally charged against him.

3.2 Where no valid recommended agreement has been sent to the judge from the master, and the defendant pleads guilty or nolo contendere to the original charges, then the judge will not accept any recommendations of sentence from the prosecutor.

3.3 Where a valid recommended agreement has been sent to the judge prior to arraignment, and he shall have carefully reviewed and considered that recommended agreement and the reasons for it prior to arraignment, then the arraignment shall proceed in the following manner:

(a) First, the judge shall enter into the record the complete valid recommended agreement and report of the master.

(b) If the judge, in his discretion, states that he rejects the valid recommended agreement, then he shall briefly state in the record his reasons for so doing. The judge shall then inquire of the participants whether they want to attempt to obtain another agreement.

(i) If they so desire, then the matter shall be returned to the master for a second pre-trial hearing according to the prescribed process beginning in § 2.3(a).

(ii) However, if the participants do not want to attempt another agreement or if a valid recommended agreement which results from the second pre-trial hearing is similarly rejected by
the judge, then the opportunity for obtaining an agreement will be exhausted. In this case, the defendant will not be prejudiced in his pleading on the original charges in accordance with § 3.1 and § 3.2. If the defendant chooses to plead guilty or nolo contendere, then in order to avoid prejudice another judge shall pass sentence on the defendant;\textsuperscript{101} and similarly, if he chooses to plead not guilty, then in order to avoid prejudice another judge shall preside at his trial.\textsuperscript{102}

(c) Alternatively, if the judge, in his discretion, states that he accepts the valid recommended agreement, then he shall sign it and read its terms into the record as a final agreement. The judge shall inquire individually of all participants whether this final agreement corresponds to what they signed at the pre-trial hearing.

(i) If the final agreement involves a plea of guilty to reduced charges or dismissed counts, the prosecutor shall be permitted to withdraw charges, dismiss charges, and substitute reduced charges. The defendant shall then enter his plea according to the various constitutional, statutory, and court-rule requirements designed to ensure that the plea is voluntary and knowing.\textsuperscript{103} The judge may give sentence immediately following the taking of the plea, or in his discretion, may postpone sentencing to a future date.

(ii) If the final agreement involves a plea of guilty in exchange for sentence concessions, the defendant shall then enter his plea according to the various constitutional, statutory, and court-rule requirements designed to ensure that it is voluntary and knowing. The judge shall immediately order the defendant’s sentence according to the terms of the agreement.

WITHDRAWAL FROM HEARING OR AGREEMENT:\textsuperscript{104}

4.1 Either the defendant or prosecutor may withdraw at any time from the pre-trial hearing and thereby terminate it; or withdraw, until the plea is entered, from a recommended agreement, or a

\textsuperscript{101} This provision is meant to avoid the issue of self-incrimination (U.S. Const. amend. V) at sentencing, because of the information resulting from the hearing, including perhaps hearsay evidence, which the judge has read in the master’s report.

\textsuperscript{102} The possibility of prejudice to the defendant is noted in President’s Commission, The Challenge of Crime 136.

\textsuperscript{103} The procedure for receiving the plea may be those which are presently in use in the jurisdiction or preferably those in §§ 1.1-1.8 of A.B.A. Standards, supra note 7, at 6-9. But note that they would have to be slightly modified in order to fit within the proposed procedure of the Model Court Rule.

\textsuperscript{104} See also § 2.1-2.2 in A.B.A. Standards, supra note 7, at 9-10, dealing with withdrawal of the plea. These standards may be used in conjunction with the Model Court Rule.
valid recommended agreement, or a final agreement and thereby invalidate such agreement.

DISCUSSION AND AGREEMENT NOT ADMISSIBLE:\textsuperscript{105} 5.1 Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, neither the fact that the defendant or his counsel and the prosecutor engaged in a pre-trial hearing for plea discussion or entered into a plea agreement, nor any terms of or reasons for the agreement should be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

INCONSISTENT RULES:
6.1 All rules or parts of existing rules which are inconsistent with this rule are henceforth invalid and inoperative.

\textit{C. Procedural Innovations}

The effect of this proposal would be to formalize the plea bargaining process, so as to make it a regular part of the procedure in every criminal case. Emphasis is on full disclosure of all discussions, terms of the agreements, and reasons for recommended bargains. Thus the system proposed here goes farther than the safeguards and standards, merely palliative measures, which are proposed in the American Bar Association's Project on Minimum Standards for Criminal Justice: Standards Relating to Pleas of Guilty.\textsuperscript{106} Many abuses can be eliminated only through a structural revision of plea bargaining altering its pronounced tendency to favor the prosecution. This is in part accomplished by reducing the tremendous discretion now lodged with the prosecutor.

Two components are at the heart of the proposed procedure: first, a mandatory pre-trial hearing conducted by a master (or judge), who will gather all facts and recommend an agreement to the parties for their approval and subsequently to the judge for his consideration; and second, a formal court procedure whereby the proposed agreement, including data and conclusions from the master, are officially entered into the record in full.

\textit{1. The Mandatory Pre-Trial Hearing—}A pre-trial hearing is

\textsuperscript{105} This section is adopted from § 3.4 in A.B.A. STANDARDS, supra note 7, at 12.

\textsuperscript{106} A.B.A. STANDARDS, supra note 7, §§ 3.1–4. See The Unconstitutionality of Plea Bargaining, supra note 28, at 1395, which criticizes these standards and concludes: "The ABA's proposed reforms attempt to ensure that defendants make voluntary and accurate pleas by prescribing a 'due process' of plea bargaining. But the discretion afforded the prosecutor, defendant and defense counsel in reaching a decision remains substantially unimpaired. The proposals may curb the most severe abuses, but they do not greatly influence the essential components of the plea bargaining process."
often required in the civil procedure of many jurisdictions and would seem to lend itself well to the system of criminal procedure. However, since the criminal charge involves a public interest which is generally more significant than the litigation between two private parties, the negotiation of a criminal case demands special pre-trial procedures. In plea bargaining the public interest in a fair bargain is too often overpowered by the intense adversary nature of the system. It is therefore proposed that every criminal case within a jurisdiction should be mandatorily referred to a master for pre-trial hearing as soon as possible after the information or indictment is issued, and the equivalent of a pre-sentence report is available. Bargaining is mandatory in order to provide every defendant with an equal opportunity to bargain. The hearing is placed under the close scrutiny and direction of an objective administrator to ensure fairness, in part, simply by removing the discretion to dictate terms from the prosecutor who also functions as the defendant's adversary. Although "bargain justice" is still dispensed, a pre-trial hearing conducted by an actively participating, independent party should provide a more rational basis for determining the disposition of a defendant's case than the present system.

The Model Rule provides that no rules of evidence should limit what is admitted or heard at the hearing. This provision serves the purpose of the hearing which is to determine a fair agreement based upon all information about the crime, evidence for and against the defendant, and the defendant's background. Since

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107 E.g., Fed. R. Civ. P. 16, and various state rules which are modeled after the federal rule. The purpose of such hearings is to try to settle the case, to guarantee that the parties have complied with the discovery rules, and to sharpen the issues for trial.

108 "A plea negotiation is fundamentally a negotiation about the correctional disposition of a case and is, therefore, a matter of moment to the community as well as to the defendant." President's Commission, The Challenge of Crime 136.

109 Of course, if the defendant pleads guilty to the original charge and takes his chances on a sentence, then he would waive any opportunity to obtain a negotiated plea.

110 The title is not critical; it could be a commissioner, or a clerk, or referee. However, such a person must have at least a law degree and preferably some practical experience in criminal law, or a background in sociology or psychology. It is suggested that perhaps law clerks for judges within the jurisdiction might be attractive candidates for such a job when they complete their clerking assignments. The master could be a judge if under a rotating-docket system.

111 The hearing represents the only opportunity for the parties to obtain a negotiated plea. In this respect the procedure here is similar to the new procedural system in Detroit Recorder's Court, as described in Cahalan, supra note 23, at 332-33.

112 Model Court Rule § 2.3(a).

the hearing is primarily a fact-finding proceeding rather than a
judicial proceeding, it should not be restricted by rules which are
appropriate only for the latter. Although signed affidavits would
be admissible under this policy, the Model Rule expressly pro-
vides that no outside witness shall be allowed to testify. This
requirement is not inconsistent with the nature and purpose of the
hearing, for if witnesses were permitted to appear and be
cross-examined the result would be similar to a trial proceeding. If
the goal is to avoid a lengthy and burdensome procedure, then the
hearing should be limited to testimony of the interested parties
and any written evidence which they may present.

This presentation of information by the prosecution and de-
defense, on its face, constitutes a form of pre-trial discovery. The
extent to which such discovery should be permitted has been a
controversial issue. While the commentators have argued pro
and con, it appears that the trend is now towards more liberal
pre-trial discovery in criminal cases.

One limitation on discovery which is encountered at the outset
is that the parties are not required to seek a bargain. Con-
sequently no one is required to reveal any information. Even if the
parties do decide to seek a plea agreement, there are no require-
ments on either side as to what must be exposed in the discussion,
other than the implicit requirement that sufficient information be
available to justify a favorable bargain. Since the hearing is con-
ducted under oath, the parties are not permitted to falsify the facts
which they do reveal. Moreover, there is a built-in incentive for
the parties to reveal at least the minimal amount of information
necessary for the master to suggest an agreement (assuming, of
course, that the parties are interested in reaching an agreement).

461-70 (1970). The probation department or pre-sentence division or other court agency
which usually prepares the pre-sentence reports could speed up its processes by hiring
more investigators who can gather information earlier in the criminal proceedings. They
will gather as much dispositional information as possible in the time available by talking to
friends, neighbors, witnesses, and family of the defendant. The chance for pre-trial witness
tampering or dishonest witnesses under this proposed procedure is no greater than under
the present system, in which the defense and prosecution go out or send out investigators
to talk to witnesses. The goal is to make sentencing and the determination of charges to
which the defendant will plead guilty, more meaningful and responsive to the defendant’s
correctional needs. The complete and frank exchange of information at the hearing is
called for in President’s Commission, The Challenge of Crime 135.

114 Model Court Rule § 2.3(a).

115 See, e.g., Fletcher, Pretrial Discovery in State Criminal Cases, 12 Stan. L. Rev.
293 (1960); Goldstein, The State and the Accused: Balance of Advantage in Criminal
Procedure, 69 Yale L. J. 1149, 1172-98 (1960); Louisell, Criminal Discovery: Dilemma
Real or Apparent?, 49 Calif. L. Rev. 56 (1961).

116 See Preliminary Draft of Proposed Amendments to Rules of Criminal Procedure for
inspection] is revised to give greater discovery to both the prosecution and the defense.”
Id. 595.
This kind of discovery does not seem to be any more burdensome on the parties than the informal exchanges of information between prosecutor and defense, which now take place when they negotiate a plea. Indeed, the primary difference is that, in the hearing, they will be dealing at arms length. Moreover, any discovery under the Model Court Rule would tend to be evenly applied, with both prosecutor and defendant exposing part or all of their case. Finally, since this pre-trial discovery is limited, if a case goes on to trial, the parties will not then be precluded from employing the usual discovery devices like a bill of particulars, or request for scientific information in order to obtain detailed data which is necessary for trial preparation.

2. Procedure at Arraignment: Incorporation into the Record—At the arraignment it is the judge's duty to enter into the record the full plea agreement and report\textsuperscript{117} which were sent to him by the master (or other judge). This will occur only where there is a valid recommended agreement which was signed by the prosecution and defense. The requirement of incorporating the terms of the agreement into the record in court, an integral part of the procedure, is widely advocated by courts and commentators.\textsuperscript{118} Some of the reasons offered to support the requirement of disclosure in open court have been articulated in support of the more restrictive A.B.A. Standards\textsuperscript{119} and include the following: it is important for the judge's determination of the voluntariness of a plea; it reduces risk of an unfair agreement; it enhances public confidence in the administration of justice; and it makes direct appellate review meaningful.\textsuperscript{120} In addition, a record of agreements would prevent misunderstandings about whether promises were really made and accusations by defendants of unfulfilled bargains or unkept promises by the prosecutor or court.

\textsuperscript{117}The master's report, which includes the master's reasons for recommending the particular terms of the agreement, is similar in spirit to the requirement that the prosecutor submit to the court his reasons for recommending a plea of guilty to a lesser offense. N.Y. \textsc{Code Crim. Proc.} \textsection 342-a (McKinney 1966), \textit{repealed} by the new Criminal Procedure Law \textsection 220.10 (to be effective Sept. 1, 1971).


\textsuperscript{119}Under these standards an agreement will be placed into the record only if the judge can elicit its existence and terms from the prosecutor and defense counsel, A.B.A. \textsc{Standards}, \textit{supra} note 7, \textsection 1.5 at 8.

\textsuperscript{120}Jones v. United States, 423 F.2d 252, 255-56 (9th Cir.), \textit{cert. denied}, 400 U.S. 839 (1970). There is some belief that it would also reduce the number of appeals and post-conviction proceedings stemming from plea bargaining, and that it would simplify them. Underwood, \textit{supra} note 118, at 5-6, 8-11.
It should be emphasized that under this system the pre-trial hearing is the only opportunity in the proceedings for the parties to reach an agreement. To facilitate this policy, the judge is prohibited from accepting a guilty plea to reduced or dismissed charges, or any sentence recommendations unless they are included within an official agreement. The remainder of the procedure at arraignment includes the acceptance of the plea and the usual practices for satisfying the constitutional requirements of a voluntary and knowing plea.

D. Proper Roles of the Judge and Participants

1. Trial Judge—Under the proposed procedure the trial judge is clearly not a participant in the plea discussions or in any proceeding before a valid recommended agreement is determined. This judicial insulation from the bargaining process has been emphatically recommended by many judges and commentators as a necessary reform of the present system. Once the agreement comes to light, however, it is recognized that the judge has a duty to examine the fairness of the agreement which results from negotiations and to ratify it in open court. In reconciling the fear of judicial pressure with the need for judicial scrutiny, the best approach would seem to be for the judge to be excluded from any bargaining or discussions, and then once an agreement is

121 Model Court Rule §§ 3.1, 3.2.

In some cases members of the judiciary have been criticized for participating in plea bargaining by persuading defendants to plead guilty: Smith v. United States, 321 F.2d 954 (9th Cir. 1963); United States ex rel. McGrath v. La Vallee, 319 F.2d 308 (2d Cir. 1963); Euziere v. United States, 249 F.2d 293 (10th Cir. 1957). But cf. People v. Williams 269 Cal. App. 879, 75 Cal. Rptr. 348, 351–52 (1969) (describing the proper conduct for a judge who does participate in plea bargaining). See also President’s Commission, The Challenge of Crime 136; Recent Development, 19 Stan. L. Rev. 1082 (1967); Comment, Official Inducements to Plead Guilty: Suggested Morals For A Marketplace, 32 U. Chi. L. Rev. 167, 187 (1964). But see Enker, supra note 8, at 117–18, allowing for some judicial involvement in the process; Underwood, supra note 118, at 5, permitting judicial participation in plea discussions only as a practical necessity. For a discussion of the judge’s involvement in the bargaining process in the English system, see Thomas, Plea Bargaining and the Turner Case, 1970 Crim. L. Rev., 559, 562–65.
123 Scott v. United States, 419 F.2d 264, 275 (D.C. Cir. 1969); United States ex rel. Thurmond v. Mancusi, 275 F.Supp. 508, 517 (E.D.N.Y. 1967); State v. Johnson, 279 Minn. 209, 215–16, 156 N.W.2d 218, 223 (1968), “[t]he ultimate judicial responsibility must be to make reasonably certain that a person innocent of any crime has not been improperly induced to plead guilty to a crime.” This procedure is in accord with the President’s Commission, The Challenge of Crime 136, stating that the agreed disposition should be openly acknowledged and fully presented to the judge for his review and acceptance before the plea is entered.
reached, to assess and indicate his acceptance or rejection of the agreement before the plea is entered. A similar position is taken by the American Bar Association in its recommendations.¹²⁴

The primary consideration underlying a policy or rule excluding the trial judge from any plea discussions has to do with the disparity in bargaining power which would result.¹²⁵ The trial judge, because of his position of power over the defendant’s case, would be in a position in which his presence might implicitly coerce or threaten the defendant.¹²⁶ However, this reasoning does not preclude the participation of a judge instead of a master in the pre-trial hearing, if the judge is on a rotating-docket system so that he will not subsequently take the plea or preside at trial.¹²⁷

A guideline suggested for the judge who reviews the agreement is that he should weigh the terms of the agreement against standards similar to those that would be applied on imposition of sentence after a trial. He may therefore consider such things as “the defendant’s need for correctional treatment; the circumstances of the case; the defendant’s co-operation; and the requirements of law enforcement.”¹²⁸ Under the procedure offered in the Model Court Rule, if the master’s report is complete, the judge should find it relatively easy to review it in terms of these considerations.

2. The Prosecutor—Because of the mandatory pre-trial hearing and the participation of the master, the prosecutor’s discretion in the negotiation process has been considerably reduced. Since it is the master who recommends the bargain to the prosecutor and defense at the hearing, the prosecutor cannot otherwise recommend reduced or dropped charges or sentence concessions in return for a guilty plea. The prosecutor nonetheless plays an important role in the process, for he helps to set the boundaries of the range of dispositions from which the master must choose. In serving this function, the prosecutor’s office could formulate general policies concerning initial charging of defendants and the

¹²⁴ See A.B.A. STANDARDS § 3.3 (Revised), supra note 7, at 11–12.
¹²⁵ See Gentile, supra note 52, at 524–26. See also Recent Development, supra note 122, at 1087–90, discussing judicial plea bargaining as compared to prosecutorial plea bargaining.
¹²⁶ See Scott v. United States, 419 F.2d 264, 273–74 (D.C. Cir. 1969); PRESIDENT’S COMMISSION, THE CHALLENGE OF CRIME 135. A third alternative regarding the judge’s role is the system in which the judge has power on his own to lower or drop charges, without any discussions at all. See Alschuler, supra note 13. However, this proposal is not desirable for at least three reasons: it allows the trial judge too much discretion; removes too much of the adversary nature from the proceedings; and would not be practical or efficient, since the judge in order to make a wise decision would have to spend too much time in obtaining and scrutinizing information about the defendant and the crime.
¹²⁷ See discussion in note 99 supra.
kinds of agreements they will accept for particular kinds of crimes and defendants. This will help to promote an equality of treatment of defendants, ensure uniformity and contribute to a better public image for the discussions.

3. Defense Counsel—Although there is presently no constitutional requirement that a defendant must be represented by an attorney at any kind of plea discussions, the better policy suggests that negotiations should only be conducted if an attorney is present at the hearing. In any event, the defendant should not enter a guilty plea without a prior consultation with counsel. Since in most instances the defendant will not be intimately familiar with the law, and because of the quasi-adversary nature of the proceedings, a defense attorney's presence at plea discussions should provide greater fairness in the process.

The defendant needs a lawyer in the course of plea bargaining to explain all the alternatives available to him including the different possibilities of conviction or various leniencies, and the fact that neither the defense lawyer, prosecutor, nor master can bargain for or bind the court. Moreover, defense counsel should ensure that his client is not an innocent man who has been coerced or intimidated into accepting a plea agreement.

129 Assuming that a felony was involved, the issue would be whether or not the plea discussion stage, here the mandatory pre-trial hearing, is a critical stage in the criminal process at which the defendant would be prejudiced without effective assistance of counsel. See Powell v. Alabama, 287 U.S. 45 (1932). The United States Supreme Court has held that the trial is such a critical stage (Gideon v. Wainwright, 372 U.S. 335 (1962)), as is the guilty plea (Doughty v. Maxwell, 376 U.S. 202 (1964)) and the preliminary hearing (Coleman v. Alabama, 399 U.S. 1 (1970)). In Anderson v. North Carolina, 221 F. Supp. 930 (W.D.N.C. 1963), the court held that the defendant was denied his constitutional right to counsel, where he was indicted for a capital crime and the prosecutor, with the consent of defendant's counsel but in the absence of his counsel, talked with the defendant in jail and induced him to plead guilty to a lesser offense. The court relied on Powell, supra, and indicated that the defendant was entitled to have counsel aid him in making a decision in the course of plea negotiations, 221 F. Supp. at 934-35. According to Judge Skelly Wright: "A lawyer balances plea bargaining. Like the confrontation in the station house, plea bargaining is an adversary proceeding—a critical stage in the criminal process where a lawyer is required." Wright, supra note 13, at 1120.


131 Commonwealth ex rel. Kerekes v. Maroney, 423 Pa. 337, 350, 223 A.2d 699, 705-06 (1966). See also A.B.A. Standards § 3.2(a), supra note 7, at 11 which states: "Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or nolo contendere is ultimately made by the defendant."

132 See Cortez v. United States, 337 F.2d 699. 701 (9th Cir. 1964). See also A.B.A. Standards § 3.2(b), supra note 7, at 11 which states: "To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by him or the defendant in reaching a decision."

133 United States v. Rogers, 289 F.Supp. 726, 730 (D.C. Conn. 1968): "But guilty pleas and plea bargaining place a heavy responsibility on defense counsel to ensure that neither
IV. CONCLUSION

The present system of bargained guilty pleas provides neither the substance nor appearance of justice, and fails to promote the rehabilitative, protective, and deterrent effects of the substantive criminal law. Hopefully, future experience with the kind of proposal submitted here for plea bargaining will eliminate abuses of the present system by reducing prosecutorial discretion, increasing public visibility and interjecting an independent administrative functionary. In terms of extra input of resources the proposed procedure only requires earlier pre-sentence reports, the hiring of masters to supervise the hearings, and the salaries of court reporters for the hearings. Thus, the costs are relatively low. The benefits should include: greater efficiency in disposing of cases; less chance for the prosecutor to abuse his discretion; high visibility of the process; the master's preparation of a fair recommended agreement as a built-in disincentive to overcharging; and a guilty plea based on a fair agreement which will be more immune from attack at the appellate level.

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the rights or interests of defendants... are thereby jeopardized. This means that defense attorneys... must exercise scrupulous care to see to it that an innocent man does not plead guilty."