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JENIA IONTCHEVA TURNER*

Judicial Participation in Plea Negotiations: A Comparative View

Current rules in most U.S. jurisdictions prohibit judges from becoming involved in plea negotiations and limit the judges' role to reviewing a plea bargain once it is presented by the parties. This Article surveys three systems that provide for more significant judicial involvement—Germany, Florida, and Connecticut—and suggests that a judge's early input into plea negotiations can render the final disposition more accurate and procedurally just. Based on interviews with practitioners and a review of the case law, the Article outlines a model for greater judicial involvement in plea negotiations.

I. INTRODUCTION

In plea bargaining, as in many areas of the American criminal justice system, the role of the judge is essentially passive.¹ In an adversarial system like ours, the parties initiate the case and direct its progress, including its possible disposition as a plea bargain. The judge's role is limited to reviewing the bargain once it is presented. Many jurisdictions, including the federal, expressly prohibit judges from participating in or commenting on the plea negotiations.

There are important reasons for preferring passive, after-the-fact participation by the judge in plea bargaining. Greater involvement could interfere with the judge's impartiality and place undue pressure on a defendant to accept a plea deal. This concern is magnified when the same judge who participates in unsuccessful plea negotiations also presides over the defendant's later trial and sentencing. Furthermore, because judges are more distant from the investigation than the parties are, they may not have a full understanding of what

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1. *E.g.*, ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY* 4 (1981).

is at stake in the negotiations, so their involvement may not be especially helpful. Judicial involvement may also be too costly and may ultimately undermine the efficiency of plea bargaining.

While these are valid concerns, there is reason to think that we have overestimated the costs of judicial participation in plea negotiations and underestimated its benefits. Many commentators have argued that the current approach to plea bargaining does not guard effectively against the main risks of the process—coercion, unfairness, and inaccurate verdicts. Recent evidence suggests that in the federal system, and possibly in some states, defendants may be abandoning meritorious defenses and pleading guilty to avoid the uncertainty of a trial and the risk of substantially higher sentences. The lack of transparency of the negotiations and the belated involvement of judges makes it nearly impossible to determine if individual prosecutors, defense attorneys, or systemic pressures may be inducing defendants to accept unfair bargains and inaccurate verdicts.

In this Article, I offer evidence of the practical effects of greater judicial participation and suggest that such participation has the potential to reduce the risks of plea bargaining, at a lesser cost than commonly assumed. A survey of Germany, Florida, and Connecticut—three systems that provide for more significant judicial involvement—suggests that a judge's early input into plea negotiations can render the final disposition more accurate and procedurally just. Judges can provide a neutral assessment of the merits of the case and prod the defense attorney or the prosecutor to accept a fairer resolution. They can also offer a more accurate estimate of the expected post-plea and post-trial sentences, which is especially valuable in systems of indeterminate sentencing. Finally, the involvement of an impartial party can render the bargaining process more transparent and more acceptable to the public.

Understanding the plea bargaining systems of Germany, Florida, and Connecticut requires more than a review of the formal rules of these jurisdictions. I have therefore supplemented my research of the case law and scholarly literature with interviews with defense attorneys, prosecutors, and judges in each jurisdiction, conducted over the telephone, in person, and through written questionnaires.² I sought to contact a range of practitioners and judges in various geographic regions,³ though the representativeness of the sample was

2. In Germany, 28 interviews were conducted in person, and four written questionnaires were gathered. In Florida, nine interviews were conducted by phone, two were conducted in person, and two were received in writing. In Connecticut, nine interviews were conducted by phone, and four were received in writing.

3. In all three jurisdictions, the initial sample was gathered through research on the Internet and to some extent through personal contacts. In Germany, most interviews were conducted in the summer of 2004 in Cologne, where I was fortunate to have the support of Professor Thomas Weigend and the Institute for Comparative and International Law at the University of Cologne. Other interviews took place in Bonn,

limited by the availability and responsiveness of practitioners. This study should not be seen as rigorous qualitative research; it is closer to what Albert Alschuler called “legal journalism” in his own study of plea bargaining 30 years ago.⁴

Part II of this Article discusses the costs and benefits of the current federal rule prohibiting judges from participating in plea negotiations. It concludes that the delayed involvement of the judge at the plea colloquy has failed to minimize the risk that guilty pleas might be coerced, uninformed, or inconsistent with the true facts of the case. Part III turns to a description of the German system of plea bargaining, in which judges closely supervise most plea negotiations. German judges regularly initiate and lead the negotiations themselves, and may gather further evidence or dismiss charges where the plea does not seem to correspond to the facts. To show how judicial involvement can work in systems closer to home, Part IV describes two American models of involving judges in the negotiations—what I call the “information source” and “moderator” models. Florida’s practice, described in IV.A, is an example of the “information source” model, in which judges do not actively participate in negotiations, but make clear to the parties what disposition would be acceptable to the court. Part IV.B focuses on Connecticut’s practice, which falls further along the spectrum toward greater judicial participation. Connecticut judges are actively involved in the negotiations as moderators and comment not only on the ultimate sentence acceptable to the court, but also on the merits of the case. To prevent judicial coercion, the judge who participates in pretrial negotiations is prohibited from presiding over the trial involving the same defendant.

After examining each system in turn, Part V discusses the lessons we can learn from the three models. I argue that the German model, which entrusts the judge with the duty to ensure the fairness and accuracy of plea bargaining, is in many respects superior to Florida’s information source model, which uses the judge primarily to reduce uncertainty in the bargaining process. The German model also has distinct advantages over Connecticut’s moderator model, which does not provide judges with adequate tools to address failures of rep-

Munich, Mannheim, Leipzig, Berlin, and Hamburg, covering both eastern and western (Leipzig and Berlin vs. Cologne, Hamburg, and Munich), southern and northern parts of the country (Munich vs. Hamburg), a couple of smaller towns (Mannheim and Leipzig) as well as larger cities (Berlin, Munich, Cologne, Hamburg). The translation of the German interviews is my own. In Florida and Connecticut, most interviews were conducted over the phone during 2005 and involved practitioners from different cities, although New Haven and Orlando were somewhat overrepresented, and Miami was underrepresented.

4. Albert W. Alschuler, *The Defense Attorney and Plea Bargaining*, 84 YALE L.J. 1179, 1181 & n.8 (1975); see also Albert W. Alschuler, *The Trial Judge’s Role in Plea Bargaining, Part I*, 76 COLUM. L. REV. 1059, 1061 n.10 (1976). Alschuler’s article is the first and only piece to seriously consider and advocate greater involvement by judges in plea negotiations.

resentation during the plea negotiations. At the same time, Florida and Connecticut have instituted important safeguards against judicial coercion that are not yet available in Germany. This Article concludes by suggesting that features of the Florida, Connecticut and German models could usefully be incorporated into the systems of other American jurisdictions, particularly the federal system. Though judicial involvement is not likely to eliminate all risks of plea bargaining, it is likely to minimize some of the gravest dangers of the practice: that a plea bargain does not reflect the true facts of the case, is unfair to the defendant, or is inconsistent with the public interest.

II. JUDGES AS PASSIVE VERIFIERS OF PLEA BARGAINS

A. *Reasons for Judicial Passivity in Plea Bargaining*

Plea bargaining is the method of resolving the vast majority of criminal cases in the United States. Yet most American jurisdictions have refrained from involving judges in plea negotiations. The common practice is for judges to review a guilty plea to ensure that it is voluntary and knowing, but only after the plea is concluded between the parties. This model of the judge as a passive verifier was endorsed by the first edition of the ABA Standards of Criminal Justice⁵ and has been followed in the Federal Rules of Criminal Procedure and many state systems.⁶

Under Federal Rule 11, judges may not take any part in plea negotiations or even make comments that might indirectly influence the bargaining process. Accordingly, judges must be cautious in giving reasons for rejecting a plea agreement. Any "remarks directed to future or ongoing plea negotiations which suggest what will satisfy the court transform the court from an impartial arbiter to a participant in the plea negotiations" and are forbidden by Rule 11.⁷ The

5. ABA STANDARDS RELATING TO PLEAS OF GUILTY § 3.3(a) (Supp. 1968) ("The trial judge should not participate in plea discussions.").

6. At least nine states and the District of Columbia prohibit judicial participation in plea negotiations: Alaska, Colorado, the District of Columbia, Georgia, Maine, Mississippi, Pennsylvania, Texas, Washington, and Wisconsin. *State v. Abraham*, 566 P.2d 267, 270 (Alaska 1977); COLO. REV. STAT. § 16-7-302 (1) (2000) (prohibiting judicial participation, but allowing judge, upon request by the parties, to indicate before the plea whether he would accept terms of the agreement); *Boyd v. United States*, 703 A.2d 818, 821 (D.C. 1997); *McDaniel v. State*, 522 S.E.2d 648, 650 (Ga. 1999); *In re Cox*, 553 A.2d 1255, 1258 (Me. 1989); *Magee v. State*, 759 So.2d 464, 470 (Miss. Ct. App. 2000); *Commonwealth v. Evans*, 252 A.2d 689 (Pa. 1969); *Ex parte Shuflin*, 528 S.W.2d 610, 617 (Tex. Crim. App. 1975); *State v. Wakefield*, 925 P.2d 183, 187-89 (Wash. 1996); *State v. Williams*, 666 N.W.2d 58, 60, 65 (Wis. 2003). Other state courts have not held outright that judicial participation invalidates a plea, but have strongly discouraged such participation. *People v. Weaver*, 12 Cal. Rptr. 3d 742, 755-56 (Cal. Ct. App. 2004); *State v. Anyanwu*, 681 N.W.2d 411, 414 (Minn. Ct. App. 2004); *State v. Moore*, 547 N.W.2d 159, 169 (Neb. Ct. App. 1996); *Standley v. Warden*, 990 P.2d 783, 785 (Nev. 1999); *State v. Byrd*, 407 N.E.2d 1384, 1388 (Ohio 1980).

7. *United States v. Kraus*, 137 F.3d 447, 455 (7th Cir. 1998).

Rule prohibits the trial judge from even observing that there may be a difference in the sentence to be imposed in the event of a plea bargain as opposed to after trial.⁸

There are important reasons for this prohibition. The judge's participation in negotiations may seem to interfere with her role as an impartial arbiter, particularly if the same judge who participates in the negotiations would preside over a subsequent trial and sentencing of the defendant. It may also, directly or indirectly, coerce a defendant to plead guilty. As the Federal Rules Advisory Committee commented, the judge's "awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence."⁹

Beyond coercion, various other reasons support the prohibition on judicial participation in plea negotiations. The process of involving the judge may be seen as cumbersome and costly. And where judicial involvement actually speeds up case disposition, observers may be concerned that judges sacrifice fairness and accuracy for the sake of moving the docket along.¹⁰ In some cases, the judge's participation may also be perceived as undue interference with prosecutorial functions. Where prosecutors use plea negotiations as a means to induce an accused to cooperate in other investigations, the judge's participation—indeed the mere presence of the judge—might undermine these prosecutorial tactics. Finally, some believe that judges are too distant from the facts of the case and from the parties involved to be able to make a useful contribution to the plea negotiations.¹¹

8. *United States v. Casallas*, 59 F.3d 1173 (11th Cir. 1995) (holding that Rule 11 was violated where trial court judge suggested that the defendant would face a 10-year minimum mandatory term if he pleaded guilty and a 15-year minimum mandatory term if he did not). States that prohibit judicial participation in bargaining have similar bans on comments about the likely sentence. *E.g.*, *McDaniel*, 522 S.E.2d 648.

9. FED. R. CRIM. P. 11, advisory committee's note (1974 amendment) (quoting *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966)).

10. Judith Resnik has expressed concern about the rise of "managerial judges," who guide pretrial proceedings primarily with an eye toward expediting cases, and often at the expense of accuracy and fairness. Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982). While Resnik described managerial judging in civil cases, Máximo Langer has argued that the same phenomenon can be observed in criminal cases in Germany and at the International Criminal Tribunal for the Former Yugoslavia. Máximo Langer, *From Legal Transplants to Legal Translations: The Globalization of Plea Bargaining and the Americanization Thesis in Criminal Procedure*, 45 HARV. INT'L L.J. 1, 44-45 (2004); Máximo Langer, *The Rise of Managerial Judging in International Criminal Law*, 53 AM. J. COMP. L. 835 (2005).

11. Telephone Interview with Nancy Daniels, Public Defender, 2d Jud. Cir., Florida, June 23, 2005; Telephone Interview with Wayne Durden, State Attorney's Office, 10th Jud. Cir., Florida, Nov. 2, 2005.

While all of these concerns are valid, some of them are inherent in the plea bargaining process itself, and it is not clear to what extent judicial participation magnifies them. For example, the common understanding that there is a difference between the sentence offered in a plea deal and the sentence after trial will tend to encourage a defendant to plead guilty, regardless of any remarks made by the judge. Whether this is a good thing may depend on the degree of the differential and the circumstances of the particular case, but the risk is present, with or without judicial participation. In fact, as the next Section suggests, judicial involvement may limit the coerciveness of plea discounts by informing the defendant of the real difference between the post-plea and post-trial sentence—which may well be lower than that anticipated by the parties. Additionally, judicial input may reduce the influence of prosecutorial tactics such as threats and bluffing, which also tend to coerce the defendant into accepting a plea deal.

The next Section shows that there are other important reasons for giving judges a greater role in the process. The party-driven method of plea negotiations has not been an effective safeguard against the risk that negotiations would produce a plea that is uninformed, unfair, or lacking factual basis. A review of these risks—and the failure of the existing procedures to guard against them—may lead us to reconsider the decision to keep judges out of plea negotiations.

B. The Risks of Plea Bargaining

1. Risk of Coercion

One of the long-recognized dangers of plea bargaining is that it might coerce an innocent defendant to plead guilty. Two features of our current federal system are especially concerning in this respect—harsh sentences and steep discounts for pleading guilty. Together, they may induce even defendants with good odds of prevailing at trial to accept a plea bargain. And if a steep sentencing discount is accompanied by prosecutorial bluffing or scare tactics, the danger of coercion becomes especially grave.

Courts have acknowledged that the sentencing discounts offered in exchange for guilty pleas can pressure defendants to waive their right to trial. To some degree, this is accepted as a legitimate and inevitable part of plea bargaining. As the Supreme Court has stated, “While confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant’s assertion of his trial rights, the imposition of these difficult choices is an

inevitable—and permissible—attribute of any legitimate system which tolerates and encourages the negotiation of pleas.”¹²

In condoning these pressures of plea bargaining, courts have noted that the criminal justice system has many features that are coercive but entirely legitimate. For example, the fact of indictment alone might pressure some accused to plead guilty.¹³ The question, then, is not of mere pressure, but of undue pressure, or coercion. If a system is so coercive as to cause innocent defendants to plead guilty, the line has clearly been crossed. Inducing a guilty defendant to accept a higher sentence, based on incorrect facts or an incorrect legal interpretation of the crime, may also be seen as undue coercion.

Over the last two decades, increasingly harsh sentences, combined with steep sentencing discounts, have imposed great pressure on defendants to plead guilty. Since 1984, mandatory sentencing laws, the federal sentencing guidelines, and the abolition of parole have led to a sharp rise in sentence length.¹⁴ In addition to increasing sentences, the federal system has offered defendants substantial rewards for pleading guilty. The federal sentencing guidelines made these rewards clear and visible to defendants. Under the guidelines, defendants who plead guilty receive a sentence discount of about one-third just for pleading guilty and “accepting responsibility.”¹⁵ Statistics from federal courts suggest that defendants who plead guilty often receive additional discounts as well. In 2003, the average sentence given for offenses resolved by guilty plea was 54.7 months, while the average sentence for offenses resolved by trial was 153.7 months.¹⁶ The plea discount appears to be roughly the same for each type of crime. These numbers suggest that the average sentencing discount is closer to two-thirds off the expected trial sentence.¹⁷ Such significant discounts may persuade even defendants with fairly good chances of acquittal to plead guilty.

A recent study by Ronald Wright reveals the distorting influence that deep discounts for “acceptance of responsibility” and “substantial assistance” have had on plea bargains. The study found that federal districts that rely most heavily on these types of discounts have had not only a higher rate of guilty pleas, but also a lower rate of

12. *United States v. Mezzanatto*, 513 U.S. 196, 209-10 (1995).

13. *Brady v. United States*, 397 U.S. 742, 750 (1970).

14. Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 129 (2005).

15. Stephanos Bibas, *Plea Bargaining Outside the Shadow of the Law*, 117 HARV. L. REV. 2463, 2535 (2004).

16. BUREAU OF JUSTICE STATISTICS, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 70, 75 tbl. 5.3 (2003).

17. The actual degree of the discount is an issue of some debate. See Bibas, *supra* note 15, at 2488-89. It is possible that defendants facing a greater than average sentence (because of their prior record, for example) are more likely to risk going to trial, thus skewing the numerical data. (I thank Stephanos Bibas for this observation.)

acquittals.¹⁸ In addition, the ratio of dismissals to acquittals in those districts has been at its highest over the last decade.¹⁹ The lower acquittal rate on its own could be the result of better prosecutorial screening and investigation. But if that were the case, we would expect the rate of dismissals to fall at a similar rate. Given the high ratio of dismissals to acquittals, the explanation likely lies elsewhere. As Ronald Wright argues, the data suggest that defendants are probably abandoning meritorious trial defenses because of the steep sentence discount they receive for pleading guilty.²⁰

The lack of transparency in plea bargaining makes it very difficult to detect undue coercion in a particular case. Plea negotiations occur privately between the prosecutor and the defense attorney. At least partly as a result of the sentencing structure discussed above, prosecutors usually have the upper hand in these discussions. Some prosecutors offer substantially higher plea discounts to defendants with a good chance of acquittal to convince them to waive their right to trial.²¹ They may also pressure defendants to plead guilty by exaggerating the strength of the evidence and threatening harsher treatment to the defendant or his family.²² Yet there is no external oversight of these negotiations up until the plea colloquy, during which the judge simply asks the defendant whether his plea is voluntary. The post-hoc inquiry into voluntariness is fairly perfunctory and ineffective. Because the parties have already reached an agreement, the judge is unlikely to discern whether the defendant was unduly induced into that agreement. It is difficult to infer coercion circumstantially. Courts have refused to hold that enormous sentence discounts are sufficient evidence of coercion.²³ And the volun-

18. Wright, *supra* note 14, at 85-86. The increased guilty plea rates in the last twenty-five years have displaced acquittals at a higher rate than dismissals or trial convictions. *Id.* at 104-06.

19. *Id.*

20. *Id.* at 85-86.

21. Albert Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652, 714-15 (1981).

22. *E.g.*, United States v. Avellino, 136 F.3d 249 (2d Cir. 1998) (prosecutor failed to disclose exculpatory DNA evidence during plea negotiations); Miller v. Angliker, 848 F.2d 1312, 1319-20 (2d Cir. 1988) (prosecution withheld information that indicated that another person had committed the offenses with which defendant was charged); Sloan v. Estelle, 710 F.2d 229 (5th Cir. 1983) (prosecutor threatened to seek the death penalty if the defendant refused the plea bargain); United States v. Whalen, 976 F.2d 1346, 1348 (10th Cir.1992) (prosecutor threatened to prosecute the defendant's wife if the defendant refused to plead guilty); United States v. Wright, 43 F.3d 491 (10th Cir. 1994) (government threatened to indict several members of the defendant's family if he did not agree to plead guilty); Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 62-64, 107-08 (1968); Russell L. Christopher, *The Prosecutor's Dilemma: Bargains and Punishments*, 72 FORDHAM L. REV. 93, 108-09 (2003).

23. Brady v. United States, 397 U.S. 742 (1970); Parker v. North Carolina, 397 U.S. 790, 792, 794-95 (1970); Aranda v. Rocha, 58 Fed. Appx. 767, 768 (9th Cir. Mar. 20, 2003); United States v. Hyden, 1997 WL 130376 at *1 (4th Cir. Mar. 24, 1997).

tariness inquiry is not meant to be an assessment of the guilt or innocence of the defendant. It is merely supposed to determine whether the plea “represents a voluntary and intelligent choice among the alternative courses of action available to the defendant.”²⁴ This minimal and belated judicial involvement in plea bargaining has left us without adequate tools to detect undue coercion in individual cases.

2. Risk of Unfair and Inaccurate Results

A related potential risk of plea bargaining is that it might produce unfair and inaccurate results. For example, lack of reliable information about the strength of the evidence and about the expected post-trial and post-plea sentence could prevent the defendant from making an intelligent choice to waive his right to trial. The lack of information, as well as risk-aversion on part of the prosecutor or the defendant may also produce sentences that are too high or too low relative to the defendant’s blameworthiness. And in most American jurisdictions today, judges have few tools and only a limited mandate to remedy inaccuracies and unfairness in guilty plea dispositions.

a. Sentencing Uncertainty

The expectation that plea bargaining produces fair and accurate results is premised on the notion that the parties have a reasonable amount of information about the estimated trial disposition and the range of possible plea outcomes. Until recently, the federal sentencing guidelines provided relatively good indication of the expected trial sentences and plea discounts. But after *United States v. Booker*, which declared the federal sentencing guidelines to be advisory, the trial sentence and the plea discount are more difficult to estimate.²⁵ It may be, therefore, that *Booker* has increased the chances that either a prosecutor or a defendant would agree to plea terms that do not correspond to the true risks of trial.

Both the defense attorney and the prosecutor must calculate in the course of negotiating a plea whether the final agreement will be acceptable to the judge and, if not, to what extent the judge might depart from the agreed-upon sentence. Under Rule 11 of the Federal Rules of Criminal Procedure, a judge may either reject a plea bargain altogether or accept the bargain, but refuse to impose the sentence proposed by the parties.²⁶ The judge’s decision to reject a plea under

24. G. NICHOLAS HERMAN, PLEA BARGAINING 178 (2d ed. 2004); see also *Parke v. Raley*, 506 U.S. 20 (1992).

25. See *United States v. Booker*, 543 U.S. 220 (2005).

26. Rule 11(e) provides for three types of agreements. The parties may agree that in exchange for a plea, the prosecutor will do one of the following: (A) move for the dismissal of other charges; (B) make a recommendation, or agree not to oppose the defendant’s request, for a particular sentence; or (C) agree to a specific sentence. If

Rule 11 is limited only by review for abuse of discretion.²⁷ Because judges have broad discretion to reject pleas or impose a different post-plea sentence under Rule 11, the defense and the prosecution have long contended with a level of uncertainty in plea bargaining.²⁸

Until recently, the federal sentencing guidelines reduced this uncertainty by limiting judicial discretion in sentencing both after a plea and after trial. Unless the judge imposed a relevant conduct enhancement or granted a substantial assistance motion by the prosecution, the guidelines gave the parties a fairly clear understanding of the potential sentence they were facing. But in the wake of *Booker*, the uncertainty following a rejected plea bargain has increased again. Judges are free to choose from a wider array of factors in departing from the guidelines, and only a requirement of reasonableness limits their discretion. As a result, both the post-plea and post-trial sentences are less predictable.

Some commentators have argued that *Booker* is unlikely to change sentencing practices greatly. Many of the currently serving judges have never sentenced without the guidelines, so their conception of appropriate sentence is likely to be shaped largely by the guidelines. Indeed, the data on federal sentencing after *Booker* suggests that judges continue to follow the guidelines in most cases.²⁹ Departures occur in more than a third of cases, however, and the number of departures has been growing.³⁰ It would not be surprising

the agreement is of Type A or C, the court may, in its discretion, reject the agreement or defer decision until it has considered the pre-sentencing report. In a Type B agreement, which merely requires the prosecutor to recommend or not to oppose the defendant's request for a particular sentence, the parties' recommendation is not binding on the court.

27. Some appellate courts have even affirmed a plea rejection where the judge has failed to state a specific reason for the decision. *United States v. Severino*, 800 F.2d 42, 45 (2d Cir. 1986); *United States v. Foy*, 28 F.3d 464, 472 (5th Cir. 1994). *But see United States v. Kraus*, 137 F.3d 447, 453 (7th Cir. 1998).

28. A 1985 study found that only about two percent of guilty pleas were rejected by judges. WILLIAM F. McDONALD, U.S. DEP'T OF JUSTICE, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES 135 (1985). But the low level of outright rejection of pleas may simply reflect the prevalence of Rule 11(e)(B) bargains, which are "mere recommendations," not agreements to a specific sentence. *See* Shayna M. Sigman, Comment, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317, 1319 (1999) (explaining why judges prefer Type B bargains). The refusal to follow a sentence recommendation would not be considered a "rejection" of the agreement, yet it still disrupts the parties' expectations by imposing a different sentence from the one to which they have agreed.

29. Memorandum from Linda Drazga Maxfield, Office of Policy Analysis, U.S. Sentencing Comm'n, to Judge Hinojosa, Chair, U.S. Sentencing Comm'n, Numbers on Post-*Booker* Sentencing: Data Extract on Apr. 5, 2005, at http://www.ussc.gov/Blakely/booker_041305.pdf (last visited Oct. 30, 2005) (finding that 61.4 percent of federal sentences after *Booker* are within the guidelines range, a small drop from the 65 percent of sentences within the guidelines in 2002, before *Booker*).

30. The Commission's Memorandum in March shows a departure rate of 37.4 percent, an increase from the 34.4 percent reported in February 2005. But it is important to note that these numbers are still fairly close to the departure rate prior to *Booker* and prior to the PROTECT Act, which sharply limited departure grounds. In

to see the rate of departures continue to increase as judges become more confident about their new discretion.³¹ This is especially likely since *Booker* also loosened the standard of review for departures from the guidelines. Even if a sentence is outside the guideline range, it may be upheld as “reasonable” under the new standard of review, as long as the judge “had something to say” about why the departure was warranted.³²

Defendants and prosecutors alike will suffer the effects of greater uncertainty. Defense lawyers will be less able to advise a client what post-trial and post-plea sentences would be acceptable to a judge in a particular case. Prosecutors will also have difficulty making sentencing predictions and bargaining accordingly. Yet the prohibition on judicial participation in plea negotiations only compounds this unpredictability. As one defense attorney remarked in response to *Booker*, “[I]n a world where judges are for the most part precluded from getting involved in plea negotiations [by Rule 11 of the Federal Rules of Criminal Procedure] the guidelines gave practitioners the ability to grab a hold, to some degree, of where a client would end up. It made it easier to counsel a client and navigate a case.”³³ After *Booker*, that sentencing compass is no longer as useful.

Some defendants, especially those who are risk-averse, are likely to settle for a bad plea bargain to avoid the danger that a judge might impose a much harsher sentence after trial.³⁴ Prosecutors, too, may accept plea terms that do not correspond to the facts of the case, if they miscalculate the likely post-trial sentence or misjudge what plea terms would be acceptable to the judge. Negotiated sentences may be too high or too low because of the parties’ inability to determine what the trial system deems an appropriate sentence for a particular case.

Finally, unpredictability reduces the efficiency of plea bargaining. The defendant and the prosecutor, as well as society at large, incur financial and opportunity costs when the parties are sent back to the negotiating table by a judge who refuses to accept their sen-

2002, 35 percent of sentences were outside the guidelines range. See U.S. SENTENCING COMM’N, 2002 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS fig. G (2002), available at <http://www.ussc.gov/ANNRPT/2002/fig-g.pdf> (last visited Mar. 20, 2005).

31. E.g., *United States v. Ranum*, 353 F. Supp. 2d 984 (E.D. Wis. 2005); *United States v. Jones*, 352 F. Supp. 2d 22 (D. Me. 2005); *United States v. Kuhn*, 351 F. Supp. 2d 696 (E.D. Mich. 2005).

32. Marcia Coyle, *Federal Appeals Courts May Now Hold Key to Sentencing*, RECORDER, Jan. 21, 2005, at 3 (quoting Susan Herman, Professor, Brooklyn Law School); see also *United States v. Booker*, 543 U.S. 220, 312 (2005) (Scalia, J., dissenting in part) (“[U]nreasonableness’ review will produce a discordant symphony of different standards, varying from court to court and judge to judge . . .”).

33. *Defending Clients Without the Guidelines*, N.Y.L.J., Jan. 18, 2005, at 2.

34. This is problematic because the suspects who are most likely to be risk-averse are also those “with the most self-control, who are least likely to recidivate and thus need punishment the least.” *Bibas*, *supra* note 15, at 2509. Innocent people are also generally more risk averse than criminals. *Id.*

tence-specific bargain. More resources are spent on an increasing number of appeals by defendants and prosecutors whose sentence proposals have been rejected by the judge. And overconfident defendants reject a greater number of reasonable pleas under the mistaken view that they would get a better outcome at trial.³⁵

b. Limited Defense Investigation

The adversarial system assigns a primary role to defense counsel to ensure that large sentence discounts and the uncertainty of the trial outcome do not distort the defendant's choice whether and on what terms to plead guilty. A good defense attorney could educate the defendant about the trial odds and the likely sentence upon a guilty plea or conviction. And where the prosecution attempts to pressure the defendant into a guilty plea despite weak evidence of guilt, the defense attorney could counter with an informed analysis of the strengths of the case. But counsel cannot always fulfill that role, in part because of overwhelming caseloads and cuts in indigent defense funding, and in part because of rules that hinder a thorough investigation by the defense.

Although courts have generally recognized the importance of competent defense counsel to ensure accurate fact-finding and fair outcomes,³⁶ legislatures have consistently underfunded defender services.³⁷ Public and appointed defense attorneys are commonly handling too many cases to devote sufficient attention to each one. State funding for defense investigations is also too limited.³⁸ Not surprisingly, studies show that defense attorneys interview witnesses very rarely and hire experts only in exceptional circumstances.³⁹

Even where funding is not lacking, current rules give the defense few tools to conduct an adequate investigation. Defense attorneys lack search and subpoena powers, and in most states, cannot depose witnesses before trials.⁴⁰ Pre-plea discovery is also very limited. The prosecution has a constitutional duty to disclose at most evidence that is materially exculpatory and relates to factual innocence.⁴¹ Im-

35. *Id.* at 2503.

36. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932); *Gideon v. Wainwright*, 372 U.S. 335, 344-45 (1963).

37. Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1590 (2005).

38. *Id.*

39. *Id.* at 1602-03 (citing several studies, including one showing that New York City defense attorneys interviewed witnesses in four percent of non-homicide felony cases and 21 percent of homicides and that they hired experts in two percent of felony cases and 17 percent of homicides).

40. *See id.* at 1601. *But see* FLA. R. CRIM. P. 3.220(a)(1)(ii) (providing for pretrial depositions by the defense).

41. *United States v. Ruiz*, 536 U.S. 622 (2002). The Supreme Court left unsettled the question whether information related to factual innocence ought to be disclosed in plea negotiations before trial, though some lower courts have required such disclo-

peachment evidence, which is often key to the defense's ability to uncover flaws and inaccuracies in the government's case, need not be disclosed prior to plea negotiations.⁴² At the federal level, Rule 16 provides for additional disclosure of items material to the preparation of the defense, even if they are not exculpatory. But this information does not extend to witness names and statements, or to materials relevant to sentencing.⁴³ Some prosecutors follow the recommendation of the federal sentencing and prosecutorial guidelines and disclose to the defense all sentencing-related facts.⁴⁴ Others, however, disclose such information only after the pre-sentencing report has been prepared, long after plea bargaining has ended.⁴⁵ Courts have approved the practice of providing sentence-related information just before sentencing, rather than before the plea colloquy.⁴⁶

Various incentives for the defendant to plead guilty as early as possible further discourage a thorough investigation by the defense. Current charging practices, for example, promote early plea negotiations. Justice Department policies allow prosecutors to bring additional charges for "tactical advantages" in presenting "the strongest case possible."⁴⁷ Defense involvement in plea discussions before the defendant is charged or shortly thereafter is critical to preventing overcharging and avoiding mandatory minimum sentences.⁴⁸ The U.S. Attorneys' Manual also states explicitly that prosecutors "should make it clear to defense counsel at an early stage of the proceeding that, if there are to be any plea discussions, they must be concluded prior to a certain date *well in advance* of the trial date."⁴⁹

Indeed, the "timeliness of the defendant's conduct in manifesting the acceptance of responsibility" is a key factor in determining whether a defendant is entitled to a sentencing discount.⁵⁰ Courts have been reluctant to grant an "acceptance of responsibility" discount where defendants pled guilty close to trial.⁵¹ Timeliness is par-

sure. *Sanchez v. United States*, 50 F.3d 1448 (9th Cir. 1995); *Ferrara v. United States*, 384 F. Supp. 2d 384 (D. Mass. 2005).

42. *Ruiz*, 536 U.S. 622.

43. States vary widely in their discovery rules, but the denial of discovery of witness statements is common. STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 987-88 (7th ed. 2004).

44. See U.S. SENTENCING GUIDELINES MANUAL § 6B1.2 cmt.; U.S. ATTORNEYS' MANUAL § 9-27.750.

45. HERMAN, *supra* note 24, at 151.

46. *E.g.*, *United States v. Brewster*, 1 F.3d 51, 53 (1st Cir. 1993).

47. HERMAN, *supra* note 24, at 114.

48. *Id.*

49. U.S. ATTORNEYS' MANUAL § 9-27.420 cmt.B(5) (emphasis added).

50. U.S. SENTENCING GUIDELINES MANUAL §§ 3E.1.1 cmt., app. 1; 6B1.2 cmt.

51. *United States v. Curtis*, 934 F.2d 553 (4th Cir. 1991); *United States v. Hill*, 953 F.2d 452 (9th Cir. 1991). *But see* *United States v. Kimpel*, 27 F.3d 1409 (9th Cir. 1994) (holding that it is improper to deny a defendant benefits of acceptance of responsibility simply because that acceptance was delayed by the defendant's exercise of his constitutional right to pretrial investigation and discovery).

ticularly important where the defendant hopes for a three-level rather than a two-level reduction of his sentence under the guidelines. To qualify for the additional reduction, "the defendant must have notified authorities of his intention to enter a plea of guilty at a sufficiently early point in the process so that the government may avoid preparing for trial and the court may schedule its calendar efficiently."⁵² Courts have accordingly refrained from granting the discount unless the defendant has pled guilty early enough "to prevent the government from engaging in needless trial preparation and to give the overburdened trial courts an opportunity to allocate their limited resources in the most efficient manner."⁵³ While the desire to save the burden and expense of trial preparation may be understandable, early plea negotiations pose the risk that the true strengths and weaknesses of a case will not be known.

c. After-the-Fact Judicial Review of the Plea

Even if negotiations between the parties fail to produce a fair and accurate plea bargain, judges have the power to reject the plea. In most jurisdictions, judges have the responsibility to determine, at the plea colloquy stage, whether the plea is voluntary, knowing, and has a solid factual basis.⁵⁴ Yet it is questionable whether this procedural safeguard is effective. In part, this is because the standard for finding that the plea is factually based is very low. And even when judges conscientiously seek to scrutinize the basis for the plea, this post-hoc review is difficult to perform. The parties have already agreed on the terms of a plea bargain and have little interest in revealing anything to the judge that might disturb the agreement.

At present, the factual basis inquiry into the plea is often perfunctory. One court has defined the standard of proof as "sufficient evidence at the time of the plea upon which the court may reasonably determine that the defendant likely committed the offense."⁵⁵ Others have simply required "some factual basis."⁵⁶ Mere admissions of guilt by the defendant are often sufficient to support a guilty plea.⁵⁷ Many courts have allowed judges to read the indictment to the defen-

52. U.S. SENTENCING GUIDELINES MANUAL § 3E.1.1(b)(2) cmt., app. 6. The PROTECT Act of 2003 amended this provision to require that the additional level be granted upon motion by the prosecutor.

53. *United States v. Francis*, 39 F.3d 803, 808 (7th Cir. 1994) (additional level reduction denied despite early notice of intent to plead guilty, where defendants failed to plead guilty until close to one week before trial); *United States v. Sowemimo*, 335 F.3d 567, 573 (7th Cir. 2003).

54. FED. R. CRIM. P. 11.

55. *United States v. Marks*, 38 F.3d 1009, 1012 (8th Cir.1994).

56. *United States v. Fountain*, 777 F.2d 351, 357 (7th Cir.1985).

57. *United States v. Deal*, 678 F.2d 1062, 1067 (11th Cir.1982) (factual basis was established when the defendant twice admitted in court to knowing that goods transported across state line were stolen).

dant and then merely to inquire whether he committed the acts in question.⁵⁸ In other courts, the prosecutor's summary of the evidence⁵⁹ or submission of a probable cause affidavit⁶⁰ is enough. Furthermore, Rule 11 requires judges to examine only "facts necessary to support the elements of the underlying criminal charge."⁶¹ This means that inquiry into non-essential factual allegations, which may be highly relevant to sentencing, rarely happens at the plea colloquy. Finally, even in cases of so-called *Alford* pleas,⁶² where a defendant pleads guilty while protesting his innocence, the factual basis for the plea need not be proven beyond a reasonable doubt.⁶³ Rather, the standard of proof is something closer to a "high probability of conviction."⁶⁴

The delayed and relatively minimal involvement of the judge in the plea bargaining process means that the plea terms may not reflect the true facts of the offense. As part of the plea bargain, the parties often stipulate to the facts relevant to sentencing. Defendants in some jurisdictions may plead to hypothetical crimes,⁶⁵ or to real crimes they did not commit.⁶⁶ And especially in systems with mandatory sentencing guidelines, the parties may engage in fact bargaining to achieve a desired sentencing outcome.⁶⁷ Judges rarely overturn such stipulations.⁶⁸ Because of this minimal supervision by the judge, the parties may reach plea bargains that are both inaccurate and unfair.

C. *Reconsidering Judicial Involvement in Plea Negotiations*

As a result of judicial passivity in the plea negotiations, prosecutors largely dictate the plea terms. As one federal judge has ob-

58. *E.g.*, *Paradiso v. United States*, 482 F.2d 409, 415-16 (3d Cir. 1973); *see also* *United States v. Guichard*, 779 F.2d 1139, 1146 (5th Cir. 1986) (holding that a guilty plea was properly accepted where the defendant agreed to and signed a recitation of events); *State v. Campbell*, 488 P.2d 968 (Ariz. 1971).

59. John G. Douglass, *Fatal Attraction? The Uneasy Courtship of Brady and Plea Bargaining*, 50 EMORY L.J. 437, 473-74 (2001).

60. Interview with Attorneys # 1 and # 2, State Attorney's Office, 17th Jud. Cir., Florida, Mar. 14, 2005.

61. Scott Moore, Comment, *Re-Examining the Admissive Effect of Guilty Pleas at Sentencing*, 1998 U. CHI. LEGAL F. 463, 475.

62. *North Carolina v. Alford*, 400 U.S. 25 (1970).

63. *United States v. Tunning*, 69 F.3d 107, 111-12 (6th Cir.1995) ("[S]trong evidence of actual guilt is not necessary to satisfy Rule 11(f), even where a defendant protests his innocence.").

64. John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 126 (1977).

65. *People v. Foster*, 225 N.E.2d 200 (N.Y. 1967) (allowing a plea to attempted manslaughter in the second degree, a legally impossible offense).

66. Barkai, *supra* note 64, at 116-17.

67. *See* Symposium, *Assessing the Probation Officers' Survey: Does Fact Bargaining Undermine the Sentencing Guidelines?*, 8 FED. SENT. REP. 299 (1996).

68. *United States v. Pimentel*, 932 F.2d 1029, 1033-34 (2d Cir. 1991); HERMAN, *supra* note 24, at 126.

served, "The prosecutor . . . is the central adjudicator of facts ([and] arbiter of most legal issues and of the appropriate sentence to be imposed)."⁶⁹ Our system has already slipped away from the adversarial model, and has become instead an "administrative system of criminal justice," managed by the prosecutor's office rather than the courts.⁷⁰ It is time to rethink whether this new administrative model, dominated by the prosecutor, is the one most likely to produce fair, accurate and voluntary plea bargains.

As the next three Sections show, there are good reasons, based on practical experience, to believe that judicial involvement in plea negotiations is a better way to promote accuracy and fairness in plea bargaining. A judge who takes part in the negotiations can more easily detect undue pressures on the defendant to plead guilty. He or she can also provide a more impartial assessment of the strength of the case and the post-trial sentence that the defendant will face. Where a plea disposition does not correspond to the facts of the case, early involvement by the judge is more likely to uncover the discrepancy. An earlier evaluation of the factual basis by the judge not only increases the accuracy of plea dispositions, but also reduces the extra costs of appealing and renegotiating plea terms rejected only at the plea colloquy.

Active judicial participation in plea negotiations may strike some as inimical to the adversarial tradition. As Part II discusses, judges tend to supervise plea negotiations most closely in inquisitorial systems such as Germany, where they have traditionally played a more active role in managing criminal proceedings. But the review of the Florida and Connecticut systems in Part III shows that even some American states have already adopted judicial participation in a way that complements party-driven procedures, instead of conflicting with them. As the next Sections argue, there are many reasons—based on experience as well as logic—to reconsider our initial skepticism toward judicial management of plea negotiations.

III. THE GERMAN MODEL: THE JUDGE AS PARTY AND SUPERVISOR

A working model of active judicial involvement in plea bargaining is that developed in Germany, where judges act as both a party to and a supervisor of plea negotiations. This proactive approach is in large part a function of Germany's inquisitorial tradition, which entrusts judges with the primary responsibility to discover and verify

69. Gerard E. Lynch, *Screening Versus Bargaining: Exactly What Are We Trading Off?*, 55 STAN. L. REV. 1399, 1403-04 (2003).

70. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

the substantive truth of the case.⁷¹ Active involvement in the plea negotiations allows judges to fulfill that responsibility in the context of plea bargaining, and helps ensure that the plea bargains are fair and consistent with the true facts of the case.

A. *Background: The German Model of Criminal Procedure in Contentious Cases*

In order to understand the German practice of plea bargaining, it is necessary to review some key aspects of German criminal procedure. Germany has a civil-law, inquisitorial criminal justice system, which traditionally envisions an active role for the judge. One of the key responsibilities of the court is to uncover the "substantive truth" of the case. To fulfill that responsibility, judges read the investigative file containing all the evidence gathered by the government and at trial conduct further investigation themselves, by questioning witnesses and requesting additional information where necessary.⁷²

Judges also have substantial control over the charges filed. When the charges do not adequately reflect the underlying events, judges can, after giving notice, convict the defendant on different charges.⁷³ Similarly, judges decide whether charges should be dismissed once the formal accusation has been filed,⁷⁴ and their approval is often needed for a prosecutor to decline to file charges.⁷⁵ In deciding whether to adjust or dismiss charges, judges can probe into the relevant facts on their own initiative, going beyond the investigative file compiled by the police and presented by the prosecution.⁷⁶

German judges also have broad discretion over the defendant's sentence. Sentencing and trial form part of a unitary proceeding in Germany. The court deliberates on punishment and sentence at the

71. The word inquisitorial is somewhat misleading. German criminal procedure today has many features commonly associated with adversarial systems, such as the questioning of witnesses by the defense and prosecution. To that extent, the German system may be better described as mixed. I use the term "inquisitorial" here to describe a system that emphasizes inquiry and control by judges, rather than by the parties.

72. StPO (*Strafprozessordnung*) §§ 214, 238, 241; Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solutions?*, 18 B.C. INT'L & COMP. L. REV. 317, 344-45 (1995).

73. StPO § 265 (judges can substitute charges, but the new charges must be based on conduct included in the initial accusation).

74. StPO §§ 156; 153II; 153aII; 153bII; 154II.

75. In felony cases, prosecution is mandatory unless the evidence is insufficient to support the charges. In less serious cases, the prosecution can decide not to file charges for several specified policy reasons, but to do so, it still needs the court's consent. StPO §§ 153, 153a, 153b. *But see* § 153I (no court consent needed for less serious crimes where culpability is minor); 153c (same for offenses abroad); § 153d (political offenses); § 153f (universal jurisdiction offenses), § 154I (collateral charges).

76. Email from Thomas Weigend, Professor of Law, Institute for Comparative and International Law, University of Cologne, Germany, to author, Sept. 14, 2005 [hereinafter Weigend E-mail # 1].

same time, and in the mixed court, which hears more serious criminal cases, lay and professional judges deliberate together.⁷⁷ At the end of trial, the judgment must describe in detail "how [the court] evaluates the evidence and which facts it finds to be true."⁷⁸ It must also provide reasons for the punishment imposed, but the law imposes relatively few limits on the court's sentencing discretion.

The German Criminal Code generally provides a maximum and sometimes a minimum sentence for each offense. At times, it also indicates distinct sentencing ranges for less serious or more serious instances of the offense.⁷⁹ The Code includes certain aggravating sentencing factors as offense elements—for example, selling or trafficking a "not insignificant amount" of drugs, acting as a member of a criminal gang, or committing a crime by use of weapons.⁸⁰ Other factors considered at sentencing include the motive and state of mind of the perpetrator, prior criminal history, and whether the perpetrator has tried to reconcile with the victim or has provided restitution.⁸¹

What weight should be attached to each of these factors is not clear. Judges have considerable discretion in deciding how much each factor will count at sentencing.⁸² As long as the trial court addresses the relevant factors in a reasoned opinion, the appellate courts are unlikely to intervene.⁸³ At the same time, following the principle that the sentence must be proportionate to the defendant's guilt, the

77. A brief description of German criminal courts' jurisdiction is warranted here: "Both misdemeanors and petty infractions . . . are tried in county court (*Amtsgericht*), either by a single professional judge . . . , or, if the case concerns a more serious offense, by a mixed court (*Schöffengericht*) consisting of one professional and two lay judges. Felonies can also be tried in the *Schöffengericht*, but serious felony cases are tried in district court (*Landgericht*) before a different mixed panel composed of two or three professional and two lay judges (*Grosse Strafkammer*). . . . To some extent, jurisdiction depends on the prosecutor's choice which, in turn, is informed by the penalty expected in the particular case." Frase & Weigend, *supra* note 72, at 321 (citations omitted).

78. StPO § 267, cited in Frase & Weigend, *supra* note 72, at 344.

79. Cornelius Nestler, *Sentencing in Germany*, 7 BUFF. CRIM. L. REV. 109, 112 (2004) (citing StGB § 224, which establishes two sentencing ranges—in cases of dangerous bodily injury, between six months to ten years, and in less serious cases of the same offense, three months to five years). In some cases, the Code provides only a minimum sentence, but the maximum prison sentence is set at 15 years, with the only longer sentence, life imprisonment, available in cases of murder.

80. *E.g.*, BtMG (*Betäubungsmittelgesetz*) § 29(a)(2) (more than an insignificant amount of drugs); StGB (*Strafgesetzbuch*) § 244 (2) (theft as a member of a gang); StGB § 244 (1) (armed theft).

81. StGB § 46.

82. Interview # 24, Landgericht Judge, Berlin ("Precise sentencing is voodoo. There are no mathematical rules. We just compare to other cases.").

83. *See, e.g.*, Interview # 5, Prosecutor, Bonn (appellate courts would not intervene unless the sentence is clearly disproportionate to the defendant's guilt); Interview # 10, Landgericht Judge, Berlin ("The BGH jurisprudence is not very helpful in guiding us, because the range is so wide I am surprised that the BGH upholds such extremely high sentences, even without reasoning. I cannot learn much from it.").

Federal Supreme Court⁸⁴ has recently become more active in reversing sentences that it finds unduly severe or lenient.⁸⁵ As plea bargaining has spread in Germany, appellate courts have become particularly concerned that negotiated sentences might be disproportionate to defendants' culpability. The Federal Supreme Court has repeatedly emphasized that sentences must be neither too lenient as a result of a plea bargain, nor too severe where plea negotiations have failed.⁸⁶

B. *How German Plea Bargaining Works: Theory and Practice*

As late as 1979, Germany could still be called a "land without plea bargaining."⁸⁷ Over the past 25 years, however, plea bargaining has grown rapidly in Germany, largely unnoticed at first and much more openly since the 1990s. While a 1986 study found that plea bargaining occurred almost exclusively in white-collar and drug cases,⁸⁸ today it also happens frequently in sexual violence, organized crime, and corruption cases, and less often in homicide cases.⁸⁹

The practice of plea bargaining in Germany developed organically, without direction from any written rule change or centrally established policy. Judges and prosecutors were looking to save time and resources as their caseloads grew and became more complex, and defendants were looking for more certainty and a sentence reduction for their cooperation. In the absence of legislative guidance, trial judges were relatively free to define their own role in the process. The higher courts stepped in occasionally, but even when they did so, they established only very broad limits on plea negotiations.⁹⁰

As in the United States, plea negotiations in Germany may concern either the underlying charges or the sentence, or both. But Ger-

84. The Federal Supreme Court, *Bundesgerichtshof* (BGH), is the highest court of appeals for criminal cases, unless a constitutional issue is involved, in which case the defendant can petition the *Bundesverfassungsgericht*, the Constitutional Court.

85. Weigend E-mail # 1 (referring to § 46 I 1 StGB and TRÖNDLE/ FISCHER, STRAFGESETZBUCH § 46 n.109 (2004)); Interview # 32, Amtsgericht Judge, Cologne.

86. BGH GSSt 1/04, NJW 1440/05, Beschluss v. 3.3.2005; see also BGH 4 StR 240/97, Urteil v. 28.8.1997 (noting that negotiated confessions should not be rewarded with a discount that is disproportionate to the defendant's guilt); BGH 1 StR 171/02, Beschluss v. 11.09.2002 (same); BGH 4 StR 371/03, Urteil v. 19.2.2004 (noting that the judge should not impose a disproportionately heavy sentence in retaliation for the defendant's failure to comply with certain conditions of the plea bargain).

87. John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979).

88. Raimund Hassemer & Gabriele Hippler, *Informelle Absprachen in der Praxis des deutschen Strafverfahrens*, StV 8 (1986) 360, 361.

89. E.g., Interview # 15, Landgericht Judge, Leipzig (common in organized crime and sexual crimes, but rarer in homicide cases); Interview # 9, Landgericht Judge, Cologne (common in all cases, but more frequent in white-collar crime and drug cases and rarer in assault and homicide cases).

90. BGHSt 43, 195, 202 ff., 4 StR 240/97; BGH GSSt 1/04, NJW 2005, 1440, Beschluss v. 3.3.2005.

man prosecutors' discretion to bargain is narrower than that of their American counterparts. The German Criminal Procedure Code limits the extent to which prosecutors can decline to file charges. Felony charges must be filed if there is an adequate evidentiary basis.⁹¹ Once the trial begins, the prosecution cannot withdraw the indictment or reduce the charges; it is the court's prerogative to do so.⁹² In addition to having control over the charges that the prosecution brings, judges have very broad discretion over sentencing. Consequently, prosecutors cannot make credible commitments that the court will accept a particular charge or sentence bargain. That is one of the main reasons why plea negotiations in Germany involve judges to a much greater degree than in the United States.

In misdemeanor and other less serious cases, German prosecutors have greater discretion to refrain from filing charges.⁹³ Not surprisingly, that is where they are most likely to engage in bargaining without directly involving the court.⁹⁴ Most common is bargaining under Section 153a of the Criminal Procedure Code, which allows prosecutors to decline to file charges on certain conditions—for example, when the defendant pays restitution or makes a contribution to a charity.⁹⁵ Although § 153a applies to crimes carrying a minimum sentence of less than one year in prison, most assault and theft cases, as well as a number of white-collar crimes, fall in that category. In practice, the parties sometimes agree to a dismissal under § 153a even for more serious crimes.⁹⁶ While § 153a was enacted to divert minor infractions away from the criminal justice system, today it is often used to dispose of more serious offenses that are too complex and burdensome to resolve through ordinary trial proceedings.⁹⁷ Two white-collar crime defense attorneys in Cologne claim that they

91. StPO § 170 (1).

92. StPO §§ 156, 154II (court may do so upon application by the prosecution), 153II (court may do so with the consent of the prosecution and the defense).

93. StPO §§ 153 (1), 153a. Although court consent is required for terminations under § 153a and terminations of more serious cases under § 153, in practice, approval is rarely withheld. *E.g.*, Interview # 3, Defense Attorney, Cologne (noting that rejection is "very, very rare"); Interview # 14, Prosecutor, Munich.

94. Prosecutors have several other important sources of discretion that give rise to bargaining—for example, whether to file a case in lower or higher court and what detention and parole conditions to recommend to the trial court or the Corrections Court (*Vollstreckungskammer*), respectively. But such bargaining is less common, so it will not be discussed here.

95. StPO § 153 (a) (1). Other conditions include paying compensation to the victim, performing charitable works, or undertaking specific support obligations. Prosecutors decline to file charges under § 153 (a) in about seven percent of cases. STATISTISCHES BUNDESAMT, FACHSERIE 10, REIHE 2, GERICHTE UND STAATSANWALT-SCHAFTEN 140 (2001).

96. BERND SCHÜNEMANN, *ABSPRACHEN IM STRAFVERFAHREN? GRUNDLAGEN, GEGENSTÄNDEN UND GRENZEN* B19 (1990); Hassemer & Hippler, *supra* note 88, at 363.

97. SCHÜNEMANN, *supra* note 96, at B19; Joachim Herrmann, *Bargaining Justice – A Bargain for German Criminal Justice?*, 53 U. PITT. L. REV. 755, 759 (1992).

settle close to half of their cases through bargaining under § 153a.⁹⁸ This bargaining occurs without any active involvement by the judge.⁹⁹ The prosecutor obtains the judge's approval only after the parties have bargained and reached an agreement on their own.¹⁰⁰

While in minor cases, the defense may negotiate with the prosecutor before the charges are filed, in more serious cases, both charge bargaining and sentence bargaining involve the court and take place after the charges are filed. Charge bargaining with the court occurs when evidence on some counts proves less convincing than anticipated by the prosecution,¹⁰¹ or when the case is very complex and contains a number of repetitive offenses.¹⁰² In the latter case, the court may dismiss a number of charges so as not to waste time in reviewing each individual count of the accusation.¹⁰³ Where charges are dismissed purely for administrative efficiency, the defendant's sentence may not be reduced or at least not by much.¹⁰⁴ On the other hand, where charges are dismissed because some counts cannot be proven, the defendant usually receives a reduced sentence.¹⁰⁵

The court is even more involved in sentence bargaining, a practice that is on the rise in Germany. Although no statutory provision authorizes it, it has spread widely because it offers distinct advantages to all involved. In return for a reduced sentence and perhaps better detention conditions,¹⁰⁶ the defendant can offer several benefits to the court and prosecution. First, he may provide a confession made on the record in court. (Neither the Code nor German language recognizes the concept of a "guilty plea.") The confession is often rather summary, but it is valuable to the court and prosecution because it largely obviates the need for further evidence gathering and saves time. In complicated white-collar crime cases or in organized crime cases with international dimensions, a confession may reduce

98. Interview # 4, Defense Attorney, Cologne; Interview # 3, Defense Attorney, Cologne.

99. Interview # 4, Defense Attorney, Cologne.

100. *Id.*

101. Hassemer & Hippler, *supra* note 88, at 363.

102. *E.g.*, Interview # 21, Landgericht Judge, Munich; Interview # 32, Amtsgericht Judge, Cologne.

103. StPO § 154.

104. *E.g.*, Interview # 21, Landgericht Judge, Munich; Interview # 32, Amtsgericht Judge, Cologne; Interview # 5, Prosecutor, Bonn.

105. Interview # 15, Landgericht Judge, Leipzig (giving as an example a case where the defendant was indicted on 1,080 counts of drug-dealing: "A large part of the indictment could not be proven because of the lack of credibility of some of the witnesses who were drug addicts The defense said that the defendant would confess to a number of the charges—about 400, and also would give information about the origin and transportation of the drugs; the prosecution agreed that on these conditions, it was prepared to drop the other counts under Section 154, and then we agreed relatively easily on a sentence of six years.").

106. *See infra* note 141.

the length of trial from weeks or months to just several hours.¹⁰⁷ In sexual violence cases, it can also spare a victim the trauma of testifying.¹⁰⁸ The defense may also agree to refrain from filing further motions—a concession that saves the court valuable time.¹⁰⁹ Furthermore, the defendant and the prosecutor may waive their right to appeal. This allows the court to write a shorter judgment¹¹⁰ and protects the plea deal from challenges. And finally, in drug-related prosecutions, the defendant may offer his cooperation with other investigations, in return for a promise by the prosecutor to recommend a more lenient sentence to the court.¹¹¹

Sentence bargaining is most commonly initiated by the defense attorney, though judges are also likely to start the discussions.¹¹² The plea discussions usually occur in the judge's chambers or in a courthouse conference room. The negotiations at this point include the defense attorney, the prosecutor and at least one judge. In *Landgericht*, a felony court composed of two or three professional and two lay judges, the negotiations could involve either just the presiding judge, or the presiding judge and the judge responsible for drafting the court's judgment, or sometimes all three professional judges.¹¹³ The lay judges are usually absent from the initial negotiations, as they are not yet empanelled at that point. The defendant is also not present—the defense attorney consults with him or her before and after the plea discussions.

The outcome of the negotiations is later entered into the trial record, as required by the Federal Supreme Court.¹¹⁴ As one Berlin *Landgericht* judge explained: "[W]e enter a notation to the effect that we had met and what the outcome of the conversations was. There is no protocol of the entire discussion. Who made what proposals—that

107. Herrmann, *supra* note 97, at 763.

108. Although this is true in various cases, German courts have been most receptive to this argument in sexual violence prosecutions, particularly where the victim is a child.

109. *E.g.*, Interview # 9, Landgericht Judge, Cologne.

110. Writing a full judgment is a very time-consuming task for German courts. StPO § 267; Email from Thomas Weigend, Professor of Law, Institute for Comparative and International Law, University of Cologne, Germany, to author, Jan. 16, 2006 [hereinafter Weigend E-mail # 2].

111. BtMG § 31.

112. Wolfgang Pfister, *Die Verständigung im Strafverfahren*, DRiZ, Juni 2004, at 179; see also Interview # 5, Prosecutor, Bonn (judges often initiate negotiations because they are overburdened). It is rare for a prosecutor to take the initiative. *E.g.*, Interview # 9, Landgericht Judge, Cologne.

113. In the past, negotiations often included only the judge and defense counsel, so the Federal Supreme Court stepped in to ensure that prosecutors are included as well. BGHSt 43, 195, 202, 4 StR 240/97 (1997).

114. In fact, the Federal Supreme Court requires that the "substance" of the negotiations be entered into the record, which may require more than an announcement of the result. See Hans-Joachim Weider, *Der aufgezwungene Deal*, 12 STRaFo 2003, 406, 409.

would not be included.”¹¹⁵ Even this minimal requirement of record-keeping is not followed scrupulously. One defense attorney suggested that in *Amtsgericht*, a county court that handles less serious offenses,¹¹⁶ the existence of a plea bargain might not be entered into the record.¹¹⁷

Because negotiations occur off-the-record in Germany, public scrutiny of the process is largely limited to the participation of lay judges in the final sentence deliberations.¹¹⁸ But even their role is rather minimal. Once the protocol is read out in public and the defendant confesses to the crime as agreed, the professional judges retire back to a conference with their two lay colleagues. Usually, it is during this conference that the lay judges first hear about the plea discussions. They rarely play a role in the negotiations because they are not empanelled until the main proceedings begin.¹¹⁹ Moreover, unlike the professional judges, they are not allowed to review the case file.¹²⁰ They have to rely on the professional judges’ representation of the facts to make their decision, so they are easily swayed by the judges’ opinion. While some professional judges are more solicitous of the laypersons’ opinions on the plea negotiations and the result reached,¹²¹ others simply tell them the outcome and ask for their consent.¹²² For all of these reasons, lay judges influence the verdict and sentence in negotiated cases only in the most exceptional circumstances.¹²³

The transparency of the process is further reduced because judgments after a plea bargain are likely to be much shorter than in a case that has been fully tried.¹²⁴ This is especially true where the defendant has waived the right to appeal the judgment.¹²⁵ In most

115. Interview # 10, Landgericht Judge, Berlin; see also Interview # 8, Prosecutor, Mannheim.

116. See *supra* note 77.

117. Remark by Defense Attorney, in Interview # 32, Amtsgericht Judge, Cologne.

118. For a brief review of the role of German lay judges during trial and sentencing, see Jenia Iontcheva, *Jury Sentencing as Democratic Practice*, 89 VA. L. REV. 311, 374-75 (2003).

119. *E.g.*, Interview # 15, Landgericht Judge, Leipzig.

120. *Id.*

121. Interview # 10, Landgericht Judge, Berlin.

122. *Id.* The lay judges formally have a veto power over certain decisions. Professional judges need the vote of at least one lay judge for any decision disadvantaging the defendant in the *Landgericht’s* Grand Chamber (*Grosse Strafkammer*), which tries more serious felony cases, and for all decisions—advantageous or not—in the *Amtsgericht’s* mixed court (*Schöffengericht*), which tries less serious offenses. StPO § 263. In reality, however, all of my interviewees stated that lay judges follow the suggestions of the professional judges in all but the most exceptional cases.

123. *E.g.*, Interview # 32, Amtsgericht Judge, Cologne; Interview # 15, Landgericht Judge, Leipzig.

124. Interview # 4, Defense Attorney, Cologne.

125. *Id.*

cases, such a waiver is an implicit part of the plea bargain.¹²⁶ It is rarely stated expressly, however, because the case law forbids judges to discuss appellate waivers in connection with a plea deal.¹²⁷ The parties can discuss such waivers in an informal manner, without the court's involvement. While this informal agreement has no binding force, the attorneys, who are usually repeat players in the local criminal justice system, have no interest in upsetting the deal by filing an appeal. Waivers therefore regularly accompany plea bargains.

Case law further provides that judges cannot promise to impose a specific sentence during the negotiations and can only state a cap beyond which they would not go.¹²⁸ The rationale behind this prohibition is that judges should be able to adjust the sentence in light of additional facts that might be revealed at trial.¹²⁹ In reality, the cap itself may be a signal about the expected sentence, or the judge may informally note in the negotiations what the expected sentence would be.¹³⁰ But judges are free to impose a lesser sentence if new material facts emerge at the main proceeding after the plea negotiations.¹³¹ If the court wishes to go beyond the cap, it must inform the defendant of its intention and give him the opportunity to adjust his defense.¹³² This leaves the defendant in an awkward position because a confession he may already have made in open court cannot be formally withdrawn and may be used against him.¹³³

C. *Assessing the German Model: Advantages and Disadvantages*

As this brief overview of the plea bargaining process indicates, German judges are active participants in the plea negotiations, particularly in more serious cases. Their role has been described as that of a mediator, a manager, or a supervisor of the negotiations.¹³⁴ The

126. *E.g.*, Interview # 27, Prosecutor, Munich; Interview # 21, Landgericht Judge, Munich. *But see* Interview # 24, Landgericht Judge, Berlin ("I think the BGH's rule [prohibiting the waiver of appellate remedies] is correct. I never ask for waiver. I think it is inconsistent with the self-image of a judge. And I operate on the presumption that my judgments are correct anyway."); Interview # 10, Landgericht Judge, Berlin.

127. BGHSt 43, 195, 202 ff., 4 StR 240/97; BGHSt, Anfragebeschl. v. 24.7.2003, StV 10/2003, 544; BGH GSSt 1/04, NJW 1440/05, Beschluss v. 3.3.2005.

128. BGHSt 43, 195, 202 ff., 4 StR 240/97.

129. *Id.* In Germany, the proceeding at which the negotiated confession is received and sentence imposed is *Hauptverhandlung*, the "main proceeding," which is the equivalent of trial in the United States.

130. Interview # 17, Landgericht Judge, Hamburg (observing that in about two-thirds of cases, the sentence cap is also the actual sentence imposed); Interview # 32, Amtsgericht Judge, Cologne.

131. BGH 4 StR 240/97, Urteil v. 28.08.1997.

132. 36 BGHSt 210/83, 214.

133. Pfister, *supra* note 112, at 181; BGH 3 StR 257/03, Urteil v. 16.10.2003. There is, however, discussion about introducing an exclusionary rule as to the confession in this situation. Weigend E-mail # 2.

134. *See* Langer, *From Legal Transplants*, *supra* note 10, at 44-45 (describing two conflicting conceptions of criminal procedure that shape German judges' role in plea

Federal Supreme Court treats them as an essential party to the negotiations.¹³⁵ Whatever the label applied, the advantages and disadvantages of the German model are worth evaluating to see what features of the model could be useful in American plea bargaining regimes.

1. The Benefits of Certainty

The first advantage of the German model of judicial supervision is that it offers the parties greater certainty about plea bargaining outcomes than a system in which the judge passively verifies the plea after the fact.

As noted earlier, German judges have wide sentencing discretion, and even seasoned attorneys have a difficult time predicting the sentence in a particular case.¹³⁶ Because of this uncertainty, parties often try to talk with judges, even outside the context of plea negotiations, to find out what sentence the court is likely to impose. The permissibility of *ex parte* communications in Germany makes the practice quite common and informal.¹³⁷ It seems so common that, when asked about the frequency of plea bargains, several interviewees emphasized a distinction between mere "conversations" with judges, which happen regularly, and the more involved process of plea bargaining, which is less common.¹³⁸ During plea negotiations, judges are actively involved, openly discussing the merits of the case and the range of acceptable dispositions.¹³⁹

As expected, many interviewees emphasized that one of the principal benefits of plea bargaining is the reduction of risk for the par-

bargaining—the conception of the judge as official investigator and the conception of the judge as a manager of an assembly line of cases). Compare Interview # 31, Defense Attorney, Mannheim (judge is more of a mediator than a supervisor); Interview # 7, Prosecutor, Mannheim (describing the judges' role in plea bargaining as rather passive), with Interview # 10, Landgericht Judge, Berlin (asserting that judges act as supervisors); Interview # 9, Landgericht Judge, Cologne (same); Interview # 13, Prosecutor, Munich (same); Interview # 12, Defense Attorney, Cologne (noting that judges play a central role, that they do more than mediate, and that their outlook is focused on leading the proceedings and uncovering the truth).

135. BGHSt 43, 195, 202 ff., 4 StR 240/97; Weigend E-mail # 1.

136. Interview # 27, Prosecutor, Cologne ("We never know what sentence will be given. When we're appearing before a judge we've dealt with before, we know the tendencies, but it is only a prognosis. It is particularly hard to predict because the sentence is a collective decision of the judges and lay judges.").

137. The only limit on *ex parte* contacts with judges seems to be the judge's duty to remain free from apparent bias. See § 24 StPO; Weigend E-mail # 1. I witnessed several such *ex parte* discussions while I was interviewing judges in Germany. The judges confirmed that *ex parte* contacts are a regular element of communications with the judge. Interview # 32, Amtsgericht Judge, Cologne.

138. E.g., Interview # 15, Landgericht Judge, Leipzig.

139. *Id.* (adding that it is harder to be as fully open in negotiations with lawyers that the judge does not know).

ties.¹⁴⁰ The certainty is especially valuable to defendants in detention, for whom the bargain might also bring prompt release.¹⁴¹ While the benefits of certainty accrue most directly to the parties, the greater predictability of the process is also a societal gain. It reduces the costs of plea bargaining by minimizing the need for renegotiation and appeals of failed bargains.¹⁴² Because German judges have substantial control over charging and sentencing decisions, their participation in the negotiations is essential to reducing uncertainty in the process.

Predictability may sometimes come into conflict with other important values of the legal process, and courts play an important role in resolving that conflict. The debate surrounding negotiated appeals waivers reflects the tension between predictability and fairness. As those favoring such waivers emphasize, the certainty of a plea bargain is reduced if the judgment can be appealed. Many German practitioners believe that without the guarantee of finality of the bargain, plea bargaining would lose its appeal.¹⁴³ So even while some appellate courts had prohibited the parties from agreeing on an appeals waiver as a condition of the plea bargain, several interviewees admitted to ignoring the prohibition.¹⁴⁴

But as other practitioners maintain, the possibility of appellate review is important to ensuring a plea bargain's fairness.¹⁴⁵ For that reason, two chambers of the Federal Supreme Court had held that a waiver of appellate remedies could not be part of the plea bargain; two others, however, allowed such waivers.¹⁴⁶ In March 2005, the Grand Senate of the Federal Supreme Court issued a new decision, which resolved the split among the courts.¹⁴⁷ It prohibited judicial involvement in waiver negotiations, but effectively left the parties free to negotiate appeals waivers informally between themselves. It

140. *E.g.*, Interview # 32, Amtsgericht Judge, Cologne; Interview # 23, Defense Attorney, Mannheim.

141. Interview # 15, Landgericht Judge, Leipzig; Interview # 18, Landgericht Judge, Hamburg. Under BGH case law, release from detention is not supposed to be subject to bargaining. But several interviewees acknowledged that in practice it is a common part of the plea bargain. In some states, freedom from detention pending trial is especially valuable because it means that a defendant would receive "open imprisonment" upon conviction, which is a much lighter regime of imprisonment than "closed imprisonment." Weigend E-mail # 1.

142. *See* Interview # 15, Landgericht Judge, Leipzig (noting that he had not seen an appeal from a plea bargain, and that the parties are generally satisfied with the result and do not bring appeals); Interview # 18, Landgericht Judge, Hamburg (observing that less than ten percent of plea bargains are appealed).

143. Interview # 12, Defense Attorney, Cologne; Interview # 31, Defense Attorney, Mannheim.

144. *E.g.*, Interview # 31, Defense Attorney, Mannheim.

145. Interview # 5, Prosecutor, Bonn.

146. *Compare* BGH, StV 97, 572, Beschluss v. 20.06.1997; BGH, StV 2000, 237, Beschluss v. 8.3.2000, *with* BGH, StV 2000, 4, Beschluss v. 19.10.1999; BGH, 5StR714/99, Urteil v. 21.04.1999.

147. BGH GSSt 1/04, NJW 1440/05, Beschluss v. 3.3.2005.

also required judges to notify the defendant, on the record and after the verdict has been rendered, that he has the right to appeal the verdict and that any previous commitment to waive appellate remedies is not binding.¹⁴⁸ If after receiving this notice, the defendant still declares a waiver, and the prosecution follows suit, the judgment becomes final.

The Federal Supreme Court's decision struck a reasonable balance between the values of predictability and fairness. It left the parties free to discuss an appeals waiver, so as to ensure finality in the plea bargaining process. But it also established procedural safeguards—prohibiting judges from demanding a waiver and requiring them to notify defendants of the right to appeal—to ensure that defendants would not waive their right to appeal unwittingly or under pressure by the court.

Another potential conflict between predictability and fairness may arise when a judge provides an assessment of the expected post-trial sentence. On the one hand, such information is very helpful to the defendant in making a knowing choice about the acceptability of a plea bargain. On the other hand, it may be perceived as a threat to impose a harsher sentence unless the defendant takes the offer on the table. Various procedural safeguards can be adopted to minimize the risk of judicial coercion in such situations, but they decrease the amount of information flowing to the parties. Currently, German plea bargaining practice weighs heavily in the direction of providing maximum information to the parties, rather than of minimizing judicial coercion.¹⁴⁹

2. Accuracy and Fairness

Plea bargaining increases the efficiency and predictability of criminal adjudication, and judicial involvement in plea negotiations further enhances predictability in a particular case. At the same time, plea bargaining may undermine the judge's duty to investigate the "truth of the matter."¹⁵⁰ It shortens significantly the actual trial and sentencing proceedings, so the judge has less opportunity to verify independently the factual basis for the defendant's admission of guilt.¹⁵¹ For that reason, German judges who participate in plea negotiations are sometimes accused of flouting their responsibility to

148. *Id.*

149. See *infra* Section III.C.3.

150. BGH, Anfragebeschl. v. 24.7.2003, StV 10/2003, 545; SCHÜNEMANN, *supra* note 96, at B81-84; Langer, *From Legal Transplants*, *supra* note 10, at 44-45; Pfister, *supra* note 112, at 179; Thomas Weigend, *Abgesprochene Gerechtigkeit*, JZ 1990, 774, 777; Interview # 24, Landgericht Judge, Berlin ("The downside of plea bargaining is that it conflicts with a central principle of our criminal process, that the court must clarify the facts . . .").

151. *E.g.*, Interview # 9, Landgericht Judge, Cologne.

ensure that the verdict and sentence are accurate and fair. They are criticized for sacrificing thoroughness and fair treatment for the sake of expediency.¹⁵² Yet the interviews gathered for this study suggest that truth-seeking remains a central purpose of judges' participation in plea negotiations.

German judges' role in plea bargaining is shaped by a long inquisitorial tradition expressly entrusting them with the duty to explore the truth. Under the German Criminal Procedure Code, judges have the responsibility of gathering all the necessary evidence to investigate the substantive truth of the case.¹⁵³ Judges often do so on their own initiative, or, where a party files a motion for evidence-taking, they are generally required to conduct further investigations in line with the party's motion.¹⁵⁴

The rise of plea bargaining has undoubtedly shifted some emphasis from truth-seeking to efficiency in German criminal practice. The concessions of truth-seeking to efficiency are much discussed in German legal scholarship¹⁵⁵ and were raised by some of the interviewees. For example, some defense attorneys intentionally file multiple evidence-gathering motions, or threaten to summon witnesses living abroad, which might prolong the proceedings substantially.¹⁵⁶ Some judges would grant the defendant sentencing concessions in exchange for the defense ceasing the evidence-gathering motions.¹⁵⁷ These judges are offering a discount that has nothing to do with the blameworthiness of the defendant. The sentence is lower not because the defendant is less culpable, but because the court is too busy to address all the motions filed by an aggressive defense attorney.

Another concession to efficiency is the shortening of the process by which the facts of the case are established. Although judges are supposed to verify themselves the factual basis of the case, when a case is plea bargained, they are more likely to accept "quick confessions" in which the defendant admits simply that the charges as laid out by the prosecution are correct.¹⁵⁸ Such a quick confession may fail to illuminate the details of the case. A plea bargain based on a "confession" of this kind may produce a worse outcome for the defendant than a full trial, especially where the defense attorney and the judge make an inaccurate assessment of the few facts uncovered

152. See *supra* note 150.

153. StPO § 244(2).

154. StPO § 244(2)-(3).

155. See *supra* note 150.

156. *E.g.*, Herrmann, *supra* note 97, at 760. Because of changes in the Criminal Procedure Code, the threat to summon witnesses from abroad is no longer effective. Weigend E-mail # 2 (citing StPO § 244 V 2).

157. *E.g.*, Interview # 17, Landgericht Judge, Hamburg; Interview # 31, Defense Attorney, Mannheim; Interview # 9, Landgericht Judge, Cologne.

158. *E.g.*, Interview # 16, Prosecutor, Hamburg; Interview # 12, Defense Attorney, Cologne.

early in the proceedings.¹⁵⁹ Truth-seeking may also be jeopardized where judges agree to dismiss a number of provable “collateral” charges in exchange for a confession to the “main” charges and a quicker resolution of the case.¹⁶⁰ The majority of judges interviewed admitted that they are most likely to plea bargain where the case is more legally or factually complex and the evidentiary record more unwieldy.¹⁶¹

These admissions reveal that plea bargaining has had a real effect on the balance between efficiency and truth-seeking in German criminal procedure. Efficiency is more important today than it was when judges saw themselves primarily as official investigators aiming to discover the truth. Today’s judges have to balance their functions as managers of plea negotiations against their duties as supervisors and official investigators.¹⁶² One German prosecutor was very critical of this effect of plea bargaining: “From the perspective of the court, you give up on the responsibility of the court to clarify the matter and to fashion a just resolution The Court becomes like a notary, who certifies something without much verification.”¹⁶³

Still, judges have not abandoned their commitment to truth-seeking. Both the German Constitutional Court and the German Federal Supreme Court have repeatedly held that the duty to seek the truth requires judges to probe into the veracity of defendant’s confessions resulting from a plea bargain.¹⁶⁴ Trial judges themselves, as well as other lawyers, perceive of the judges’ role in plea bargaining at least in part as official investigators of the truth.¹⁶⁵ As one defense attorney—otherwise skeptical of the fairness of plea bargaining—explained, judges play a central role in plea negotiations, leading the discussions and focused on uncovering the truth.¹⁶⁶ Judges themselves deny sacrificing accuracy for efficiency and emphasize their role in imposing a just sentence. When they speak about “quick confessions,” it is often regarding cases they have heard or read about in appellate case law, but rarely regarding their own

159. Interview # 9, Landgericht Judge, Cologne; Interview # 12, Defense Attorney, Cologne.

160. *E.g.*, Interview # 15, Landgericht Judge, Leipzig.

161. *E.g.*, Interview # 16, Prosecutor, Hamburg (citing as an incentive to plea bargain long records of intercepted phone conversations, especially conversations that had to be translated from a foreign language); Interview # 32, Amtsgericht Judge, Cologne; Interview # 15, Landgericht Judge, Leipzig.

162. Langer, *From Legal Transplants*, *supra* note 10, at 44-45.

163. Interview # 7, Prosecutor, Mannheim.

164. BVerfG, 1987 NStZ 419; BGHSt 43, 195, 204, 4 StR 240/97 (1997); BGH GSSt 1/04, NJW 1440/05, Beschluss v. 3.3.2005.

165. *E.g.*, Interview # 9, Landgericht Judge, Cologne; Interview # 10, Landgericht Judge, Berlin; Interview # 24, Landgericht Judge, Berlin; Interview # 12, Defense Attorney, Cologne.

166. Interview # 12, Defense Attorney, Cologne.

cases.¹⁶⁷ Those who acknowledge ending evidence-gathering early note that they do so only when the written record before them clearly establishes the defendant's guilt.¹⁶⁸ They insist that they carefully review the file compiled by the police and even after a confession, ask clarifying questions to confirm the facts in the record.¹⁶⁹ Where the file reveals ambiguities in the evidence, judges affirm that they would follow up with additional questions or where that is not enough, with further evidence-gathering.¹⁷⁰ Some would conduct several days of proceedings before they conclude what an appropriate disposition might be.¹⁷¹

When it comes to negotiations of charge dismissals, judges assert that such dismissals do not impair the accuracy of sentencing. In some cases, the court dismisses charges because the defense has shown that they are based on weak evidence.¹⁷² Even where that is not the case, the judge has vast sentencing discretion where numerous offenses have been charged, so the dismissal of "collateral" charges does not have a significant influence on the ultimate sentence.¹⁷³ One judge gave the example of charge dismissals in a mass fraud case, where it would be impractical to call witnesses to confirm each instance of fraud. The dismissal of charges for 30 or even 60 instances of fraud out of 200 would not, on its own, have an influence

167. Interview # 9, Landgericht Judge, Cologne (hearing from a colleague the theory that cases are plea bargained where there is a risk of acquittal, but disagreeing with that proposition); *id.* (explaining that he would not accept quick confessions unless they are supported by other evidence); *see also* Interview # 5, Prosecutor, Bonn (although it is theoretically possible that a judge may not read the file carefully and may allow a plea bargain that does not correspond to the facts, in his experience, judges carefully review the file).

168. Interview # 9, Landgericht Judge, Cologne (noting that plea bargains are entered to avoid further evidence-gathering only where the evidence already clearly establishes the defendant's guilt and the evidence-taking measures are perceived as unnecessary and too time consuming).

169. Interview # 24, Landgericht Judge, Berlin (noting that he does so by asking questions that only the defendant could answer); Interview # 17, Landgericht Judge, Hamburg; Interview # 9, Landgericht Judge, Cologne (noting that additional inquiry is necessary to corroborate a confession and that he would have grave misgivings about accepting a confession that is difficult to verify).

170. *E.g.*, Interview # 21, Landgericht Judge, Munich; *see also* Hassemer & Hippler, *supra* note 88, at 362 (finding that proceedings after plea are similar to regular trial proceedings and include a review of the evidence, albeit to a very limited extent).

171. Interview # 5, Prosecutor, Bonn (pointing out that the court would rarely come to judgment, even when a plea bargain is anticipated, before the judges hear evidence for several days of trial).

172. *See* Interview # 15, Landgericht Judge, Leipzig.

173. *E.g.*, Interview # 21, Landgericht Judge, Munich; Interview # 15, Landgericht Judge, Leipzig ("[I]t is relatively easy to drop some of the instances because there are still many [sentencing] possibilities [for the court]"). It is not clear to what extent these "collateral" charges reflect overcharging by the prosecution. The interviewees did not identify overcharging as a problem, but some German commentators have suggested that prosecutors file collateral charges to gain leverage in plea bargaining. Weider, *supra* note 114, at 408.

on the sentence.¹⁷⁴ Even if some of the facts were not entirely clarified during the trial, the sentence may still reflect the defendant's blameworthiness. In some sense, this practice is similar to "relevant conduct" enhancements under the U.S. Sentencing Guidelines, where judges would take into account uncharged conduct proven by mere preponderance of the evidence at sentencing.¹⁷⁵

Other features of the German plea bargaining process also suggest that judges remain oriented toward truth-seeking. Unlike their American counterparts, German judges cannot accept a "plea of guilty" where a defendant protests his innocence.¹⁷⁶ A sentence discount can be offered only where the defendant confesses guilt and thus at least minimally assists in the search for truth. German defendants cannot "plead" to hypothetical crimes,¹⁷⁷ or to real crimes they could not have committed.¹⁷⁸ And the practice of "fact bargaining"—whereby the parties misrepresent facts in order to ensure a particular sentence negotiated between them—seems to occur rarely, if at all, in Germany.¹⁷⁹ As a Hamburg prosecutor explained, "It is wrong to bargain about the evidence It is one thing for a plea bargain to leave a question open, for example, whether a crime was committed by a gang, but it is another to make it part of the bargain that the conclusion would be that it was not committed by a gang."¹⁸⁰ The rarity of fact bargaining in Germany is probably due to the absence of sentencing guidelines and the greater limits on charge bargaining.¹⁸¹ Because the court and the parties in Germany are not constrained by narrow sentencing ranges, they need not alter the facts to achieve a particular sentence.

In comparison to their American counterparts, German judges are also provided with better tools to fulfill their duty of investigating the evidence. To begin, the evidence on file at the time of charging is often more complete than the evidence that American prosecutors have in their possession when they plea bargain. German prosecutors begin plea bargaining only after the police have completed their

174. *E.g.*, Interview # 5, Prosecutor, Bonn (pointing out that in a case of multiple burglaries, the sentence would not depend on whether 35 or 40 cases of burglaries are proven, so charge bargaining is common).

175. While these practices aim at aligning the sentence with the "real offense" committed by the defendant and are therefore truth-seeking, they also carry the risk of enhancing the defendant's sentence without sufficient procedural safeguards.

176. Contrast with the American approach in *North Carolina v. Alford*, 400 U.S. 25 (1970).

177. Frase & Weigend, *supra* note 72, at 344.

178. *Id.*

179. Interview # 16, Prosecutor, Hamburg. *But see* Weigend E-mail # 2 (suggesting that "partial" confessions are common and are a form of fact bargaining). For a review of fact bargaining in U.S. federal courts, see Symposium, *supra* note 67.

180. Interview # 16, Prosecutor, Hamburg.

181. *See supra* notes 79-86, 91-105 and accompanying text.

investigation.¹⁸² Moreover, German police and prosecutors have a duty to investigate and gather exculpatory, as well as inculpatory evidence.¹⁸³ Other factors being equal, the earlier, fuller investigation of the facts in Germany means not only that the prosecution will be less likely to bring innocent defendants to the negotiating table, but also that it will be less likely to give unwarranted sentence reductions to defendants who have committed serious crimes. By contrast, in the United States, "[u]nder the pressure of a heavy, time-consuming caseload, the prosecutor may easily be seduced at an early stage of the proceedings, before such facts are more fully developed, by the offer of a quick guilty plea in exchange for a light sentence, only to discover too late that the offense, or the offender, was far more serious than originally thought."¹⁸⁴

The scope of discovery afforded to the defense is also greater in Germany. The German system requires the prosecutor to disclose fully its evidence, and the requirement applies at all stages of the investigation.¹⁸⁵ This is in stark contrast to U.S. practice at the federal level, where pre-plea discovery is much more limited.¹⁸⁶ Broader and earlier disclosure by the prosecution, as practiced in Germany, ensures that the court hears more informed arguments by the defense during plea discussions and can better evaluate the accuracy and fairness of a proposed plea bargain.

The judge herself has access to the entire file before she meets with the parties for plea discussions.¹⁸⁷ This access to the record allows judges to step in where lawyers may be failing in their representation. Some judges see this supervisory role as flowing naturally from the duty to ensure that the plea reflects the true facts. As a Berlin judge observed:

The court does have a supervisory function, to verify the evidence. The tendency with prosecutors is that they have investigated the case, they have delivered the charges . . . and have done everything they had to do so that they think: "I

182. *E.g.*, Interview # 5, Prosecutor, Bonn.

183. StPO § 160 II.

184. YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE 1282 (2002).

185. StPO § 147 ("Defense counsel shall be entitled to inspect those files which are available to the court, those which would have been submitted to the court if charges had been preferred, and to inspect officially impounded pieces of evidence."). In practice, discovery in many cases begins only when the investigation has been concluded. Inspection of the file can be denied to the extent that it would endanger the success of the investigation. StPO § 147 (2). Unlike in the United States, there is no obligation for the defense to reciprocate in disclosing information about its case. *See* Frase & Weigend, *supra* note 72, at 341.

186. *See supra* notes 41-46 and accompanying text.

187. The availability of the complete investigative file before negotiations explains in large part German judges' willingness to accept "quick confessions." When a judge has reviewed the facts laid out in the file, it is not surprising that in clear-cut cases, she would be satisfied with the defendant's simple admission of guilt.

would not have brought charges if I were not convinced that the accused was the perpetrator." But this is not necessarily true; there are also cases where the evidence presents itself quite differently. And that is the task of the court, of course also of the defense attorney, but in the first place of the court, to find out, what the evidence really is.¹⁸⁸

The same judge also opined that it is "important for the court to support a little bit the defense attorney or the prosecutor who is unable to represent her position adequately."¹⁸⁹ Other judges explained that they are most likely to take a lead in the negotiations where they see an inexperienced or incompetent defense attorney.¹⁹⁰ They see their role as looking out for the interests of the defendant, but also as ensuring that the sentence reflects the gravity of the crime. In pursuing these goals, the judge may intervene by advising a defendant directly (though not too emphatically) about the benefits of a confession where the lawyer fails to do so,¹⁹¹ or may suggest a sentence higher or lower than the one offered by the prosecution.¹⁹²

In short, in their attitude and by design, German judges remain active supervisors of the accuracy of the confession and the fairness of the sentence. While the introduction of plea bargaining may have reduced the emphasis on truth-seeking in German criminal procedure, the continued involvement by judges ensures that truth-seeking plays a more central role in the German process than it does in U.S. federal courts, where judges do not participate in plea negotiations. Moreover, the willingness of German judges to step in where the prosecutor or defense attorney fails in her duties renders the plea negotiations fairer to both the defendant and the public at large.

The German practice of actively involving judges in plea bargaining to ensure truthfulness in the process reflects a broader difference between the adversarial and inquisitorial systems. In contrast to

188. Interview # 10, Landgericht Judge, Berlin. Some judges elaborated on the cases in which they would reject a plea: "It would happen where the result seemed unreasonable to me. Or where I thought a rich defendant was buying his freedom. Or where I thought the sentence was too low. It's practically never about the dismissal of charges, but about the sentence length." Interview # 24, Landgericht Judge, Berlin. "For example, if in sexual abuse or rape cases, the bargain and the confession do not match with the content of the files and the testimony of the victim, then I would not accept a bargain. And I would want to examine the victim. Also where the confession is only partial, when it leaves out much that is in the files, then I would not accept bargains. And in the end, I am generally negatively predisposed toward bargains in violent crimes." Interview # 10, *supra*.

189. Interview # 10, Landgericht Judge, Berlin.

190. Interview # 32, Amtsgericht Judge, Cologne; Interview # 9, Landgericht Judge, Cologne.

191. Interview # 9, Landgericht Judge, Cologne.

192. See Interview # 24, Landgericht Judge, Berlin. *But see* Interview # 12, Defense Attorney, Cologne (explaining that if, on a rare occasion, the defense and prosecution agreed on a disposition without the judge's participation, it would be unlikely that a judge would disturb it).

continental Europe's criminal procedure, our system has traditionally been more concerned with "procedural" rather than with "substantive" truth.¹⁹³ We are likely to accept the outcome of a criminal case as legitimate as long as it is reached in conformity with procedural rules.¹⁹⁴ For that reason, we rely on the parties to investigate the truth and on the judge to ensure that the rules are obeyed. The German criminal justice system, by contrast, aims to uncover the substantive truth of the case, and it does not trust the adversarial process to fulfill that role.

Our adversarial model works well in the context of a public trial, but it is not as well-suited to plea negotiations, which occur out of public sight and, in many U.S. jurisdictions, out of the judge's sight too. The German practice of involving judges in the negotiations may be a better way to ensure fair plea bargaining, as long as it does not lead to judicial coercion of defendants to plead guilty.

3. Judicial Supervision and Coercion

If some commentators are concerned that judges in Germany do not supervise the plea carefully enough,¹⁹⁵ others worry that a dominant judge might prejudice the case and coerce a defendant into entering a plea. Concerned about the coercive potential of active judicial participation in plea bargaining, the Federal Supreme Court has held that the defendant cannot be pressured to enter a plea bargain through threats of a higher sentence or through unlawful promises.¹⁹⁶ There are both substantive and procedural aspects of the case law against judicial coercion.

On the procedural side, the Federal Supreme Court has held that the substance of the plea bargain must be announced in open court, on the record, and with all parties present.¹⁹⁷ This rule minimizes the possibility of judicial coercion, but it is not followed scrupulously in practice. As mentioned earlier, the common practice is for the parties, together with the judge, to meet in private and engage in preliminary plea negotiations. These negotiations rarely include the lay judges. The defendant is also usually absent, although his counsel is there to represent his interests. Although the defense attorney can insist that the substance of the plea negotiations be entered on the record, attorneys rarely do so, lest they upset the plea bargain or

193. Thomas Weigend, *Is the Criminal Process About Truth?: A German Perspective*, 26 HARV. J.L. & PUB. POL'Y 157, 168 (2003).

194. *Id.*

195. See, e.g., Weigend, *supra* note 150, at 777 (arguing that courts do not examine the factual basis of the plea with sufficient care).

196. BGH St 43, 195, 202 ff., 4 StR 240/97 (1997).

197. *Id.*; BGH, Anfragebeschl. v. 24.7.2003, StV 10/2003, 545.

strain relations with the court.¹⁹⁸ The record commonly includes only the result of the negotiations—typically, the sentence that the defendant may expect in return for a confession. The open-court announcement of the result would not mention potentially unlawful promises or threats that might have influenced the defense to accept the bargain. It offers neither a meaningful guarantee of transparency nor an effective safeguard against judicial coercion.

A substantive safeguard against judicial coercion is the rule that a judge may be disqualified from a case for bias. Removal for bias can occur if the judge fails to include a relevant party in the negotiations,¹⁹⁹ or if she makes remarks that might coerce the defendant into confessing.²⁰⁰ It may sometimes be hard to distinguish whether the judge is simply informing the defendant of the likely outcome of trial in the absence of a confession or pressuring the defendant to make a confession.²⁰¹ The standard is whether a reasonable defendant would conclude that the judge has predetermined the outcome of the case.²⁰² Under that standard, remarks by the judge suggesting that the evidence is stacked against the defendant and that a confession would mean a lighter sentence, especially when couched in reproachful language, may be grounds for removal.²⁰³ A judge may also be disqualified if he expresses a clear opinion on how the case should be resolved before reviewing all of the evidence.²⁰⁴ The case law on judicial bias deters at least some judges from being too assertive in plea negotiations²⁰⁵ or committing to a particular sentence.²⁰⁶

Even where a defendant fails to file a motion to disqualify an overbearing judge for bias, he may raise the question of judicial coercion on appeal. If he shows that the judge used threats of a higher sentence or unlawful promises to procure a plea bargain, the judg-

198. See Weider, *supra* note 114, at 412 (urging defense attorneys to demand a fuller record).

199. BGH 4 StR 240/97, Urteil v. 28.8.1997.

200. BGH 1 StR 574/03, Urteil v. 2.3.2004; BGH 3 StR 452/04, Beschluss v. 8.2.2005 (noting that a judge may be disqualified where he suggests to defense counsel that if the defendant does not accept plea offer that day, expert testimony the following day may lead to imposition of heavier sentence).

201. E.g., Karsten Altenhain & Michael Haimerl, *Modelle konsensualen Erledigung des Hauptverfahrens*, 152 GOLTDAMMER'S ARCHIV 281, 289-92 (2005).

202. BGH 1 StR 574/03, Urteil v. 2.3.2004.

203. *Id.*; cf. Herrmann, *supra* note 97, at 74 (noting that a judge who is overzealous in trying to steer the plea negotiations may be disqualified on grounds of bias).

204. LUTZ MEYER-GOSSNER, STRAFPROZESSORDNUNG § 24, 101-02 (2005). Compare Interview # 5, Prosecutor, Bonn, and Interview # 18, Landgericht Judge, Hamburg (suggesting that bias would be found where the judge states a specific sentence, instead of a sentencing cap, that the defendant could expect to receive as part of a plea bargain), with MEYER-GOSSNER, *supra*, at 102 (suggesting that commitment to a specific sentence would not be enough to warrant removal for bias).

205. See Interview # 15, Landgericht Judge, Leipzig; Interview # 5, Prosecutor, Bonn; Interview # 18, Landgericht Judge, Hamburg.

206. Interview # 31, Defense Attorney, Mannheim.

ment would be reversed.²⁰⁷ The availability of appellate remedies is therefore a critical procedural safeguard against judicial coercion. But as mentioned earlier, recent case law has sanctioned appeals waivers, as long as the court has not been complicit in obtaining them. In any event, formal limits on appellate waivers have not been observed closely in practice. The repeat interaction between judges, prosecutors, and defense attorneys in a particular district means that judges could refuse to bargain in the future with those attorneys who regularly seek appellate review of plea bargains with the court.²⁰⁸

While these protections against judicial overreaching are often circumvented in practice, several structural safeguards help minimize the overall coerciveness of German plea bargaining. First, plea negotiations still occur in fewer cases in Germany than in the United States. While the percentage of cases plea bargained varies greatly by locality and by type of case,²⁰⁹ the average national figure is estimated to fall somewhere between 30 and 50 percent.²¹⁰ The rate is significantly lower than in the United States, where over 90 percent of convictions are by guilty plea.²¹¹ The common presumption in Germany, at least at present, is that the case will go to trial and not that it will be plea-bargained. This presumption may reduce the likelihood that judges will press for a plea bargain, or that defendants will quickly accept one.

Another reason for the lower level of coerciveness of German plea bargaining is the relative mildness of the expected post-trial sentence and the smaller discounts given to defendants who confess guilt. German sentences expected after trial are significantly lower than American post-trial sentences.²¹² The highest statutory sentence is

207. BGH 4 StR 84/04, Urteil v. 16.9.2004 (reversing judgment and ordering new trial of defendant who was threatened with pretrial detention if he refused to confess and persisted in filing motions to subpoena witnesses located abroad).

208. Weider, *supra* note 114, at 409. The phenomenon of judges punishing recalcitrant attorneys by denying them benefits in future cases has been observed in American courts as well. MILTON HEUMANN, PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS 63-68 (1977).

209. Larger cities, particularly Munich and Berlin, seem to have a higher rate of plea bargaining than smaller cities, and plea bargaining occurs more frequently in white-collar crime and drug cases than in other cases.

210. Pfister, *supra* note 112, at 178 (citing an estimate that plea bargaining occurs in 50 percent of criminal cases); SCHÜNEMANN, *supra* note 96, at B18 (estimating that in 1990 plea bargaining occurred in 20-30 percent of cases).

211. BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING (2002), at <http://www.ojp.usdoj.gov/bjs/abstract/fccp02.htm> (last visited Nov. 12, 2005) (showing that federal prosecutors declined to prosecute 27 percent of all matters investigated in 2002, that 89 percent of those whose criminal cases were concluded in federal district court were convicted, and that 96 percent of those convicted pleaded guilty or no contest); see also BUREAU OF JUSTICE STATISTICS, FELONY DEFENDANTS IN LARGE URBAN COUNTIES 24 tbl. 23 (2002) (showing that 61 percent of arrest charges in large-county state courts were resolved through a guilty plea).

212. Frase and Weigend estimate that sentences are on average three times more severe in the United States than in Germany. Frase & Weigend, *supra* note 72, at

15 years, except in cases of murder, where life imprisonment is mandatory. The vast majority of criminal cases are resolved through fines.²¹³ Moreover, plea bargaining is rarely used to dispose of violent crime cases. For that reason, in many of the cases that are resolved through bargaining, the expected sentence is likely to be fairly low.

The reward that German defendants are likely to receive for confessing and cooperating is also likely to be somewhat lower than that given to American defendants. While in U.S. federal court, the average discount for pleading guilty could be as high as two-thirds off the sentence expected after trial,²¹⁴ in Germany, an admission of guilt is commonly rewarded with a one-fourth to one-third reduction in the expected sentence.²¹⁵ Accordingly, the difference between the bargained-for and post-trial sentences is at most five years; more often, it is mere months. Where trial courts go beyond this accepted sentencing discount, appellate courts may step in. Although German appellate courts rarely intervene in sentencing matters, they are more likely to do so in cases where the differential between a bargained-for sentence and the sentence considered proportional to the offense is deemed too great.²¹⁶ At the same time, appeals of an excessive plea discount are rare because defendants have no interest in contesting a lenient sentence, and prosecutors avoid challenging bargains to which they have already agreed.

There is an important exception to the generally low sentencing discounts offered in Germany. Defendants receive a substantial plea discount when the execution of their sentence is suspended, which can occur when the imprisonment imposed does not exceed two

347-48; *see also* JAMES WHITMAN, *HARSH JUSTICE* 71 (2005) (noting that prison sentences are on average "far shorter" in Germany than in the United States).

213. StGB § 47 (providing that imprisonment of less than six months should be imposed only in exceptional cases and that fines should be imposed instead).

214. *See supra* notes 16-17 and accompanying text.

215. Interview # 5, Prosecutor, Bonn; Interview # 24, Landgericht Judge, Berlin; Interview # 26, Defense Attorney, Cologne; Interview # 11, Amtsgericht Judge, Munich (one-fourth); Interview # 18, Landgericht Judge, Hamburg (between 10 percent and 30 percent, depending on the strength of the evidence); Interview # 10, Landgericht Judge, Berlin ("Between half a year and three years, but it depends a lot on the case [T]he discount is smaller than in the United States because German sentences are shorter, with the maximum at 15 years."); Interview # 27, Prosecutor, Cologne ("At least a third. In very complicated cases even more."); Interview # 32, Amtsgericht Judge, Cologne (citing as typical a reduction of a four-year sentence to three and one-half years).

216. BGH StR 411/04, Beschluss v. 12.1.2005 (holding that a proposed plea discount of about 50 percent, from a sentence of six-seven years to a sentence of three years and six months, was unlawful, because it was an unwarranted reward for a confession and might unduly coerce a defendant into confessing); BGH StV 2004, 470 (5 StR 579/03) (holding that a two-thirds discount, from six years to two years, is unlawful because it may coerce a defendant to plead guilty); BGH, NStZ 2004, 164 (1 ARs 27/03), *cited in* Pfister, *supra* note 112, at 179; *see also* BGH, StV 2000, 556 (2StR 388/99); StV 2002, 637 (1StR 171/02).

years.²¹⁷ As part of a plea bargain in less serious cases, the court often reduces the time to which the defendant is sentenced to two years or less, suspends execution of the sentence, and grants probation. Here, the discount is worth a lot more than the reduction in the sentence itself—it spares the defendant from spending any time behind bars. Still, when it comes to sentences served, low plea discounts combine with mild sentences to reduce somewhat the coerciveness of plea bargaining.

Other features of the German process, however, leave room for judicial coercion and raise more serious concerns. As noted earlier, appellate waivers are a common feature of plea agreements—whether as a formal or informal matter. Even where the parties exercise their right to appeal, the lack of a record of the substance of plea discussions also means that appellate courts cannot adequately police judicial behavior. As one practitioner has suggested, German defense attorneys have not made good use of all the procedural protections against coercion available under the Federal Supreme Court's case law.²¹⁸

The case law itself is not always sensitive to dangers of coercion. For example, it provides that statements by the defendant offered to support the plea bargain may be considered by the court at a subsequent trial if the bargain falls through.²¹⁹ Once the defendant has made some incriminating statements pursuant to a plea bargain, he or she has no good exit strategy if the bargain falls through.

There are two structural features of German procedure which further increase the risk of coercion. The first is the common practice of German judges to initiate plea discussions, and the second is the participation of the judge involved in the negotiations in the trial of the defendant where the negotiations fail. Where the judge initiates the plea discussions, a defendant may feel additional pressure to confess—both because of the inherent authority of the court and because the same judge or judges who are involved in the plea negotiations would decide the defendant's guilt or innocence and sentence if a bargain falls through. Although lay judges will also have a say, their influence is marginal. By contrast, in the United States, a defendant who rejects a pretrial offer by a judge to plead guilty may request a jury trial. And in some U.S. jurisdictions that allow judges to take part in plea negotiations, the judge involved in plea negotiations must recuse himself from the trial and sentencing of a defendant who has rejected the judge's pretrial plea offer.

The interviews do not suggest that undue judicial pressure in plea negotiations is a systemic problem in Germany. Few practition-

217. StGB § 56.

218. Weider, *supra* note 114, at 409.

219. Pfister, *supra* note 112.

ers pointed to examples from their own experience in which a judge directly pressured a defendant to plead guilty.²²⁰ Some expressly rejected the possibility that a defendant might confess to a crime he has not committed as a result of judicial involvement in plea bargaining.²²¹ Still, a number of practitioners clearly worry about the voluntariness of plea bargaining.²²² Even if coercion is relatively rare, it results in serious injustice and ought to be minimized. The German system can do more to ensure that active judicial involvement does not have a coercive effect on defendants and prosecutors. As we shall see in the next Part, American jurisdictions such as Florida and Connecticut fare better in reducing the coerciveness of judge-mediated plea negotiations.

IV. TWO AMERICAN MODELS OF JUDICIAL INVOLVEMENT: THE JUDGE AS INFORMATION SOURCE AND AS MODERATOR

The German model of involving judges in the negotiations displays several features that can be a guide to reform of American plea bargaining practices. German judges help produce a more informed plea bargain by advising the parties of the applicable sentencing ranges. By carefully studying the evidence and providing a neutral perspective on the case early in the negotiations, the judges also promote fairness and accuracy in plea bargaining. But the German model may appear too foreign to be a useful guide for reform in the United States. The active supervisory role played by the judge may seem more consistent with inquisitorial methods of investigating and adjudicating a case.

This Part reviews two American systems, Florida and Connecticut, which have also allowed judicial involvement in plea negotia-

220. Interview # 21, Landgericht Judge, Munich (reporting a case of alleged coercion in the regional court and saying that it is possible that some judges exercise pressure on defendants to plead guilty); Interview # 32, Amtsgericht Judge, Cologne (stating that judges probably induce defendants to confess by threatening them with a longer post-trial sentence); Interview # 10, Landgericht Judge, Berlin ("I have also heard that in some cases, courts accept a plea bargain in cases with uncertain evidence. And the defense attorneys say that sometimes they strike bargains because they cannot predict what the court would do and are afraid that the sentence would be much higher. I would not say that the accused are innocent, but that is what they claim. I find that very problematic, even irresponsible, that an accused is pressed into a corner, because he is being threatened with a long sentence."); Interview # 31, Defense Attorney, Mannheim (observing that some of his clients felt they were pressed to agree to a particular version of the facts of the case because of the plea discount); Interview # 14, Prosecutor, Munich (in isolated cases, judges "work on" defendants for too long). Judges may also prod prosecutors to accept a deal. Interview # 7, Prosecutor, Mannheim ("[O]ften . . . the court pushes for a quick resolution under 153a, before I have had a chance to investigate the case properly, and that is when I have my doubts . . .").

221. Interview # 13, Prosecutor, Munich (judges do not pressure defendants into accepting plea); Interview # 15, Landgericht Judge, Leipzig (expressing the belief that an innocent defendant would not confess to a crime he has not committed).

222. See *supra* note 220.

tions, albeit to a different degree. The review suggests that greater participation of judges is not inimical to our adversarial system. Quite to the contrary, the experiences of Florida and Connecticut point to different ways in which judges can play a role in negotiations and thus enhance the fairness and accuracy of the plea bargaining process.

A. *Florida: The Judge as Information Source*

The current ABA Standards on Criminal Justice and more than a dozen states provide for a limited role for judges during the plea negotiations.²²³ Under the Standards, which have been followed in a number of states' rules, judges are not to participate actively in plea negotiations. Upon request of the parties, however, a judge may explain under what conditions the plea bargain would be acceptable to her. The main impetus behind this rule is to provide certainty to the parties when sentence reductions or charge dismissals are at stake.

Florida is a jurisdiction that has adopted the ABA-recommended model of the judge as an information source. It stands out among other jurisdictions because it has developed case law delineating fairly clear limits on judicial participation. This Section reviews the case law and practice of plea bargaining in Florida and assesses the value of involving the judge as an information source for the parties.

1. *Warner and the Florida Rules on Judicial Participation*

The Florida Rules of Criminal Procedure provide the baseline for judicial involvement in plea bargaining. Rule 3.171(d) allows judges to advise the parties, prior to the acceptance of a plea, whether factors unknown to the parties at the time may make the judge's concurrence to the plea impossible.²²⁴ In 1975, the Florida Supreme Court held that the Rule should be read literally and that it allows judicial participation in plea discussions.²²⁵ The boundaries of this participation were left unsettled until 2000, when, in *State v. Warner*, the court faced the question whether a sentence is "per se invalid where

223. ABA STANDARDS FOR CRIMINAL JUSTICE: PLEAS OF GUILTY § 14-3.3(d) (3rd ed. 1999). The states include Arizona, Florida, Illinois, Indiana, Maryland, Massachusetts, Michigan, Missouri, Montana, New York, Oklahoma, and South Carolina. ARIZ. R. CRIM. P. 17.4; *State v. Warner*, 762 So. 2d 507 (Fla. 2000); *People v. Dunn*, 342 Ill. App. 3d 872 (Ill. Ct. App. 2003); *Lineberry v. State*, 747 N.E.2d 1151 (Ind. Ct. App. 2001); *Barnes v. State*, 523 A.2d 635, 639 (Md. 1987); *Commonwealth v. Johnson*, 543 N.E.2d 22, 24 (Mass. App. Ct. 1989); *People v. Cobbs*, 505 N.W.2d 208 (Mich. 1993); *Brown v. State*, 821 S.W.2d 113, 116 (Mo. Ct. App. 1991); *State v. Milinovich*, 887 P.2d 214, 216 (Mont. 1994); *McMahon v. Hodges*, 382 F.3d 284 (2d Cir. 2004) (discussing New York state law); *Ryder v. State*, 83 P.3d 856, 863 (Okla. Crim. App. 2004); *Medlin v. State*, 280 S.E.2d 648 (S.C. 1981); see also *supra* note 6, listing California, Minnesota, Nebraska, Nevada, and Ohio as states that allow, but discourage participation.

224. FLA. R. CRIM. P. 3.171(d).

225. *Davis v. State*, 308 So. 2d 27 (Fla. 1975).

the trial court, over the state's objection, advises a defendant regarding what sentence would be imposed pursuant to a plea of guilty, and accepts the defendant's subsequent guilty plea."²²⁶ In a thorough, well-reasoned opinion about the costs and benefits of judicial participation in plea bargaining, the Florida Supreme Court reaffirmed the acceptability of such participation. At the same time, the court established certain limits within which such participation must occur.

First, the court emphasized that the judge should serve as a provider of information about the ultimate sentence, not as a mediator between the parties.²²⁷ The judge's discretion in plea negotiations would thus extend to "stat[ing] on the record the length of sentence which, on the basis of information then available to the judge, appears to be appropriate for the charged offense."²²⁸ Moreover, because the judge is a mere information provider and not an active participant, she should not initiate the plea dialogue. She may participate only in response to a party's request.²²⁹

To minimize the possibility that the court may prejudice the outcome of the case, *Warner* held that a judge's preliminary evaluation of the case is not binding where material new facts emerge before the sentencing hearing.²³⁰ Although the court acknowledged the risk of prejudice arising from the judge's involvement in plea negotiations, it did not require judges who had been involved in plea discussions to recuse themselves in the case of a plea withdrawal. The court concluded that "[a] judge's candid statement of how a case appears at an early stage of the proceedings does not prevent the judge from deciding the case in a fair and evenhanded manner later, when additional facts become known."²³¹

226. *State v. Warner*, 762 So. 2d 507, 507 (Fla. 2000).

227. Although Florida courts have consistently emphasized the limited role of judges as information providers, a more recent Florida Supreme Court case suggests that the Court may tolerate greater involvement by judges, as long as it is not coercive. *Wilson v. State*, 845 So. 2d 142, 156 (Fla. 2003). As a dissenting member of the Court observed, the totality of circumstances test adopted by the court allows judges to act as more than "information centers" in plea negotiations. *Id.* at 161.

228. *Warner*, 762 So. 2d at 514; *see also Wilson*, 845 So. 2d at 160-61 (Lewis, J., concurring in result in part and dissenting in part) ("Under *Warner*, while judges may have limited participation in the plea bargaining process, they may not be a party to the actual plea the defendant must weigh. Judges are to act as information centers only. The limited *Warner* holding was intended to allow a judicial officer to provide information to a defendant and answers to his or her questions. Clearly, the judge may not initiate the bargaining process or make statements that could in any way be construed as actual negotiation.").

229. *State v. Faulk*, 840 So. 2d 319 (Fla. Dist. Ct. App. 2003) (holding that court's initiation of plea negotiations is per se reversible error); *Davis v. State*, 860 So. 2d 1058 (Fla. Dist. Ct. App. 2003).

230. *Warner*, 762 So. 2d at 514.

231. *Id.* (noting that concerns "that the trial court will be unable to rule fairly on the voluntariness of a bargain it has helped to induce, or a perception of unseemliness potentially evoked by judicial plea bargaining[,] appear to be unique to judicial involvement beyond that contemplated by rule 3.171").

Recognizing the risk of coercion by judges who engage in plea bargaining and sentencing in the same case, the court established special procedures to minimize that risk. First, it prohibited judges from initiating plea negotiations. Second, it required that all plea-related communications between the judge and the parties be entered into the record.²³² A judge must also refrain from stating or implying "alternative sentencing possibilities which hinge upon future procedural choices, such as the exercise of a defendant's right to trial."²³³ The last two requirements are complementary: A defendant can challenge a coercive judicial remark more effectively when that remark is entered into the record. All of these factors may be considered in the context of a motion to disqualify a judge, in which a defendant attests to a fear that he would not receive a fair hearing from the trial judge.²³⁴

Alternatively, where a defendant rejects the judge's pretrial offer, proceeds to trial, and then receives a significantly higher sentence than he had been offered pre-trial, he may challenge that sentence on the grounds of judicial vindictiveness. The factors to be reviewed at that stage are similar to those considered in a motion to disqualify a judge: (1) whether the judge initiated the plea discussions; (2) whether the judge urged the defendant to accept a plea or implied that the sentence imposed would hinge on future procedural choices, such as exercising the right to trial; (3) whether the disparity between the plea offer and the ultimate sentence is significant; and (4) whether the judge pointed to facts on the record to account for the increased sentence.²³⁵ Many cases turn on the last factor. If the judge imposes a significantly higher sentence after trial, without giving reasons for the departure from the pre-trial offer, the appeals court is likely to find judicial vindictiveness.²³⁶

2. Judicial Involvement in Practice

The practice of plea bargaining in Florida diverges in various ways from the parameters established by case law. Florida practitioners report that judges sometimes overstep their role as "information providers" in plea negotiations—a practice that seems to be tolerated by the Florida Supreme Court as long as it is not coercive.²³⁷ The extent of involvement varies from judge to judge. While

232. *Id.*

233. *Id.*

234. *Pierce v. State*, 873 So. 2d 618 (Fla. Dist. Ct. App. 2004).

235. *Wilson v. State*, 845 So. 2d 142, 156 (Fla. 2003).

236. *E.g.*, *Blanco v. State*, 849 So. 2d 381, 384 (Fla. Dist. Ct. App. 2003); *Dominquez v. State*, 863 So. 2d 407 (Fla. Dist. Ct. App. 2003).

237. *See supra* note 227 and accompanying text.

some judges never participate in plea negotiations,²³⁸ others serve as “sounding boards for the parties,”²³⁹ and yet others actively mediate plea discussions between the parties.²⁴⁰ Judges are especially likely to become involved in plea negotiations in cases that are too politically sensitive for the prosecution to bargain on its own.²⁴¹ It is not unusual for the parties to come to the judge after they have tried and failed to resolve their differences. As one defense attorney commented, “It varies by prosecutor. The hard-liners who make tough offers also have more plea conferences [with the judge].”²⁴²

Judges may also be involved more actively in pretrial when they are worried about the competence of the defense attorney or the prosecutor or where a defendant is unrepresented.²⁴³ Further, they are more likely to participate actively in urban districts, where the caseload is higher.²⁴⁴ As several practitioners commented, judges use their involvement in plea negotiations as a means to speed cases along.²⁴⁵ Finally, judges are more likely to step in where they have more discretion in the ultimate disposition—for example, where jail time is not mandatory, and the judge can choose among many alternative punishments.²⁴⁶ Conversely, some judges are reluctant to participate in plea negotiations concerning violent crimes because of their concern for the victim.²⁴⁷

Negotiations involving the court usually occur during the pretrial conference. Because pre-trial conferences are routine, it is hard to tell who “initiates” plea discussions with the court—such discussions appear to be a matter of course.²⁴⁸ The open-court pretrial conference generally guarantees a public record of the discussions. But

238. Telephone Interview, Willie Meggs, State Attorney, 2nd Jud. Cir., Florida (stating that judges in the Second Judicial Circuit are not involved in plea negotiations); Telephone Interview, Wayne Durden, State Attorney's Office, 10th Jud. Cir., Florida, Nov. 2, 2005 [hereinafter FL Prosecutor Durden] (noting that judges are rarely involved in the Tenth Judicial Circuit).

239. *E.g.*, Telephone Interview with Circuit Court Judge, Florida, Oct. 28, 2005 [hereinafter FL Judge # 3].

240. *E.g.*, Telephone Interview with Circuit Court Judge, Florida, June 9, 2005 [hereinafter FL Judge # 1]; Telephone Interview with Nancy Daniels, Public Defender, 2nd Jud. Cir., Florida, June 23, 2005 [hereinafter FL Public Defender Daniels].

241. FL Judge # 1 (stating that judges are most likely to be involved “where the state attorney would rather not take the political heat if a deal is to be made”).

242. FL Public Defender Daniels.

243. *E.g.*, FL Judge # 3; Interview with Attorneys # 1 and # 2, State Attorney's Office, 17th Jud. Cir., Florida, Mar. 14, 2005 [hereinafter FL Prosecutors # 1 and # 2].

244. FL Judge # 1.

245. *Id.*; Questionnaire, Florida Public Defender # 1, June 22, 2005 [hereinafter FL Public Defender # 1].

246. FL Judge # 1; Telephone Interview with Circuit Court Judge, Florida, Oct. 31, 2005 [hereinafter FL Judge #4].

247. Telephone Interview with Circuit Court Judge # 2, Florida, Aug. 29, 2005 [hereinafter FL Judge # 2].

248. FL Judge # 1. Plea discussions often begin when the judge asks about the status of the case at a pretrial conference. FL Public Defender Daniels.

some practitioners note that chamber discussions, off the record, also occur from time to time.²⁴⁹ Off-the-record discussions are seen as encouraging candor among the participants.²⁵⁰

Whether in open court or in chamber discussions, the negotiations proceed in a similar fashion. The prosecution typically lays out its case first, reciting some of the material facts and asking for a particular disposition.²⁵¹ Usually, the prosecutor's case would include the nature of the crime, the background of the defendant, and the defendant's score under the Florida sentencing system—most importantly, whether the defendant is eligible for probation or jail is mandatory.²⁵² The defense attorney responds with his or her own interpretation of the facts, with information on mitigating facts and with a request for a more lenient disposition. The court's knowledge of the evidence in the case is more limited than that of the parties. The judge does not see all of the information that is available to the defense under the liberal discovery rules in Florida. With respect to written documents, the judge is likely to have seen only a probable cause affidavit filed by the prosecution.²⁵³ So at pretrial, she has to make an evaluation of the case based on the affidavit and select facts that the parties present orally at that time.

Typically, the court does not actively mediate between the two sides, but simply offers a disposition of the case after hearing both the prosecution and the defense.²⁵⁴ The judge communicates the expected post-plea sentence in the form of a sentence cap, a range, or a fixed sentence.²⁵⁵ In some cases, the court asks the defendant to enter an open plea without an assurance as to the sentence. This is something that defendants are reluctant to do²⁵⁶—after all, one of the most important benefits of a plea bargain is the certainty about the ultimate disposition. But even if a judge states that he would impose a particular sentence after a plea, he is not bound by it. So it is not entirely uncommon that new facts emerging at sentencing on occasion may lead the judge to change his mind. He may reject the plea altogether, or he may add new conditions and allow the defendant to accept the conditions or back out of the deal.²⁵⁷

249. *E.g.*, FL Public Defender # 1.

250. Questionnaire, Florida Public Defender # 2, June 22, 2005 [hereinafter FL Public Defender # 2].

251. *Id.*

252. *E.g.*, FL Judge # 1.

253. *E.g.*, FL Judge # 2.

254. *E.g.*, FL Public Defender # 2; FL Judge # 4. Though this seems to be the exception, some judges also comment on the merits of each side's position. Telephone Interview with Circuit Court Judge # 5, Florida, Oct. 21, 2005.

255. *E.g.*, FL Judge # 1 (any of the three); FL Public Defender # 2 (fixed sentence).

256. FL Public Defender # 2.

257. *E.g.*, FL Public Defender Daniels; *see also* State v. Warner, 762 So. 2d 507, 514 (Fla. 2000).

Judges generally refrain from giving information about the possible post-trial sentence, because such statements may be perceived as coercing the defendant into waiving his right to trial.²⁵⁸ Instead, a typical comment by the judge to the defense might take the following form: "I have not seen the witnesses and the other information that might come at trial, but just from the information I have here, I think you would get X [years]. But if we go to trial, you might get a different sentence if a lot of the evidence is new."²⁵⁹ Such reluctance to express an opinion about the post-trial sentence seems to be the norm in Florida. Several practitioners reported that some judges still threaten that the sentence would be much higher after trial.²⁶⁰ But it does not seem to be a widespread problem, particularly since appellate courts have become more vigilant about such threats.²⁶¹ If the defendant indeed backs out of a deal, judges may still occasionally act on their threat. Practitioners disagree on the extent to which such vindictive sentencing occurs, but they concur that appellate case law formally prohibits it.²⁶²

3. Evaluating the Florida Model

The Florida Supreme Court has opined that the main value of judicial participation is to provide greater certainty for both parties as to the sentencing outcome of the case. As the court has suggested, a clear statement about the sentence to be imposed can enhance the judge's role as a neutral arbiter of the case, instead of leaving matters largely in the prosecutor's hands.²⁶³ The predictability provided by the judge's involvement is especially valuable where, as in Florida, the sentencing scheme itself provides little information about the post-plea or post-trial disposition. In Florida, a sentencing "score sheet" has replaced a system of sentencing guidelines, but it is less helpful than the guidelines in assisting the parties in making an in-

258. *E.g.*, FL Judge # 1; FL Judge # 2.

259. FL Judge # 1. The judge may also say: "My inclination would be X, without commitment." FL Public Defender Daniels; FL Public Defender # 2 ("The judges are very careful when it comes to telling you what your client will get if he loses at trial He doesn't want there to be a perception of vindictive sentencing.").

260. *E.g.*, FL Public Defender Daniels ("We have a couple of judges who threaten to give a tough sentence.").

261. FL Judge # 1 ("Judges who try to coerce defendants are likely to have a lot more trials. I would say it does not happen very often. More generally, appeals courts and the culture has changed, so coercion is less likely to happen."); FL Judge # 2 (observing that judicial vindictiveness occurs occasionally, but is not a serious problem and has been reduced dramatically by appellate case law).

262. *Id.* But see FL Public Defender Daniels (expressing dissatisfaction with appellate oversight of vindictive sentencing); FL Public Defender # 2 ("[A]ppellate courts can intervene, but it has to be fairly obvious that the judge was using vindictive sentencing.").

263. See *Warner*, 762 So. 2d at 514.

formed judgment about their odds.²⁶⁴ Prosecutors have an easier time predicting the expected minimum in many cases, because judges are limited in departing downward from the score sheet. But defense attorneys find it difficult to predict when a judge may sentence their client near the statutory maximum, because the judge need not give reasons for upward departures.²⁶⁵ So when judges state their view on the case during pre-trial, they help defendants make a more informed plea decision.²⁶⁶ Some practitioners believe this certainty makes defendants more likely to plead guilty,²⁶⁷ and less likely to appeal subsequently.²⁶⁸

At least in part because it enhances the predictability of plea bargaining, judicial involvement is also seen as more efficient.²⁶⁹ Some practitioners believe that judges are more likely than prosecutors to be under pressure to resolve cases quickly because the Florida Supreme Court requires each circuit to report on the size of its docket.²⁷⁰ Because judges have a strong interest in moving cases along, their "participation is usually geared to facilitate progress on a case."²⁷¹

Judicial involvement may enhance the fairness of plea negotiations as well. As one defense attorney observed, more experienced judges have better judgment than young prosecutors who do not know where a particular case fits within the system and instead try to "impress the world" by getting a tough sentence.²⁷² "[Y]ou can make the argument that circuit and county judges are elected to use their good judgment Ninety-six percent of cases [in Florida] are plea-bargained. It's a huge chunk of the cases. It is reasonable for the

264. The score sheet, prepared by the Department of Corrections, is used merely to guide judges in their sentencing decision. Previously the guidelines set a mandatory range within which judges had to sentence; today they are merely presumptive. Judges are free to sentence up to the statutory maximum and can even depart below the guidelines minimum, but downward departures are subject to appellate review. Robert Batey & Stephen M. Everhart, *The Appeal Provision of Florida's Criminal Punishment Code: Unwise and Unconstitutional*, 11 U. FLA. J.L. & PUB. POL'Y 5 (1999). Upward departures are only reviewable if they "patently fail to comport with statutory or constitutional limitations." *Hall v. State*, 773 So. 2d 99, 100 (Fla. Dist. Ct. App. 2000).

265. FL Public Defender Daniels ("[The] Florida sentencing [scheme] doesn't give you much certainty You can't ever guarantee to a client that the judge will not go to the [statutory] maximum. The Sentencing Guidelines were much better because they narrowed the range").

266. FL Public Defender # 2.

267. FL Public Defender Daniels ("It's human nature not to want to take risks. You may want to take a plea if you know for sure you would sit in jail 60 days and then get probation. Certainty is comforting").

268. FL Public Defender # 1.

269. *E.g.*, FL Judge # 1 (listing efficiency as the main advantage of judicial participation); FL Public Defender # 1.

270. FL Public Defender Daniels.

271. FL Public Defender # 2.

272. FL Public Defender Daniels.

public to expect judges to be involved, rather than to defer to the judgment of rather inexperienced prosecutors and defenders.”²⁷³ The advance review of the plea terms by the judge also makes the bargain appear fairer to the defendant:

[Involvement by judges in the plea negotiations] can possibly help with determining whether the plea is voluntary, knowing, or whether there is a factual basis The colloquy is probably sufficient for that, but it helps somewhat to be involved in advance because the defendant sees the court as somewhat less hostile than the prosecutor. So the defendant is more likely to believe it is a fair deal.²⁷⁴

The “information source” model is fairly limited in promoting more accurate pleas, however. In theory, advance review of the evidence and the terms of the plea could help the judge determine if a plea corresponds to the material facts and is voluntarily and knowingly made. But in practice, Florida judges rarely probe into the factual basis of the plea until the plea colloquy itself. At the time of negotiations, their assessment of the case is based primarily on a probable cause affidavit submitted by the prosecution and oral statements of facts made by the parties.²⁷⁵ They are not likely to have a pre-sentencing report at that time²⁷⁶ and would not have talked to the witnesses or observed them in deposition, or read the full investigative file in the case.²⁷⁷ The judge could learn some of the details by listening to each side’s interpretation of the evidence and asking questions. Liberal discovery rules in Florida allow both the defense and the prosecution to have a good grasp of the underlying facts. But because of the pressure of time, the parties’ presentations to the judge are too brief and informal to educate the judge adequately about the case. Moreover, plea negotiations often occur at the early stages of the prosecution, when the evidence has not yet been fully examined.²⁷⁸ This lack of information is seen as a major disadvantage of judicial involvement in the negotiations and is what discourages some judges from participating more actively.²⁷⁹

273. *Id.*

274. FL Judge # 1.

275. FL Judge # 2; FL Prosecutors # 1 and # 2.

276. Judges will occasionally request a pre-plea sentencing report, but it is done rarely, because it is perceived as costly and time-consuming. *E.g.*, Telephone Interview, Attorney # 3, State Attorney’s Office, 17th Jud. Cir., Florida, Nov. 22, 2005; FL Judge # 2 (noting that pre-plea reports are rarely ordered and are usually waived by defendants).

277. FL Public Defender Daniels.

278. FL Public Defender # 1 (stating that some offers are worked out as early as arraignment).

279. *E.g.*, FL Judge # 3; FL Prosecutor Durden; FL Public Defender Daniels.

The Florida model of involving judges in plea negotiations has two other potential disadvantages. First, it may prejudice some judges as to the outcome of the case because the same judge who is involved in pretrial negotiations would also preside over the trial and sentencing of a defendant who rejects the judge's pretrial offer. Practitioners have occasionally observed prejudice when the judge "has an ego" or is negotiating "in bad faith."²⁸⁰ They generally think such prejudice is the exception, however.²⁸¹ Second, some judges who have already made up their mind about the defendant's culpability may pressure the defendant to plead guilty. As noted earlier, practitioners report that, once in awhile, some judges threaten a harsher sentence after trial. Such threats undermine the integrity of judicial involvement in plea bargaining. As some practitioners have suggested, the Florida system may benefit from more rigorous appellate oversight of judicial behavior.²⁸² Alternatively, Florida may reduce judicial coerciveness by requiring a different judge to conduct the trial and sentencing where the defendant withdraws his plea—a practice that some judges adopt from time to time on their own initiative.²⁸³

Florida's experience with involving judges as an information source during plea negotiations offers several lessons. First, it confirms that increased predictability of outcome is an important benefit of judicial participation in the negotiations. It also shows that it might be difficult to limit the judge's role to that of an information source. Instead of trying to impose such limits, it might be better to embrace a more active role for judges and provide them with the necessary tools to fulfill that function adequately. Florida judges might be better able to ensure the fairness and accuracy of the plea if they were allowed to engage more actively in the plea negotiations and were provided with ample information about the case. At the same time, Florida's experience shows the importance of limiting judicial coercion. More stringent appellate oversight and a rule of changing judges in cases of plea withdrawals can strengthen the integrity of judicial involvement in plea negotiations. The next Section describes how Connecticut has attempted to address some of these issues in a

280. FL Judge # 1 (some judges who have big egos may be prejudiced); FL Public Defender Daniels (some judges who negotiate in "bad faith" may be prejudiced); *see also* FL Public Defender # 1 ("Most judges assume all defendants are guilty. I don't think [involvement in the negotiations] affects them to any great extent unless the plea went right up to final disposition and was withdrawn by the defendant.").

281. FL Public Defender # 2 (noting that defense attorneys are given a fair chance to convince the judge that the defendant might not be guilty); FL Judge # 4 (noting that judges are not prejudiced because plea bargaining is such a common practice). *But see* FL Judge # 3 (noting that it takes a special effort to keep an open mind).

282. FL Public Defender Daniels.

283. FL Judge # 2 (noting that when a backlog of cases has piled up, some judges may trade cases so that one judge handles all the pretrial matters while the other handles trials and sentencing).

system that allows even more active involvement by judges in plea bargaining.

B. Connecticut: The Judge as an Active Moderator

Connecticut has endorsed more active involvement by judges in the plea discussions than Florida. In Connecticut, the judge moderates between the parties' positions, and in some cases, directly offers his views on the plea bargain's merits. This Section argues that the Connecticut model has several distinct advantages over the federal model of the judge as a passive verifier and the Florida information source model. The Connecticut approach not only increases the certainty in plea bargaining, but also provides the parties with a more neutral view of the merits of the case, makes the practice more transparent, and better protects against judicial coercion.

1. *Revelo* and Connecticut Rules on Judicial Participation

The Connecticut Supreme Court has acknowledged that it is "common practice [in the state] for the presiding criminal judge to conduct plea negotiations with the parties."²⁸⁴ Judges need not limit their participation to providing information to the parties—they may actively attempt to mediate. While Connecticut courts have generally approved of the open judicial involvement in plea negotiations, they have repeatedly pointed out the dangers of coercion and the appearance of impropriety of such participation.²⁸⁵ Judges are therefore supposed to refrain from "assum[ing] a position of advocacy, real or apparent."²⁸⁶ They are not allowed to urge the defendant to accept a plea by suggesting that the exercise of the right to trial would be punished by a harsher sentence.²⁸⁷

Like Florida's Supreme Court, Connecticut's highest court has tried to prevent judicial vindictiveness against defendants who withdraw their plea bargains. In *State v. Revelo*, the court held that judges who participate in plea negotiations cannot threaten to punish or actually punish a defendant "merely for exercising a statutory or constitutional right."²⁸⁸ The court explained that judges' actions in plea negotiations should be held to a higher standard than those of prosecutors.²⁸⁹ It noted further that prosecutors have "relatively equal bargaining power" with the defense, so plea bargaining between them is based on a "mutuality of advantage"; by contrast, the

284. *State v. Revelo*, 775 A.2d 260, 268 (Conn. 2001).

285. *State v. D'Antonio*, 830 A.2d 1187, 1194 (Conn. App. Ct. 2003); *State v. Falcon*, 793 A.2d 274 (Conn. App. Ct. 2002).

286. *State v. Delarosa*, 547 A.2d 47, 51 (Conn. App. Ct. 1988) (discussing standards of judicial impartiality at trial).

287. *Revelo*, 775 A.2d 260 at 268.

288. *Id.*

289. *Id.*

unequal position of the judge and accused "raise[s] a question of fundamental fairness."²⁹⁰ If a judge tells the defendant that the exercise of certain procedural rights would result in a longer sentence, and if the same judge then imposes a greater sentence when the defendant exercises his rights, there is a presumption of judicial vindictiveness, and the court has to explain why a greater sentence is nonetheless warranted.²⁹¹

But Connecticut has gone even further than Florida in safeguarding against judicial coercion in the bargaining process. Connecticut case law provides that, when the parties and the court fail to reach an agreement during plea discussions, a judge who was not involved in the plea negotiations and is unaware of the plea terms offered at pre-trial should conduct the trial and post-trial sentencing phase.²⁹² Similarly, motions to suppress go to a trial judge different from the judge who handles the negotiations. This rule aims to prevent judges who perceive a personal stake in the plea agreement from punishing the defendant for derailing it. It also ensures that the trial judge is not influenced by any incriminating concessions made during the plea negotiations.²⁹³

2. Judicial Involvement in Practice

Interviews with Connecticut practitioners confirm that active judicial involvement in plea negotiations is common and that for the most part, it occurs within the boundaries set by case law. Although the defense and the prosecution in Connecticut can meet independently to conduct plea negotiations, they often choose to proceed through judicially moderated plea bargaining.²⁹⁴ In some districts, virtually all plea negotiations are conducted in the judge's chambers.²⁹⁵ In other districts, most cases involve a judge during pretrial negotiations; such involvement is especially likely in more serious cases, where the stakes are higher, and the parties find it more difficult to come to an agreement.²⁹⁶ Finally, in less populated districts, judicial involvement is rare, because it is difficult to find replacement

290. *Id.*

291. *Id.* at 273.

292. *State v. D'Antonio*, 830 A.2d 1187, 1194 (Conn. App. Ct. 2003).

293. *Id.*

294. *E.g.*, Telephone Interview with Mike Dearington, State Attorney, New Haven, Mar. 18, 2005 [hereinafter CT State Attorney Dearington]; Telephone Interview with John Williams, Defense Attorney, New Haven, June 9, 2005 [hereinafter CT Defense Attorney Williams].

295. *E.g.*, CT State Attorney Dearington.

296. *E.g.*, Telephone Interview with Prosecutor # 1, Connecticut, June 22, 2005 [hereinafter CT Prosecutor # 1]; Telephone Interview with Mary Miller Haselkamp, Office of the Public Defender, New Haven, Sept. 23, 2005 [hereinafter CT Public Defender Haselkamp].

for the pretrial judge who has to recuse himself if the defendant decides not to plead guilty and proceeds to trial.²⁹⁷

As in Florida, judges in Connecticut become involved in negotiations during pre-trial conferences. Unlike in Florida, however, these conferences usually occur in the judge's chambers and are not officially recorded, though both parties and the judge take notes of the conversations.²⁹⁸ The first time the parties meet with the judge, the prosecutor presents a brief summary of the case, and the defense attorney is entitled to respond. The prosecutor may also file a probable cause document, and less frequently, the defense may file a psychiatric evaluation or a drug dependence assessment.²⁹⁹ But most of the evidence is presented orally by the parties.³⁰⁰ Since the defense often lacks the full facts of the case at the early stages of the case, the defense attorney regularly requests a continuance to obtain discovery (Connecticut provides for liberal discovery from the prosecutor).³⁰¹ It is common for the judge to grant five to six pretrial continuances, for three-four weeks each, to allow the defense to get up to speed on the case and to investigate the facts independently.³⁰²

The judge's role during pretrial is best described as that of a mediator or moderator. As one prosecutor explained, "[Judges] listen to the description and the pitch from each side and they suggest to either side that they are being unreasonable and tell them things they should consider."³⁰³ A defense attorney observed that judges are likely to be especially active when they think a case is not worth a lot of time in court—for example, where the prosecution is reluctant to bargain mainly because the complaining party is "politically connected or unusually vocal."³⁰⁴ At the end of the back-and-forth between the parties and the judge, the judge usually states the expected sentence after a plea.³⁰⁵ Sometimes, the judge will also offer an estimate of the post-trial sentence—but since a different judge would be imposing that sentence in the case of a plea withdrawal, the

297. *E.g.*, Telephone Interview with State Attorney, Connecticut, Nov. 9, 2005 [hereinafter CT Prosecutor # 3].

298. Practitioners generally agree that the lack of an official record encourages candor. *E.g.*, CT Prosecutor # 1; CT Defense Attorney Williams.

299. Telephone Interview, Attorney # 1, Office of the Public Defender, New Haven, Sept. 28, 2005 [hereinafter CT Public Defender # 1].

300. Telephone Interview with Prosecutor # 2, Connecticut, June 22, 2005 [hereinafter CT Prosecutor # 2]; CT Public Defender Haselkamp.

301. CT State Attorney Dearington; see also William F. Dow, III, *Shall We Gather at the River?*, NEW HAVEN COUNTY B. ASS'N, Feb. 2002, at 4, at http://www.newhavenbar.org/files/MarCols_Feb_02.pdf (last visited Mar. 18, 2005).

302. CT State Attorney Dearington.

303. CT Prosecutor # 1.

304. CT Defense Attorney Williams.

305. *E.g.*, CT Prosecutor # 1 (may be a sentence range, a cap, or a fixed sentence, but a fixed sentence is most common); Telephone Interview with Karen Goodrow, Public Defender, Tolland Judicial District, Connecticut, Nov. 4, 2005 [hereinafter CT Public Defender Goodrow].

pre-trial judge's estimate is not necessarily more accurate than that of the parties.³⁰⁶ At the same time, it is perceived as more neutral and may help in mediating the discussion.³⁰⁷

What is unique about Connecticut practice in some districts is that several attorneys are invited to come in and observe the negotiations as they wait their turn for a pretrial meeting.³⁰⁸ One New Haven attorney has called these pretrial meetings "group participation events"—"somewhere between a group therapy session on the one hand and a Penology 101 seminar on the other."³⁰⁹ The lawyers sitting by often contribute alternative ideas and perspectives as plea negotiations take place in front of them.³¹⁰ Most importantly, they learn the "going rate" for plea bargains, and their presence lends credibility to the system.³¹¹

According to one source, such judicial involvement in plea negotiations began occurring regularly fifteen to twenty years ago, after New Haven prosecutors stopped plea bargaining in protest against judges who were undercutting their offers.³¹² To eliminate the backlog created from the prosecutors' refusal to plea bargain, judges began bargaining directly with the defense attorneys.³¹³ The prosecutors were invited to join these chamber conversations as well, and if they refused to participate, they could "watch as their cases were bargained away."³¹⁴ Soon thereafter, other lawyers were invited to the pretrial discussions, to ensure the transparency of the process. Today Connecticut practitioners generally favor the group format of the bargaining discussions because it reaffirms the credibility of the process.³¹⁵

The rule requiring a judge to recuse herself after participating in plea negotiations is also seen as key to the legitimacy of the system.³¹⁶ One interviewee worried that the rule is occasionally

306. CT Prosecutor # 1; CT Defense Attorney Williams (judges give a vague estimate, but cannot predict the sentence). *But see* Questionnaire, Judge # 2, Connecticut [hereinafter CT Judge # 2] (judges do not comment on the post-trial sentence); CT Prosecutor # 2; CT Public Defender # 1.

307. CT Prosecutor # 1. Because the negotiations usually occur in chambers, without the defendant being present, a statement of the post-trial sentence cannot directly coerce the defendant. But sometimes, though rarely, a judge might note the possibility of a longer post-trial sentence in open court in order to directly urge the defendant to plead guilty. *See* CT Public Defender Haselkamp.

308. CT State Attorney Dearington; CT Defense Attorney Williams.

309. Dow, *supra* note 301, at 4.

310. *Id.*

311. CT State Attorney Dearington.

312. Dow, *supra* note 301, at 4. Other studies point to even earlier judicial participation in plea negotiations, dating back to at least the late 1970s. HEUMANN, *supra* note 208, at 147.

313. Dow, *supra* note 301, at 4.

314. *Id.*

315. CT State Attorney Dearington.

316. *Id.*

breached in practice, whereby a pretrial judge may lobby the sentencing judge on the same case to give the defendant a harsher sentence for rejecting the pretrial offer.³¹⁷ According to the same interviewee, although such conduct occurs rarely, it sets the tone for the negotiations and undermines the credibility of the process.³¹⁸ Other interviewees contested that possibility.³¹⁹ One prosecutor pointed out that, in about one-fourth of cases, post-trial sentences are the same as or lower than the pre-trial offers, which suggests that judges are not punishing defendants for rejecting plea offers.³²⁰

Even if occasionally a defendant might receive a lower sentence post-trial than upon a guilty plea, in a large majority of cases, the post-trial sentence is higher.³²¹ While practitioners disagree about the acceptability of a large sentence differential between the post-plea and post-trial sentence,³²² they agree that such a differential is common.³²³ To make that point, the New Haven State Attorney gave an example of a person recently accused of committing sexual assault on a minor. The pretrial offer by the judge had been four years served, but the defendant chose to go to trial and received 35 years upon conviction.³²⁴ The government sees this as the cost of imposing on a child victim the burden of testifying about his traumatic experience at trial.³²⁵ The sentence can hardly be seen as vindictive, as the judge who imposed the post-trial sentence was unaware of the differential between the ultimate sentence and the one offered by the pretrial judge. In practice, neither the appellate courts nor the Sentence Review Division of Connecticut's Superior Court³²⁶ are likely to intervene to strike down a post-trial sentence simply because it is far

317. CT Defense Attorney Williams.

318. *Id.*

319. *E.g.*, CT Prosecutor # 1; CT Public Defender Haselkamp.

320. CT Prosecutor # 1; CT Public Defender Haselkamp.

321. CT State Attorney Dearington; CT Prosecutor # 1 (noting that in about 75 percent of cases the trial sentence is likely to be higher than the pretrial offer); CT Prosecutor # 2 (observing that whether someone receives a higher sentence depends on the sentencing judge).

322. CT Prosecutor # 1 ("There is always an element of coercion in the fact that the post-trial sentence will be higher, but I don't think that it's improper coercion . . . I think we take our obligation to do justice pretty seriously; if we thought the person was innocent, we would not be looking for a plea."); *cf.* CT Prosecutor # 2 (acknowledging that innocent people may plead guilty, but noting that this is due to the large plea discounts).

323. CT Prosecutor # 1 (gives as an example a differential between 8 and 20 years, but notes that it could be higher or lower depending on the case); CT Prosecutor # 2 (gives examples of differentials between 6 and 40 years and between 3 and 25 years); CT Defense Attorney Williams (noting that the differential is hard to gauge, but that the post-trial sentence is at least twice as high as the pretrial offer).

324. CT State Attorney Dearington.

325. *Id.*

326. Connecticut appellate courts may review a sentence only for abuse of discretion. *State v. Baldwin*, 618 A.2d 513 (Conn. 1993). The normal course for challenging a sentence is through a petition for review to the Sentence Review Division of the Superior Court. CONN. GEN. STAT. ANN. § 51-195 (West 2005).

higher than the pretrial offer.³²⁷ One defense attorney reported that the Sentence Review Division is "appalled when a defense attorney dares to raise the issue."³²⁸

While the large differential may on its own terms raise questions about the coerciveness of plea negotiations, this problem would exist whether the judge is involved or not.³²⁹ It is especially serious where, as in Connecticut, no guidelines help the parties estimate the post-plea and post-trial sentence. Defendants know they are likely to be sentenced more harshly after trial, but they do not know how much more harshly—so they plead guilty to avoid the risk.³³⁰ Similarly, a prosecutor may agree to a sentence that is too lenient because the judge's disposition of the case is uncertain. Therefore, by reducing the uncertainty facing the parties, judicial input in the negotiations also decreases the coerciveness of plea bargaining and is consistent with the public interest in proportionate sentencing.³³¹

3. Evaluating the Connecticut Model

One of the key virtues of the Connecticut system is that, in comparison to the federal system, it gives the parties a better sense of the possible outcomes of the plea negotiations and of trial. In the absence of any sentencing guidelines, the parties are eager to learn first-hand from the judge what plea bargain would be acceptable to the court.³³² Involving the judge early in the negotiations responds to that need. As noted earlier, the increased certainty allows both sides to make a more intelligent plea decision. It reduces the danger that either side might enter into a plea deal simply due to a miscalculation of the expected sentence.

Some predictability regarding the post-trial outcome is lost as a result of the requirement that a different judge preside over trial and sentencing where plea negotiations break down. Because of that rule, the judge moderating the negotiations cannot accurately predict what sentence would be imposed if the case goes to trial. This reduction in predictability may be a reasonable tradeoff for the decrease in judicial coercion that results from the recusal requirement. Thanks to the recusal rule, defendants do not have to fear that if they with-

327. *E.g.*, CT Prosecutor # 3.

328. CT Defense Attorney Williams ("I had a case of marital rape . . . and during trial, my client was offered four years, and he did not take it. He received 24 years after trial. The Sentencing Review Division was horrified, but it was not because of the disparity; it was horrified that I mentioned it.")

329. *E.g.*, CT Prosecutor # 1 (any coerciveness that exists is independent of judicial involvement).

330. CT Defense Attorney Williams.

331. *Cf.* Questionnaire, Judge # 3, Connecticut, Oct. 21, 2005 [hereinafter CT Judge # 3] (involving judges in the negotiations is more likely to reduce coercion created by sentencing uncertainty).

332. *E.g.*, CT Defense Attorney Williams; CT Prosecutor # 3.

draw from the plea discussions and choose to go to trial, they would be punished at trial by the judge whose pretrial offers they rejected. All but one of the interviewees from Connecticut agreed that the recusal rule is an effective way to curb judicial coercion in plea negotiations. The one interviewee who disagreed based his opinion on a perception that the recusal rule is not followed in practice, not that it is unwise in principle.³³³

The interviewees also perceived the Connecticut system of judicial participation as more efficient than systems where the judge remains passive.³³⁴ They believe the parties are more likely to agree on a disposition early in the process and are less likely to appeal afterward.³³⁵ Judicial involvement therefore saves the system the costs of re-negotiation or appeals of the plea.³³⁶ Of course, efficiency is not an unqualified good. The emphasis on efficiency by some judges might come at the expense of other goals of the criminal justice system, such as ensuring a fair and accurate outcome. Although the emphasis on efficiency may at times conflict with fairness and accuracy, this tradeoff is largely inherent in plea bargaining. The question is whether active judicial participation further undermines or instead enhances accuracy and fairness.

One prosecutor and one defense attorney expressed a worry that judges are more concerned than prosecutors about the size of the docket.³³⁷ According to one defense attorney, the docket statistics are very important for the judges' internal evaluations and for their rotation appointments.³³⁸ This concern may prompt judges to speed up the resolution of a case at the expense of fairness. The same defense attorney opined that, as a result of this emphasis on efficiency, "[t]he system is seen as corrupt by almost all defense attorneys. The perception of justice is severely affected. There is a perception that judges are just rushing a case through."³³⁹ But others disagree with this assessment of the judges' work. As a prosecutor interviewee noted, "[The judge's motivation is] to make sure that the defendant is treated fairly and receives a just sentence. I have not seen a judge do

333. CT Defense Attorney Williams.

334. *E.g.*, CT State Attorney Dearington; CT Defense Attorney Williams. *Cf.* CT Prosecutor # 2 Interview (agreeing that the practice is generally more efficient because it encourages defendants to plead earlier and to appeal less, but pointing out that it is very labor-intensive for the judge).

335. CT Prosecutor # 2.

336. Questionnaire, Judge # 1, Connecticut, Aug. 24, 2005 [hereinafter CT Judge # 1].

337. CT Prosecutor # 1 (listing as the main disadvantage of judicial participation that judges may be motivated too much by concerns such as docket size and, to a lesser degree, prison overcrowding); CT Defense Attorney Williams.

338. CT Defense Attorney Williams.

339. *Id.*

anything other than that.”³⁴⁰ Judges themselves are also unlikely to perceive their involvement as sacrificing fairness for efficiency; a judge interviewee asserted that the judge’s motivation is above all “to see that justice is served for all parties involved, the state, the defense, and the public, including any victims.”³⁴¹ The reality may reflect a bit of both of these contrasting viewpoints—a small number of judges may sometimes rush through a plea bargain without heeding all the facts available—but this seems to be the exception, rather than the rule.³⁴²

While the views differ as to the extent to which judges may be more likely than prosecutors to sacrifice fairness for efficiency, there is broad agreement that the active involvement of an impartial third party in the plea negotiations makes its own contribution to the fairness of the process. As an independent arbiter, the judge can temper the bargaining positions of both overzealous prosecutors and overconfident defendants. As one prosecutor noted, “The biggest function of judicial involvement is in assessing the strengths and weaknesses of the case. It is a more objective view. The judge could suggest to one side or another [to change their position].”³⁴³ Other interviewees concurred that pretrial judges evaluate the relative strengths and weaknesses of both sides’ cases and point to problems that each might have if the case goes to trial.³⁴⁴ Some policymakers in Connecticut concur that judicial participation is needed as a check on the plea bargaining process.³⁴⁵ In the presence of a judge, a prosecutor is less likely to attempt to bully the defense during negotiations, but also less likely to give in too easily to an unreasonable defense offer so as to dispose of the case more quickly. At the same time, the judge’s involvement may be valuable to defendants who would refuse a reasonable bargain simply because they mistrust the prosecutor, yet would accept the same offer if it came from the judge.³⁴⁶ Or the judge may encourage the defense attorney to explore alternatives to incarceration.³⁴⁷ All of this influence is subtle—the judge cannot co-

340. CT Prosecutor # 2; *see also* Questionnaire, Prosecutor # 4, Connecticut, Oct. 31, 2005 [hereinafter CT Prosecutor # 4].

341. CT Judge # 1; *see also* CT Judges # 2 and # 3.

342. *E.g.*, CT Public Defender Haselkamp; CT Prosecutor # 3 (noting that sometimes docket pressure leads judges to sentence more leniently).

343. CT Prosecutor # 1; *see also* CT Prosecutor # 2 (pointing out as one of the main advantages of the practice that “judges are able to talk freely in chambers and point out weaknesses and strength of cases and bring the lawyers around”); CT Public Defender Goodrow.

344. *E.g.*, CT Judges # 1 and # 2; CT Public Defender Haselkamp.

345. Kellie A. Wagner, *Judge Rebuffed for Role in Plea Bargain*, CONN. L. TRIB., Oct. 6, 2003, at 1 (quoting Michael Lawlor, co-chairman of the Judiciary Committee of the Connecticut legislature).

346. *E.g.*, CT Prosecutor # 3; CT Public Defender Haselkamp.

347. CT Defense Attorney Williams.

erce a defendant to plead guilty and cannot dismiss a case simply as a means of docket control.

As an impartial mediator, the judge can also better ensure that the plea adequately reflects the facts of the case, even where lawyers fail in their representation. For example, the judge can refuse to accept a bargain where she sees that the defendant is misinformed or induced to enter into a bargain by an incompetent defense attorney or an attorney who is too quick to urge her clients to plead (for instance, where the attorney is paid per case or is otherwise overburdened with work).³⁴⁸ The judge can also refuse to acquiesce to a bargain distorted by a prosecutor's lack of competence or eagerness to dispose of a case as quickly as possible in order to reduce an unbearable workload.³⁴⁹ At the very least, the judge can and does "keep both parties honest," prodding each side to produce information that the other side has lawfully requested.³⁵⁰

For the judge to step into this active role, however, he or she must be familiar with the facts of the case. Connecticut rules require a factual basis for guilty pleas, and judges inquire into the factual basis by hearing the parties' summaries of the case. Although the court can order a thorough pretrial sentence investigation by the probation office, financial and time pressures weigh against it, and the judge rarely has a full record at her disposal that could help her check the parties' stories.³⁵¹ Furthermore, pretrial negotiations sometimes occur before the investigation and discovery have ended.³⁵² The judge often prods the prosecution to investigate further.³⁵³ But ultimately, even when a judge tells the prosecution that its evidence is too weak, the prosecution may simply disagree and go

348. *E.g.*, CT Public Defender Goodrow (noting that even pro-prosecutor judges try to help inexperienced attorneys to make sure that client will not be harmed); *see also* Bibas, *supra* note 15, at 2543.

349. *Cf.* CT Public Defender # 1 (noting that judges are more likely to intervene where prosecutors are off-base because of lack of experience); CT Prosecutor # 1 (noting that judges may tell the prosecutors they do not have a good case).

350. CT Public Defender Haselkamp.

351. CT Public Defender Goodrow (noting that courts order pre-sentencing report only where they have agreed to a sentence cap, but will not commit to a specific sentence until reviewing the report); CT Judge # 1 (noting that the court has the benefit of a pretrial sentence investigation by probation, but that normally, the court relies only on oral presentations by the parties); CT Prosecutor # 3 (stating that a report is ordered by the court very rarely, but sometimes the defense hires its own private investigators to obtain the same information). *But see* CT Prosecutor # 4 (stating that a pre-sentence report is the tool that judges use during pretrial plea discussions).

352. *E.g.*, CT Prosecutor # 1; CT Public Defender # 1. *But see* CT Prosecutor # 2 (noting that some cases take a number of pretrial conferences until the investigation is complete, but that the prosecution would not negotiate until they have completed the investigation).

353. *E.g.*, CT Judge # 1; CT Defense Attorney Williams.

forward with the case.³⁵⁴ To that extent, judges' ability to remedy the lawyers' failures remains limited. It is therefore not surprising that judges' questions during pretrial tend to focus on the appropriate sentence rather than on the factual basis for the plea.³⁵⁵

As the analysis of the German model of judicial participation suggested, it is possible to provide judges with more thorough information about the case and the defendant, whether in the form of a complete investigative file or in the form of a pre-sentencing report. Such information may be an essential element in entrusting judges with the responsibility of supervising the accuracy of plea bargains.

V. A NEW ROLE FOR JUDGES IN PLEA NEGOTIATIONS

The review of different models of judicial involvement in plea negotiations reveals that, if properly structured, such involvement can have three important benefits:

- 1) increasing the predictability of plea bargaining;
- 2) enhancing the accuracy and fairness of the plea; and
- 3) introducing more openness and transparency in the plea negotiations.

Although none of the jurisdictions examined here does so perfectly, each has valuable features that can be incorporated into a model that moves closer to these goals. This Part sketches an outline for such a model, building on insights from the way plea bargaining operates in Florida, Connecticut and Germany. Several of the practices that appear useful were anticipated by Albert Alschuler 30 years ago in an article defending judicial participation in plea negotiations.³⁵⁶

The model set forth here could be particularly useful in federal courts, where judicial involvement is currently prohibited. The uncertainty created by the end of mandatory guidelines in the federal system, the high number of guilty pleas, as well as the concern that some of these pleas are not fair or accurate makes the federal system a good candidate for judicial intervention into the plea negotiations. Moreover, the federal system has already assigned magistrates with the similar function of managing settlement negotiations in the context of civil cases. Federal magistrates might therefore be able to play a greater role in plea negotiations as well. State systems may also find that judicial involvement will enhance the fairness of their

354. CT Defense Attorney Williams (noting that this is what the prosecution usually does). *But see* CT Public Defender Haselkamp (noting that the prosecution usually dismisses the case).

355. *See* CT Public Defender # 1; *cf.* CT Prosecutor # 2 (judges often do not determine the factual basis until the plea colloquy); CT Judge # 3.

356. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1122-48.

plea bargaining practices. Many of the features discussed here would be equally applicable to state practices.

A. *Informed Bargains*

Judicial involvement in plea negotiations offers an early and more reliable estimate of the expected post-plea, and in some cases, post-trial sentence. As discussed earlier, this increased predictability helps ensure that the plea bargain is informed, voluntary, and fair. This Section will outline a procedure for judicial involvement that is more likely to produce informed plea bargains.

As in all three jurisdictions—Florida, Connecticut, and Germany—the process could begin with a pretrial conference, in which the prosecution and defense would each tell the judge their interpretation of the facts. The prosecution would go first in presenting its side, setting a ceiling for the plea offer. The defense may then contest the facts, offer facts in mitigation, and potentially propose its own bargain terms. Depending on the facts, the judge may ask further questions, attempt to mediate, or simply inform the parties what he or she considers an acceptable sentencing range.

The judge could further assist the parties by providing several pieces of information. As in all three systems discussed here, the judge could be permitted to advise the defendant of the expected post-plea sentence. The judge may do this “on the spot,” if he has previously had enough time to consider the evidence, or he could take the parties’ positions into consideration and make his position known at a later hearing. In any event, this early assessment of acceptable plea terms would allow the parties to make a more informed decision and would reduce the rate of bargain renegotiations and appeals. The discussion of each side’s position at the pretrial stage would also help the judge herself come to a more educated sentencing decision.³⁵⁷

A related question is whether the judge should be allowed to comment on possible post-trial outcomes. Florida law prohibits comments about the post-trial sentence because of their potential for coerciveness, and Florida judges have generally complied with the ban. In Germany and Connecticut, judges are more open to discussing the expected sentence after trial, though they also have to guard the language they use so as not to appear to coerce the defendant into pleading guilty. In part, the willingness of Connecticut and German judges to speculate on a post-trial sentence is a function of the broad

357. See Allen F. Anderson, *Judicial Participation in the Plea Negotiation Process: Some Frequencies and Disposing Factors*, 10 HAMLINE J. PUB. L. & POL’Y 39, 46 (1989) (conducting a study of North Carolina judges’ involvement in plea negotiations and finding that judges become increasingly involved primarily to “get more complete information to render an adequate sentence”).

discretion they possess over sentencing. Unlike Florida, neither Connecticut nor Germany has ever had a system of sentencing guidelines. The greater the uncertainty of the sentencing regime, the more eager defendants are to hear from the real decision-maker, the judge, about the outcome facing them if they decide to exercise their right to trial. Naturally, if judges perceive that the defense is interested in hearing about the expected post-trial sentence, they are more likely to comment on it.

The question of judicial comments on the post-trial sentence reveals an inevitable tension between enhancing predictability and avoiding coercive plea bargains. Because Germany, Connecticut and Florida all reward guilty pleas with sentencing discounts, post-trial sentences are generally longer than post-plea sentences. For that reason, an accurate statement of the post-trial sentence by the judge may well sound threatening and seem coercive to a defendant. But the coercion in this case stems not from any bad faith on part of the judge, but from the sentencing structure that encourages plea bargaining through substantial sentence discounts. Allowing judges to provide assessments of the post-trial sentence, as they do in Germany and in Connecticut, is not likely to have any independent coercive effect on the defendant.³⁵⁸ On the contrary, in some instances it may diminish the coercive influence of our sentencing schemes by narrowing the range between the expected post-trial and post-plea sentences.

When defendants make a decision to plead guilty, they assess not only the difference in sentencing length after a plea and after trial, but also the odds that they would be convicted at trial. So another way in which judges can help ensure that pleas are informed is by providing a neutral assessment of the parties' positions. Judges in Connecticut and Germany are freer to provide information on the merits of the case than their counterparts in Florida, and they use their discretion to steer the parties toward reasonable and fair plea terms. Such involvement may prevent prosecutorial bluffing, and it may encourage an overconfident defendant to accept a reasonable offer. Connecticut interviewees consistently pointed to the judge's evenhanded assessment of the merits of the case as one of the chief advantages of judicial participation in the negotiations.

Judges should therefore be permitted to comment on the merits of the case as a way of providing a neutral assessment of the evidence and helping the parties reach a fair agreement. Because there are special risks of coercion arising from such comments, as Section D

358. Unless, of course, judges use language that aims to coerce the defendant. But this is something all three systems described here prohibit to a different degree. See *infra* Section V.D.

elaborates, it is also important to consider procedural safeguards to minimize undue pressure.

B. Truthful Bargains

Providing sentence information and a neutral assessment of the merits of the case is already a significant step toward increasing the fairness of plea bargaining. But judicial participation can offer even more. Judges can also make a significant contribution to the accuracy of plea bargaining outcomes.

Consider the example of German judges, who enter the plea bargaining process with a full awareness that their responsibility to seek the truth does not cease when a case is resolved in a consensual fashion. The American analogue to this responsibility could be a more probing "factual basis" inquiry, which would occur in the process of judge-mediated plea negotiations rather than at the plea colloquy. Requiring judges to inquire more thoroughly into the facts of the case early, before the parties have agreed on a version of the facts, could minimize the chances that the plea terms are unduly harsh, unduly lenient, or otherwise misrepresent the facts.

A judge who questions the factual basis of the plea could advise the parties that the court would not accept a plea based on the facts presented at the plea conference (or as discussed later in this Section, based on a pre-plea investigation report prepared by a probation officer). Two possibilities exist at this stage. The case could proceed to trial, or it could be dismissed. When a judge conducts a factual basis review and concludes that evidence to support the plea is insufficient, it would seem unlikely that the case would proceed to trial. This is because the factual basis is understood to be a lower standard of proof than that for a directed verdict of acquittal. It would seem both unfair and illogical that a defendant whose guilty plea has been rejected for lacking factual basis is later convicted by a jury and faces a harsher sentence after trial.

Of course, there is the possibility that the prosecution has simply not been able to gather enough evidence during the plea negotiations. Before dismissing a case that lacks factual basis, therefore, a judge might give the prosecution more time to gather evidence. But ultimately, the prosecution should not try to negotiate cases where it lacks evidence to support a factual basis for the plea. And because double jeopardy would not have attached at this point, if the judge dismisses the case, the prosecution would be free to re-indict the defendant later if it gathers new evidence.

In reality, judges already play a similar role in Connecticut, but they do so much more informally. If they find that the facts are insufficient to support a guilty plea, they recommend that the prosecutor gather further evidence. This is enough to prod most prosecutors to

act, and when they cannot collect more evidence, to dismiss the case. Although judges would not always grant a motion to dismiss at that point, prosecutors have reason to worry that unless they support their case with further evidence, the court may direct a verdict of acquittal at the end of the prosecution's case-in-chief.

If active investigation of the truth is to become a principal responsibility of judges who participate in plea negotiations, judges need to be provided with adequate tools to fulfill that responsibility. Germany can serve as a model in this respect. As discussed in Part II, a complete file of the investigation is available to both the judge and the defense prior to plea negotiations in Germany. All participants in the negotiations therefore come to the bargaining table well-equipped to assess the fairness and accuracy of proposed plea terms. Connecticut and Florida also provide for liberal discovery prior to the plea, although the judge does not receive all of the information available to the parties.³⁵⁹ Still, liberal pre-plea disclosure to the defense ensures that the judge's input will not be distorted by a one-sided presentation of the evidence by the prosecution.³⁶⁰

Requiring full pre-plea disclosure might be seen as a significant departure from the current law in many jurisdictions, including the federal system. Under present interpretations of due process requirements for disclosure, the prosecution is required to turn over only material, factually exculpatory evidence prior to a guilty plea. At the same time, the Federal Rules of Criminal Procedure require the prosecution, upon request, to turn over specified evidence material to the preparation of the defense, and many federal prosecutors on their own initiative turn over more evidence to encourage the defendant to plead guilty. It is not radical to propose, therefore, that unless witness intimidation or destruction of the evidence is a concern, the prosecution should open its files to the defense early in the process, and certainly before the plea colloquy. This disclosure ought to apply to items material to the defense not only at trial, but also at sentencing.

The evidence gathered by the prosecution could also be provided directly to the judge before the negotiations, as is the practice in Germany. Such disclosure would enable judges to evaluate independently the factual basis of the case before the plea conference and to intervene when the prosecutor and the defense attorney fail in their representation during the negotiations. This kind of disclosure raises none of the concerns about witness intimidation or evidence destruction that liberal pre-plea discovery to the defense might.

An alternative method of informing the judge, suggested by Albert Alschuler, is to require probation officers to prepare a pre-sen-

359. See CONN. GEN. STAT. ANN. § 54-86 (West 2005); FLA. R. CRIM. P. 3.220.

360. Eleanor J. Ostrow, *The Case for Preplea Disclosure*, 90 YALE L.J. 1581 (1981).

tencing report before the plea discussions.³⁶¹ Probation reports can already be requested by Florida and Connecticut courts during pre-trial.³⁶² Unfortunately, they are rarely used at that early stage, because they are costly and take a long time to prepare.³⁶³ But if these reports would be prepared before sentencing in any event, it would not be significantly more costly to prepare them earlier in the process. The only additional cost might be incurred in cases where the defendant ultimately decides not to plead guilty—but that cost would be minimal and would be outweighed by the benefit that probation reports carry in informing the plea bargaining process.

If the preparation of a probation report early in the process is perceived as too time-consuming and costly, legislatures could simply require disclosure to the judge of the same evidence that the parties would receive under liberal discovery rules. Oral summaries of the evidence by the parties during the plea conference would still supplement the written documents, and the judge could clarify much of the factual basis through direct questions to the parties at the conference. But where ambiguities arise, the judge should be able, before and during the negotiations, to consult the investigative files and any supplemental documents filed by the defense.

C. *Transparent Bargains*

Another important element that ought to accompany judicial involvement in plea negotiations is transparency. Transparency could strengthen the public legitimacy of plea bargaining and ensure that the outcomes of plea bargaining are consistent with public views of blameworthiness. It can also justify plea bargaining to victims, who often distrust negotiations behind closed doors, especially because the secretive negotiations frequently result in a sentence significantly shorter than the expected post-trial sentence.³⁶⁴

With respect to transparency, the German model largely falls short, whereas the Connecticut and Florida models fare better. As mentioned earlier, despite the emphasis on publicity by the German Federal Supreme Court, the record of the plea negotiations includes only the outcome of the negotiations. Although lay judges provide some public oversight into negotiations that stretch into the main proceedings, their lack of access to the investigative file, combined with the general distrust of their abilities by the professional judges,

361. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1146.

362. Telephone Interview with Judge # 2, Florida, Circuit Court, Aug. 29, 2005 [hereinafter FL Judge # 2]; Questionnaire, Judge # 1, Connecticut, Aug. 24, 2005 [hereinafter CT Judge # 1]; Telephone Interview with Attorney # 3, State Attorney's Office, 17th Jud. Cir., Florida, Nov. 22, 2005 [hereinafter FL Prosecutor # 3].

363. FL Judge # 2 (noting that the long preparation time conflicts with judges' aim to dispose of cases as quickly as possible).

364. *E.g.*, Interview # 10, Landgericht Judge, Berlin.

means that their input is insignificant. The comfort that German lawyers have with *ex parte* communications with the judge further exacerbates the problem.³⁶⁵

Florida and Connecticut may handle this issue better. Florida law requires that all plea discussions with judges be on the record,³⁶⁶ although anecdotal evidence suggests that judges sometimes ignore this requirement, even at the risk of reversal.³⁶⁷ Some Connecticut courts ensure a level of transparency through their unique format of group plea bargaining, where a number of defense attorneys and prosecutors are present at the plea negotiation conference with the judge. Connecticut also allows a victim's advocate to participate in plea negotiations where the case concerns serious injuries or personal losses.³⁶⁸

Yet the most transparency-friendly proposal comes from Albert Alschuler, who has recommended that a stenographic transcript be made of all the pretrial plea discussions involving the judge.³⁶⁹ A record of negotiations has clear benefits in that it reduces coercion and strengthens the public legitimacy of plea bargaining. Requiring a record of plea negotiations also allows appellate courts to identify biased and coercive remarks more easily and to develop clear limits on judicial involvement in plea bargaining. But a full stenographic record is costly and burdensome. As some practitioners have pointed out, it may also discourage candor and reduce the information that the judge provides to the parties. For that reason, a record should be made available only when requested by the parties or the judge. This is the practice with respect to judge-mediated settlement discussions in civil cases,³⁷⁰ and it strikes the right balance between transparency, on the one hand, and efficiency and candid negotiations, on the other.

D. Avoiding Coerced Bargains

As discussed earlier, the main concern in structuring a system of judicial plea bargaining is that judges may form premature conclusions about cases and pressure defendants to plead guilty. Although case law consistently emphasizes the perils of judicial coercion, in practice, few practitioners from Florida and Connecticut seem to consider coercion by judges a serious problem. For that reason, it is worth considering the structural safeguards that these jurisdictions

365. See *supra* note 137 and accompanying text.

366. *State v. Warner*, 762 So. 2d 507, 514 (Fla. 2000).

367. See *supra* note 249 and accompanying text.

368. CT Judge # 1. Some Florida judges also allow victims to be present at the pretrial conference. FL Prosecutor # 3.

369. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1148.

370. *E.g.*, *Lynch, Inc. v. SamataMason, Inc.*, 279 F.3d 487, 490 (7th Cir. 2002).

have adopted in order to minimize any existing or apparent undue influence.

Appellate courts in Florida monitor judicial remarks closely for evidence of threats of harsh treatment during plea discussions. Where a judge initiates the plea discussions and makes comments that tie the expected sentence to the defendant's exercise of legitimate procedural choices, appellate courts may grant a motion to disqualify the judge for partiality.³⁷¹ Appellate courts may also vacate a post-trial sentence where it is more severe than the sentence offered pre-trial, and no reasonable explanation for the disparity is given.³⁷² Several Florida practitioners interviewed for this study emphasized that appellate case law on judicial vindictiveness has dramatically reduced judicial coercion.³⁷³ A strict standard of reviewing judicial remarks in the context of plea discussions would therefore be a good component of any system that involves judges in plea negotiations.

Florida case law also prohibits judges from initiating plea discussions. If a defendant wants to plead guilty, he has to request a plea conference at which both the prosecutor and the judge would be present. Judicial initiation of this process adds minimal value, perhaps by expediting pretrial consideration of a plea bargain. But the interest in minimizing even the appearance of judicial coercion clearly outweighs this marginal efficiency gain. For that reason, it would be best to leave the decision to start negotiations to the defendant.³⁷⁴

Connecticut has implemented what appears to be the most effective safeguard against judicial coercion. When a defendant decides not to plead guilty or withdraws his plea, Connecticut case law requires that he be tried and sentenced by a judge other than the one involved in the plea discussions.³⁷⁵ Connecticut practitioners see this arrangement as essential to the credibility of the system.³⁷⁶ Just as it limits judicial coercion, however, the Connecticut practice of switching judges in the case of a plea withdrawal may disturb the predictability of plea bargaining. Assigning the case to a second judge in the case of a plea withdrawal means that the first judge cannot offer a reliable prognosis of what the post-trial sentence will be. The rule is also difficult to implement in small districts, where only

371. *Pierce v. Florida*, 873 So. 2d 618 (Fla. Dist. Ct. App. 2004).

372. *Wilson v. State*, 845 So. 2d 142, 156 (Fla. 2003).

373. See *supra* note 261 and accompanying text.

374. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1146.

375. *State v. Revelo*, 775 A.2d 260, 268 (Conn. 2001). A similar system of judge rotation has been used by the city of Detroit. It is less likely to minimize coercion, however, because it provides trial judges with a record of the sentence offered to defendants by pretrial judges. Defendants who reject that offer and proceed to trial are therefore practically assured to receive a higher sentence. Stephanie Baron, Comment, *Pretrial Sentence Bargaining: A Cure for Crowded Dockets?*, 30 EMORY L.J. 853, 880-90 (1981).

376. See *supra* note 316 and accompanying text.

one judge is available.³⁷⁷ Finally, the practice may be less efficient, because in the event of a plea withdrawal, the second judge needs to become newly acquainted with the case. At the same time, plea withdrawals are not as likely to occur where the parties know in advance what plea bargain would be acceptable to the judge, so the loss in efficiency may be insignificant.

A system that endorses judicial participation must take special care to display a serious commitment to judicial integrity. Even the appearance of partiality or coerciveness could undermine one of the key benefits of judicial involvement—its tendency to enhance the fairness and legitimacy of plea bargaining. For that reason, a fair system of judicial participation should adopt both the Florida and Connecticut safeguards against coercion. Pretrial judges would be prohibited from initiating plea discussions on their own. Appellate courts would be vigilant against express or implied threats by judges in the course of plea negotiations. And where a defendant decides not to accept a pretrial judge's plea offer, he would be entitled to have a different judge preside over his trial and sentencing. As the next Section discusses in greater detail, the rule on recusal would be more feasible in federal court if magistrate judges managed pretrial negotiations.

E. Maintaining the Efficiency of Plea Bargaining

Even if the measures discussed above minimize judicial coercion, judicial involvement may still seem impractical because of the additional costs and time required. Judges have little time to take away from their already overloaded dockets. Requiring a more complete review of the facts, further investigation, and a more thorough disclosure to the parties and the judge adds to the costs of judicial involvement.

While there is no clear measure of the costs of the proposal put forth in this Article, it is worth noting that proponents of judicial participation, as well as observers from jurisdictions that allow such participation, see it as a cost-saving measure.³⁷⁸ In civil cases, too, the rise of managerial judges has been praised by some for streamlining the process of discovery and settlement.³⁷⁹ Regardless of whether it actually expedites plea discussions, judicial participation saves the system some resources by reducing the number of motions and ap-

377. Alschuler, *The Trial Judge's Role*, *supra* note 4, at 1148.

378. *See supra* notes 269, 334 and accompanying text; *see also* Anderson, *supra* note 357, at 52.

379. *E.g.*, Jaclyn Barnao, *In Pursuit of Settlement: Deciphering Judicial Activism*, 18 GEO. J. LEGAL ETHICS 583, 586 (2005) (citing FED. R. CIV. P. 16 advisory committee's note to 1983 Amendment). *But see* Resnik, *supra* note 10, at 419-24 (questioning this conclusion).

peals that result from the unpredictability of current bargaining and sentencing practices.

Much of the cost increase from judicial participation comes from a more thorough review of the facts of the case—it takes more time for judges to review a fuller investigative file, and it takes yet more time if the judge orders that further evidence be taken. But this sacrifice of efficiency is likely to have a direct benefit in increasing the accuracy and fairness of plea bargaining outcomes, a trade-off we should not be quick to reject.

Furthermore, at least at the federal level, the concern about costs can be alleviated by involving magistrates rather than Article III judges in the plea negotiations. Magistrates already handle a number of tasks in criminal cases, such as initial appearances, bond settings, and extradition hearings.³⁸⁰ Separately, they have taken a lead role in managing settlement negotiations and discovery practice in complex civil cases. There is also some evidence that they have begun applying some of the lessons learned from civil case management to their supervision of criminal investigations.³⁸¹

In fact, with the defendant's consent, federal magistrates have already been authorized to accept guilty pleas³⁸² and, in misdemeanor cases, to impose sentences.³⁸³ As long as the defendant agrees to this procedure, there is no clear constitutional or statutory hurdle to involving magistrates in the plea negotiations.³⁸⁴ In *Peretz v. United States*, the Supreme Court upheld the delegation to a magistrate of the authority to conduct *voir dire* proceedings, because the defendant had consented to it. The consent made the delegation of such essential judicial duties consistent with Article III. If the delegation of *voir dire* responsibilities was upheld, then assigning plea negotiations to federal magistrates would also be legal and practical, as long as the defendant agrees to it. The delegation would be consistent with legislative history of the Federal Magistrates' Act, which encourages "innovative experimentations in the use of magistrates to improve the efficient administration of the courts' dockets."³⁸⁵ Fi-

380. Daniel E. Hinde, Note, *Consensual Sentencing in the Magistrate Court*, 75 TEX. L. REV. 1161 (1997).

381. *In re* 3817 W. West End, First Floor Chicago, Illinois 60621, 321 F.Supp.2d 953 (N.D. Ill. 2004).

382. *E.g.*, *United States v. Reyna-Tapia*, 328 F.3d 1114, 1119 (9th Cir. 2003) (*en banc*); *United States v. Torres*, 258 F.3d 791, 795-97 (8th Cir.2001); *United States v. Williams*, 23 F.3d 629, 632-33 (2d Cir. 1994).

383. 28 U.S.C. § 636(a)(5) (2000), *cited in* Hinde, *supra* note 380, at 1164 n.20.

384. 28 U.S.C. § 636(b)(3) (2000) (providing for the delegation of "additional duties" to magistrates); *United States v. Osborne*, 345 F.3d 281, 285-90 (4th Cir. 2003) (discussing statutory and constitutional grounds for delegating to magistrates the power to conduct a plea colloquy); Hinde, *supra* note 380, at 1175-79 (discussing magistrates' authority to hand down sentences in negotiated cases).

385. *Peretz v. United States*, 501 U.S. 923, 934-35 (1991) (quoting H.R. Rep. No. 94-1609, at 12 (1976)).

nally, it would bring many of the benefits of judicial involvement in plea negotiations, without unduly burdening the dockets of federal district judges.

VI. CONCLUSION

Partly because of our adversarial tradition and partly because we see plea bargaining as a contract between the prosecution and the defense, we have decided to leave the process of negotiating the plea to the parties. Since criminal justice also involves important public interests, judges have been entrusted with the responsibility of verifying that the plea is knowing, voluntary and factually based. Yet there is reason to believe that passive, after-the-fact review of the plea by the judge has not provided a sufficient safeguard of the important public interests in fair and accurate outcomes. This Article has suggested that it is time to reconsider involving judges in the plea negotiations.

The systems of Florida, Connecticut, and Germany offer three different models by which a judge can play a more active role in the plea negotiations. Each model has useful features that could be considered in efforts to reform other current plea bargaining systems. To promote informed bargains, judges could tell the parties what post-plea and post-trial sentences are likely to be accepted by the court. To increase the fairness and accuracy of plea outcomes, judges could inquire into the factual basis of the plea during the negotiations, and where necessary, prod the prosecution to gather further evidence. Finally, to minimize judicial coercion, appellate courts could scrutinize more strictly allegations of threatening or biased judicial remarks. And the pretrial judge could be required to recuse herself if the defendant rejects the pretrial plea offer and decides to proceed to trial.

A plea bargaining process that is open to the more active role played by the judge in these ways has greater potential to be fair, transparent, and true to the facts. Several state systems, including Florida and Connecticut, have already grown comfortable with a higher level of judicial involvement, and Germany has endorsed even more active judicial supervision of the plea negotiations. Reform-minded courts and legislatures should study the effects of these different experiences and construct plea bargaining systems that combine the best features of all three.

I. TABLE: MODELS OF JUDICIAL INVOLVEMENT IN
PLEA NEGOTIATIONS

	Germany	Florida	Connecticut	Proposal
<i>Judge can initiate discussions</i>	Yes.	No.	Yes.	No.
<i>Negotiations on record</i>	Bare record of the result of negotiations.	Yes, although sometimes ignored in practice.	No.	Available upon request by the parties or the court.
<i>Judge can discuss post-plea sentence</i>	Yes.	Yes.	Yes.	Yes.
<i>Judge can discuss post-trial sentence</i>	Yes.	No.	Yes.	Yes.
<i>Judge probes into factual basis of the plea during the negotiations</i>	Yes.	No.	Sometimes—depends on the judge.	Yes.
<i>Pre-plea disclosure to the defense</i>	Yes—open-file.	Yes, liberal discovery, although less than open-file.	Yes, liberal discovery, although less than open-file.	Yes—open-file, unless good cause shown.
<i>Pre-plea disclosure to the judge</i>	Yes—full investigative file.	Probable cause affidavit; oral presentation by the parties; probation report available, but rarely used.	Probable cause affidavit; oral presentation by the parties; probation report available, but rarely used.	Full investigative file; oral presentation by the parties; pre-plea probation report.
<i>Different judge conducts trial and sentencing if plea discussions fail</i>	No.	No.	Yes.	Yes—use magistrates at pre-trial.
<i>Appellate review of judge's remarks for bias</i>	Yes, though not very probing.	Yes.	Yes, though not very probing.	Yes.