TRIAL JUDGES' PARTICIPATION IN PLEA BARGAINING: AN EMPIRICAL PERSPECTIVE

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The trial judge's role in plea bargaining is examined, using national survey data supplemented by observations and interviews. We analyze the frequency with which judges participate in plea discussions and the organizational, social, and legal contexts that affect the judicial role. Our data suggest the trial judge is often an important or crucial actor in the construction of plea agreements, a finding that contradicts much of the legal and social science literature. Several variables directly influence what role a judge will adopt, including self-perceived skill at negotiating and whether the state has a court rule or case law prohibiting or discouraging judicial participation. Future research should focus upon the impact of judicial participation in plea bargaining.

I. INTRODUCTION

The once invisible institution of plea bargaining is now quite salient. It is at the core of the criminal justice system and, according to some observers, has been there quite a long time (Nardulli, 1976; Heumann, 1975). But despite an exponential increase in attention to the processes of plea bargaining, most empirical research and legal scholarship assumes, hypothesizes, or finds that the trial judge is nothing more than a lowly supporting actor reading a tired script. The real drama is allegedly played out in the backstage exchanges between prosecutor and defense counsel. This article critically reviews the picture of a prosecutor-dominated process, using national data.

The literature of plea bargaining generally emphasizes the role of the prosecutor. Legal scholarship generally *presumes* prosecutorial dominance and therefore focuses upon ways to limit or standardize the discretionary decisions prosecutors make (Bubany and Skillern, 1976; Cox, 1976; Abrams, 1971). Empirical research, usually within a small number of jurisdictions, has sought to identify the factors associated with bargaining decisions—e.g., strength of evidence, seriousness of case, and defendant-related characteristics such as prior record (Bond, 1976; Lagoy *et al.*, 1976; Bequai, 1974; Koblenz and Strong, 1972; Alschuler, 1968). The recent proliferation of these

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studies suggests that the assumption of prosecutorial dominance may now be widely accepted.

There has been less attention paid to the role of the defense attorney. The commentaries have typically exhorted, criticized, or provided guidelines to defense attorneys concerning their negotiation of charges and dispositions (Bazelon, 1973; Feit, 1973; Dash, 1968). Researchers, by contrast, have explored the interpersonal or tactical relationships between prosecutor and defense counsel, often emphasizing the cooptation of the defense attorney as a result of economic pressure or bureaucratic involvement. Blumberg's (1966) classic work, for example, describes the "double-agent" role of the defense attorney, who seeks to induce a guilty plea and "cool out" the defendant (see also Battle, 1971). Alschuler (1975) similarly finds that client advocacy is almost always less important than economic considerations. And Mather (1974), examining the perspective of public defenders, finds that strength of evidence and seriousness of the case interact to determine their decisions to plead a defendant guilty or go to trial. Although *defendants* believe that private counsel are more effective advocates than public defenders (Casper, 1972; Blumberg, 1967), there is little independent support for this belief.

A substantial amount of the social science research on plea bargaining has been "process-oriented," focusing not on individuals but on relationships. For example, Neubauer (1974) describes plea bargaining in a smaller midwestern city as an informal exchange of ideas and evidence between prosecutor and defense ("mini-trials") outside the scrutiny of the trial judge. Cole (1970) found that the "decision to prosecute" in a western city was not the sole prerogative of the prosecutor but a product of an exchange network in which the interests of defense attorneys, police, community leaders, and the public set broad constraints on prosecutorial discretion. Church (1976) describes participant adaptations to an attempted elimination of charge bargaining in drug cases in a midwestern county, one result of which was increased involvement of the trial judge in negotiations. Heumann (1978) analyzes the socialization process by which "newcomer" prosecutors, defense attorneys, and judges learn to adapt their attitudes and behaviors to the realities of plea bargaining. And Eisenstein and Jacob (1977) characterize the disposition of felony cases in three large cities in terms of the stability of "courtroom workgroups" comprised of prosecutors, defense attorneys, and judges. Their research, which offers the most sophisticated portrayal of the balance

among those three roles, reveals that in Chicago, in particular, judges are often aggressively involved in plea bargaining.

Interest in the role of the trial judge in plea bargaining is relatively recent, not only in the social science literature noted above but also in the legal literature. Law review commentary focuses on the question of the *coerciveness* of judicial participation (Gallagher, 1974; Ferguson, 1972) and conveys the impression that the judge's only function is to inform the defendant of his rights and see that those are protected.

In the only significant empirical study focusing directly on the judge's participation in plea bargaining, Alschuler (1976) describes four plea bargaining systems in the ten large cities he visited: (1) no judicial involvement of any kind, (2) involvement through unannounced but known sentencing breaks to those who plead guilty, (3) involvement by the judge in sentencing discussions in an occasional, vague, and inconsistent manner, and (4) direct participation in which the judge makes a sentence commitment before the defendant pleads. Though his sample of cities was neither random nor fully representative, Alschuler found occasional and inconsistent involvement by judges to be the most frequent pattern. Only Houston exhibited no involvement and only Chicago displayed formalized, direct participation.

Perhaps one reason for the paucity of empirical study of variation in the judicial role in plea bargaining has been the existence, and presumed effect, of normative rules in this area—most notably state court rules, state and federal case law, and standards promulgated by national commissions on the administration of criminal justice and by the American Bar Association. The most influential statements concerning the judge's role in plea negotiations are contained in the American Bar Association's *Standards Relating to Pleas of Guilty* (1968: Standards 3.1-3.4), which have been cited with approval in numerous articles and judicial decisions.[1] A primary purpose of these standards was to establish the propriety of plea discussions and agreements. The advisory committee that drafted them expressed the belief that undesirable influences could be minimized if the process were made more visible and subject to control.

Because the ABA advisory committee sought to legitimate a practice previously viewed by many as unacceptable, it took

[1] Indeed, they have been more frequently cited than any other standards promulgated by the ABA in the area of criminal justice. See American Bar Association Section of Criminal Justice, (1977: k).

pains to impose numerous safeguards, among them an absolute ban on judicial participation in plea discussions.[2] In setting forth its rationale for this prohibition, the committee expressed the belief that judicial participation: (1) can give the defendant the impression that he will not receive a fair trial if he is tried by the same judge; (2) makes it difficult for the judge objectively to determine the voluntariness of the plea; (3) is inconsistent with the theory behind the use of the pre-sentence investigation report; and (4) may induce the defendant to plead guilty even if he is innocent.

Although no empirical evidence was introduced to support this rationale, the influence of the ABA Standards has been considerable. The standard banning judicial participation has been quoted or cited with approval in numerous federal and state court decisions[3] and in commentary to other standards[4] and court rules.[5] The court cases, paraphrasing the Standards, reiterate the belief that judicial participation in plea bargaining is inherently coercive and tends to destroy the voluntariness of the defendant's plea.

Most courts that have expressed disapproval of judicial participation have done so indirectly, in dicta, and thus there is little or no guidance as to what constitutes "participation." Does the mere presence of a judge at a plea conference constitute participation? The Supreme Courts of Pennsylvania (*Commonwealth* v. *Evans*, 252 A.2d 689, 1969) and Wisconsin (*State* v. *Wolfe*, 175 N.W.2d 216, 1970) differ on this point. The former set aside a guilty plea where there had been a plea conference

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[2] Standard 3.3(a): "The trial judge should not participate in plea discussions." However, a proposal was presented to the ABA House of Delegates in February, 1979, to modify this standard to permit judicial participation in plea discussions where counsel cannot reach agreement between themselves. Under such circumstances additional protections for the defendant would be required, including automatic substitution of the judge if negotiation failed and the availability of a pre-plea pre-sentence report if the defendant consented.

[3] See, for example, *Brown* v. *Beto*, 377 F.2d 950 (5th Cir. 1967); *Scott* v. *United States*, 419 F.2d 264 (D.C. Cir. 1969); *United States* v. *Gallington*, 488 F.2d 637 (8th Cir. 1973), *cert. den.*, 416 U.S. 907 (1974); *State* v. *Johnson*, 279 Minn. 209, 156 N.W.2d 218 (1968); *Commonwealth* v. *Evans*, 434 Pa. 52, 252 A.2d 689 (1969); *State* v. *Wolfe*, 46 Wis.2d 478, 175 N.W.2d 216 (1970); *People* v. *Clark*, 183 Colo. 201, 515 P.2d 1242 (1973); *State* v. *Carlson*, 555 P.2d 269 (Alaska, 1976).

[4] U.S. National Advisory Commission on Criminal Justice Standards and Goals (1973: § 3.7); American Law Institute (1975: § 350.3(1)). Although both the NAC and ALI Standards prohibit judicial participation in plea negotiations, the former calls for the eventual abolition of plea bargaining (§ 3.1).

[5] The commentary to the Federal Rules of Criminal Procedure, which were revised in 1975 to provide that ". . . The court shall not participate in any such discussions" (Rule 11(e)(1)), contains numerous references to the ABA standards. A similar ban on judicial participation is contained in Ariz. R. Crim. P. 17.4(a); Ark. R. Crim. P. 25; Colo. R. Crim. P. 11(f)(4); N.M. R. Crim. P. 21(g)(1); N.D.R. Crim. P. 11(d)(1); Ore. Rev. Stat. § 135.432(1); Pa. R. Crim. P. 319(b)(1); D.C. R. Crim. P. 11(e)(1).

in the judge's chambers, explaining that it felt compelled to forbid *any* participation by the trial judge before the defendant pleaded guilty. The latter, on the other hand, refused to reverse where there had been a plea conference in the judge's chambers. Perhaps the most extreme definition of judicial participation is that expressed by the Michigan Court of Appeals in dicta to the effect that any judge who adopts a practice of sentencing more lightly those defendants pleading guilty cannot escape participation in the bargaining process (*People* v. *Earegood*, 162 N.W.2d 802, 1968). The court apparently believed that lawyer knowledge of a judge's sentencing policies necessarily results in covert participation by the judge. In this case, conviction as well as sentence were set aside because the trial judge had indicated at arraignment that those who "dillydallied" in deciding whether to plead guilty would be dealt with more severely.

Most appellate courts confronted with a case involving overt judicial participation have been unwilling to reverse on such grounds,[6] though these courts have sometimes taken pains to indicate that they do not commend the practice. A number of federal courts, in particular, have taken the view that though the ABA standard prohibiting judicial participation may prescribe proper practice, it does not state a constitutional limitation (see, e.g., *Brown* v. *Peyton*, 435 F.2d 1352, 4th Cir., 1970, *cert. den.*, 406 U.S. 931, 1972; *U.S. ex. rel. Robinson* v. *Housewright*, 525 F.2d 988, 7th Cir., 1975).

In sum, this ABA standard appears to have fostered a widespread sentiment among appellate courts against judicial participation in plea negotiations. But no empirical foundation exists to support the rationale behind that position or to document whether it has any effect on the actual behavior of judges.

The purpose of this paper is to provide an empirical perspective on trial judge participation in plea bargaining. Specifically, we will examine (i) the frequency with which trial judges participate in plea discussions, and (ii) the legal, organizational, and social contexts in which trial judges are more or less likely to participate. We thereby hope to stimulate some improved theory-building, especially on the relationship between

[6] See, for example, *U.S. ex. rel. Bullock* v. *Warden* (408 F.2d 1326, 2d Cir. 1969, *cert. den.*, 396 U.S. 1043, 1970); *Orman* v. *Bishop* (435 S.W.2d 440, Ark., 1968); *State* v. *Tyler* (440 S.W.2d 470, Mo., 1969); *People* v. *Montgomery* (27 N.Y.2d 601, 261 N.E.2d 409, 1970); *Maxwell* v. *State* (106 Ariz. 527, 479 P.2d 412, 1971).

plea bargaining and sentencing. We will draw upon two independent sources of quantitative data to examine these questions: national mail surveys of trial judges in courts of general (felony) and limited (misdemeanor) jurisdiction. Both surveys include a number of items directly related to the trial judge's role in plea bargaining, and both are supplemented by observations and interviews.

II. FINDINGS: TRIAL JUDGES IN FELONY AND MISDEMEANOR COURTS

A. Data Sources

Our data relating to the participation of judges in plea bargaining in felony courts are derived from a national study of the tasks trial judges perform.[7] We observed for several days in the courtrooms and chambers of each of forty judges in eight states selected for their geographic and political diversity; more than half heard criminal cases, either exclusively or together with civil cases. In May 1977 we also administered a mail questionnaire to all judges in state trial courts of general jurisdiction; it included items focusing on the judge's involvement in plea bargaining, time spent in plea negotiation discussions and conferences, and his perceptions of the efficiency of conferences and his own skill in negotiation. Sixty-three percent (3,032) of the judges responded,[8] of whom more than two-thirds hear criminal cases in their current assignment.

Our data relating to the participation of judges in plea bargaining in misdemeanor courts are derived from a national study of management problems, including case processing, in state misdemeanor courts.[9] A questionnaire with items related

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[7] This research was financed by Grant 76-14964 from the National Science Foundation, Division of Research Applied to National Needs. The analyses, conclusions, and opinions expressed are those of the authors and do not necessarily represent the official position or policies of the American Judicature Society or the National Science Foundation. For the larger study, see Ryan *et al.* (forthcoming).

[8] We received a response of 50 percent or better in every state except New Jersey (where a "ban" on questionnaires was being enforced by the state court administrative office). In addition, our analysis indicates that those who responded late (i.e., after two follow-up appeals) were no different along key variables, such as role in plea discussions or workload measures, from those who responded early. We believe that reactivity on questions related to plea bargaining was probably low, since the survey covered the entire range of judicial work. No tests of statistical significance are applied to the felony-judge data because we surveyed the universe.

[9] This research was financed by Grant 76-NI-99-0114 from the Law Enforcement Assistance Administration, National Institute of Law Enforcement and Criminal Justice. The analyses, conclusions, and opinions expressed are those of the authors and do not necessarily represent the official position or policies of the American Judicature Society or the United States Department of Justice.

to plea bargaining and the judge's role therein was mailed in November 1976 to a random sample of 25 percent of the judges in all state courts where we were able to ascertain that (1) being a judge was the primary occupation of those judges on the court, and (2) misdemeanor cases represented the most significant portion of the court's total criminal workload.[10] Using these criteria, we surveyed judges in every state except Illinois, whose consolidated trial court system made it impractical to attempt an identification of the universe of judges handling misdemeanor cases. The response rate was 54 percent (N=743).[11] These survey data are supplemented by direct observation and interviews with judges and other courtroom actors in twenty jurisdictions across fifteen states.

The two survey instruments did not ask identical questions because the larger purposes of the two studies were different. The misdemeanor judge survey is more limited in the potential range of explanatory variables. Nevertheless, the two surveys as well as data collected from other sources are quite comparable and provide a unique opportunity to contrast upper and lower level trial judges in America.

B. Participation Levels

How frequently are trial judges present during plea discussions between prosecuting and defense counsel? Of those who are, to what degree do they involve themselves in the substance of those discussions—in the sentencing negotiations that are at the core of most plea bargaining sessions.[12] Table 1 presents the frequency distributions for level of judicial involvement in felony and misdemeanor courts.

In both felony and misdemeanor courts, the majority of trial judges do *not* attend plea discussions. Fully two-thirds restrict their role to ratifying in court bargains struck between prosecutor and defense counsel. But this generalization requires further elaboration. First, we asked the judge about his

[10] This eliminated courts in which judging is extremely part-time (e.g., the justice courts in New York, Mississippi, and Texas), and general jurisdiction courts that handle both felony and misdemeanor cases.

[11] We cannot be as confident about the representativeness of these respondents. We drew a modest random sample from a universe more difficult to define and locate. Our overall response rate was somewhat lower, and state variations in response rate somewhat greater. Thus, this data base may be weaker than for felony judges. Nevertheless, this survey also is likely to contain a low amount of reactivity on items related to plea bargaining, since it covered a wide range of management issues.

[12] In the later questionnaire to felony judges, we refined the "participation" category to include two options: "recommend" dispositions and "review" dispositions. Otherwise the wording of the question is virtually identical.

TABLE 1

TRIAL JUDGES' LEVEL OF PARTICIPATION IN PLEA BARGAINING: FELONY AND MISDEMEANOR JUDGES

Felony		*Misdemeanor*	
Q. Which one of the following roles do you *most typically* assume with respect to plea negotiations?		Q. To the extent that plea negotiation takes place, which statement best characterizes your role generally?[b]	
"Attend plea negotiation discussions, and recommend dispositions to the D.A. and/or defense counsel" (RECOMMEND)	7%		
"Attend plea negotiation discussions, and review recommendations of the D.A. and/or defense counsel" (REVIEW)	20	"I participate in plea discussions" (PARTICIPATE)	21%
"Attend plea negotiation discussions, but do not participate" (ATTEND)	4	"I am present during plea discussions but do not participate in the discussions" (ATTEND)	12
"Do not attend plea negotiation discussions; only ratify in open court dispositions agreed to outside your presence" (RATIFY)	69%	"I only ratify agreements reached outside my presence" (RATIFY)	67%
	100%		100%
N[a]	(2187)		(616)

a Responses include only those judges whose *current* assignment involves the hearing of criminal cases.

b This question was preceded by a question asking the judge about the frequency of plea bargaining (as to charge or sentence) in misdemeanor cases in his court. Eight percent (N=57) reported that plea negotiations "never" take place.

"most typical" role or the one he generally assumes. On some occasions, as we observed in the field, judges will depart from their normal noninvolvement—either by attending the early discussions leading to the bargain or, more likely, by making a sentence commitment to the attorneys in chambers after hearing a brief summary of the proposed disposition. Second, some judges who do not attend plea negotiations report that they occasionally *reject*, in open court or in chambers, an agreement struck between the attorneys. From our observations, this is an infrequent occurrence, especially in open court. Judges in the courtroom seem more likely to scrutinize the voluntariness of

the plea and the guilt of the defendant than the sentence recommendation. Third, judges may have informally established upper or lower limits for sentencing in certain types of cases, thereby influencing the recommendations of counsel (see Alschuler, 1976). In sum, "ratification" may not represent complete withdrawal from participation in plea negotiations. Rather, ratification implies a set of activities on the judge's part primarily designed, but not always limited, to ensuring that the defendant understands his rights and has not been (unduly) coerced into a plea of guilty. Judges varied widely in the amount of time and the level of interest, precision, and sensitivity with which they accomplished this task. In general, we observed judges in felony courts to be more thorough and careful in the ratification process than their counterparts in misdemeanor courts.

Almost one-third of trial judges do attend plea discussions between prosecutor and defense counsel. Most of those report that they do more than merely "attend," especially in the felony courts.[13] Here, judges seem more likely to review the sentencing recommendations of counsel than to recommend dispositions themselves, but the line between "reviewing" and "recommending" dispositions is a thin one, which judges undoubtedly traverse. For example, we observed one judge in the criminal division of a large metropolitan court who recommended appropriate dispositions to timid prosecutors but waited to review the recommendations of those who were more aggressive or more experienced. Who initiates the "bidding" on the length of the defendant's sentence is probably not important in most instances, since even those judges who restricted themselves to reviewing sentences did so actively, often rejecting or sharply modifying the initial recommendations of counsel. Overall, the level of involvement of felony and misdemeanor judges is quite parallel.

C. Variations and Their Causes

The national pattern of trial judge involvement in plea bargaining, exhibited in Table 1, masks wide variation from state to state. Although a presentation of data for each of the fifty states is beyond the scope of this article (but see Figure A-1 in

[13] This finding is consonant with our observational data. We observed no felony judges who attended plea discussions but refrained entirely from getting involved in the disposition.

the Appendix), we do wish to analyze the patterns in some selected states where state court rule or case law, or both, comment upon the role of the trial judge in plea negotiations.

Seven states (Arizona, Arkansas, Colorado, New Mexico, North Dakota, Oregon, and Pennsylvania) and the District of Columbia expressly prohibit, in their general statutes or rules of criminal procedure, judicial participation in plea discussions. In all these jurisdictions, a pattern of infrequent judicial participation is present. Indeed, in both North Dakota and the District of Columbia not a single felony judge reported attending or participating in plea discussions.

We have selected five states for specific comparison of the impact of court rules. In Colorado[14] and Oregon,[15] court rules are supported by dicta discouraging participation. In Pennsylvania, the court rule is supported by a holding of the state supreme court reversing conviction because of judicial *presence* at a plea bargaining session.[16] We also present data for two other states that explicitly adopt a different stance with respect to the proper role of the trial judge. In Illinois, a court rule prohibits only judicial "initiation" of plea discussions (interpreted in practice to mean that the attorneys must first ask the judge in open court for a conference).[17] By contrast, the Florida Rules of Criminal Procedure make clear that the trial judge is *not* prohibited or discouraged from participating in

[14] Colo. R. Crim. P. 11(f)(4) simply states: "The trial judge shall not participate in plea discussions." In *People* v. *Clark* (515 P.2d 1242, 1973), the Colorado Supreme Court vacated a sentence imposed by a trial judge who was unsuccessful in securing a guilty plea by threatening defense counsel with a sentence much heavier than the district attorney's offer. The court goes on to say that "participation by the trial judge in the plea bargaining process must be condemned" (515 P.2d 1243).

[15] Ore. Rev. Stat. § 135.432(1) states: "The trial judge shall not participate in plea discussions." The next section contains language similar to that of the ABA Standards regarding disclosures of "tentative plea agreements." In *Rose* v. *Gladden* (433 P.2d 612, 614, 1967), the Oregon Supreme Court commented: "The court was not in the instant case and should not in any case be involved in the negotiation process." These *dicta* were unrelated to the specific issues in the case.

[16] Pa. R. Crim. P. 319(b)(1) states: "The trial judge shall not participate in the plea negotiations preceding an agreement." The last three words of the prohibition are potentially ambiguous, but a complete reading of the section and the accompanying comment makes clear that the intent of the rule is to limit the judge to an inquiry into voluntariness and understanding, in open court and on the record. See also *Commonwealth* v. *Evans* (434 Pa. 52, 1969).

[17] Ill. Ann. Stat. ch. 110A, § 402(d)(1) states: "The trial judge shall not initiate plea discussions." There is no clarification of the significance of "initiate" in the commentary, except for a reference to the ABA Standards at 36-52. Before the trial judge agrees to participate in a conference, the defendant is advised that a substitution of judge will *not* be permitted in the event that negotiation attempts fail.

plea discussions.[18] This subtle *encouragement* to participation in Florida is not found in the rules of other states. Thus, in Table 2 below we have a spectrum of state rules defining the role of the trial judge ranging from most restrictive to least restrictive.

TABLE 2

TRIAL JUDGES' LEVEL OF PARTICIPATION IN PLEA BARGAINING: THE IMPACT OF COURT RULES IN FIVE STATES

	Colorado[a]		Oregon[a]		Pennsylvania[a]		Illinois[b]	Florida[c]	
	Felony	*Misd.*	*Felony*	*Misd.*	*Felony*	*Misd.*	*Felony*[d]	*Felony*	*Misd.*
RECOMMEND	0%		0%		3%		5%	19%	
PARTICIPATE		0%		0%		11%			10%
REVIEW	7		14		6		33	31	
ATTEND	4	6	4	0	7	27	1	3	25
RATIFY	89%	94%	82%	100%	84%	62%	61%	47%	65%
N	(53)	(16)	(49)	(12)	(148)	(26)	(134)	(72)	(20)

a. Court rule barring judicial participation in plea bargaining.

b. Court rule barring judicial *initiation* of plea discussions.

c. Florida Rules of Criminal Procedure adopt all provisions of the A.B.A. Standards Relating to Pleas of Guilty *except* the one barring judicial participation.

d. For reasons stated earlier in the text, misdemeanor judges were not surveyed in Illinois.

Table 2 provides strong support for the impact of court rules. In Colorado and Oregon—states where there can be little ambiguity as to the language or policy intent of the rule—less than fifteen percent of felony and no misdemeanor judges report participation in plea discussions. In Pennsylvania, which also has a rule that appears to be clear and supported by case law, very few felony judges but quite a few misdemeanor judges report attending or becoming involved. This disparity between the two levels of judges might be accounted for by the lack of legal training which characterizes Pennsylvania justices of the peace (who are overwhelmingly nonlawyers). In Illinois, where participation is not actually prohibited, a substantially larger proportion of felony judges become involved, and in Florida the largest percentage of felony judges participate in discussions. In Florida, too, there is significant disparity between the reported behavior of felony and misdemeanor judges; again, felony judges better reflect the language and spirit of the rule. Based upon these five states, at least, a linear trend is clear: the more restrictive a court rule, the less frequent judicial participation (or attendance) occurs.

[18] Fla. R. Crim. P. 3.171(c) states that "after an agreement on a plea has been reached, the trial judge may, with the consent of the parties, have made known to him the agreement and reasons therefore prior to acceptance of the plea. . . ." Although this language is taken directly from ABA Standard 3.3(b), the commentary to this section in the Florida rules states that they contain "no such restriction" as that found in the ABA Standards regarding judicial participation.

Our field observations of felony judges in Illinois and Pennsylvania support the survey data in Table 2. In Philadelphia, neither of the two criminal court judges we observed participated in or attended plea discussions, and both mentioned the court rule in Pennsylvania as one reason. In rural Pennsylvania, the general assignment judge accepted seven guilty pleas in court, over the course of a week, and was present at only one informal plea discussion in chambers. In contrast, in Chicago both of the criminal court judges observed attended and participated in plea negotiations—usually by actively reviewing the recommendations of the prosecutor and defense counsel. Thus, we have every reason to believe that judicial self-reports parallel rather closely what judges, in fact, do.

What is perhaps less clear are the mechanisms by which court rules in a particular state are "communicated" to trial judges, and the incentives to conform. Court rules are published but so are many other sources of information and guidance (perhaps too many). Interpersonal contacts—particularly with a presiding judge or fellow judges—may be a more viable source of information about state court rules. These contacts might be most salient in small and intermediate sized courts rather than in one-judge courts (where a judge has no colleagues) or very large multi-judge courts (where sheer size often results in lack of contact). To test this hypothesis, we examined the residuals—participating judges in states where court rules ban participation—but found no linear or curvilinear pattern with the size of court, among either felony or misdemeanor judges.

To pursue this line of analysis one step further, we examined the relationship between key explanatory variables (which we will discuss in detail later in this section) and level of judicial participation in states whose rules prohibit participation. If judges do not "comply" with such a rule because they are unaware of it, they should be distributed along these explanatory variables in the same fashion as are judges who do comply with the court rule. But this is not entirely the case. Felony judges who participate in plea discussions in violation of a court rule are much more likely to see themselves as highly skilled at negotiation ("that damn rule is for judges who don't know what they're doing in plea negotiation . . . I know how to protect defendant rights and still move cases"). Likewise, misdemeanor judges who participate in plea discussions are much more likely to have been on the bench for ten years or more. Thus, we might tentatively conclude that factors other

than lack of awareness of court rules account for at least some of the noncompliance. Judges do what they are skilled at doing and what they have become accustomed to do, sometimes even when that is officially proscribed.

We next turn to specific state court decisions that discuss the role of trial judges in plea discussions. We have selected four state high courts that range from more to less restrictive in their views of that role (in none of these states is there a court rule regarding judicial participation).[19]

In Kansas, in a case legitimating plea bargaining, the state high court commented at some length that the trial judge "should not participate in plea discussions" (*State* v. *Byrd*, 453 P.2d 22, 1969). In Minnesota, the high court sustained a guilty plea conviction even though the judge did not ask whether the defendant understood his rights; in dicta, the court stated that the judge should not participate in plea negotiations but should inquire "discreetly" into the propriety of the suggested settlement (*State* v. *Johnson*, 156 N.W.2d 218, 1968). In New York, in a sole *per curiam* opinion on this question, the Court of Appeals noted that judicial participation in plea discussions may not be the best practice but rejected the defendant's claim of coercion (*People* v. *Montgomery*, 261 N.E.2d 409, 1970). And in California, the state supreme court has restricted the trial judge's discretion in "charge bargaining" (vacating a guilty plea agreed to by judge and defense over the prosecutor's objection), but has not spoken to the question of "sentence bargaining" (*People* v. *Orin*, 533 P.2d 193, 1975). Although it is more difficult to rank states in terms of their case law regarding the role of the trial judge in plea discussions, Kansas appears to be the most and California the least restrictive; the other two fall in between: Minnesota and New York have ambiguous dicta in cases upholding convictions.

Table 3 describes judicial involvement in plea discussions in felony and misdemeanor courts in these four states. It suggests that judicial participation is associated with the messages and tone of relevant case law and dicta. Kansas judges adhere to the unambiguous dicta of their high court and refrain from participation. Minnesota judges are somewhat more likely to participate. There is also a high percentage of "attenders" in Minnesota—fence-sitters who are perhaps troubled by exactly how to resolve the conflicting cues they receive from their high

[19] The choice of states was largely determined by the presence of a respectable sample size in our misdemeanor survey. Wisconsin, for example, has some case law (cited earlier) but only four respondents in our misdemeanor survey.

court. Judges in California and New York are quite likely to participate (more than half of the felony judges and about half of the misdemeanor judges). In all of these states, misdemeanor judge participation closely parallels that of felony judges, suggesting that case law may be a more visible referent for misdemeanor judges than court rules.

TABLE 3

TRIAL JUDGES' LEVEL OF PARTICIPATION IN PLEA BARGAINING: THE IMPACT OF CASE LAW IN FOUR STATES

	Kansas[a]		Minnesota[b]		New York[c]		California[d]	
	Felony	*Misd.*	*Felony*	*Misd.*	*Felony*	*Misd.*	*Felony*	*Misd.*
RECOMMEND	3%		7%		23%		24%	
PARTICIPATE		5%		19%		50%		44%
REVIEW	3		12		50		41	
ATTEND	0	5	9	19	3	18	5	14
RATIFY	94%	90%	72%	62%	24%	32%	30%	42%
N	(40)	(22)	(42)	(21)	(107)	(22)	(234)	(73)

a. Dicta stating that the trial judge should not participate in plea discussions.

b. Dicta suggesting that the trial judge should not participate but could inquire into the propriety of the settlement.

c. Dicta stating that judicial participation in plea discussions may not be the best practice but is not inherently coercive.

d. Case law restricting the trial judge's discretion in "charge bargaining."

Court rules and case law, independently and sometimes in combination with one another, seem to influence the role of felony and misdemeanor judges in plea bargaining. But what other variables might also predispose trial judges to participate in plea discussions?

We examined the relationship between four classes of explanatory variables and trial judge participation in plea discussions: (1) environmental variables external to the court; (2) elements of local court structure and operations; (3) the prebench professional and political experiences of judges; and (4) the perceptions of judges regarding themselves, attorneys, tasks, and workload. Two caveats are in order. First, we do not always have directly comparable data for felony and misdemeanor judges. Sometimes, this is attributable to the different goals of the survey, but in other cases it is a function of differences in the settings of felony and misdemeanor courts. Second, the relationships among these many variables may not always be truly independent. For example, perception may be shaped by past professional experience or by the nature of the local court structure. Similarly, environmental variables may influence local structure and operations. We will consider, and

attempt to control for, some of these confounding variables in the analysis to follow.

Size (character) of community is the external variable most strongly related to judicial participation, especially among felony judges, as Table 4 reports. Almost half of felony judges participate in plea discussions in large metropolitan areas, a figure that drops rapidly in intermediate sized cities/suburbs and declines still further in rural communities. A smaller but distinctly linear downward trend occurs among misdemeanor judges. Not only is community size related to participation across the states, but it is also related *within* those larger states where some variation in participation exists. For example, among felony judges in Illinois there is little reported participation "downstate" (20 percent) but it is widespread in Chicago (77 percent). Smaller relationships in a similar direction can be found among felony judges in other large states.

TABLE 4

IMPACT OF COMMUNITY SIZE UPON TRIAL JUDGES' LEVEL OF PARTICIPATION IN PLEA BARGAINING

	Felony				*Misdemeanor*		
	Large Metropolitan	Medium City[a] Suburban[a] Nonmetropolitan[a]	Rural		Large Metropolitan	Medium City[a] Suburban[a] Nonmetropolitan[a]	Rural
RECOMMEND	15%	6%	4%				
				PARTICIPATE	35%	23%	14%
REVIEW	29	20	12				
ATTEND	5	4	3	ATTEND	13	9	15
RATIFY	51%	70%	81%	RATIFY	52%	68%	71%
N	(533)	(994)	(621)	N	(63)	(307)	(234)
	gamma = .39				gamma = .19; p = .001		

a. Combined because of similarity of distributions on dependent variable.

Beyond these empirical relationships, however, size of community presents difficult theoretical problems because it is a surrogate variable that stands for differences in the structure and procedures of local courts. We examined the relationships of a number of structural variables with judicial participation in felony courts: size of court, current assignment (mix of cases heard), case assignment system (master or individual), stability (longevity) of the prosecutor and defense counsel members of the courtroom workgroup, and frequency with which judges are rotated through different divisions. In almost every instance, the structural variable was related to judicial participation in a simple bivariate framework, but when a control for

community size was imposed the initial relationship disappeared. The larger the community (and court) the more likely that the judge hears only criminal cases, the shorter the stay of prosecutors and defense counsel in one courtroom, and the less frequently judges are rotated (where there are divisions).

Only one relationship, an apparently curvilinear one, remained within metropolitan and medium sized cities and rural areas alike: when prosecutors are assigned to the same felony courtroom for up to one year (two years in metropolitan areas), the trial judge is more likely to participate in plea negotiations than when prosecutors are not regularly assigned to a courtroom or stay longer than one (two) year(s). These data provide some highly tentative support for, and suggest an extension of, the Eisenstein and Jacob (1977) theory of workgroup stability and plea bargaining. It appears that felony judges may be encouraged to stay out of plea discussions both when they are unfamiliar with the other participants, as Eisenstein and Jacob suggest, and when prosecutors become sufficiently experienced in a particular courtroom to gain the judge's confidence and to learn his sentencing patterns.

In misdemeanor courts, too, a number of variables describing structure and case processing are related to the judge's participation in plea discussions. For example, judges who perceive that they are "always" or "frequently" under significant pressure to process cases rapidly are more likely to participate than those "infrequently" or "never" under such pressure (24 percent of the former compared to 17 percent of the latter; p=.01). The timing of guilty pleas is associated with the likelihood that the judge will participate in plea discussions. In courts where most guilty pleas occur at a pretrial conference,[20] 30 percent of misdemeanor judges participate in plea negotiations, compared with 21 percent where most occur on the day of trial, and 15 percent where most occur at the initial appearance (p=.001). Both of these operational variables, however, are sharply influenced by community size: in urban areas, misdemeanor judges perceive that they are under greater case pressure and accept more guilty pleas *after* the initial appearance. Because of smaller numbers, especially in metropolitan areas, it is not possible to examine these associations controlling for community size as we did with felony judges.

Two other variables *unique* to misdemeanor courts are also

[20] For a discussion of formalized pretrial conferences, see Nimmer and Krauthaus (1977).

related to judicial participation. The presence or absence of attorneys at various stages of a case is related, in an unusual way, to the judge's role in negotiations. Though the percentage of plea-negotiated dispositions seems to be higher in "formal" misdemeanor courts where prosecutor and defense counsel are typically present at a trial, judicial participation in discussions (often directly with the defendant) is higher in "informal" courts where the prosecutor is often *not* present at trial. Where the misdemeanor judge himself sometimes conducts the prosecution, in lieu of a prosecutor, 30 percent of the judges participate in plea discussions; this contrasts with a lower level of judicial involvement (15 percent) in discussions where the arresting officer or another police officer conducts the prosecution ($p=.05$). Thus, when a misdemeanor judge assumes the role of prosecutor, as he not infrequently must in some courts, he often takes on all the trappings of the prosecutorial role, including negotiation.

The other variable that affects the judicial role in negotiations only in misdemeanor courts is the availability of a jury trial. In most states, a jury trial is available to the defendant in the misdemeanor court but in thirteen it is not.[21] The latter either provide for trial *de novo* in, or a change of venue to, the general jurisdiction court where the defendant may have a jury trial. The pressures to settle cases without recourse to time-consuming and administratively cumbersome jury trials—in misdemeanor courts that may, but rarely do, hear jury trials—are no doubt substantial and serve to encourage the judge to participate in plea discussions, informally or formally, as a way of ensuring and expediting guilty pleas. We found that misdemeanor judges do participate in (and attend) plea discussions more frequently in states where a defendant can demand a jury trial in the lower court. Table 5 displays this relationship, in effect controlling for the presence or absence of a court rule prohibiting judicial participation.

It is clear from Table 5 that the availability of a jury trial makes a fairly sizeable difference in the frequency with which judges participate in plea discussions in states without adverse court rules. Furthermore, by separating states with a court rule banning participation from those without such a rule, we see the negative effect of court rules on participation once again. Although it cannot directly be demonstrated from these data,

[21] The thirteen states are: Alabama, Arkansas, Hawaii, Louisiana, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, South Dakota, Tennessee, Virginia, and Wisconsin.

TABLE 5

MISDEMEANOR JUDGES' PARTICIPATION IN PLEA BARGAINING: THE INTERACTION BETWEEN THE EFFECTS OF JURY TRIAL AVAILABILITY AND COURT RULE[a]

	Jury Trial Available/ No Court Rule	Jury Trial Not Available/ No Court Rule	Jury Trial Available/ Court Rule
PARTICIPATE	24%	15%	8%
ATTEND	13	4	17
RATIFY	63%	81%	75%
N	(432)	(95)	(76)

a. There is only one state (Arkansas) in which a jury trial is not available and where a court rule prohibits judicial participation in plea discussions. In that state 18 percent participate and 82 percent ratify.
p=.001 (jury trial effect) / p=.05 (court rule effect).

the influence of jury trial availability appears to be slightly greater than that of court rules, as seen by comparing the first and second columns (jury trial effect) and the first and third (court rule effect).

The professional experience and background of trial judges provide very little explanation for differences in the level of judicial participation in plea bargaining. Such variables as years on the bench, immediate prior occupation,[22] political party affiliation, and amount of involvement (time) in community relations or bar association activities are unrelated to participation by felony judges even before any controls are introduced. Among misdemeanor judges, such variables as whether the judge is a lawyer and serves full or part time are not related to level of participation, but years on the bench does have a small effect. Veteran misdemeanor judges are more likely to report participation in plea discussions.

Judicial perceptions about the courtroom work environment play a significant part in the negotiation role a trial judge adopts. This is true for felony judges, as our data will show, and it may also be true for misdemeanor judges though we do not have comparable or appropriate data to report. One key perception is the felony judge's assessment of his skill at negotiation. Judges in the felony survey were asked to rate their

[22] We did attempt to distinguish among those felony judges whose immediate prior occupation was private legal practice by asking whether it had been criminal, civil, or unspecialized. We found that those with a prior criminal specialization were more likely to participate in or attend plea negotiations as a judge (50 percent) than those with a civil (32 percent) or general practice (23 percent). Nevertheless, this finding is not of much explanatory value because only a very small number (N=36) of felony judges came to the bench from a private practice with a criminal specialization.

skill from "excellent" to "poor" in each of five broad tasks (adjudication, administration, community relations, legal research, and negotiation). There was substantial variation along each of these dimensions,[23] including negotiation where the modal response category was "average." As Table 6 indicates, there is also a substantial relationship between a felony judge's evaluation of his skill at negotiation and his participation in plea discussions.

TABLE 6

RELATIONSHIP BETWEEN FELONY JUDGES' SELF-EVALUATION OF SKILL IN NEGOTIATION AND THEIR LEVEL OF PARTICIPATION IN PLEA BARGAINING

	Felony Judges' Self-Perceived Skill at Negotiation				
	Excellent	Above Average	Average	Below Average	Poor
RECOMMEND	23%	7%	5%	2%	2%
REVIEW	25	28	17	10	6
ATTEND	4	3	4	4	6
RATIFY	48%	62%	74%	84%	86%
N	(320)	(675)	(801)	(202)	(49)

gamma = .38

This relationship is distinctly linear: at each higher rating category, the percentage of judges participating (by recommending or reviewing dispositions) increases. Though community size exerts some influence on judges' perceptions in this area (metropolitan judges see themselves as most skilled at negotiation, rural judges as least), the initial relationship demonstrated in Table 6 holds within metropolitan areas (gamma=.32), medium sized cities (gamma=.31), and rural areas (gamma=.37). The direction of causality is not entirely clear. It could be that judges rationalize that they are good at what they must do. However, our earlier finding that this relationship between skill and participation is also true in states having court rules *prohibiting* participation would suggest that the direction of influence does indeed proceed from perceptions (of skill) to behavior (participation).

Judges' perceptions about the negotiation skills of local criminal attorneys, unlike those about their own, are unrelated to their participation in plea discussions. Although we saw numerous instances in which the poor quality of counsel compelled a civil or criminal judge to take a more active part in other tasks—in nonjury trials, the drafting of decrees, etc.—compensation behavior by the trial judge apparently does

[23] Interestingly, there was relatively little correlation among the judges' assessments of their skills in different areas. The highest intercorrelation occurred between adjudication and legal research (r=.35).

not take place in plea bargaining, at least not with respect to sentence negotiations.

Another perception about plea bargaining that may shape a judge's role is his view of the efficiency of time spent in plea discussions. Felony judges as a group thought that they accomplished less per hour of time spent in plea discussions ($\bar{x}$ = 4.9) than in nonjury ($\bar{x}$ = 5.7) or even jury trials ($\bar{x}$ =5.3).[24] Nevertheless, felony judges who perceive plea discussions as relatively efficient are more likely to participate in them (gamma = .33). Size of community makes little difference in perceptions of efficiency, and thus the relationship between perceived efficiency of plea discussions and judicial participation holds uniformly within communities of all sizes.

Finally, we examined the perceptions of felony judges about their caseload. Their feelings as to whether they were under "too much" or "too little" case pressure (measured by a semantic differential item) proved unrelated to their level of participation in plea discussions. But a somewhat different indicator of caseload pressures—one more closely related to levels of attorney adversariness—is substantially related to judicial role in plea bargaining. We asked judges to estimate the length of time required for a jury trial in a typical armed robbery case. If judges perceive that jury trials consume substantial resources, we would expect them to feel additional pressure to become involved in plea discussions to ensure that their docket, or the court's central docket, does not become hopelessly backlogged. Table 7 presents the expected relationship between trial time estimates and judicial participation in plea discussions.

TABLE 7

IMPACT OF TRIAL TIME PRESSURES UPON PARTICIPATION BY FELONY JUDGES IN PLEA BARGAINING, CONTROLLING FOR COMMUNITY SIZE

	Hours Needed to Conduct Typical Armed Robbery Jury Trial			
	All Communities	Metropolitan	Medium Suburban Nonmetro-politan	Rural
RECOMMEND	20.2	22.1	18.3	19.0
REVIEW	18.2	20.2	17.9	16.0
ATTEND	16.7	21.3	14.5	14.6
RATIFY	14.5	16.6	14.2	13.8
N	(1995)	(455)	(925)	(570)

[24] The mean figures in parentheses are based on semantic differential items (1 = inefficient to 7 = efficient).

Felony judges who participate in plea discussions report substantially longer trial time, on average, than those who only attend or ratify agreements. This relationship is remarkably linear: estimates of trial time rise for each increment in judicial involvement. In essence, judges who are most actively involved—through recommending dispositions—face about one extra working day for each armed robbery jury trial. This relationship is present and equally strong within metropolitan areas, medium sized cities, and rural communities. It is also present and about equally strong in master as well as individual case assignment systems, suggesting that judges respond not only to their own personal backlogs but to those of the court as a whole.

D. Summary: Toward a Multivariate Model of Participation by Felony and Misdemeanor Judges in Plea Bargaining

Court rules and case law seem to exert a sizeable influence on judicial participation in plea bargaining. The association cuts across urban and rural states, though prohibitions seem to correlate more closely with lack of participation than the absence of prohibitions do with participation. The influence of community size is multifaceted, affecting both the procedures and operations of local courts as well as the perceptions of trial judges in these courts. It is the perceptions by felony judges of themselves and their working environment, not the organization of local courts, that is consistently correlated with judicial participation in plea discussions when we control for community size.

A multivariate analysis strikingly corroborates the picture that gradually emerges from this bivariate analysis. It also suggests that our model leaves much of the variation to be explained. Table 8 presents a summary of a stepwise regression analysis, indicating variables that are statistically significant predictors of judicial participation in plea discussions in felony and misdemeanor courts.[25]

Felony judges who perceive themselves to be skilled at negotiating, who face long trial time in individual cases, who sit in courts not governed by a rule prohibiting plea involvement, who hear only criminal cases in their current assignment, and

[25] The use of an ordinal-level dependent variable in regression analysis suggests the need for some caution in interpretation. The analyses are presented primarily as verification of the bivariate analysis. For arguments in support of utilizing interval-based statistical techniques with ordinal data, see Gurr (1972) and Labovitz (1967).

TABLE 8

PREDICTORS OF FELONY AND MISDEMEANOR JUDGES' PARTICIPATION IN PLEA BARGAINING: SUMMARY OF MULTIVARIATE ANALYSIS

	Beta	
	Felony	*Misdemeanor*
Court Rule Prohibiting Judicial Participation	−.18	−.15
Judge's Perception of Own Skill at Negotiation	.22	NC
Type of Assignment[a]	.14	ns
Trial Time for Typical Armed Robbery Case	.13	NA
Stability of Prosecuting Attorneys in Courtroom[b]	.12	NC
Availability of Jury Trial	NA	.18
Timing of Guilty Pleas[c]	NC	.16
Years on Bench	ns	.11
Who Conducts Prosecution in Courtroom[d]	NA	.09
Community Size	ns	ns
R =	.42	.27
R^2=	18%	8%
N	(1777)	(435)

Table Key: NA = not applicable; NC = not collected for sample; ns = not statistically significant.

a. Criminal assignment coded high; general assignment coded low.

b. Moderate stability (3 months to 2 years) coded high; no stability or extreme stability (2 years or more) coded low.

c. Judges in courts where most guilty pleas occur *after* initial appearance (i.e., either at pretrial conference or on day of trial) were coded high; at initial appearance coded low.

d. Judge-conducted prosecution coded high; all others (prosecutor or police) coded low.

whose prosecutors achieve some (but not too much) longevity in their courtroom are more likely to become actively involved in plea discussions. Taken together, these five variables account for 18 percent of the variation, a small but not trivial amount. The relative import of each of these variables is not greatly different, though the judge's perception of his skill at negotiating is the most important and prosecutorial stability the least important.

Misdemeanor judges who sit in courts where a jury trial is available to the defendant, where guilty pleas are most likely to occur after the defendant's initial appearance, and where there is no restrictive court rule are more likely to participate in plea discussions. To a lesser degree, judges who have been on the bench for a number of years and who are occasionally required to conduct the prosecution themselves (in lieu of a prosecutor) are also more likely to participate in plea negotiations. These five variables together account for only 8 percent of the variation, an amount smaller than that for felony judges. For both felony and misdemeanor judges, community size does not exert any direct or independent effect. That variable is thus nothing

more nor less than the sum of certain structural and operational characteristics of local courts and concomitant judicial perceptions.

In sum, differences between felony and misdemeanor courts may mask the extent of similarities in the plea negotiation process in these courts, especially in the judge's role in plea negotiations. In both levels of trial court, the judge responds to court rules, existing case law or dicta,[26] the pressures of jury trials (either their availability or cost in time), familiarity with, or presence of, a prosecutor, and a variety of unknown factors, in fashioning for himself a role in the plea bargaining process. It is particularly important to emphasize the significant weight of variables still to be identified, given the low multiple correlation coefficients. Judicial "personality," the norms of the local court (expressed either through the presiding judge or colleagues), and attorney behavior[27] undoubtedly influence the behavior of the individual judge.

III. CONCLUSION

We have analyzed the trial judge's role in plea negotiations—in particular, his level of overt involvement in plea discussions. Though findings in this area carry important implications for questions of judicial administration, including the efficacy and appropriateness of procedural rules, it is the relationship between such involvement and the judicial role in sentencing that is most theoretically significant.

It has been commonplace for most research to deemphasize the actual role of the trial judge in sentencing, given the high proportion of cases that result in guilty pleas. The values of the prosecutor (see Carter, 1974), the parole board (see O'Leary and Nuffield, 1972; Dawson, 1969), and the legislature (see Cole, 1977) have been increasingly scrutinized as they affect sentencing. Although it is unquestionable that these actors play an important, if variable, role in sentencing, our data strongly suggest that the trial judge also must be reckoned with. One in four felony judges and one in five misdemeanor judges participate in the substance of plea negotiations with counsel, and in doing so influence, sometimes even dominate,

[26] The difficulty of coding reliably the case law or *dicta* of each state on judicial participation in plea bargaining precluded its entry into the multiple regression models.

[27] Based upon our observations in selected misdemeanor courts, private counsel and public defenders may interact with the judge in different ways. In one court, private counsel did not give judges with a "tough" sentencing reputation the opportunity to negotiate actively (see Alfini and Ryan, 1977).

the sentencing decision upon which the courtroom workgroup "agrees." An additional, if smaller, group of judges "passively" attend such discussions, in order to control the influence of attorneys over sentencing. By his mere presence the judge, even if not actively involved in the give-and-take of bargaining over sentence, helps to restrict the introduction of conflicting values in sentencing and to facilitate the flow of information relevant to sentencing. These two groups of judges—those who participate in and those who attend plea negotiations—constitute fully one-third of felony and misdemeanor judges.

But "ratifiers"—judges who restrict their overt role to placing an imprimatur in the courtroom upon attorney agreements—also sometimes participate in sentencing decisions. One type of participation by some judges who characterize their role in plea negotiations as limited to ratification arises from the expectations attorneys bring to the courtroom. Judicial sentencing philosophies and patterns are known by prosecutors, public defenders, and private defense counsel with a very high degree of reliability, or at least interpersonal agreement.[28] This information leads to judge-shopping, where possible, but in any event it tends to produce plea agreements that conform broadly, or sometimes even precisely, to the sentencing patterns of the trial judge. It is this fear of rejection of plea agreements among attorneys that ensures some role in sentencing decisions for many judges who take no overt part in plea discussions per se.[29] Equally, however, some judges consistently ratify agreements they would not have formulated had they participated in the negotiations. They may do this for "administrative" purposes (to move cases), or in deference to attorneys. Still other judges may have no clearly formulated sentencing philosophy and may follow no pattern in the

[28] In the St. Paul (Minnesota) Municipal Court (an eleven-judge court), we found that prosecutors' mean ratings of judges' sentencing philosophy (measured by a semantic differential) were strongly correlated with those of private defense counsel (r=.85) and with those of public defenders (r=.93), and that private defense counsel ratings of judges were strongly correlated with those of public defenders (r=.84). These findings are particularly significant because the potential sentencing range is so narrow in Minnesota misdemeanor courts, which are constrained by a maximum of three months in county jail (see Alfini and Ryan, 1977).

[29] This assessment of the trial judge's role in plea bargaining is similar to that reached by Heumann (1978:152), who commented: "The judge's significance for the plea bargaining process, then, rests in his potential power to upset negotiated dispositions." Heumann downplays the frequency or significance of actual judicial participation in plea discussions in the Connecticut courts he studied. Such an emphasis is not inconsistent with our data from Connecticut (statewide), which indicate that a small percentage (13 percent) of judges participated in plea discussions.

sentences they impose. In these instances, the values of the attorneys do indeed dominate. The exact proportions of "ratifiers" who fall into each of these three categories cannot be determined from our data, either observational or survey, but should be the subject of future research.

In light of the data we have presented and the inferences drawn, it is likely that most trial judges in felony and misdemeanor courts are significantly involved in sentencing decisions belying the notion that trial judges generally have surrendered their sentencing prerogatives through the plea negotiation process.[30] We have, in a very limited way, been able to explain some of the variation in overt participation in plea discussions among felony and misdemeanor court judges by examining legal cues, organizational influences, and individual judicial preferences. In addition, a specification of contextual variables can supplement our analysis. Interactions with attorneys, both prosecutors and defense counsel, seem to shape the behavior of judges in subtle and complex ways. For example, prosecutors may need to be assigned to the courtroom of a particular judge for some time in order to be socialized to recommending "appropriate" sentences, at which point the judge may become less involved in the discussions leading to sentence decisions (or even totally uninvolved). It is such subtleties in the plea negotiation and sentencing processes that need further research in field settings.

Finally, what impacts are likely to flow from judicial participation in plea discussions? This is an important policy issue that surrounds our empirical data but to which we have not spoken directly. Revisionist reformers (Morris, 1974) see at least two areas in which an expanded judicial role in plea bargaining may benefit defendants: risk management and fairness in sentencing. Where judges participate actively in plea negotiations, especially when the result is a commitment to a particular sentence, defendants may experience less uncertainty about the outcome, enabling them to make more informed decisions. But do they? Also, under which circumstances does

[30] Trial judges participate in sentencing decisions in yet another way. In probation violation hearings it is the judge who must decide what to do with a defendant, usually the same judge who sentenced the defendant to probation in the first place. Defense counsel may make a strong pitch to keep their clients out of jail or state prison, but prosecutors usually stay out of this decision entirely. From our observations in felony courts, this may be the trial judge's most frequent, and most difficult, involvement in the sentencing process. In these situations, there is no person or group to whom the judge can diffuse responsibility for sentencing (Blumberg, 1967).

more information lead to (more) coercion? Second, direct judicial participation affords the trial judge a viable opportunity to control or limit the size of the penalty incurred by defendants for refusing to plead guilty and instead going to trial. But do participating judges reduce this kind of sentencing disparity (or do they actually increase it)? These and other questions related to policy and to normative theories of criminal jurisprudence can be tested with appropriate empirical data. We encourage others to begin utilizing empirical perspectives to attack these sensitive but central concerns of plea bargaining.

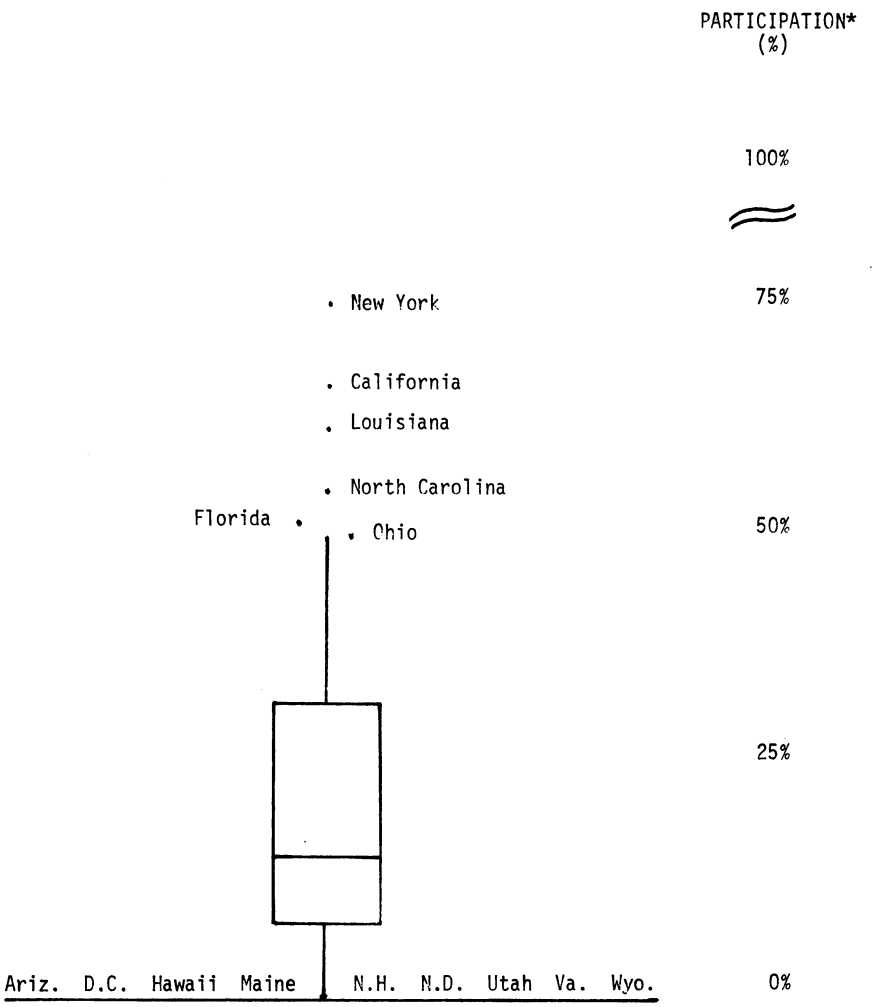
APPENDIX

The box-and-whisker plot in Figure A-1 indicates that the distribution of states along the variable—felony judges' involvement in plea discussions—is rather sharply skewed toward the low end. That is, in most states relatively few judges participate. The median state value (indicated by the horizontal line inside the box) lies at 13.5 percent, and the midpoint state between the median and the extreme upper value (top of box) lies only at 29 percent. Thus, in three-fourths of the states less than 30 percent of felony judges participate in plea discussions. A handful of states—those six indicated well above the box—disproportionately contribute to the phenomenon of judicial participation, both by their high rate of participation and because of the large number of judges in courts of general jurisdiction in these states. For a more detailed discussion of the utility and interpretation of box-and-whisker plots, see Tukey (1977).

We have not attempted a parallel summary for misdemeanor judges because our sample size is unreliably low in a number of states.

Figure A-1.

Felony Trial Judges' Participation
in Plea Discussions by State:
A Box-and-Whisker Plot Summary



*Includes "Recommend" and "Review" categories.

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REFERENCES

ABRAMS, Norman (1971) "Internal Policy: Guiding the Exercise of Prosecutorial Discretion," 19 *UCLA Law Review* 1.

ALFINI, James J. and John Paul RYAN (1977) "Trial Judges' Participation in Plea Bargaining: How Much, Why, With What Results?" Presented at the Annual Meeting of the Southern Political Science Association, New Orleans.

ALFINI, James J. and Rachel N. DOAN (1977) "A New Perspective on Misdemeanor Justice," 60 *Judicature* 425.

ALSCHULER, Albert W. (1968) "The Prosecutor's Role in Plea Bargaining," 36 *University of Chicago Law Review* 50.

——— (1975) "The Defense Attorney's Role in Plea Bargaining," 84 *Yale Law Journal* 1179.

——— (1976) "The Trial Judge's Role in Plea Bargaining, Part I," 76 *Columbia Law Review* 1059.

AMERICAN BAR ASSOCIATION. PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE (1968) *Standards Relating to Pleas of Guilty.* Chicago: American Bar Association.

AMERICAN BAR ASSOCIATION SECTION OF CRIMINAL JUSTICE (1977) 5(2) *Criminal Justice* k.

AMERICAN LAW INSTITUTE (1975) *Model Code of Pre-Arraignment Procedure.* Washington, D.C.: American Law Institute.

BATTLE, Jackson B. (1971) "In Search of the Adversary System: The Cooperative Practices of Private Criminal Defense Attorneys," 50 *Texas Law Review* 60.

BAZELON, David L. (1973) "The Defective Assistance of Counsel," 42 *University of Cincinnati Law Review* 1.

BEQUAI, August (1974) "Prosecutorial Decision-Making: A Comparative Study of the Prosecutor in Two Counties in Maryland," 4 *Police Law Quarterly* 34.

BLUMBERG, Abraham S. (1966) "The Practice of Law as Confidence Game: Organizational Cooptation of a Profession," 1 *Law & Society Review* 15.

——— (1967) *Criminal Justice.* Chicago: Quadrangle Books.

BOND, James E. (1976) "Plea Bargaining in North Carolina," 54 *North Carolina Law Review* 823.

BUBANY, Charles P. and Frank F. SKILLERN (1976) "Taming the Dragon: An Administrative Law for Prosecutorial Decision-Making," 13 *American Criminal Law Review* 473.

CARTER, Lief (1974) *The Limits of Order.* Lexington, Mass.: Lexington Books.

CASPER, Jonathan D. (1972) *American Criminal Justice: The Defendant's Perspective.* Englewood Cliffs, N.J.: Prentice-Hall.

CHURCH, Thomas W., Jr. (1976) "Plea Bargains, Concessions, and the Courts: Analysis of a Quasi-Experiment," 10 *Law & Society Review* 377.

COLE, George F. (1970) "The Decision to Prosecute," 4 *Law & Society Review* 331.

——— (1977) "Will Definite Sentences Make a Difference?" 61 *Judicature* 58.

COX, Sarah J. (1976) "Prosecutorial Discretion: An Overview," 13 *American Criminal Law Review* 383.

DASH, Samuel (1968) "The Defense Lawyer's Role at the Sentencing Stage of a Criminal Case," 54 *Federal Rules Decisions* 315.

DAWSON, Robert O. (1969) *Sentencing.* Boston: Little, Brown.

EISENSTEIN, James and Herbert JACOB (1977) *Felony Justice: An Organizational Analysis of Criminal Courts.* Boston: Little, Brown.

FEELEY, Malcolm (1975) "The Effects of Heavy Caseloads." Presented at the Annual Meeting of the American Political Science Association, San Francisco (September 5).

FEIT, Michael A. (1973) "Before Sentence is Pronounced: A Guide to Defense Counsel in the Exercise of his Postconviction Responsibilities," 9 *Criminal Law Bulletin* 140.

FERGUSON, Gerard A. (1972) "The Role of the Judge in Plea Bargaining," 15 *Criminal Law Quarterly* 26.

GALLAGHER, Kathleen (1974) "Judicial Participation in Plea Bargaining: A Search for New Standards," 9 *Harvard Civil Rights-Civil Liberties Law Review* 29.

GURR, Ted Robert (1972) *Politimetrics.* Englewood Cliffs, N.J.: Prentice-Hall.
HEUMANN, Milton (1975) "A Note on Plea Bargaining and Case Pressure" 9 *Law & Society Review* 515.
——— (1978) *Plea Bargaining: The Experiences of Prosecutors, Judges, and Defense Attorneys.* Chicago: University of Chicago Press.
KOBLENZ, M. R. and C. P. STRONG, Jr. (1972) "Justice: A Word to Bargain," 8 *The Prosecutor* 388.
KRANTZ, Sheldon, Charles SMITH, David ROSSMAN, Paul FROYD and Janis HOFFMAN (1976) *Right to Counsel in Criminal Cases: The Mandate of* Argersinger *v.* Hamlin. Cambridge, Mass.: Ballinger.
LABOVITZ, Sanford (1967) "Some Observations on Measurements and Statistics," 56 *Social Forces* 151.
LAGOY, Stephen P., Joseph J. SENNA and Larry J. SIEGEL (1976) "An Empirical Study on Information Usage for Prosecutorial Decision-Making in Plea Negotiations." 13 *American Criminal Law Review* 435.
MATHER, Lynn M. (1974) "Some Determinants of the Method of Case Disposition: Decision-Making by Public Defenders in Los Angeles," 8 *Law & Society Review* 187.
MCINTYRE, Donald M. and David LIPPMAN (1970) "Prosecutors and Early Disposition of Felony Cases," 56 *American Bar Association Journal* 1154.
MILLER, Herbert S., William F. McDONALD and James A. CRAMER (1978) *Plea Bargaining in the United States.* Washington, D.C.: National Institute of Law Enforcement and Criminal Justice.
MORRIS, Norval (1974) *The Future of Imprisonment.* Chicago: University of Chicago Press.
NARDULLI, Peter F. (1976) "Criminal Justice Reform in Cook County Courts: Is More Always Better?" 2(8) *Illinois Issues* 5.
NEUBAUER, David W. (1974) *Criminal Justice in Middle America.* Morristown, N.J.: General Learning Corporation.
NIMMER, Raymond T. and Patricia Ann KRAUTHAUS (1977) "Plea Bargaining: Reform in Two Cities," 3 *Justice System Journal* 6.
O'LEARY, Vincent and Joan NUFFIELD (1972) "Parole Decision-Making Characteristics: Report of a National Survey," 8 *Criminal Law Bulletin* 651.
RYAN, John Paul, Allan ASHMAN, Bruce D. SALES and Sandra SHANE-DuBOW (forthcoming) *America's Trial Judges at Work: The Role of Organizational Influences.* New York: The Free Press.
TUKEY, John W. (1977) *Exploratory Data Analysis.* Reading, Mass.: Addison-Wesley.
U.S. NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS (1973) *Courts.* Washington, D.C.: Government Printing Office.
YALE LAW JOURNAL (1972) "Comment: Restructuring the Plea Bargain," 82 *Yale Law Journal* 286.