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A Brief Look at Broward County Lawyers' and Judges' Attitudes Toward Plea
Bargaining as a Tool of Courtroom Efficiency.

by Mohammad A. Faruqi

I

Introduction:

A legal community's attitude toward a specific tool of practice in criminal law, such as plea bargaining, can have significant effects on the manner in which lawyers and judges practice criminal law and on the potential outcomes of defendants. Research and observation in a Broward County, FL courtroom has shown that most lawyers and judges depend on the use of criminal pleas to maintain a steady flow of cases and to ensure that only the most serious cases are given the time, energy, attention and expense of a trial.¹ The practitioners, including even the most rigidly ideological prosecutors, acknowledge that they need to plea out most of the less serious criminal charges to ensure justice without incurring an unmanageable backlog of cases. But those who are in positions of power, such as legislators, judges or state attorneys, will often tweak the plea bargaining environment to suit their socio-political philosophy about crime and punishment. They achieve this by making it difficult or easy for defendants to make plea arrangements or by adding restrictions to a judge's or assistant state attorney's discretion on sentencing or charging decisions.²

The nature of plea bargains changed over time because of this tweaking. Tough prosecutorial policies and numerous minimum sentencing guidelines that have evolved over time make it more difficult for public defenders to successfully negotiate a lesser punishment for their clients' guilty plea.³ One Broward County assistant public defender said that plea arrangements lack room for negotiation when a state attorney or a judge act rigidly on their policy or are given little room to wiggle on a policy that they did not establish themselves.⁴ Although politicians and the public demand that prosecutors and judges should be tough on crime, the lack of at least some flexibility on the part of prosecutors and judges can have detrimental effects on the criminal system. This is especially true if the lack of flexibility causes defendants to refuse to plea en masse, so that defendants are effectively holding lawyers and the court hostage to the added case pressure.⁵

This essay will explore the attitudes of a few local practitioners toward plea bargain practice and will compare their attitudes to Milton Heumann's discovery of practitioners' attitudes in Connecticut jurisdictions in the 1970s.⁶ Part II of the essay will show that although lawyers in Broward County who practice thirty years later hold the same beliefs about the need for plea bargaining, they do not necessarily make the same jaded comments about smaller cases. Current practitioners look at plea bargaining as a necessary tool of "exploring punishment availability" more than they see it as an escape valve for cases that are difficult to try or not worth trying.⁷

Heumann also argues that caseload pressure is not the significant reason that most criminal cases do not go to trial.⁸ Part III of the essay will show that despite Heumann's theory, the practitioners' belief that the plea arrangement system greatly alleviates lawyers' and judges' caseloads still persists. It is because of the immortality of this belief that most defendants serve lesser sentences than they would have if they were convicted in trial.⁹ A state executive summary reviewing the effects of Alaska's attempt to ban plea bargain practice will also shed some light on the case pressure theory.¹⁰ The bans successes seem to confirm Heumann's objection to the case pressure argument but its failures might support the belief that plea bargain practice alleviates caseloads. Alaska is the only state that enacted a general ban on plea arrangements.

Parts IV and V are brief visitations to the possibility of abuse of the plea arrangement system and to an experimental pre-trial settlement conference program that was conducted in Dade County thirty years ago.¹¹ These two concepts sometimes spur questions about the structure of the plea arrangement system. The purpose of these two parts is to merely echo an alarm that researchers often ring about weaknesses in the criminal justice system, and to add some context to this paper's big picture of plea bargain practice. The conclusion in Part VI will show that despite some uproar that existed in the mid-20th century about alleged overuse of plea bargains, the practice is still accepted today as a staple of criminal law.¹² It is the acceptability of this practice, despite the public's general dislike for plea bargains, which makes reduced sentences possible for the majority of relatively minor criminal charges.

II

Attitudes About The Big Picture:

Today's attorneys seem to show a more positive attitude toward plea bargain practice and they face a public that might be somewhat more accepting to the concept of plea bargains than thirty years ago. Public defenders often fight for and reasonable state attorneys often fish for the "best available sentence" for each defendant.¹³ Lawyers and judges feel that when plea bargains are appropriate, they each serve their respective interests properly. But one complaint that many current practitioners have is that prosecutors and judges have far less discretion in charging and sentencing decisions than was available thirty years ago. This lack of discretion makes it difficult for defense attorneys to negotiate a lesser sentence when circumstances compel them to seek such reductions. This is one factor that can dampen practitioners' attitudes toward plea bargain practice.

Heumann's study showed that, in the 1970s, many judges and attorneys in busier jurisdictions felt that most of the plea-able cases were "garbage cases" or the result of "Mickey Mouse crimes."¹⁴ Prosecutors and defense attorneys often said, "Nickel-and-dime cases are not seen as being worthy of extensive plea negotiations."¹⁵ Had defendants overheard such jargon, they might have felt that the attorneys were slighting the defendants' personal situation and did not care whether they would receive a just outcome. A defendant who has no prior record or only one prior conviction might hold a more catastrophic view of his fate than the lawyers would when he faces a long-term loss of liberty. Even clients

who willingly take a three- or five-year prison term after a successful plea bargain, knowing that they would have faced a stiffer sentence had they lost in a jury trial, would need to warm up to the idea that they will lose their liberty.

Current attorneys in Broward County characterize their reasons to plea in a somewhat different manner. Although they acknowledge that plea arrangements move the volume of cases efficiently, current practitioners do not display a lack of willingness to work hard for smaller cases. They merely talk about how much it takes to prepare for the larger cases that will go to trial. Prosecutors and defense attorneys clamor that it seems they are always preparing for a trial.¹⁶ Today's lawyers insist that they only consider plea arrangements, if they think it is the right thing to do, after evaluating a defendant's prior background, strength of the case, and seriousness of the offense.¹⁷ One assistant state attorney compared trial preparation to practicing hard for an important varsity sports event.¹⁸ He said he was operating on three to four hours of sleep per night for a case that he was currently preparing. The prosecutor observed that preparation is far more taxing than the actual trial, and that lawyers simply want to go home and watch TV after trying even a simple drug possession case.¹⁹ Public defenders have similar sentiments about the need to thoroughly prepare for a case that will go to trial. They believe that having thirty to forty open case files at a given time is far more manageable than having three or four times as many active triable cases because of the preparation required for each case.²⁰

But the lack of discretion for prosecutors and judges can sometimes dampen the legal community's attitude toward plea bargain practice. Defense attorneys have little to worry about their own discretion because they are only responsible to their clients. But defense attorneys feel that strict policies in the state attorney's office and a plethora of legislated sentencing guidelines have put a chokehold on the plea arrangement environment. There is no longer room for negotiation because of minimum sentencing guidelines that do not take into account extenuating individual circumstances.²¹ The Florida 10-20-Life statute dictates that a person convicted of pointing a gun gets a minimum of ten years in state prison for each offense committed. The Broward County courthouse saw the case of a Nathaniel Samuels in Summer 2003, where the defendant was charged with eleven counts of armed robbery. Samuels was a middle-aged man with no prior criminal history who suffered a breakdown after his wife died under tragic circumstances.²² Although Samuels would have served 110 years if he was convicted of all counts, he will serve twenty years because of his plea arrangement. But the circuit judge who presided over the case believed the resulting sentence was still too harsh, and it made him feel as if the sentencing scheme was always on "auto-pilot" because of the minimum sentence statutes. These statutes are a product of legislative response to many judges' alleged failures to do their job.²³

A circuit judge in Broward County believes that the Broward County State Attorney's Office has such rigid policies that it is more difficult to plea bargain with its assistant state attorneys than with their counterparts in Dade County. A

person facing a cocaine delivery charge in Broward County will routinely be offered eighteen months in state prison despite the lack of a prior criminal background.²⁴ The State Attorney's Office knows that most defendants will simply not take a plea when faced with such a sentence, and the defense makes an open plea to the judge in the hopes that the court will lower the sentence to a fairer level of punishment. The Dade County State Attorney's Office has no such policy. Defendants in Dade County who face the same charge are simply released on probation if the defendant has no prior background. The circuit judge said he too would rather give a similar defendant two years probation. "If he violates the probation then he should go to prison," he said. "Or else if he never violates the probation then God bless him."²⁵ Another reason that defense attorneys in Broward County find it difficult to plea for a lesser sentence is that prosecutors are wholly answerable to their supervisors. The assistant state attorneys have very little discretion in the court room and often reply to defense attorneys' requests with, "I cannot do that, I have to ask my supervisor."²⁶ Public defenders become extremely frustrated when they successfully reason with an assistant state attorney toward a plea arrangement, but cannot procure an actual agreement because of restrictions to the prosecutor's decision-making authority.

Current practitioners have for the most part shown a strongly positive attitude toward plea bargain practice because they see it as a very effective tool for case count control. But lawyers and judges do show frustration when they cannot use their discretion to treat an exceptional case differently, and it is

sometimes a source of tension between prosecutors and defense attorneys during plea negotiations.

III

Judicial Economy Argument:

Lawyers and judges have always pointed to case volume flow and efficiency as the direct result of plea bargain practice.²⁷ Practitioners strongly believe that they would face a crushing case volume if the plea arrangement system did not exist. But Heumann disputes this belief and has held on to his theory for more than thirty years.²⁸ Despite his insistence that the practice of taking pleas for most of the cases will never have a connection with the overall judicial economy, the legal community will likely continue to believe that plea bargains alleviate case pressure. Heumann says little about what else is the likely reason that the majority of criminal cases plea out, other than the fact that, “Cases are different that go to trial than those that plea.”²⁹ But he does briefly posit in his Connecticut study that court personnel assume that “90 percent of the defendants in the court are factually guilty,” and such people are rewarded by the system with a lower sentence if the defendants plea guilty.³⁰

Circuit judges only have so many days to try cases and would rather not deal with relatively smaller cases when the judges could devote time to serious cases.³¹ One judge estimated that because of his daily dockets of plea-able cases, he only has 150 to 175 days per year available to try serious cases.³² A courtroom also faces significant down time if a defendant in a serious case pleas guilty or nolo contendere in the middle of trial because judges often clear their

schedules for one or more days to make room for the trial.³³ It is because of these sometimes aggravating chain of events that judges feel they are at a loss for adequate trial time. The prosecutors themselves set the pace and case volume by deciding which cases to try and when to offer a plea arrangement. But even they complain about “an already clogged system in which the attorneys would be exhausted all the time” were it not for the judicial economy achieved through plea bargain practice.³⁴ Even when an assistant state attorney only has fifteen cases in a seven-month period in which he had to pick a jury, the prosecutor feels that he is always preparing for cases.³⁵

But to break the legal community from its strongly held belief in the case pressure argument, Heumann attempted to make a statistical analysis comparing large and small jurisdictions in his Connecticut study. Heumann also studied the effects on plea bargain practice in Connecticut after court jurisdiction for felony cases that involved up to five years in state prison were realigned.³⁶ When the circuit courts began taking such felony cases, the superior courts were relieved of a significant burden and were able to concentrate on serious crimes that were punishable by more than five years in state prison.³⁷

The study assumed that the legal community believes that if there were a lower volume of cases in a given court, then a higher percentage of cases would be in trial. The statistical analysis was molded to address that assumption, and it showed that between the years 1880 and 1954, the Connecticut courts with low case volume “did not try substantially more cases than the high volume courts.”³⁸ Heumann concluded that there was a negligible difference in trial rates despite a

large difference in actual case pressure.³⁹ He also observed that sometimes low-volume courts tried proportionately fewer cases than high-volume courts.⁴⁰

The study's second test, which compared the caseloads of Connecticut superior courts before and after jurisdiction realignment, returned an even more dramatic rebuttal to the case pressure theory. The superior courts employed the same number of judges and state attorneys after jurisdictional realignment as they did before, even though they processed two thousand fewer cases between June 1972 and June 1973 than in the previous year.⁴¹ This allowed Heumann to "examine the impact of the relative decrease in case pressure on specific superior courts" when the personnel levels were constant.⁴² He found that the three busiest superior courts still had the same rate of trials even though their case pressure was half of what it was the previous year, and the results in lower volume courts were mixed but still constant in the eye of statistical standards.⁴³ It is because of these two tests that Heumann was convinced that case pressure has no relationship with the rate at which case disposition is achieved by plea bargain.

But Heumann agreed with most legal scholars that there was no case for banning plea bargains because it is impossible. One reason is that the "guilty plea is legally protected, and concessions to the defendant who pleads guilty may readily be justified in terms other than saving the state time and money."⁴⁴ But a national commission had called for general bans on plea bargain practice and Alaska was the one state that acted upon that recommendation.⁴⁵ The state's attorney general enacted the ban in 1975 through an inter-office

memorandum forbidding all state attorneys who work in state courts from engaging in charge bargaining or sentence bargaining with defendants, except with “sexual abuse or assault cases, drug cases, and those involving informants.”⁴⁶ The ban affected almost all courts in Alaska because only Anchorage and Fairbanks have any municipal courts, and because the Alaskan justice system is highly centralized.⁴⁷ The Alaska Judicial Council’s study showed that the ban caused police work to improve because state attorneys were now solely responsible for filing charges against a defendant. Prosecutors engaged in screening, which meant they sifted through arrests and filed charges only under the standard of “beyond a reasonable doubt” instead of probable cause. This triggered police to investigate cases more thoroughly lest their felony referrals to prosecutors were rejected. The entire scheme resulted in a somewhat lighter case volume throughout the courts and a higher rate of cases going to trial.⁴⁸

But the ban suffered from two major failures. Although sentence bargaining disappeared, charge bargaining returned in full-swing ten years after the ban and began to play a more significant role in court than before the ban.⁴⁹ The Alaska Judicial Council acknowledged the state was too ambitious to strictly prohibit charge bargaining, and it concluded that the overall policy against plea bargain practice had decayed over the years.⁵⁰ The decay became especially acute when Alaska’s two episodes of economic recession made the state increasingly conscious about the expense of taking such a high ratio of cases to trial.⁵¹ The other failure was that prosecutors in some parts of Alaska ignored or

misinterpreted the general ban, with the district attorney in one jurisdiction believing that plea-bargaining was just “frowned on to some degree.”⁵² Many rural jurisdictions just found plea-bargaining unavoidable in their localities and hardly changed their practice after the ban. Localities in the Alaskan Bush that adhered to the ban were sometimes seen as overly sensitive to the statewide policy.⁵³

It is safe to assume that some of the failures of Alaska’s ban on plea bargain practice are largely the function of lawyers’ and judges’ attitudes toward the practice. Only a minority of practitioners opposes the concept of using plea bargain practice as a tool of efficiency whether or not the case pressure theory holds any water. The judicial economy argument will probably prevail among practitioners and legal scholars who support the use of plea bargain practice. They might also perceive Alaska as an exceptional jurisdiction that harbors a different legal culture and handles far fewer cases than a jurisdiction such as Florida. The Broward and Dade counties in Florida have such an immense criminal case load that they might not have the flexibility necessary to institute a general ban on plea bargain practice even as an experiment.

IV

Potential Room For Abuse:

The plea arrangement system leaves some room for unscrupulous criminal defense attorneys, especially those in private practice, to use a criminal plea for their personal gain. One critic of the current state of criminal malpractice laws cited a case involving a guilty plea as prime example of what could

happen.⁵⁴ In the example given, Johnie Gibson's representatives Jerry Cunningham and Douglas Trant asked Gibson to persuade his co-defendants to hire the same two lawyers for their selves. The co-defendants hired Cunningham and Trant, and then the two lawyers coerced Gibson to plead guilty to the federal drug charges in exchange for what they said would be a paltry eight to ten years in prison.⁵⁵ Gibson could not win his lawsuit against Cunningham and Trant because the civil court ruled, "the guilty defendant is entirely to blame for his predicament and is the sole proximate cause of any injury sustained as a result of his conviction."⁵⁶ Duncan proposes that criminal malpractice law should be reformed by allowing, "criminal malpractice claimants to file their claims contemporaneously with any post-conviction proceedings."⁵⁷ This may have the effect of closing one loophole that allowed abuse of the plea arrangement system.

But such behavior does trigger some questions. Can some private practice attorneys resort to plea bargains, not only to push case volume to earn a living, but also to avoid the possibility of facing malpractice inherent in a risky trial where a lawyer could make mistakes?⁵⁸ If so, does that mean less scrupulous lawyers or lawyers engaging in defensive-practice can negligently overlook the possibility that any given client might be better served if the attorney took the risks of a trial?⁵⁹ What about the potential for abuse where "private defense counsel may have an economic incentive if their fee is the same whether the defendant pleads or goes to trial?"⁶⁰ Finally, one question that was frequently raised by scholars and active practitioners is whether certain tactics in plea

bargain practice can sometimes give the appearance that “justice is for sale.”⁶¹

There may be some value in studying whether such practices exist in South Florida despite the state’s strict ethical standards, and whether they are frequent or rare.

V

Fate of A New-Age Experiment:

When plea bargain practice became unpopular and the National Advisory Commission on Criminal Justice Standards and Goals recommended that plea negotiations be abolished, Dade County, FL became an ideal jurisdiction for an experimental alternative to plea arrangements. The National Institute of Law Enforcement and Criminal Justice, under the U.S. Department of Justice, acted upon a 1974 proposal that “judges should play a more active role in plea negotiations and that victims and defendants should be invited to participate in these discussions.”⁶² The experiment involved a taking a random sample of 1,074 felony cases in Dade County from February 1977 to February 1978, of which three hundred and seventy-eight were assigned to pre-trial settlement conferences and the rest were in a control group, and comparing the satisfaction of lay parties including the victim, defendant, and arresting police officer.⁶³ Cases that were assigned to pre-trial settlement conference were handled in a more business-like manner as if an arbitration between two corporations were to occur. A conference was held in the judge’s chambers instead of in the courtroom, the judge wore a business suit instead of a robe, and all parties were able to give their input before decisions were made.⁶⁴

The results of the experiment were inconclusive because the National Institute of Law Enforcement and Criminal Justice could not find another jurisdiction in the United States willing to participate in the experiment, so the institute was stuck with examining only one sample jurisdiction.⁶⁵ The lack of another sample jurisdiction was compounded by Dade County's existing pre-trial intervention program, which had been in effect since 1972 and had many striking similarities to the pre-trial settlement conference experiment.⁶⁶ The only difference was that Dade County's existing program did not have judicial involvement in the process. The Institute acknowledged that the pre-existence of Dade County's pre-trial intervention program "reduces the differences in treatment between test and control cases. This may make the results less noticeable than they would be in a jurisdiction which did not utilize these techniques."⁶⁷ The one positive remark that the Institute could make was that the program worked, that all lay parties were generally more satisfied than in conventional proceedings, and that the experiment "did not place undue stress on the felony disposition process in Dade County."⁶⁸

Current practitioners spoken to for this essay professed no knowledge about the Dade County pre-trial settlement experiment, but one assistant public defender showed some visceral opposition to the idea of a judge actively participating in the negotiation of a defendant's fate. She said the nature of conventional plea-bargaining is almost the opposite of pre-trial settlement conferences because a judge is supposed to be a neutral and detached magistrate.⁶⁹ The assistant public defender suggested it would be appropriate

for a judge to be nominally involved in a plea negotiation “at the request of one party.” A typical scenario would involve the prosecutor’s refusal to offer a lower sentence when the defense believes the standing offer is unfair to the defendant, and the defense attorney asks the judge for an opinion on the offer.⁷⁰

The pre-trial settlement conference, as an alternative to conventional plea bargain practice, is not likely to gain popularity in Broward County based on the initial reactions of a small sample of practitioners. But the concept might be worth re-experimenting with cases where defendants only face restitution as a penalty because pre-trial settlement conferences have an ambiance that is similar to arbitration proceedings.

VI

Conclusion:

Current practitioners in Broward County would make staunch defenders of the plea arrangement system as the core of their criminal law practice. The plea bargain practice is such a strong institution in the American criminal justice system that it would be impractical to abolish. Practitioners are heavily dependent on plea negotiations for their efficiency and for leveraging on behalf of their respective interests, and veteran lawyers cannot recall a time when plea-bargaining was not the norm.⁷¹ Heumann’s study showed that plea bargain practice existed for at least one hundred years prior to his work, and a Miami attorney remarked that even the medieval Joan of Arc faced a plea negotiation when the English captured her.⁷² The overall attitude of Broward County judges and lawyers is more positive toward plea bargain practice and far less jaded

about smaller, less serious cases than Connecticut practitioners interviewed in Heumann's study. It is possible that today's practitioners are hiding some of their more cynical attitudes because of modern workplace demands for professionalism and political correctness. But the few interviews showed that the judges and lawyers were sincere in their efforts to achieve the best possible result for their respective interests.

VII

Endnotes:

¹ MILTON HEUMANN: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS (1977) (note that the primary purpose of Heumann's study was to examine how newly-minted prosecutors, public defenders and judges adapt and handle case pressures, which in turn was supposed to shed light into the relationship between case pressure and trial rates. But the data from his study was still significantly useful for this essay); see also, Gary Blankenship, *Debating the Pros and Cons of Plea Bargaining*, The Florida Bar News, Jul. 15, 2003, at 6 (Covering the first annual Professor Gerald T. Bennett Summit on Criminal Justice Issues, in which Milton Heumann was a participant).

² Interview with anonymous circuit judge, in Ft. Lauderdale, FL (July 10, 2003) [hereinafter Circuit judge].

³ Blankenship, supra note 1, at 6.

⁴ Interview with Elizabeth Connolly, assistant public defender, The Public Defender's Office of Broward County, in the Broward County Courthouse, Ft. Lauderdale, FL (July 23, 2003). [hereinafter, Connolly].

⁵ *Id.* (There was one circuit judge in Broward County who would not take pleas unless a two-year probation was attached to defendants' sentences. Public defenders in that court often saw entire days of arraignment hearings in which none of the defendants pled guilty. Defense attorney believe that convicts already facing a jail term would rather go to jail without having to face probation. Defendants do not want to be followed around by the criminal justice system once they have served their time in prison.)

⁶ HEUMANN, SUPRA NOTE 1.

⁷ Connolly (It is interesting that public defenders are using diction such as "What punishment is available" to their clients from the Broward County State Attorney's Office. It is almost as if prosecutors and defense attorneys are bidding and counter-bidding with each other, and that the defendant will eventually sign a contract for a punishment that is essentially a bargained-for service from the state.)

⁸ HEUMANN, SUPRA NOTE 1, at 27-30; see also Blankenship, supra note 1, at 6.

⁹ Blankenship, supra note 1, at 6. (Heumann complains that the case pressure belief is a huge myth that continues to bedevil analyses about plea bargain practice. He says that if the courts had unlimited resources to hold trials, about seventy percent to 80 percent of all cases would still end with pleas).

¹⁰ TERESA WHITE KARNS, ALASKA JUDICIAL COUNCIL, ALASKA'S PLEA BARGAINING BAN RE-EVALUATED (1991) (This study found that Alaska's ban on plea bargaining resulted in improved police work, better prosecutorial screening, and the cessation of sentence bargaining. But charge bargaining simply would not disappear from the Alaskan criminal justice system. The Alaska Judicial Council saw both successes and failures in the State Attorney General's ban on plea bargain practice).

¹¹ Meredith J. Duncan, *Criminal Malpractice: A Lawyer's Holiday*, 37 Ga. L. Rev. 1251 (2003) (A study on why convicted felons almost always lose when they sue their attorneys for malpractice); WAYNE A. KERSTETTER & ANNE M. HEINZ, U.S. DEPARTMENT OF JUSTICE, PRE-TRIAL SETTLEMENT CONFERENCE (1979) [hereinafter PRE-TRIAL SETTLEMENT].

¹² HEUMANN, SUPRA NOTE 1, at 2.

¹³ Connolly (Recall comments, supra 7).

¹⁴ *Id.*, at 38.

¹⁵ *Id.*, at 38.

¹⁶ Dixon.

¹⁷ Connolly; *also* Dixon.

¹⁸ Interview with Andrew Dixon, assistant state attorney, The Broward County State Attorney's Office, in the Broward County Courthouse, Ft. Lauderdale, FL (July 21, 2003) [hereinafter, Dixon]. (It is possible that today's practitioners do not readily use terms such as "garbage cases, Mickey Mouse crimes, or nickel-and-dime cases" because of stricter discipline toward professionalism and political correctness in the modern legal workplace. If such is the case, it makes it so much more difficult to adequately gauge the most deep-seated attitudes that lawyers might have toward the plea arrangement system. There is some indication that current practitioners in Broward County might actually have the same mentality, as practitioners in Connecticut did thirty years ago, because one judge commented that his morning docket consists of "mostly trash." But it is possible that the judge was unique in today's courtroom environment because he comes from a generation that is fifteen to twenty years older than prosecutors and public defenders that carry little or no corporate memory about jargon used in the 1970s. On the other hand, it is possible that judges simply speak more openly than junior prosecutors and defense attorneys.)

¹⁹ Dixon.

²⁰ Connolly (When assigned to a circuit judge that would only accept pleas if defendants took at least two years of probation, defendants' refusal of pleas had caused the public defenders' volume of active case files to balloon. The caseload became so unmanageable that the public defenders assigned to that judge felt that they were not effective defense attorneys.)

²¹ Connolly; *see also* Bernard E. Harcourt, *From the Ne'er-Do-Well to the Criminal History Category: The Refinement of the Actuarial Model*, The New Data: Over-Representation of Minorities in the Criminal Justice System, 66-SUM Law & Contemp. Probs. 99 (2003) (Harcourt argues the individualization of punishment and treatment in post-Victorian criminal practice was the source of judicial and prosecutorial discretionary power between the late 19th century and the 1970s. But because of political pressure to act tough on crime, and because of alleged failures of rehabilitation attempts and other forms of individualized punishment or treatment, judges began to lose discretion once again and the American criminal justice system is gradually returning to Victorian-era charging and sentencing schemes that are mechanical and indiscriminate.)

²² Samuels would have served at least 110 years if he was convicted of all eleven charges. But in exchange for a guilty plea to two counts of armed robbery, the state attorney's office amended the felony information so that the firearm charge was dropped on the other nine counts of robbery.

²³ Circuit judge.

²⁴ Circuit judge; *also* Connolly

²⁵ Circuit judge; *also* Connolly.

²⁶ Connolly.

²⁷ HEUMANN, SUPRA NOTE 1, at 35-40 (Some critics referred to plea bargain practice as "assembly line" justice); *also* Connolly; Dixon; and Circuit judge.

²⁸ HEUMANN, SUPRA NOTE 1, at 24-46; *see also* Blankenship, supra note 1, at 6.

²⁹ Blankenship, supra note 1, at 6. (quoted in article) (Heumann *also* said at the Bennett Summit that programs aimed at circumventing plea bargains are still the functional equivalent of negotiating pleas).

³⁰ HEUMANN, SUPRA NOTE 1, at 156 (Argues that it only matters that the defendant perceives that he received a reward. Heumann says that it's because of high rate of implicit assumption of guilt and the perception of rewards through reduced sentences that, "Court personnel simply recognize the factual culpability of many defendants, and the fruitlessness, at least in terms of case outcome, of going to trial).

³¹ *Id.* at 156 (Court personnel try to create time for serious trials by disposing of less serious cases).

³² Circuit judge (saying that if every defendant was charged with and tried for every crime then the system would break down).

³³ Circuit judge (During my observation, there were incidents in this judge's court where a defendant pled guilty in the middle of a drug distribution case or a sexual battery of a minor case. Once a defendant pled guilty, there was little or no activity in the courtroom for the rest of the day and the judicial assistants scrambled to salvage the next day's schedule by trying to re-open it for the daily docket. Re-opening the next day for the daily docket would then hopefully make room for another potential trial date later in the year); *also* Dixon (explaining that sometimes when he would prosecute a case, some detail might arise in the middle of trial that might cause him to offer the defendant a plea arrangement. A common example is when, in the middle of a trial, a chemist cannot verify that the subject substance that gave rise to a defendant's arrest was an illegal drug).

³⁴ Dixon.

³⁵ Dixon.

³⁶ HEUMANN, SUPRA NOTE 1, at 8 (The circuit courts of Connecticut, which were the lower criminal courts, only had jurisdiction over traffic offenses, misdemeanors, and felonies punishable by a maximum imprisonment of one year. But in 1972 the circuit courts' jurisdiction was increased to felonies punishable by up to five years in prison and/or a five thousand-dollar fine).

³⁷ *Id.* at 30.

³⁸ *Id.* at 29.

³⁹ *Id.* at 30.

⁴⁰ *Id.* at 30.

⁴¹ *Id.* at 30.

⁴² *Id.* at 30.

⁴³ *Id.* at 30.

⁴⁴ *Id.* at 162.

⁴⁵ KARNs, SUPRA NOTE 10, at 10 (Unfortunately the Alaska Judicial Council’s executive summary only referred to “the National Commission” and did not specify which National Commission they were referring to and at what time period had it made such a recommendation. The research did find reference to “the National Advisory Commission on Criminal Justice Standards and Goals” in PRE-TRIAL SETTLEMENT. This National Advisory Commission made the same recommendation that the “National Commission” that the Alaska Judicial Council mentioned. The Alaskan study’s extensive footnotes did not make any subsequent references to or explain about the “National Commission” that it mentioned. So it is unclear whether the two works, KARNs, SUPRA NOTE 10, and PRE-TRIAL SETTLEMENT, refer to the same “National Commission” or “National Advisory Commission”); see PRE-TRIAL SETTLEMENT, at xi.

⁴⁶ *Id.* at 14

⁴⁷ *Id.* at 8. (see footnote 6 of KARNs, SUPRA NOTE 10,).

⁴⁸ *Id.* at 11.

⁴⁹ *Id.* at 11-13

⁵⁰ *Id.* at 17, 13.

⁵¹ *Id.* at 31, 7 (see footnote 4 of KARNs, SUPRA NOTE 10,).

⁵² *Id.* at 13.

⁵³ *Id.* at 13.

⁵⁴ Duncan, supra note 11 (Duncan argues that the system makes it extremely difficult for convicted defendants to sue their attorneys for negligent representation. The defendants cannot win such suits because they fail “to procure previous exoneration of the charges” and because of various public policy reasons. Criminal defense attorneys effectively have such a strong shield against malpractice suits that shady lawyers need not worry about their practices. It is because of such shields that a lawyer might coerce a defendant to take a plea so that the lawyer could unduly profit from the defendant’s loss of liberty.

⁵⁵ *Id.* at 1261, 1262 (citing *Gibson v. Trant*, 58 S.W.3d 103, 105 (Tenn. 2001)) (Johnie Gibson’s lawyers allegedly told him that the prosecutor planned to file charges against Gibson’s elderly father unless Gibson took the plea that was offered to him. When Cunningham and Trant pressured Gibson to take the plea, they told him he would only face eight to ten years in prison. But when Gibson pled guilty, he was sentenced to twenty years without the possibility of parole, which was actually the minimum sentence permitted for the particular charges that Gibson faced.

⁵⁶ Duncan, supra note 11, at 1261, 1262 (Gibson lost his suit because he must first win post-conviction relief before seeking damages from his lawyers. He did attempt to have his involuntary plea vacated but the motion was denied. Duncan used this dilemma of how attorneys could profit from abusing the plea

arrangement system as an example of what unscrupulous lawyers do because they are shielded from malpractice suits.)

⁵⁷ *Id.* at 1256.

⁵⁸ HEUMANN, SUPRA NOTE 1, at 25.

⁵⁹ Duncan, supra note 11.

⁶⁰ *Debating the Pros and Cons*, at 6.

⁶¹ Interview with anonymous private defense attorney, in the Broward County Courthouse, Ft. Lauderdale, FL (July 23, 2003) (He compared plea bargain practice to the stock market; defense attorneys strive to get the lowest possible “price” or sentence for their defendant’s guilty plea, and prosecutors strive for the highest possible “price”).

⁶² PRE-TRIAL SETTLEMENT, at xi.

⁶³ *Id.* at 21.

⁶⁴ *Id.* at 5-6.

⁶⁵ *Id.* at 7 (Most of the localities that refused to participate said that their caseload was too burdensome for such an experiment, that they were already engaged in other experiments, that prosecutors saw judicial participation as an invasion of an executive function, and mostly, that a role in plea discussions was just inappropriate for a judge).

⁶⁶ *Id.* at 8-10.

⁶⁷ *Id.* at 9.

⁶⁸ *Id.* at 126.

⁶⁹ Connolly (Argued that judicial involvement makes pre-trial settlement conferences ethically less desirable because the judge would not adequately fulfill his role if he is not detached and neutral. The judge’s active participation in a plea arrangement negotiation would destroy his appearance of neutrality, and in Florida, it could sometimes be grounds for reversal).

⁷⁰ Connolly (She said the most a judge can do is make a brief remark such as, “I think the state’s offer is fair.” Even with this kind of interaction, judges have to be extremely careful with the use of their terminology to avoid accusations of being non-neutral).

⁷¹ HEUMANN, SUPRA NOTE 1, at 31.

⁷² HEUMANN, SUPRA NOTE 1, at 28-30; see also Blankenship, supra note 1, at 6. (Miami attorney Scott Fingerhut remarks during the Bennett Convention that the English offered Joan of Arc that she, “Recant that she heard God command her to lead the French and they would not burn her at the stake”).