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Recommended Citation

32 Hofstra L. Rev. 1349 (2003-2004)

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DUE PROCESS DENIED: JUDICIAL COERCION IN THE PLEA BARGAINING PROCESS

*Richard Klein**

Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law.¹

Felony Trial Court Judge in Detroit: "All this stuff about jury trials and due process, what it really amounts to is crooks getting not-guilty verdicts."²

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1. MODEL CODE OF JUDICIAL CONDUCT pmbl. (5th ed. 2000). The initial set of ethical standards governing judges were the Canons of Judicial Ethics, but almost fifty years after the Canons were first adopted, the House of Delegates of the ABA enacted the Code of Judicial Conduct in 1972. The ABA Standing Committee on Ethics and Professional Responsibility determined in 1986 that a comprehensive review of the Code was appropriate. Four years later, the Model Code of Judicial Conduct was adopted; it was amended in 1997, 1999, and 2003. *See id.* At the August 2003 meeting of the ABA House of Delegates, amendments were adopted to the Model Code of Judicial Conduct designed to address First Amendment challenges to restrictions on speech during judicial campaigns. *See American Judicature Society, Amendments to ABA Model Code Adopted*, WKLY. JUDICIAL ETHICS NEWS, Aug. 20, 2003. As of 2004, there is an ABA Joint Commission on Evaluation of the Model Code of Judicial Conduct examining possible improvements in the Code. *See Patricia Manson, ABA Contemplates Reworking Rules of Professional Conduct for Judges*, CHI. DAILY L. BULL., Sept. 26, 2003, at 3. The ABA President, Dennis Archer, explained the need for such a commission: "It has been 12 years since the ABA took a good, hard look at the Code to see if it provides adequate guidance to judges about their conduct, and to the public about what to expect from judges." *Id.* The Joint Commission held its first hearing in December of 2003, and has scheduled hearings for 2004 at various locations throughout the country.

2. Comments of Detroit, Michigan Recorder Court Judge Leonard Townsend as reported in Andy Court, *Special Report: Poorman's Justice*, AM. LAW., Jan./Feb. 1993, at 56. The Recorder's Court is the trial court for all felony offenses in Detroit and other parts of Wayne County, Michigan. The judge added: "I'm not talking about cases where it's arguable. I'm talking about cases where you have a guilty person walking out the door [because of a misguided jury verdict]. It happens quite a lot." *Id.*

The Court [a Justice of the New York State Supreme Court]: "Now the offer in this case, Mr. Barry, *for today only* is three to six which he [the defendant] is not obligated to accept."³

A Juvenile Court judge in Georgia: "I tell the minor, *I will up the sentence if you take it to trial*, because you could have pleaded and saved us all this trouble."⁴

Report of the New York State Special Commission on Attica: "What makes inmates most cynical about their pre-prison experience is the plea bargaining system. . . . [A]lmost 90% of the inmates surveyed had been *solicited* to enter a plea bargain. Most were bitter"⁵

It is, perhaps, in the criminal courts of our largest cities where judges most commonly fail to comply with the professional and ethical mandates that they are required to uphold. In the New York State Supreme Court case cited above,⁶ the judge made it clear that if the defendant were to refuse the "for today only" plea offer and choose instead to go to trial, he would, if convicted, be sentenced to the maximum prison time the law permitted.⁷ The defendant responded to

3. Official Court Transcript at 4, *People v. Derrick Smith* (N.Y. Sup. Ct. 1998) (Indictment No. 7996-98) (emphasis added) [hereinafter Official Court Transcript].

4. ABA JUVENILE JUSTICE CENTER & THE SOUTHERN CENTER FOR HUMAN RIGHTS ET AL., *GEORGIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS* 31 (Patricia Puritz & Tammy Sun eds., 2001) (emphasis added) [hereinafter *GEORGIA: AN ASSESSMENT*]. This 2001 examination of the juvenile justice system in Georgia found that pleas are frequently taken by the Court without any input or even presence of counsel and without any colloquy to determine if the child even understood his rights.

5. REPORT OF THE NEW YORK STATE SPECIAL COMMISSION ON ATTICA 30-31 (1972) (emphasis added). The Commission was empanelled to examine the causes of the inmate rioting at Attica State Prison in 1971. See *id.* at xxiii.

6. See Official Court Transcript, *supra* note 3, at 4.

7. Telephone Interview with Frank Bari, defendant's attorney (Sept. 10, 2003). As is true with much of the plea bargaining that occurs in our criminal courts, the transcript itself does not reflect the entire proceeding because the plea "discussion" and details are, as here, "off the record". See Official Court Transcript, *supra* note 3, at 3 (indicating that a "[d]iscussion off the record" occurred as evidenced by the statement "The Court: On the record, Joyce," which followed. Joyce was the first name of the Court Reporter.). Most plea discussions where the judge is involved occur at the judge's bench and are rarely transcribed by a court reporter. For example, an analysis of plea bargaining in the criminal courts of North Carolina revealed that in almost 85% of the cases, the reporter rarely or never records what is discussed when the judge had initiated or even participated in plea discussions. Norman Lefstein, *Plea Bargaining and the Trial Judge, the New ABA Standards, and the Need to Control Judicial Discretion*, 59 N.C. L. REV. 477, 504 tbl.IV (1981). The 1986 second edition of the ABA Standards for Criminal Justice had required all plea bargain discussions that involved the judge to be transcribed verbatim in order to avoid the possibility of judicial coercion of the defendant. ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY,

the judge: "I'm 19 years old, your Honor. . . . That is terrible. . . . That's terrible."⁸ The defendant turned and told his mother, who was weeping as she sat in the courtroom,⁹ "Mom, I can't do it" and jumped to his death out of the window of the sixteenth floor courtroom.¹⁰

The *Smith* case stands out, and was the object of press coverage, not because of the coercive tactics of the judge that were designed to achieve a plea,¹¹ but because of the defendant's subsequent suicide. The "for today only," "this is a one-time-offer," "if you don't plead guilty you'll get the max if convicted at trial" style-of-judging is all too *common* to warrant tabloid headlines.¹² There was no media coverage at all when another New York State Supreme Court judge allegedly told the defendant's counsel: "Tell the defendant that if he doesn't take the 15 years to Life, I *promise* if he is found guilty after trial, I will give him 25 to Life for the murder and 12-½ to 25 for the attempted murder, *running consecutive*."¹³ Over the years, a pattern has emerged where judges

Standard 14-3.3 (2d ed. 1986). The current edition of the ABA Standards For Criminal Justice, Pleas of Guilty severely limits judicial participation in the plea bargaining process. *See* ABA STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, Standard 14-3.3(c) (3d ed. 1999) [hereinafter PLEAS OF GUILTY]; *see also* State v. Faulk, 840 So. 2d 319, 320 (Fla. 2003) (trial court conducted unauthorized plea discussions off the record); State v. Williams, 666 N.W.2d 58, 60, 65 (Wis. 2003) (prohibiting the judge from playing any role in the plea bargaining process and allowing the defendant to withdraw a plea resulting from the trial judge's invitation to the defendant, his counsel, and the prosecutor to "have a little chat in chambers"). The off-the-record, secretive plea negotiating in many instances violates the requirement set out by the Supreme Court that if the plea "was induced by promises, the essence of those promises must in some way be known." Santobello v. New York, 404 U.S. 257, 261-62 (1971). The threats that are used to "persuade" the defendant to enter the plea should be part of the record as well.

8. Official Court Transcript, *supra* note 3, at 4; *see also* Laura Italiano & Larry Celona, *Horror Suicide at Courthouse; Mom Sees Suspect's 16-Story Death Leap*, N.Y. POST, Oct. 30, 1998, at 5.

9. *See* Italiano & Celona, *supra* note 8.

10. David Rohde, *Prisoner Leapt to Death Despite Plea for Suicide Watch*, N.Y. TIMES, Oct. 31, 1998, at B2.

11. The D.C. Circuit Court of Appeals has explained what is meant by "coercive" in this context: "To say that a practice is 'coercive' or renders a plea 'involuntary' means only that it creates improper pressure that would be likely to overbear the will of some innocent persons and cause them to plead guilty." United States v. Pollard, 959 F.2d 1011, 1021 (D.C. Cir. 1992), *cert. denied*, 506 U.S. 915 (1992).

12. For example, in a 2003 Florida case, the judge told the defendant that "the court made an offer to your attorney to resolve this case. . . . You reject the offer *it's not going to be made again*. I'm not going to make the offer again." Faulk, 240 So. 2d at 320 (emphasis added).

13. People v. Lewis, 630 N.Y.S.2d 605, 607 (N.Y. Sup. Ct. 1995) (emphasis added). The defendant alleged in a series of motions that the judge had made the quoted comment. *See id.* Even though there apparently is no transcript of the judge's promise (the promise was allegedly made while counsel was at the judge's bench and therefore off the record), the defendant's allegation, as discussed by the appellate court reviewing the matter, does not appear to have been challenged

routinely engage in practices that violate the constitutional rights of the defendants who come before them, and which run counter to the ethical conduct that we have a right to expect and demand from those empowered to engage in critical decisions concerning the liberty of our citizens.¹⁴

Consider for example the actions of the judge in the case of *People v. Jorge Delgado*.¹⁵ The attorney, employed by the Legal Aid Society of the City of New York, was outside of the courtroom discussing a matter with a client, when the *Delgado* case, which was also assigned to her, was called and ready to be heard in the courtroom.¹⁶ Upon her return to the court, counsel and defendant were informed of a plea offer, and the judge told the attorney and her client: "Come on. Let's go."¹⁷ Counsel responded that she was speaking with her client about the plea offer and when the judge told her "*Time up. Does he want the offer or not?*"¹⁸ the attorney responded: "No, Your Honor. Since I don't have the time to finish completing my discussion with my client, he doesn't want to take the offer today."¹⁹ The judge then proceeded to tell the attorney to "leave

either by the judge, the defense counsel or the prosecution. See *id.* See also *United States v. Coronado*, 554 F.2d 166, 172 (5th Cir. 1977), *cert. denied* 434 U.S. 870 (1977) ("Even a plea taking session should have more dignity than a bargain basement sale at a department store.").

14. See, e.g., PLEAS OF GUILTY, *supra* note 7, Standard 14-1.8.

The court [shall] not impose upon a defendant any sentence in excess of that which would be justified by any of the protective, deterrent, or other purposes of the criminal law *because the defendant has chosen to require the prosecution to prove guilt at trial rather than to enter a plea of guilty or nolo contendere.*"

Id. (emphasis added). Imposing a prison sentence, which is longer than justified by the circumstances simply because the defendant chose not to plead guilty, "is forbidden by Standard 14-1.8(b)" because it would create the perception that courts penalize defendants for exercising their constitutional right to a jury trial. *Id.* at Standard 14-1.8 cmt.; see also NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, COURTS, Standard 3.1 (1973) (instructing courts, when determining the sentence to be imposed, not to consider whether the defendant pled guilty).

15. There is no reported decision in this case which was prosecuted in the Criminal Court of the City of New York, New York County in September, 1999. See Recant (N.Y. Comm'n on Judicial Conduct, Nov. 19, 2001), available at <http://www.scjc.state.ny.us/Determinations/R/Recant.htm>.

16. See *id.*

17. *Id.*

18. *Id.* (emphasis added). See *United States v. Coronado*, 554 F.2d 166, 172 (5th Cir. 1977) (plea bargaining should be "unhurried and patient"), *cert. denied*, 434 U.S. 870 (1977).

19. Recant. An empirical study of 250 inmates in Alaska focused on the inmates' reactions to their most recent defense attorneys. A common inmate complaint was that their counsel had not stood up for them to enforce their rights, was too anxious to make a deal, and that the attorney, rather than working for them, worked for the state. Marcus T. Boccaccini & Stanley L. Brodsky, *Characteristics of the Ideal Criminal Defense Attorney from the Client's Perspective: Empirical Findings and Implications for Legal Practice*, 25 LAW & PSYCHOL. REV. 81, 98 (2001). In other words, exactly what Judge Recant attempted to get this counsel to do in *Delgado*.

the courtroom as soon as we are done with this. Don't come back."²⁰ The judge then vacated the attorney's assignment to the case and assigned a court-appointed counsel in her place.²¹ Apparently, the judge only wished to have appearing before her "cooperative lawyers"²² who understood that the business taking place in the courtroom was to dispose of cases.²³ Any concern for the rights of defendants would unnecessarily waste the court's time.²⁴ It was clearly of no import to the judge that counsel comply with her obligation as "an officer of the court" to "render effective, quality representation."²⁵ There was no

20. Recant. A judge's anger at counsel can sometimes lead the judge to strike at the easier target—the lawyer's client. For example, a California judge told the Deputy District Attorney that he was going to teach counsel a lesson for seeking a jury trial; to wit, that counsel's client, who had been offered no jail time if he were to have plead guilty, would be sentenced to jail. *Richard Ryan v. Commission on Judicial Performance*, 754 P.2d 724, 732 (1988). The defendant was convicted, and imprisoned. *See id.*

21. *See* Recant. In New York City, the general policy is to have the Legal Aid Society assigned to represent indigents accused of crime and to use appointed private counsel to appear when there are co-defendants and a risk of a conflict of interest among the defendants.

22. Justice Brennan commented that "[t]o satisfy the Constitution, counsel must function as an *advocate* for the defendant, as opposed to a *friend of the court*." *Jones v. Barnes*, 463 U.S. 745, 758 (1983) (Brennan, J., dissenting) (citing *Anders v. California*, 386 U.S. 738, 744 (1967)) (emphasis added).

23. *Cf.* Recant (finding that the judge "mistreated both defendants and attorneys, abused her judicial powers, and ignored proper legal procedure"). The situation that exists in American courts is disturbingly similar to that which occurs in courts in Toronto, Canada except that the plea deal in Toronto is always worked out between the defendant and the prosecutor, not the judge. The following is a description of the Toronto criminal court scene:

[T]he daily justice bazaar is in full swing. . . . Behind closed doors, lawyers haggle over where in the punishment range the sentence will fall. . . . It's usually over in a flash. . . .

Plea bargaining is the key tool to deal with the more than 100,000 charges that move through Toronto's provincial courts each year.

Donovan Vincent & Nick Pron, *Closed Doors: Justice by Plea Bargain*, TORONTO STAR, Mar. 10, 2001.

24. *See, e.g.,* GEORGIA: AN ASSESSMENT, *supra* note 4, at 2 (indicating that judges viewed counsel as standing in the way of the courts accomplishing their goals, resulting in counsel's having a severely diminished role).

25. ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-1.2(b) (3d ed. 1993) [hereinafter PROSECUTION FUNCTION AND DEFENSE FUNCTION] (stating that the "basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and the render effective, quality representation"). In 1967, the ABA was the first organization to enact standards relating to criminal defense services by adopting the ABA Standards for Criminal Justice, Providing Defense Services, and then followed by adopting the Defense Function in 1971, and the ABA Guidelines For Appointment and Performance of Counsel In Criminal Cases in 1989. Other institutions have enacted standards relating to criminal justice issues as well: The National Legal Aid and Defender Association adopted Performance Guidelines For Criminal Defense Representation in 1994; the National Study Commission on Defense Services presented the Guidelines for Legal Defense Systems in the United States in 1976, and the President's National

indication that the judge felt any need to comply with the holding of the court in *United States ex rel. Elksnis v. Gilligan*²⁶ that due process is violated if the plea does not represent “the *considered choice* of the accused.”²⁷ There was no adherence to the all-too-clear statement of one state’s supreme court when considering disciplinary action against a judge: “‘Common courtesy and considerate treatment of [others] are traits properly expected of judges. Court proceedings and all other judicial acts must be conducted with fitting dignity and decorum.’”²⁸ There was absolutely no attention given to the instruction in the ABA Criminal Justice Standards on Discovery²⁹ that there should exist discovery procedures that provide a defendant with “sufficient information to make an informed plea”³⁰ because the “informed plea is crucial to the integrity of the criminal justice system.”³¹ The Supreme Court explained the requirement:

[T]he defendant and his counsel must make their best judgment as to the weight of the State’s case. Counsel must predict how the facts, as he understands them, would be viewed by a court. If proved, would those facts convince a judge or jury of the defendant’s guilt? On those facts would evidence seized without a warrant be admissible? Would the trier of fact on those facts find a confession voluntary and admissible? Questions like these cannot be answered with certitude; yet a decision to plead guilty must necessarily rest upon counsel’s answers.³²

Advisory Commission on Criminal Justice Standards and Goals adopted Chapter 13, *The Defense*, in 1973. See ABA, THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM 4 n.2 (2002).

26. *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244 (S.D.N.Y. 1966).

27. *Id.* at 253 (emphasis added).

28. *In re Perry*, 641 So. 2d 366, 369 (Fla. 1994) (quoting *In re Turner*, 421 So. 2d 1077, 1081 (Fla. 1982)).

29. ABA STANDARDS FOR CRIMINAL JUSTICE DISCOVERY AND TRIAL BY JURY (3d ed. 1996) [hereinafter DISCOVERY].

30. *Id.* at Standard 11-1.1(a)(ii). There is considerably less information provided to one’s adversary as a matter of course in criminal proceedings than in civil. If the defense counsel does not subpoena or file motions seeking discoverable material he will not obtain information which might prove to be vital for the defense of his client. Even when the defense is self-defense, the prosecution is not obligated to provide the defendant with the arrest record of the victim unless specifically requested by defense counsel to do so. *United States v. Agurs*, 427 U.S. 97, 110 n.17 (1976), modified by *United States v. Bagley*, 473 U.S. 667, 681 (1985) (finding that the Court’s prior formulation of *Agurs*, as applied in *Strickland v. Washington*, 466 U.S. 668 (1984), covers situations where the defendant’s attorney either specifically requested, or failed to specifically request, certain information from the prosecution).

31. DISCOVERY, *supra* note 29, at Standard 11-1.1(a)(ii) cmt.

32. *McMann v. Richardson*, 397 U.S. 759, 769–70 (1970).

And judges may well believe that in order for defendants in future cases to know that the judge indeed means business when he or she threatens “the max,”³³ the judge must make it crystal clear at sentencing time:

If you’d have come in here, as you should have done in the first instance, to save the State the trouble of calling a jury, I would probably have sentenced you, as I indicated to you I would have sentenced you, to *one* to life in the penitentiary. It will cost you *nine years additional*, because the sentence now is *ten* to life in the penitentiary.³⁴

One might well expect that there would be a successful appeal of a sentence such as this, based on the claim that the sentence was excessive in that the judge’s initial assessment of the appropriate punishment was one-tenth of the sentence imposed, but appeals courts know how the game has to be played to get the desired result of the pre-trial plea of guilty. In *State v. Pennington*,³⁵ the New Jersey Supreme Court established an absolute rule that “public policy. . . prohibits [the] use of rejected plea offers” in determining whether the ultimate sentence of the trial judge was excessive in relation to the offense committed.³⁶ Exactly what is the “public policy”? That a defendant must know that the trial judge will indeed punish the defendant for the exercise of his constitutional right to trial? The court stated pretty much exactly that. The court explained that to permit the defendant to compare the judge’s pre-trial plea offer with the post-trial sentence “would unfairly undermine plea negotiations, an essential tool in the administration of criminal justice.”³⁷ Certainly a decision such as this from the state’s highest court can function to encourage judges not only to engage in the

33. If the judge’s reputation for sentencing a convicted defendant to the maximum amount permissible becomes well enough known, the judge might not in every case *need* to articulate the threat. A defendant told by the judge what the sentence would be were he to plead guilty, would know what would await him were he to choose instead to go to trial.

34. *People v. Moriarty*, 185 N.E.2d 688, 689 (Ill. 1962) (emphasis added); *see also People v. Young*, 314 N.E. 2d 280, 281 (Ill. App. Ct. 1974) (“I have no inclination to give you the same thing had you chose to throw yourself on the mercy of the Court. I will add one year.” (internal quotation marks omitted)).

35. 712 A.2d 1133 (N.J. 1998).

36. *Id.* at 1142.

37. *Id.* The sole dissenter wrote that the court had “unnecessarily and improperly imposed a blanket restriction against any consideration of plea offers by appellate courts in reviewing excessive-sentence challenges. *Id.* at 1144 (Stein, J., dissenting).

threat of a maximum sentence if the defendant does not plead guilty, but also to feel free to actually carry out the threat.³⁸

Further support for the principle that however disparate the post-trial sentence is from that which was offered pre-trial, the excessiveness of the sentence imposed after the trial should not be measured by that which was offered pre-trial, comes from those courts applying contract theory to the plea bargaining context.³⁹ The New Jersey Supreme Court determined that "consistent with contract principles . . . a rejected plea should have no impact on sentencing following a trial."⁴⁰ In ruling that the rejection by the defendant of the sentence-deemed-appropriate during plea negotiations voids that offer "for all purposes," the court made it clear that the sentence imposed after trial can be many times greater than that offered earlier.⁴¹

To apply contract theory to a situation where an all-powerful judge is negotiating with a powerless defendant about how long the judge will send the defendant to prison for is inappropriate.⁴² The process of negotiation generally implies and assumes relatively comparable positions of power on each side. The *Commentary to the Restatement (Second) of Contracts*⁴³ defines "undue influence" in a way that is certainly applicable to judicially-initiated plea bargaining: "Undue influence is unfair persuasion of a party who is under the domination of the person exercising the persuasion or who by virtue of the relation

38. Just days before the trial began, the offer to the defendant was a prison term of fifteen years with no parole possible until seven and a half years were served. *State v. Pennington*, 693 A.2d 1222, 1225 (N.J. Super Ct. App. Div. 1997), *rev'd*, *State v. Pennington*, 712 A.2d 1133 (N.J. 1998). After trial, the sentence was life plus twenty years with no parole possible until the defendant was incarcerated for at least thirty-five years. *See id.* The Appellate Division of the Superior Court of New Jersey had determined that the "extreme disparity" between the pre-trial offer and the sentence actually imposed was a factor to be considered when evaluating the ultimate reasonableness of the post-trial sentence. *See id.*

39. *See, e.g.*, *Petition of Geisser*, 554 F.2d 698, 704 (5th Cir. 1977) ("a plea bargain is contractual in nature"). *See generally* Peter Westen & David Westin, *A Constitutional Law of Remedies or Broken Plea Bargains*, 66 CAL. L. REV. 471 (1978) (suggesting that the contract law provides the most appropriate remedies for breached plea agreements).

40. *Pennington*, 712 A.2d at 1142.

41. *Id.* at 1147.

42. *See People v. Selikoff*, 318 N.E.2d 784, 791-92 (N.Y. 1974) (It is incongruous to apply contract law to plea negotiations; public policies favoring rehabilitation, protection of society, and deterrence are "paramount to benefits" that might derive from permitting defendants to enter into plea contracts.).

43. RESTATEMENT (SECOND) OF CONTRACTS (1981).

between them is justified in assuming that that person will not act in a manner inconsistent with his welfare.”⁴⁴

Perhaps the defendant in *State v. Williams*,⁴⁵ who “negotiated” his plea with the judge in the judge’s chambers, best made the point regarding undue influence as he was later attempting to withdraw his plea:

I had no intentions of pleading guilty, but . . . you invited me into [your] chambers, you influenced me and pressured me into giving a guilty plea. . . .

Your Honor, since I originally turned down a plea bargain in the hallway, I can honestly say if you wouldn’t have taken me in your chambers, I wouldn’t have never pled guilty. Myself being in a powerful judge’s chambers, you eroded my ability to make a decision of my own.⁴⁶

The bringing of a defendant into the judge’s chambers is truly bringing the “full force and majesty of [the] office”⁴⁷ of the judge home to the defendant. Most defendants, however, don’t need to be taken into chambers to be aware of the “awesome power”⁴⁸ of the judge. The judge sitting on high in his robes is symbolism enough.⁴⁹

44. *Id.* at § 177(1); *N. Am. Rayon Corp. v. Comm’r of Internal Revenue*, 12 F.3d 583, 589 (6th Cir. 1993) (applying New York law, which defines undue influence as “exist[ing] where a relationship of control exists between the contracting parties, and the stronger party influences the weaker party in a way that destroys the weaker party’s free will and substitutes for it the will of the stronger party”); see also RESTATEMENT, *supra* note 43, at § 175 cmt., *quoted in* *United States v. Speed Joyeros, S.A.*, 204 F. Supp. 2d 412, 425 (E.D.N.Y. 2002) (explaining that the implicit threat contained in the offer made by the prosecutor could “arouse such fear as precludes a party from exercising free will and judgment or that it [is] such as would induce assent on the part of a brave man or a man of ordinary firmness”).

45. 666 N.W.2d 58 (Wis. 2003).

46. *Id.* at 62 (alteration in original). The “susceptibility of the person persuaded” is to be taken into account when assessing whether of not there has been “undue influence.” RESTATEMENT (SECOND) OF CONTRACTS § 177 cmt. b (1981).

47. *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 254 (S.D.N.Y. 1966).

48. *Id.*

49. See *id.* Not all defendants (or counsel for that matter) would have the same view of the robes that former Supreme Court Chief Justice Arthur Vanderbilt had: “The wearing of a judicial robe by a judge is important in part because it reminds all concerned of the fact that the judge represents the law on which liberty depends . . .” Hon. Arthur T. Vanderbilt, *The Municipal Court—The Most Important Court in New Jersey: Its Remarkable Progress and Its Unsolved Problems*, 10 RUTGERS L. REV. 647, 653 (1956) (emphasis added). And some may feel the following description by a former law professor to be somewhat extreme:

Glaring down from their elevated perches, insulting, abrupt, rude, sarcastic, patronizing, intimidating, vindictive, insisting on not merely respect but almost abject servility—such

To be sure, there is the appearance of arbitrariness when a judge just throws a certain number of extra years at a defendant who chose to go to trial rather than plead guilty. And it is this abuse of judicial discretion that the Supreme Court warned of in *Duncan v. Louisiana*.⁵⁰

Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. . . . [T]he jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge⁵¹

As to those judges who do act arbitrarily, the criminal justice system would be far better off if they were not quite so crude about it all. For example, the judge in *People v. Young*⁵² explained to the defendant why he was getting sentenced to a longer prison term after the trial: “You shot the dice and they just came up craps.”⁵³ In *State v. Peterson*,⁵⁴ there was only a slight deviation from that language as the trial judge explained to the defendant that he had “rolled the dice in a high stakes game with the jury, and it’s very apparent that [you] lost that gamble.”⁵⁵ Somehow, exercising one’s constitutional right to trial ought not be analogized to a roll of the dice—the imposition of extra years of incarceration is not quite comparable a penalty as is the dice “coming up craps.”

But for an extreme example of a judge acting arbitrarily, consider the action of a veteran Long Island judge who had to determine the appropriate sentence for the defendant who had pled guilty to driving while impaired.⁵⁶ The judge increased the sentence because the defendant was wearing jeans, explaining that the fine “would be

judges are frequently encountered in American trial courts, particularly in the lowest criminal and juvenile courts which account for most of our criminal business. Indeed, the lower the court, the worse the behavior.

Herman Schwartz, *Judges as Tyrants*, 7 CRIM. L. BULL. 129, 129–30 (1971) (footnote omitted).

50. 391 U.S. 145 (1968).

51. *Id.* at 156.

52. 314 N.E.2d 280 (Ill. 1974).

53. *Id.* at 281.

54. 571 S.E.2d 883 (N.C. 2002).

55. *Id.* at 884. The Court of Appeals in North Carolina did find that a new sentencing hearing was required because it was clear that the sentence after trial was, in part, punishment for the defendant’s choice to go to trial. *See id.* at 885.

56. *See* Chau Lam, *Crime (and Denim) Doesn’t Pay*, NEWSDAY, Dec. 6, 2003, at A03.

normally 300 [dollars], but it will be 350 [dollars] because he's got a pair of jeans on."⁵⁷ But lest anyone think that the defendant was being *punished* for wearing jeans, the judge clarified that the extra fine wasn't punishment, the defendant just would have gotten a break if he hadn't been wearing the jeans.⁵⁸ The judge didn't elaborate on what other forms of appearance—overweight, dreadlocked, tattooed—might also disqualify a defendant from lenient treatment, but did add that “[i]f you show the law respect, the law will show respect back to you.”⁵⁹

In *People v. Dennis*,⁶⁰ the pretrial offer was two-to-six years imprisonment, while the sentence after trial was forty-to-eighty,⁶¹ even though the judge clearly did know at the time of the plea offer the strength of the prosecutor's case and the defendant's prior criminal history.⁶² Whereas the forty-to-eighty term was certainly arbitrary, so was the sentence of the Illinois appellate court, which determined that punishing the defendant for exercising his right to trial by increasing the amount of incarceration *twenty-fold* was unconstitutional, but *three-fold* was not. The sentence was reduced “in the interests of justice” to six-to-eighteen years.⁶³

The standard of what an acceptable punishment for choosing to go to trial in Illinois was to be was measured after the *Dennis* case by comparing post-conviction sentence increases to the twenty-times-greater sentence imposed by the *Dennis* trial court. So, appellate review in *People v. Carroll*⁶⁴ did not find the sentence by the trial court in that matter to be inappropriate because “the sentence imposed was *only two-and-a-half times* that which was offered to [the defendant] at the pre-trial conference; clearly, this does not approach the excessive nature of the sentence deemed an improper punishment in *Dennis*.”⁶⁵ If the punishment is not twenty times greater for choosing to go to trial rather than pleading guilty, *then* is it to be found acceptable? Is a sentence which is *only* two-and-one-half times greater than that which was offered pre-trial really appropriate? What about a sentence of eight years imprisonment imposed after trial when the pre-trial offer in exchange for

57. *Id.*

58. *See id.*

59. Ed Lowe, *Judge Gets a Dressing Down*, *NEWSDAY*, Dec. 12, 2003, at A8.

60. 328 N.E.2d 135 (Ill. 1975).

61. *See id.* at 138.

62. *See id.*

63. *Id.*

64. 631 N.E.2d 1155 (Ill. 1992).

65. *Id.* at 1175 (emphasis added).

a guilty plea was two years *probation*?⁶⁶ Or, when the defendant was given a sentence of thirty years post-trial compared to the plea offer of forty-two months?⁶⁷

As is true for all judges, whether assigned to criminal or civil court, the American Bar Association Model Code of Judicial Conduct⁶⁸ is “intended to govern conduct of judges and to be binding upon them.”⁶⁹ A pervasive theme of the Model Code of Judicial Conduct is the import of the judiciary acting honorably and with integrity⁷⁰ so that the public will have confidence in its judges.⁷¹ The very first paragraph of the Preamble, for example, describes judicial office as a “public trust”⁷² where the judge is a “highly visible symbol of government.”⁷³ The Commentary to the very first Canon of the Code warns that “violation of this Code diminishes *public confidence* in the judiciary and thereby does

66. See *People v. Peddicord*, 407 N.E.2d 89, 93 (Ill. 1980). The appeals court upheld the sentence, rejecting the defendant’s claim that the post-trial sentence constituted punishment for choosing to go to trial. The court used *Dennis* once again as the standard, concluding that “[i]n the present case the 8-year sentence imposed is not as grossly disparate as that found in *Dennis*.” *Id.* at 94.

67. See *McDonald v. State*, 751 So. 2d 56, 58 (Fla. 1999). The Court of Appeals of Florida did conclude that the sentence was vindictive and remanded the case with directions to resentence the defendant to a term of forty-eight months. See *id.* at 59–60.

68. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 1. The Model Code forms the basis for the state-adopted codes of judicial conduct in every state but Montana whose rules of conduct for the judiciary are not based on the Model Code. See Cynthia Gray, *The Line Between Legal Error and Judicial Misconduct: Balancing Judicial Independence and Accountability*, 32 HOFSTRA L. REV. 1245 (2004). The current Code, designed to replace the 1972 Code, was adopted by the ABA House of Delegates in August of 1990.

69. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 1, pmbl. The Commentary to Canon 1 informs that judges “must comply with the law, *including the provisions of this Code*.” *Id.* at Canon 1 cmt. (emphasis added).

70. In 2003, the Model Code of Judicial Conduct’s Canon 1 Commentary was amended to explain what was meant by “integrity”: “A judiciary of integrity is one in which judges are known for their probity, fairness, honesty, uprightness, and soundness of character.” *Id.* (Any resemblance to the Boy Scout Pledge, is, I’m sure, completely unintended.)

71. See *id.* It would be difficult to imagine the public being confident in the judiciary that presides over prosecutions of juveniles in Virginia. An ABA Juvenile Justice Center investigative analysis of the courts concluded:

Nothing appeared more “second rate” than watching the countless families endure the humiliating process of going through juvenile court. . . . Families sat on benches and the clerk called them into court over a loudspeaker system. Several investigators repeatedly noted the rude and often cutting manner in which juvenile court personnel, *including judges*, spoke to children and their families.

ABA JUVENILE JUSTICE CENTER & THE MID-ATLANTIC JUVENILE DEFENDER CENTER ET AL., VIRGINIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31–32 (Patricia Puritz et al. eds., 2002) (emphasis added).

72. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 1, pmbl.

73. *Id.*

injury to the system of government under law.”⁷⁴ The first sentence of Canon 2 reiterates that judges “shall act at all times in a manner that promotes *public confidence* in the *integrity* of the judiciary.”⁷⁵ The Commentary to that Canon warns judges that they “*must expect* to be the subject of *constant public scrutiny*.”⁷⁶

There is, perhaps, no part of our justice system that is as visible to the public as are the criminal courts. It is, therefore, of paramount importance that the judges, who sit in criminal cases, comply with the mandate to act honorably, fairly⁷⁷ and with integrity.⁷⁸ And since the vast majority of the criminal prosecutions that occur throughout the country result in pleas of guilty,⁷⁹ the conduct of the judiciary in relationship to plea bargaining is of crucial import.⁸⁰

Recognizing the need to identify ethical standards relating to plea bargaining for defense counsel, prosecutors, and judges, the ABA adopted Standards for Criminal Justice,⁸¹ Chapter 14—Pleas of Guilty.⁸² The most recent edition deleted previous provisions, which had established procedures for judicial participation in plea bargaining,⁸³ and

74. *Id.* Canon 1 cmt. (emphasis added). The Canon itself describes an “*honorable judiciary*” as “indispensable to justice in our society.” *Id.* Canon 1 (emphasis added).

75. *Id.* Canon 2 (emphasis added).

76. *Id.* Canon 2 cmt. (emphasis added).

77. *See, e.g., id.* Canon 3(B)(8): “A judge shall dispose of all judicial matters promptly, efficiently and *fairly*.” (emphasis added). The 2003 amended Commentary to Model Code Canon 1 designates “fairness” as an integral part of acting with “integrity”. *See id.* Canon 1 cmt.

78. *See id.* at Canon 2.

79. *See* CAROLINE WOLF HARLOW, U.S. DEP’T OF JUSTICE, SPECIAL REPORT DEFENSE COUNSEL IN CRIMINAL CASES 6 t.10 (2000) (indicating over 75% of all criminal cases result in convictions, and approximately 71% of all convictions in 1996 were the result of defendants entering guilty pleas).

80. The active participation of the judiciary in the plea bargaining process may not be common knowledge. *Black’s Law Dictionary* provides an example of the popular understanding of what constitutes a plea bargain: “A negotiated agreement between a *prosecutor* and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, usu[ally] a more lenient sentence or a dismissal of the other charges.” BLACK’S LAW DICTIONARY 1173 (7th ed. 1999) (emphasis added).

81. The initial seventeen volumes of the ABA’s Standards for Criminal Justice were issued in 1968 and were described by the then-Chief Justice of the United States Supreme Court Warren Burger as “the single most comprehensive and probably the most monumental undertaking in the field of criminal justice ever attempted by the American legal profession in our national history.” ABA NETWORK, CRIMINAL JUSTICE SECTION STANDARDS (1999). There is a nine-member Standards Committee responsible for updating the existing standards as well as creating new volumes relating to issues not previously covered. *See id.*

82. *See* STANDARDS FOR CRIMINAL JUSTICE, CHAPTER 14 – PLEAS OF GUILTY (2d ed. 1986).

83. Prior to 1999, the prosecutor and defense counsel, when unable to reach a plea bargain, could request a meeting with the judge, and if the judge agreed to meet with counsel, the judge was

instead, added a new section providing that "[a] judge should *not* ordinarily participate in plea negotiation discussions among the parties."⁸⁴ To emphasize the importance of the requirement of judicial detachment, there is a separate mandate: "A judge should not through word or demeanor, *either directly or indirectly*, communicate to the defendant or defense counsel that a plea agreement should be accepted or that a guilty plea should be entered."⁸⁵ The Commentary to the Standards is explicit: "These standards reflect the view that direct judicial involvement in plea discussions with the parties tends to be coercive and should not be allowed."⁸⁶

Coercive indeed. Take the case of New York Supreme Court Judge Harold Rothwax, who rather than adjourning the case of one of two co-defendants who had no counsel in a burglary case, appointed an attorney from those who were waiting in the courtroom for other matters to be called.⁸⁷ As soon as the newly-appointed counsel approached the judge's bench, the judge informed the counsel that the offer in the case, in exchange for a plea, was a sentence of a minimum prison term of two years and a maximum of four.⁸⁸ In a variation of the "for today only" warning discussed previously,⁸⁹ Judge Rothwax had a gradation of threats: Only for that day was the offer of two-to-four to be valid, "[a]fter today, it's 3 to 6."⁹⁰ But the judge, hardly adhering to the calm deliberation expected of the judiciary, or to the required presumption of innocence,⁹¹ then added "after that, it's 4 to 8."⁹² And, as if the point was

to act only as "moderator" in order to avoid the coercion that may be seen as accompanying any judicial involvement. *See id.*

84. PLEAS OF GUILTY, *supra* note 7, at Standard 14-3.3(d) (emphasis added). This was a return to the position of the first edition of the ABA Pleas of Guilty Standards that had admonished the judge not to participate in any way in plea discussions.

85. *Id.* at Standard 14-3.3(c) (emphasis added).

86. *Id.* at Standard 14-3.3 cmt.

87. Sam Roberts, *For One Zealous Judge, Hard Bargaining Pushes Cases Through the Courts*, N.Y. TIMES, Apr. 29, 1985, at B1.

88. *See id.*

89. *See supra* note 7 and accompanying text.

90. Roberts, *supra* note 87 (internal quotation marks omitted); *see also* Bordenkircher v. Hayes, 434 U.S. 357, 365 n.8 (1978) (expressing a concern that promises given by the prosecutor can pose a "danger of inducing a false guilty plea by skewing the assessment of the risks a defendant must consider"). Judicial promises are certainly much more likely than prosecutorial promises to create such dangers.

91. The "presumption of innocence" is not a mere formality, but rather "express[es] vital principles of our criminal jurisprudence and criminal procedure." *State v. Hardy*, 128 S.E. 152, 155 (N.C. 1925).

92. Roberts, *supra* note 87 (internal quotation marks omitted). The Supreme Court of Florida, in considering possible disciplinary action against a judge, observed that judges should never be

yet unmade, Judge Rothwax concluded: "If they're ever going to plead, today is the time to do it."⁹³

The United States Supreme Court has determined that even *subtle* threats void a subsequent plea,⁹⁴ and Judge Rothwax was certainly not making any attempts to be subtle. He, and many throughout the country like him,⁹⁵ violated the ABA Standards instructing judges of their responsibility in plea cases: "[T]he court should not accept the plea where it appears the defendant has not had the effective assistance of counsel."⁹⁶ The attorney in this case did not even have any opportunity to discuss the matter with his client. The Commentary to the Standards makes it clear that the judge's actions were in violation of ethical requirements: "[Because] it is seldom possible to engage in effective negotiations minutes before the defendant is called upon to plead . . . a reasonable interval should elapse between assignment of counsel and the pleading stage."⁹⁷

Judge Rothwax's actions also violated the Supreme Court mandate of *Chandler v. Warden Fretag*⁹⁸ that the defendant must be provided with sufficient opportunity to *consult* with his attorney, "otherwise, the right to be heard by counsel would be of little worth."⁹⁹ Furthermore, the judge called upon the defendant's lawyer to violate the ABA Defense Function¹⁰⁰ Standard instructing counsel that he must conduct a full

autocratic or abusive, and added that judges "'are not depositories of arbitrary power, but judges under the sanction of law.'" *In re Perry*, 641 So. 2d 366, 368–69 (Fla. 1994) (quoting *In re Turner*, 421 So. 2d 1077, 1081 (Fla. 1982)).

93. See Roberts, *supra* note 87 (internal quotation marks omitted). The judge was, of course, aware that the just-appointed counsel had no time to have developed adequate knowledge of the allegations against his client. The judge, nevertheless, pushed for a plea and violated the requirement that a plea be entered only after counsel has had the opportunity to assess the facts of the case which often entails interviewing witnesses. See *State v. Draper*, 762 P.2d 602, 604–05 (Ariz. Ct. App. 1988), *vacated in part by* 784 P.2d 259 (Ariz. 1989) (en banc) (holding that there are times when a defendant may waive the right to question the victim in reaching a plea agreement).

94. *Boykin v. Alabama*, 395 U.S. 238, 242–43 (1969), *superseded by* FED. R. CRIM. P. 11(c) (West 1986 & Supp. 2004) (codifying the plea bargain admonishments stated in *Boykin*).

95. See, e.g., *State v. Gaston*, No. 8628, 2003 Ohio App. LEXIS 5181 (Ohio Ct. App. Oct. 30, 2003). The trial judge informed the defendant that if he didn't plead guilty and instead went to trial that he'd be punished, thereby imparting a direct threat that constituted overt and overwhelming pressure on the defendant to enter a guilty plea. See *id.* at *13.

96. PLEAS OF GUILTY, *supra* note 7, at Standard 14-1.4(d).

97. *Id.* at Standard 14-1.3 cmt.

98. 348 U.S. 3 (1954).

99. *Id.* at 10.

100. PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, at Standard 4-4.1(a); see also PLEAS OF GUILTY, *supra* note 7, at Standard 14-3.2(b) cmt. (defense counsel is required to conduct an "appropriate investigation" of the case before the defendant enters any plea of guilty).

investigation and study of the case, including the controlling law¹⁰¹ and evidence that is likely to be introduced at trial, *before providing any recommendation concerning a plea*.¹⁰² Our adversary-based system of justice assumes that *each* side will have the opportunity to uncover evidence that's relevant not just as to the guilt or innocence of the defendant, but to the determination of the appropriate sentence as well. Prosecutors notoriously over-charge and may engage in "bluffing"; how can defense counsel possibly call the bluff if there's no opportunity to investigate the allegations?

Judge Rothwax's concern was simply complying with the technicality that a living being with a Juris Doctor degree stand next to the defendant in court.¹⁰³ The presence of an attorney constituted, in the court's eyes, a mere legal formality, a precondition for the court's efforts to obtain the desired plea.¹⁰⁴ The attempt was to co-opt the attorney, to have the lawyer act as a mere assistant in the rapidly-moving assembly line, and in doing so to redefine the role of counsel so that the whole process would have the appearance of legitimacy.¹⁰⁵ But the very reason

101. See *United States v. Loughery*, 908 F.2d 1014, 1018–19 (D.C. Cir. 1990) (finding ineffective assistance of counsel where counsel failed to become familiar with the applicable state of the law, including recent court decisions that may have affected their clients' interests); *Herring v. Estelle*, 491 F.2d 125, 128 (5th Cir. 1974) (counsel is obligated to know the elements and case law applicable to the charges against his client and to communicate that information to his client); *State v. Whitmore*, No. 20020471-CA, 2003 WL 22510937, at *1–*2 (Utah Ct. App. 2003) (unpublished opinion) (counsel's error about the lack of a valid legal defense available to the defendant constituted ineffective assistance).

102. See PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, at Standard 4-6.1(b). In order for an attorney to provide effective counseling for his client he must provide the defendant with an "understanding of the law in relation to the facts." *Walker v. Caldwell*, 476 F.2d 213, 218 (5th Cir. 1973) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969), *superseded by* FED. R. CRIM. P. 11(h) (West. 1986 & Supp. 2004)).

103. See *United States v. Decoster*, 624 F.2d 196, 219 (D.C. Cir. 1979) (MacKinnon, J., concurring) Judge MacKinnon reasoned that:

The Sixth Amendment . . . guarantees more than the appointment of competent counsel. By its terms, one has a right to "Assistance of Counsel [for] his defense." Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant's Sixth Amendment right to "have Assistance of Counsel" is denied.

Id.

104. Whereas the general rule is that an individual cannot appeal a conviction obtained as a result of a voluntarily entered plea of guilty, a plea which has been given without the effective assistance of counsel may be successfully attacked in a post-conviction proceeding. See, e.g., *Loughery*, 908 F.2d at 1018–19 (failing to provide the defendant with effective assistance of counsel was sufficient grounds for the withdrawal of the guilty plea).

105. A lawyer who complies with a judge's "request," such as the one at issue in the case under examination, subjects himself to possible disciplinary proceedings. See, e.g., *Holt v. Whelan*,

that counsel *is* required is to avoid just the type of perfunctory process that this judge had created.¹⁰⁶ The requirement to provide an indigent defendant with counsel is not met when the assignment occurs under circumstances precluding counsel from providing effective assistance. The very reason that the appointment of counsel for indigents is mandatory whenever a conviction threatens the defendant with the loss of liberty¹⁰⁷ is because the Court was concerned that, without such a mandate, the heavy volume of cases “may create an obsession for speedy dispositions, regardless of the fairness of the result.”¹⁰⁸ The Court further explained that

[b]eyond the problem of trials and appeals, is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.¹⁰⁹

The United States Supreme Court should have added “*and by the judge.*”

When there is no actual assistance rendered by counsel, the constitutional guarantee to counsel has clearly been violated.¹¹⁰ In the

199 N.W.2d 195, 196 (Mich. 1972) (averring that the disciplinary action taken against the attorney was a result of his inadequate analysis of “the failure of the trial court . . . to observe the constitutional, statutory and court rule requirements in taking a guilty plea”).

106. See *Argersinger v. Hamlin*, 407 U.S. 25, 34 (1972).

107. See *id.* at 37–38. The first instance where the Supreme Court held that an indigent had a right to appointed counsel was in *Powell v. Alabama*, 287 U.S. 45, 71 (1932). The Court explained that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. . . . [The defendant] requires the guiding hand of counsel at every step in the proceedings against him.” *Id.* at 68–69. *Powell*’s holding was limited, however, and only applied to requiring the appointment of counsel for an indigent being tried for a capital offense. See *id.* at 71.

108. *Argersinger*, 407 U.S. at 34.

109. *Id.* In *Johnson v. Zerbst*, the Court held that all indigents in federal court who were charged with a felony had a Sixth Amendment right to counsel. 304 U.S. 458, 468 (1938). It was not until *Gideon v. Wainwright*, however, that the Court applied the Due Process Clause of the Fourteenth Amendment to felony prosecutions in state courts. 372 U.S. 335, 344 (1963). The Court in *Gideon* explained that

in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Id. at 344.

110. The right to the assistance of counsel is one of those few, basic constitutional rights that have been held to be “so basic to a fair trial that their infraction can never be treated as harmless

court case examined previously where the judge appointed counsel for the defendant from the group of attorneys who were in the courtroom and then exerted pressure for an immediate plea,¹¹¹ the judge had made it *impossible* for *any* attorney, however able, to have provided effective assistance of counsel. Effective counsel are “necessities not luxuries,”¹¹² and “the right to be represented by counsel is by far the most pervasive for it affects [the defendant’s] ability to assert any other rights he may have.”¹¹³ When the Court stated that counsel’s “*presence* is essential,”¹¹⁴ the Court most certainly did *not* mean just a live body with a J.D. degree standing next to the defendant as the judge bellowed “today, 2 to 4. . . after today, it’s 3 to 6 . . . after that, it’s 4 to 8.”¹¹⁵

The need for rapid processing of cases notwithstanding, there are two qualities that are vital attributes of any distinguished judge: patience and fairness. A jurist must be sufficiently patient with attorneys in order to fully consider their arguments. Only then is it possible for the judge to evaluate counsel’s claims and adjudicate the issues fairly and properly. The knowledge to determine what outcome would be most just can only be obtained after there is careful examination of the merits of the positions of each side. Such patience and fairness is all the more necessary when an individual’s liberty is at stake.

The judge’s responsibility to ensure that the defendant’s appointed counsel does, in fact, effectively represent the defendant who wishes to enter a guilty plea, is all the greater after the Supreme Court’s decision in *Hill v. Lockhart*.¹¹⁶ The Court had, years earlier in *Kercheval v. United States*,¹¹⁷ held that in order for a guilty plea to be constitutionally valid, the plea must be “made voluntarily after proper advice and with full understanding of the consequences.”¹¹⁸ The standard for assessing

error.” See *Chapman v. California*, 386 U.S. 18, 23 (1967), *overruled in part by Brecht v. Abramson*, 507 U.S. 619, 637–38 (1993). In general, an error committed by the trial court will be deemed harmless and therefore not lead to a reversal of a conviction if it is determined that the error did not contribute to the conviction. See *Fahy v. Connecticut*, 375 U.S. 85, 86–87 (1963). But see *Holloway v. Arkansas*, 435 U.S. 475, 487 (1978) (indicating that some courts consider the right to counsel as being too fundamental to permit courts to engage in calculations to determine the amount of prejudice that occurred due to its denial).

111. See Roberts, *supra* note 87; see also *supra* notes 87–93 and accompanying text.

112. *Gideon*, 372 U.S. at 344.

113. *United States v. Cronin*, 466 U.S. 648, 653 (1984) (quoting Walter V. Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956)).

114. *Cronin*, 466 U.S. at 653 (emphasis added).

115. See *supra* notes 89–95 and accompanying text.

116. 474 U.S. 52, 59 (1985).

117. 274 U.S. 220 (1927).

118. *Id.* at 223.

counsel's effectiveness when a plea of guilty was entered was set forth in *McMann v. Richardson*.¹¹⁹ The validity of the plea was to be determined by examining whether the representation provided by counsel was "within the range of competence demanded of attorneys in criminal cases."¹²⁰ However, the Court in *Hill* imposed the additional requirement that the defendant on appeal must demonstrate that "there is a reasonable probability that, [were it not for his attorney's] errors, he would not have pleaded guilty and would have insisted on going to trial."¹²¹ Justice Rehnquist's opinion for the Court emphasized that because the vast majority of criminal convictions arise from guilty pleas, the need for finality in judgment was particularly great.¹²² The Court stated that, "we believe that requiring a showing of 'prejudice' from defendants who seek to challenge the validity of their guilty pleas on the ground of ineffective assistance of counsel will serve the *fundamental interest in the finality of guilty pleas*."¹²³

The standard set forth in *Hill* for a defendant to successfully challenge a plea bargain is an exceptionally demanding one.¹²⁴ Once the

119. 397 U.S. 759 (1970).

120. *Id.* at 771. Vague, generalized standards, such as this, for assessing the effectiveness of counsel have historically been the norm. *See, e.g.,* *Cooper v. Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978) (stating that the assistance by counsel should be that of a "reasonably competent attorney acting as a diligent conscientious advocate"); *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976) (requiring counsel to "exercise the customary skills and diligence that a reasonably competent attorney would perform under similar circumstances").

121. *Hill*, 474 U.S. at 59. When the defendant has entered a guilty plea and there's been no trial, the burden on defendant to show ineffective assistance is increased. *See* *Coon v. Weber*, 644 N.W.2d 638, 643 (S.D. 2002). The defendant must show not just deficient performance but gross error by the attorney in advising the plea of guilty. *See id.*

122. *See Hill*, 474 U.S. at 58. For a rather unusual instance where a Circuit Court of Appeals criticizes a decision of the Supreme Court, see *United States v. Arvanitis*, 902 F.2d 489, 494 n.4 (7th Cir. 1990), *superseded by* 18 U.S.C.A. § 3663 (West 2000) ("The majority opinion in *Hill* . . . is not well reasoned. . . . We therefore join in the minority's criticism of the *Hill* opinion.").

123. *See Hill*, 474 U.S. at 58 (emphasis added).

124. The requirement that the defendant show "prejudice" ought not to exist at all in instances where the court prohibits counsel from having the opportunity to engage in any fact investigation or preparation for his client's case. Courts have found constitutional error when counsel was prevented from providing assistance to his client during a critical stage of the proceeding, and the entrance of a plea of guilty is most certainly a "critical stage." *See, e.g.,* *Geders v. United States*, 425 U.S. 80, 91 (1976) (finding that the night before defendant was to be cross-examined in his criminal trial was critical and denying defendant access to his counsel during that time violated his rights under the Sixth Amendment); *Brooks v. Tennessee*, 406 U.S. 605, 612-13 (1972) (finding that a Tennessee law that requires a testifying defendant to testify first denied the defendant of the effective assistance of counsel); *Hamilton v. Alabama*, 368 U.S. 52, 55 (1961) (finding that an arraignment is a critical stage); *Ferguson v. Georgia*, 365 U.S. 570, 598 (1961) (finding that the presentation of the defense to the court is a critical stage).

defendant has entered the guilty plea there will ordinarily be no appellate review of counsel's preparation of the case. The overburdened public defender knows, therefore, that if his client pleads guilty, counsel will not be examined as to what investigation or preparation he may have done or failed to have done on his client's case.

The general reluctance of appellate courts to overturn guilty pleas is illustrated by the case of *Parrish v. Beto*.¹²⁵ The defendant had been a young, uneducated boy, incarcerated for six months on a capital charge at the time the district attorney threatened the boy with being "burned" on the electric chair if he chose to go to trial, and his counsel pressured him to plead to a sentence of ninety-nine years.¹²⁶ The Fifth Circuit, in spite of the prosecutor's threat to the defendant of what could happen were he not to plead guilty, nevertheless deemed the plea to be voluntary.¹²⁷

The primary objective of our criminal justice system must be fairness and justice, not finality and judicial economy. Is it just or fair to inform a defendant who was represented by a counsel so overwhelmed with cases operating in a system "in which the need simply to dispose of cases has overshadowed everything else"¹²⁸ that he has no recourse because of the "fundamental interest in the finality of guilty pleas"?¹²⁹ The Tenth Circuit in *Sanchez v. Mondragon*¹³⁰ quite accurately portrayed reality: "Given the well-known overworked state of many public defenders, it is possible that [the defendant's] lawyer was insufficiently prepared, and that his attempts to persuade [the defendant] to plead guilty were affected by his lack of preparation."¹³¹ In the recent

125. 414 F.2d 770 (5th Cir. 1969) (per curiam).

126. See *id.* at 771.

127. See *id.* at 771-72.

128. CRIMINAL COURTS COMM. OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK, SAVING THE CRIMINAL CODE: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK 2 (1983) [hereinafter REPORT ON THE CASELOAD CRISIS].

129. *Hill v. Lockhart*, 474 U.S. 52, 58 (1985). Twenty years earlier, the Court favored the rights of the individual over the need for finality: "[C]onventional notions of finality . . . cannot be permitted to defeat . . . constitutional rights of personal liberty . . . without the fullest opportunity for plenary federal judicial review." *Fay v. Noia*, 372 U.S. 391, 424 (1963), *overruled by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 4 (1992), *superseded by* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(e)(2) (West 1994 & Supp. 2004); see also *Townsend v. Sain*, 372 U.S. 293, 311-12 (1963), *overruled by* *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 4 (1992), *superseded by* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(e)(2) (West 1994 & Supp. 2004).

130. 858 F.2d 1462 (10th Cir. 1988).

131. *Id.* at 1466-67.

case of *United States v. Bliss*,¹³² the Ninth Circuit held that a guilty plea which is entered by the defendant *because* his counsel's lack of preparation made conviction likely, was involuntary and invalid.¹³³

Proving prejudice to courts that desire finality is most difficult—especially given the sparseness of the record when the plea is offered. The *Hill* requirement, that in order for a defendant to get relief from a plea bargain in which he was denied effective assistance he must establish the reasonable likelihood that he would otherwise have gone to trial and perhaps have been acquitted,¹³⁴ negates the many significant ways a defendant can suffer from inadequate counsel. True plea negotiations should often be as adversarial as a trial itself; counsel must aggressively attempt to obtain the most advantageous plea bargain for his client. The factual investigation required, but so often not done, in part because the judge does not permit counsel to have the time to do so, can be crucial to counsel's ability to present the most positive information about the defendant and the charge to both the prosecutor and the court.¹³⁵ Furthermore, an abbreviated court transcript of the plea hearing will not reveal what a thorough investigation would have uncovered,¹³⁶ nor will it reveal what weaknesses in the prosecution's case that competent counsel, given enough time, may have discovered by interviewing both defense and prosecution witnesses. We are left by the *Lockhart* decision with a most unfortunate result: in the vast majority of instances where an effective, competent counsel could have negotiated a better plea for the defendant than his incompetent counsel did, there will be no remedy.

132. No. 02-56362, 84 Fed. Appx. 820, 822 (9th Cir. 2003) (unpublished mem.).

133. *See id.* On the day that Bliss' trial was to begin, his counsel was unprepared because counsel had not conducted the investigation that was required. The refusal of the court to grant a continuance presented the defendant with "a Hobson's choice: proceed to trial with unprepared counsel and risk a life sentence or plead guilty and receive a lesser sentence." *Id.*

134. *See supra* note 123 and accompanying text.

135. *See* Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 344 (2002) (The pre-trial work of counsel is crucial, including determining what had really occurred, who the witnesses are and what was actually observed, and such pre-trial effort "is the only key to a favorable disposition.").

136. *See* *Britt v. North Carolina*, 404 U.S. 226, 227, 229 (1971) (acknowledging that, at the very least, a transcript is valuable before trial as a discovery tool and after trial as an impeachment tool). Courts have recognized that there must be funds allocated to provide indigent defendants with investigative assistance to ensure effective assistance of counsel. *See id.* at 227. *Cf.* *Smith v. Enomoto*, 615 F.2d 1251, 1252 (9th Cir. 1980) (holding that an indigent defendant must make a showing of need in order to show entitlement to "state-funded investigative services"); *see also* *Strickland v. Washington*, 466 U.S. 668, 691 (1984) (requiring counsel to conduct reasonable investigations or to make a reasonable decision that a particular investigation is unnecessary).

Judges' attempts to get the defendant to plead guilty quickly by offering a shorter prison sentence than what would be imposed after trial ignores the substantial collateral consequences that may impact a defendant who accepts the plea bargain.¹³⁷ Judges very rarely inform a defendant that accepting the "one-time offer" might affect his livelihood;¹³⁸ that the imposition of civil damages will become more likely; that he might be required to register as a sex offender;¹³⁹ that he may be subject to mandatory substance abuse testing;¹⁴⁰ that he and his family might be denied access to governmental benefits such as public assistance funds;¹⁴¹ that he may no longer be eligible to live in public housing;¹⁴² and in most states as a convicted felon he would lose his right to vote.¹⁴³ For some individuals, the most serious consequence would be a change in immigration status including the possibility of deportation.¹⁴⁴ Courts fail to take the time to inform defendants of these

137. For example, the failure to be aware of the consequences of entry into a guilty plea procured by misrepresentation results in the vacatur of the plea. *See Bettancourt v. Willis*, 814 F.2d 1546, 1549 (11th Cir. 1987). However, there is no constitutional requirement that the possible consequences of a plea that are collateral as opposed to direct be explained to the defendant. *See United States v. Gilliam*, No. 95 Cr. 387, 1996 U.S. Dist. Lexis 15314, at *12 (S.D.N.Y. Oct. 17, 1996); *United States v. U.S. Currency*, 895 F.2d 908, 915 (2d Cir. 1990).

138. Many states have mandatory license revocations for individuals convicted of felonies and certain jobs are not available for felons even if no prison time resulted from the conviction. *See, e.g., CAL. BUS. & PROF. CODE* § 2221(d) (West 2003). For example, licenses which often are foreclosed to felons are required in many states in order to become a teacher, day care worker, real estate salesman, home repairman, liquor store or restaurant operator, a variety of positions within the health care field, or positions with banks or insurance companies. *See PLEAS OF GUILTY*, *supra* note 7, at Standard 14-1.4 cmt.

139. *See, e.g., ALA. CODE* § 13A-11-200 (1994); *CAL. PENAL CODE* § 290 (West 1999). An increasing number of states are requiring registration and public dissemination of the conviction for individuals convicted of an ever-increasing list of offenses. This has many ramifications for the convicted individual, not the least of which is the increased difficulty in obtaining employment.

140. *See, e.g., VA. CODE ANN.* § 18.2-251.01 (1996) (requiring substance abuse screening and assessment for individuals convicted of felonies).

141. *See, e.g., ARK. CODE ANN.* § 20-76-409(b) (2001); *N.J. STAT. ANN.* § 44:10-48(b)(7) (West Supp. 2004). Many states prohibit individuals convicted of drug offenses from receiving aid from state programs such as food stamps or assistance for dependent children. *See PLEAS OF GUILTY*, *supra* note 7, Standard 14-1.4 cmt.

142. The entire household may be evicted from federally-funded public housing if any member of the household is convicted of a drug offense. *See 24 C.F.R.* § 966.4(l) (2004).

143. *See, e.g., CAL. CONST.* art. II, § 4 (West 2002); *FLA. STAT. ANN.* § 97.041 (West 2002). The impact of the loss of vote has meant that minority communities in particular have diminished political power due to the over-representation of minorities amongst the population of convicted felons.

144. The 1996 Antiterrorism and Effective Death Penalty Act Amendments to the Immigration and Normality Act contains provisions which have widespread impact on non-citizens who are convicted of felonies. *See 8 U.S.C.A.* § 1227(a)(2) (West 1999).

consequences even though the court is constitutionally required to inform the defendant of all direct consequences of any guilty plea.¹⁴⁵ As the court explained in *United States ex rel. McGrath v. LaVallee*,¹⁴⁶ “a fair description of the consequences attendant upon the prisoner’s choice of plea . . . [is] manifestly essential to an informed decision on the part of the prisoner.”¹⁴⁷

Defendants are not fungible, they are not just cogs in the criminal court assembly line. *Unique* issues and *particular* concerns of *specific* defendants must be understood by both the court and defense counsel; such awareness requires time. Judges, all too typically, not only refuse to devote sufficient time for themselves to get the required information about the defendant, but also refuse to permit counsel to conduct the investigation required to obtain the data.¹⁴⁸ The proper determination of an appropriate sentence, whether imposed after a plea pre-trial or post-conviction at trial, requires consideration of factors such as any record of drug addiction that might lead to the realization that a drug rehabilitation program and not incarceration ought to be part of the sentence, the defendant’s psychiatric history, employment record, prior involvement with the victim, family responsibilities, and a myriad of other factors that properly bear on the determination of the most-appropriate sanction.¹⁴⁹

The Supreme Court has been explicit in emphasizing the responsibilities of the trial judge toward the defendant in a criminal case. In *Glasser v. United States*,¹⁵⁰ the Court stated that “[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.”¹⁵¹ The Court almost thirty years

145. See *Aguirre-Mata v. State*, 125 S.W.3d 473, 485 (Tex. Crim. App. 2003) (Holcomb, J., dissenting) (explaining that “[a] consequence is direct if it is a definite, practical consequence of a defendant’s guilty plea”) When the judge’s offer does not include incarceration, the defendant may be all the more unaware of the consequences that may nevertheless occur.

146. 319 F.2d 308 (2d Cir. 1963).

147. *Id.* at 314.

148. See PLEAS OF GUILTY, *supra* note 7, Standard 14-3.2(a) cmt. (requiring counsel to conduct sufficient investigation so as to be able to provide the individualized consideration required in order to give meaningful advice regarding a possible plea).

149. See 28 U.S.C. § 994(d) (1993). Appellate courts rarely determine that a sentence is improper; trial judges have broad discretion as long as the sentence imposed is within statutory limits. There is considered to be a strong public policy opposing interference with the trial court’s discretion in sentencing. See, e.g., *State v. Echols*, 499 N.W. 2d 631, 640 (Wis. 1993).

150. 315 U.S. 60 (1942).

151. *Id.* at 71. In *Cordova v. Baca*, the failure of the trial judge to admonish the defendant appropriately as to the dangers and disadvantages inherent in waiving counsel and choosing to represent oneself automatically led to a reversal of the conviction. 346 F.3d 924, 930 (9th Cir.

later, in *McMann v. Richardson*,¹⁵² again highlighted the significance of the judge's function: "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."¹⁵³

The ABA places similar responsibilities upon the trial judge in Standards for Criminal Justice: Special Functions of the Trial Judge.¹⁵⁴ The very first of the "Basic Duties" charges the judge with the responsibility of safeguarding the rights of the accused.¹⁵⁵ The Standard continues with language that almost seems designed to warn judges *not* to proceed as we have seen judges do regarding the coercion of pleas:¹⁵⁶ "The trial judge should require that every proceeding before him or her be conducted with *unhurried* and *quiet dignity* . . ."¹⁵⁷ The Standard's language seems not even to contemplate that it would, in fact, be the judge and not counsel who was "hurried" and not acting with the requisite and expected "quiet dignity."¹⁵⁸ Yet in one respect it does seem as if the *Basic Duties of the Trial Judge* had been written in an attempt to directly respond to the way some judges coerce defendants to decide

2003). Even if the reason for the court's failure was mere oversight on the part of the judge, overturning of the conviction is mandated. *See id.*

152. 397 U.S. 759 (1970).

153. *Id.* at 771; *see also* *Braxton v. Peyton*, 365 F.2d 563, 564 (4th Cir. 1966) (acknowledging that "[c]ourts have a duty of vigilance to assure that appointed counsel shall give proper professional service to their indigent clients"). Some judges may possess distorted perceptions about what is proper representation. In *State v. Huskey*, the defendant was charged with four counts of first degree murder and faced the death penalty. 82 S.W.3d 297, 302 (Tenn. Crim. App. 2002). The trial judge, citing his authority to monitor court-appointed counsel for indigent defendants, removed and replaced defendant's counsel because counsel had made too many motions which were "unnecessarily lengthy," "repetitive," and "duplicious." *Id.* at 302-03. The discharged counsel had, the judge maintained, filed an "unprecedented number of pleadings in this multi-faceted case." *Id.* at 303.

154. ABA STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE: SPECIAL FUNCTIONS OF THE TRIAL JUDGE (3d ed. 2000) [hereinafter SPECIAL FUNCTIONS].

155. *Id.* at Standard 6-1.1.

156. *See, e.g., supra* notes 2 and 3 and accompanying text.

157. SPECIAL FUNCTIONS, *supra* note 154, at Standard 6-1.1(b) (emphasis added). The judge also has the obligation to be patient and courteous to the defendant. *Id.* at Standard 6-3.4.

158. It would appear that the Standards contemplate that the judge would be the individual who reigns in the unruly counsel, as contrasted to the judge actually *creating* the improper courtroom atmosphere. The judge ought to control the tone of the courtroom and "ensure that the proceedings are conducted with dignity" and "do everything within his or her power to require that the lawyers treat each other with courtesy and respect. Although the trial judge cannot be expected to monitor the behavior of attorneys outside his or her presence, inquiry and admonition are warranted when complaints are made." *Id.* at Standard 6-1.1(b) cmt.

whether to accept in a matter of minutes pleas which are offered “for today only.” One Standard instructs the judge to engage in conduct toward the defendant which manifests “professional respect, courtesy, and fairness.”¹⁵⁹ The Supreme Court mandate in *Sheppard v. Maxwell*¹⁶⁰ that “trial courts must take strong measures to ensure that the balance is never weighed against the accused”¹⁶¹ certainly ought to operate to prevent the judge himself from becoming instrumental in *causing* the balance to be “weighed against the accused.”

If the message that comes from the judge is that time is all that counts and that speed in the processing of cases is all-important,¹⁶² then the whole system and all its participants can become diseased. The prosecutor may well not have the opportunity to fully assess the strength of his case, and in some instances, the police report the prosecutor is forced to rely on is exaggerated, may contain distortions, or omit vital information. Yet, it is this police report that forms the basis of the prosecutor’s or judge’s plea offer to the defendant. Is the defendant, who has been assigned counsel by a court whose first words are to convey the judge’s *one-time offer*, truly to believe that he has had the effective assistance of counsel? And since so many minorities pass through the criminal courts of our country, might those individuals perceive the courts as simply unconcerned with their constitutional rights because of their color or ethnicity? A defendant may expect partiality from the prosecution, but shouldn’t have to expect it from the judge. Furthermore, the lawyer who just does the judge’s bidding¹⁶³ delivers the defendant-client a one-two punch, a lesson in how the system is stacked against him.

The Supreme Court has made it clear that the judge at times has the affirmative obligation to intervene in the adversarial proceedings in

159. *Id.* at Standard 6-1.1(c). It is not just the defendant to whom the judge must offer respect, the judge must also treat the defense attorney with “courtesy, fairness, and respect.” *Id.*

160. 384 U.S. 333 (1966).

161. *Id.* at 362.

162. See Albert W. Alschuler, *Courtroom Misconduct by Prosecutors and Trial Judges*, 50 TEX. L. REV. 629, 678 (1972) (arguing that our “nation seems to have done its best to divert its trial judges from their naturally reflective role and to convert them into traffic policemen. At least we have placed most of our judges at very busy intersections”).

163. The decision of whether to plead guilty is that of the defendant and the defendant alone. See MODEL CODE OF PROF’L RESPONSIBILITY EC 7-7 (1986) [hereinafter PROF’L RESPONSIBILITY]. The ABA’s Model Rules of Professional Conduct are not quite as explicit regarding pleas specifically, but Rule 1.2(a) states that “[a] lawyer shall abide by a client’s decisions concerning the objectives of representation.” MODEL RULES OF PROF’L CONDUCT R. 1.2 (2003), available at http://www.abanet.org/cpr/mrpc/mrpc_home.html.

order to protect the rights of the defendant. In *Batson v. Kentucky*,¹⁶⁴ the Court emphasized the trial court's responsibility to prevent the use of peremptory challenges for discriminatory goals.¹⁶⁵ In *Fludd v. Dykes*,¹⁶⁶ the Eleventh Circuit extended the holding in *Batson* to civil cases and made it clear that by permitting counsel to act in a discriminatory manner, the court itself "becomes guilty" of violating the Equal Protection Clause.¹⁶⁷ The Supreme Court's decisions relating to possible conflict of interests cases present other examples. In *Cuyler v. Sullivan*,¹⁶⁸ the Court declared that an attorney must advise the trial court of any conflict of interest that arises during his representation of two or more clients, and that the court then has the duty to intervene. The Supreme Court explained in *Holloway v. Arkansas*¹⁶⁹ that the obligation to intervene arises because "[u]pon the trial judge rests the duty of seeing that the trial is conducted with the solicitude for the essential rights of the accused."¹⁷⁰

The extreme example of the responsibility of the trial court to act on the defendant's behalf is when the court is obligated to act *sua sponte*, even if counsel for the defendant objects. The trial court is obliged to "protect a defendant's right not to be tried or convicted while incompetent to stand trial"¹⁷¹ whenever and however the court has information that creates a reasonable doubt as to the competency of the defendant.¹⁷² If a judge fails to meet this obligation, the defendant has been deprived of due process because the trial would not have been a fair one.¹⁷³ In the plea context, the judge is too often the *cause* of the denial of due process and too infrequently the *protector* of the rights of the defendant.¹⁷⁴ In *Stano v. Dugger*,¹⁷⁵ the dissent emphasized the need for the court to intervene when required:

164. 476 U.S. 79 (1986), *overruled in part by* *Purkett v. Elem*, 514 U.S. 765 (1995) (*per curiam*) and *Powers v. Ohio*, 499 U.S. 400 (1991).

165. See *Batson*, 476 U.S. at 99 & n.22.

166. 863 F.2d 822 (11th Cir. 1989).

167. *Id.* at 828.

168. 446 U.S. 335, 347-48 (1980).

169. 435 U.S. 475 (1978).

170. *Id.* at 484 (quoting *Glasser v. United States*, 315 U.S. 60, 71 (1942)) (internal quotation marks omitted).

171. *Fallada v. Dugger*, 819 F.2d 1564, 1568 (11th Cir. 1987).

172. See *Lokos v. Capps*, 625 F.2d 1258, 1261 (5th Cir. 1980).

173. See *id.*

174. Compare, e.g., *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938) (discussing the protective function of the trial court *vis-à-vis* the defendant), *overruled by* *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981) with the discussion *supra* notes 87-93 and accompanying text.

175. 921 F.2d 1125 (11th Cir. 1991).

When a trial judge receives notice of a circumstance or event implicating the fairness of a proceeding before the court, he assumes a responsibility to intervene in order to preserve the proceeding's fairness. If the trial judge fails to discharge this duty, then he becomes causally responsible for the error and its effects.¹⁷⁶

Judges are, of course, required not only to be familiar with the canons and codes which are applicable to the trial judge,¹⁷⁷ but must conform their conduct to the specific ethical rules governing the judiciary.¹⁷⁸ Therefore, the judge's statements ought to reflect not only the "dignity of judicial office"¹⁷⁹ but must also "carefully avoid any words or actions that could undermine the dignity of the proceedings."¹⁸⁰ It is impossible to maintain that the "for today only" style of judging conforms to the mandate that the trial judge "must be careful to allow sufficient time" for the defense to "properly prepare their case."¹⁸¹

Judges who treat defendants with a minimum amount of respect or dignity are perhaps similar to the judge in *In re Yengo*,¹⁸² who was described by the New Jersey Supreme Court upon removing the judge from office, as being

unable to understand the relationship between justice and the defendant. The poorest, weakest, most hapless or illiterate defendant, standing before an American Court, is entitled to exactly the same respect, rights and hearing as would be the Chief Justice of the United States standing before the court and similarly accused. This is part of what our Constitution means by "equal protection of the laws."¹⁸³

There are two other significant ways that the coercion of pleas violates judicial codes of conduct. The judge who assesses a case he sees for the first time in a matter of moments and then concludes what the outcome should be with no or minimum input from defense counsel,

176. *Id.* at 1158 (Tjoflat, C.J., dissenting).

177. See SPECIAL FUNCTIONS, *supra* note 154, at Standard 6-1.3. The Standard is titled, *Adherence to Standards*, and is one sentence in length: "The trial judge should be familiar with and adhere to the canons and codes applicable to the judiciary, the ethical rules effective in the particular jurisdiction applicable to the legal profession, and standards concerning the proper administration of criminal justice."

178. *Id.* at Standard 6-1.3 cmt.

179. *Id.* at Standard 6-1.4.

180. *Id.* at Standard 6-1.4 cmt.

181. *Id.* at Standard 6-1.5(a) cmt. See *supra* notes 87-93 and related discussion regarding the judge telling counsel that the time was up.

182. 371 A.2d 41 (N.J. 1977).

183. *Id.* at 56-57.

violates the requirement that "[t]he trial judge should give each case individual treatment; and the judge's decisions should be based on the particular facts of that case."¹⁸⁴ It is all too often what the court itself actually does that may leave the impression that the criminal process is mechanical and that there is no individual justice. The judge is not just the bystander to the lack of individualized justice, but all too often, the judge is a major player and, in many ways, the major cause.

Furthermore, the judge who threatens the defendant in order to get him to plead guilty to criminal conduct is no longer acting as the requisite "neutral" figure.¹⁸⁵ As an Ohio Court of Appeals stated so forcefully in *Ohio v. Filchok*:¹⁸⁶ "It stretches the appearance of neutrality past the breaking point for a trial court to usurp the role of the prosecutor by formulating and proposing a plea bargain, and neither the State nor the Federal Constitutions will countenance such a practice."¹⁸⁷

The Criminal Justice Standards properly link the requirement of judicial impartiality with public confidence in the integrity of the judiciary.¹⁸⁸ Judges certainly lose the appearance of objectivity and impartiality when they take on the role of advocate and pressure defendants to plead guilty and not to contest the charges against them.¹⁸⁹ As the court stated in *Bethany v. State*,¹⁹⁰ "[w]here a trial judge abandons his position as a neutral arbiter and takes on the role of an advocate, this system cannot function and fairness is lost."¹⁹¹

Judicial pressure may even be directed to the defendant's family members. One judge in Ohio requested that the defendant's mother and

184. SPECIAL FUNCTIONS, *supra* note 156, at Standard 6-1.1(b).

185. *Id.* at Standard 6-3.4. The Standard also requires that the judge "suppress personal predilections" and not permit himself to get "embroil[ed]" in the conflict. *Id.* The Commentary is even stronger: "The judge should not demonstrate even a hint of partiality." *Id.* at Standard 6-3.4 cmt.

186. 688 N.E.2d 1063 (Ohio Ct. App. 1996).

187. *Id.* at 1067; *see also* *State v. Delarosa*, 547 A.2d 47, 51 (Conn. App. Ct. 1988) (asserting that the court "should never assume a position of advocacy, real or apparent").

188. *See* SPECIAL FUNCTIONS, *supra* note 156, at Standard 6-1.6(a). The Commentary highlights the need for the judge to appear to be impartial and instructs the judge to "remain alert" as to whether any action by the judge may even create the "appearance of partiality." *Id.* at Standard 6-1.6(a) cmt. (emphasis added).

189. *See* *Filchok*, 688 N.E.2d at 1067; *Delarosa*, 547 A.2d at 51. The plea of guilty requires that the defendant waive his constitutional right to a jury trial. The Supreme Court explained that "[a] waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938), *overruled by* *Edwards v. Arizona*, 451 U.S. 477, 484-85 (1981).

190. 814 S.W.2d 455 (Tex. Ct. App. 1991).

191. *Id.* at 462.

sister meet with the judge outside of the presence of either the defendant or his counsel.¹⁹² The defendant in the case was black and the judge told the family that if the defendant were to insist on going to trial he would face a predominately white jury, and, were a conviction to ensue, the defendant's sentence would be death.¹⁹³ The judge asked the family to request the defendant to sign a statement indicating that he wished to plead guilty.¹⁹⁴ The family members acquiesced and, in the absence of his counsel, but in the presence of the prosecutor, the plea bargain was arranged in the judge's chambers.¹⁹⁵

Judges may, in fact, be torn between their desire to get the plea and their knowledge that the coercion needed at times to get the plea might be inappropriate.¹⁹⁶ But the court's message, however masked, is often quite clear. Consider the trial judge in *United States ex rel. McGrath v. LaVallee*.¹⁹⁷ The judge told the defendant: 1) that the plea which was offered was "very, very fair,"¹⁹⁸ 2) that the chance of any acquittal at trial was "not too good,"¹⁹⁹ 3) that he would not be entitled to any kind of favorable consideration were he to be convicted,²⁰⁰ and 4) that the judge "might have to send you away for the rest of your life."²⁰¹ "But," the judge then added, cavalierly, "I emphasize that I am not telling you

192. See *State v. Byrd*, 407 N.E.2d 1384, 1385–86 (Ohio 1980).

193. See *id.* at 1386. The judge had, in actuality, the discretion to impose *either* a prison sentence *or* the death penalty after conviction.

194. See *id.* Theoretically, pressure from family members on a defendant to plead guilty will not make a plea involuntary or coerced. See *Kent v. United States*, 272 F.2d 795, 798 (1959). However, where, as was the case here, the source of the threat to the defendant was easily traceable back to the court, due process would be violated. See *Lo Conte v. Dugger*, 847 F.2d 745, 753 (11th Cir. 1988).

195. See *Byrd*, 407 N.E.2d at 1386. The plea bargain was voided because of the intense pressure that the judge placed upon the defendant. See *id.* at 1389. However, the court in its decision retreated from its prior holding in *State v. Griffey* that under *no* circumstances should a judge partake in plea negotiations. See *id.* at 1388 (modifying *Griffey*, 298 N.E. 2d 603, 610 (Ohio 1973)). The *Byrd* rule adopted by the court required careful scrutiny, and condemnation in only some instances, of judicial participation in plea bargaining. See Michael A. Hiser, Comment, *Judicial Participation in Plea Bargaining—Fundamental Fairness?* 8 OHIO N.U. L. REV. 212 (1981).

196. The Model Code of Judicial Conduct is not always understanding of the conflicting demands on judges. The Code, at times, seems to have been written with the belief that judges can do it all. For example, the Commentary to Standard 3B(4) informs that, "The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and businesslike while being patient and deliberate." MODEL CODE OF JUDICIAL CONDUCT, *supra* note 1, at Canon 3B(4) cmt.

197. 319 F.2d 308 (2d Cir. 1963).

198. *Id.* at 323 app. (Marshall, J., dissenting).

199. *Id.*

200. See *id.* at 324 app. (Marshall, J., dissenting).

201. *Id.* at 323 app. (Marshall, J., dissenting).

what to do son.”²⁰² What is crucial, in any event, is not whether the judge’s comments were *deliberately designed* to induce the guilty plea, the issue is whether the judge’s statements to the defendant have that impact.²⁰³

Although the Supreme Court in *Brady v. United States*²⁰⁴ has upheld the overall constitutionality of plea bargaining, the Court, in *United States v. Jackson*,²⁰⁵ declared unequivocally that “due process forbids convicting a defendant on the basis of a *coerced* guilty plea.”²⁰⁶ A plea which has been induced by threats is deprived of its requisite voluntariness.²⁰⁷ The *Jackson* Court held the death penalty clause of the Federal Kidnaping Act²⁰⁸ to be unconstitutional in that the only time the death sentence could be imposed under the statute was if the defendant refused to plead guilty and was convicted after a jury trial.²⁰⁹ The Court elaborated on its prohibition of coerced guilty pleas: “[T]he evil in the federal statute is not that it necessarily *coerces* guilty pleas and jury waivers but simply that it needlessly *encourages* them. A procedure need not be inherently coercive in order that it be held to impose an impermissible burden upon the assertion of a constitutional right.”²¹⁰

State courts have, albeit infrequently, also condemned the “punishment” of an individual for the exercise of his right to a jury trial. The Supreme Court of North Carolina remanded a case for re-sentencing because the trial judge had stated in open court that the sentence he was imposing was in response to the defendant’s insisting on a jury trial, and forcefully explained the basis of its decision:

No other right of the individual has been so zealously guarded over the years and so deeply embedded in our system of jurisprudence as an accused’s right to a jury trial. This right ought not to be denied or

202. *Id.* at 324 app. (Marshall, J., dissenting) (emphasis added). This is evocative of the New York State Supreme Court judge in *People v. Derrick Smith*, who told the defendant that he was “not obligated to accept” the plea which had been offered. See *supra* note 3 and accompanying text.

203. See *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 253 (1966).

204. 397 U.S. 742, 746, 753 (1970) (holding that merely because the defendant was motivated to accept a specific penalty rather than be subjected to a greater sentence after trial did not, in and of itself, cause the plea to be involuntary or coerced). The Court deemed plea bargaining to be an “essential component of the administration of justice.” *Santobello v. New York*, 404 U.S. 257, 260–61 (1971).

205. 390 U.S. 570 (1968).

206. *Id.* at 581 n.20 (emphasis added).

207. See *Brady*, 397 U.S. at 750.

208. 18 U.S.C.A. § 1201(a)(5) (2003).

209. *Jackson*, 390 U.S. at 581–82.

210. *Id.* at 583 (emphasis in original).

abridged nor should the attempt to exercise this right impose upon the defendant an additional penalty or enlargement of his sentence. The statement of the trial judge . . . we cannot condone.²¹¹

One reason why appellate court language such as this is unusual is that it is rare for a trial judge to state so clearly *on the record* the relationship between the sentence that is imposed after trial and the refusal of the defendant to have accepted the offered plea.

There's one additional, and very significant way that judicially-coerced plea bargaining may often violate the constitutional rights of the defendant. There is a Fifth Amendment right for an individual not to incriminate himself,²¹² yet if the defendant chooses to exercise that right by remaining silent, i.e., *not to plead guilty*, he may well be punished by an increased sentence after trial.²¹³ It can be demanded that an individual testify in ways which might, in fact, incriminate himself only when he is to be granted immunity from penalty or prosecution based on those statements. It is only after the state makes it clear to the individual that immunity is to be granted that the state can penalize the individual for remaining silent. In the plea bargaining scenario, the defendant not only receives no immunity but is convicted of the crime immediately upon acknowledging his guilt.

A coerced plea is certainly one form of coerced confession. The Supreme Court in *Brown v. Mississippi*²¹⁴ held that the Due Process Clause of the Fourteenth Amendment prohibited states from using coerced confessions against an individual. And the Court in *Malloy v. Hogan*²¹⁵ declared that the Fifth Amendment privilege against self-incrimination is the essential mainstay of the American system of criminal prosecution and that the Fourteenth Amendment protects the privilege from any form of "abridgment by the States."

How can a defendant's silence (as indicated by a refusal to plead guilty) be *both* protected *and* subject to penalty by the court's increase in

211. *State v. Boone*, 239 S.E. 2d 459, 465 (N.C. 1977).

212. *See* U.S. CONST. amend. V.

213. *See, e.g., State v. Pennington*, 712 A.2d 1133 (N.J. 1998); *see also supra* notes 35–42 and accompanying text.

214. 297 U.S. 278, 286 (1936).

215. 378 U.S. 1, 6 (1964). Some judges seem so antagonistic to a defendant exercising his right to remain silent that the defendant will actually be asked by the judge to explain *why* he was pleading not guilty. *See, e.g., McKevitt* (N.Y. Comm'n on Judicial Conduct, June 27, 1998), available at <http://www.scjc.state.ny.us/Determinations/M/mckevitt2.htm>. The New York State Commission on Judicial Conduct concluded that such questioning by the judge gives the defendant the appearance that the judge wants him to plead guilty. *Id.*

punishment because that silence necessitated a jury trial? The constitutional right of an individual charged with crime to force the government to prove its case without the aid of the defendant has existed in this country “since the earliest days of the Republic.”²¹⁶ The burden upon the state to prove the defendant guilty beyond a reasonable doubt is not a mere formality but is a crucial and vital component of our system of criminal justice.²¹⁷ The individual accused of crime has every right—and the exercise of rights must be protected not penalized—to seek to have the prosecution meet its burden.

Even in situations where the judge himself is not an active participant in determining the plea deal offered to the defendant, the judge has the ethical responsibility of ensuring that the prosecutor is acting appropriately. A prosecutor, unlike virtually any other attorney, has an ethical obligation that extends beyond just representing his “client”; the prosecutor has the duty to seek justice and “to guard the rights of the accused as well as to enforce the rights of the public.”²¹⁸ The prosecutor is to be “an administrator of justice,”²¹⁹ whose duty is “to seek justice, not merely to convict.”²²⁰

The obligation of the judge to protect the defendant from prosecutorial misconduct²²¹ flows not just from the judicial obligation to

216. *Corbitt v. New Jersey*, 439 U.S. 212, 233 (1978) (Stevens, J., dissenting); see also 8 WIGMORE, EVIDENCE § 2251 (McNaughten rev. ed. 1961), quoted in *Corbitt*, 439 U.S. at 229 (Stevens, J., dissenting) (explaining that the Fifth Amendment privilege enables an individual to “requir[e] the government in its contest with the individual to shoulder the entire load”).

217. *Corbitt*, 439 U.S. at 228 n.3 (Stevens, J., dissenting) (citing *State v. Hardy*, 128 S.E. 152, 155 (N.C. 1925)).

218. PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, Standard 3-1.2 cmt.; see also *United States v. Agurs*, 427 U.S. 97, 110–11 (1976), modified by *United States v. Bagley*, 473 U.S. 667, 681 (1985) (requiring prosecutors to prosecute with vigor but also to be faithful to the overriding concern that “justice . . . be done”); MODEL RULES OF PROF’L CONDUCT, *supra* note 165 at R. 3.8 cmt. (charging prosecutors with the responsibility of being “a minister of justice and not simply that of an advocate”); PROF’L RESPONSIBILITY, *supra* note 165, at EC 7-13. One primary obligation is the duty of the prosecutor to provide the defense with any exculpatory evidence obtained by the prosecutor. See FED. R. CRIM. P. 16 (2002).

219. PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, Standard 3-1.2(b). A witness that a prosecutor might potentially call at trial to testify against the defendant does not “belong” to the prosecutor and it is improper for the prosecutor to suggest to a witness that the witness not agree to be interviewed pre-trial by defense counsel. See *id.* at Standard 3-3.1 cmt.

220. *Id.* at Standard 3-1.2(c). The dual responsibilities of the prosecutor exist not just at trial, but at all stages of the prosecution. See *id.* at Standard 3-2.8. The prosecutor has the burden of disclosing to the court the existence of any legal authority known to the prosecutor which is adverse to the position of the prosecutor. See *id.* at Standard 3-2.8(d).

221. There’s a danger that some judges may view their own role as that of the judicial arm of the prosecutor’s office and too often defer to the perceived need for both to act together to deter crime. Such a perspective may lead to the view that the defense counsel is an obstacle to the goals

ensure that the due process rights of defendants are protected, but also from the judge's responsibility to be "mindful of the attorneys' duties" in any case before the court.²²² The prosecutor is clearly deemed to be "an officer of the court"²²³ and the court cannot in any way sanction prosecutorial abuse of what is often very far-reaching discretion.²²⁴ The ABA Standards for Criminal Justice note the possibility that "personal ideological, or political beliefs" of prosecutors²²⁵ might improperly influence a prosecutor's conduct as might the "desire for personal achievement, or for personal or political success."²²⁶

Prosecutors' offices increasingly rely upon statistics to gauge the success of the office as well as the individual assistant district attorneys, and the focus is on conviction rate. A guilty plea *is* a conviction, and the judge must be alert to situations where the prosecutor's case is too weak to survive a challenge at trial so the prosecutor is all the more determined to get a plea of guilty pre-trial. In such circumstances, the prosecutor may well attempt to have his case *seem* to be far stronger than it in fact is. The judge cannot be a party to pressuring a defendant to plead guilty to a charge that the prosecutor is simply not able to prove beyond a reasonable doubt. This would include situations where the prosecutor's case is dependant upon illegally-obtained evidence which would not be admissible at trial.

Vigilance may well be required on the part of the judge to ensure that the prosecutor does not act to violate the defendant's rights. The prosecutor is instructed by the ABA Criminal Justice Standards not to "seek a continuance solely for the purpose of mootng the preliminary hearing by securing an indictment"²²⁷ and the judge therefore must be an

of law enforcement. One judge certainly expressed this view: "[I]f crime is, in fact, on the increase today, it is due in large part to the fact that waiting in the wings are lawyers who are willing to forego their professional responsibilities, professional obligations, professional duty in their defense [of their client]." Schwartz, *supra* note 50, at 135 n.13 (quoting Judge Julius Hoffman who directed his remarks to attorney William Kuntsler after sentencing Kuntsler for contempt of court in *United States v. Dellinger*, 657 F.2d 140 (7th Cir. 1981)).

222. SPECIAL FUNCTIONS, *supra* note 156, at Standard 6-1.1(c) cmt. The Standard is not meant to apply just to defense counsel, but clearly requires judges to be cognizant of the propriety of the prosecutor's conduct as well. See also *United States v. Rogers*, 471 F. Supp. 847, 852 (E.D.N.Y. 1979) (mem.) (recognizing that the court has inherent power to require compliance with fundamental ethical and professional standards).

223. PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, at Standard 3-1.2(b).

224. *Id.* (requiring the prosecutor to "exercise sound discretion in the performance of his or her functions").

225. *Id.* at Standard 3-1.3 cmt.

226. *Id.*

227. *Id.* at Standard 3-3.10(d).

active enquirer of the prosecutor. The prosecutor is not to seek "excessive bail . . . in an attempt to coerce a plea agreement."²²⁸ Yet not only do judges fail to prevent such bail requests, judges may frequently be the very ones who are using high bail to obtain a plea. In fact, judges may do what the judge in *People v. Derrick Smith*²²⁹ did: entirely revoke the bail that had been set by a different judge as part of the attempt to persuade the defendant to plead guilty.²³⁰

Judges may, especially in misdemeanor cases, set bail at a level they expect is too great for the defendant to make, and then indicate to the defendant that were he to plead guilty the sentence would be time served and he'd be released from custody. For example, the Referee's findings in *The Matter of Judge Henry Bauer*, concerning a judge who was being investigated by the New York State Commission on Judicial Conduct, concluded that the judge had coerced pleas in that "defendants had no alternative but to plead guilty and receive [the judge's] sentence so that they could be discharged from jail."²³¹ In another matter as well, a Criminal Court Judge in New York City²³² was also disciplined in part because she had conveyed "the explicit message that she was using bail as a coercive tactic when defendants appeared reluctant to accept the plea that was offered."²³³

It is rare that judges are disciplined, and it's even more uncommon when the discipline is based on judicial violation of the due process rights of defendants. Yet such discipline of judges is vital because, as the Supreme Court of New Jersey indicated when ordering the removal of a municipal court judge:²³⁴ "[A]nything that happens in just a few of the courtrooms casts a shadow upon all of us."²³⁵ At those rare times when a judge is disciplined for conduct that many judges may in fact be

228. *Id.* at Standard 3-3.10 cmt.

229. *People v. Derrick Smith* (N.Y. Sup. Ct. 1998) (Indictment No. 7996-98).

230. The transcript of *Derrick Smith* reveals that *immediately* after the judge stated "Bail conditions are remand, gentlemen," the court went on to say: "Now, the offer in this case, Mr. Barry, for today only is three to six which he obviously is not obligated to accept." Official Court Transcript, *supra* note 7, at 4 (emphasis added).

231. Bauer (N.Y. Comm'n on Judicial Conduct, Mar. 30, 2004), *available at* <http://www.scjc.state.ny.us/Determinations/B/bauer.htm>.

232. *See* Recant (N.Y. Comm'n on Judicial Conduct, Nov. 19, 2001), *available at* <http://www.scjc.state.ny.us/Determinations/R/Recant.htm>.

233. *Id.*

234. *In re Yengo*, 371 A.2d 41, 56 (N.J. 1977).

235. *Id.* at 46 (quoting comments of former Chief Justice Weintraub at the Eleventh Annual Conference of Magistrates in New Jersey in 1959). In the *Yengo* matter, the court found that the disciplined judge had used bail as an "arbitrary weapon for harassment of defendants." *Id.* at 51.

engaging in, it is particularly necessary for such rebuke to get widespread publicity (especially within the legal community) so that judges may be deterred from engaging in such inappropriate conduct in the future. When a judge feels that he is not accountable, then the arrogant abuse of power may flourish.

The ethical obligations of the prosecutor exist at the time of the commencement of the case against the defendant and most certainly exist at the arraignment of the defendant where plea bargaining might well be occurring. The ABA's Model Rules of Professional Conduct²³⁶ mandate the prosecutor to "make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense."²³⁷ The corresponding ABA Criminal Justice Standard emphasizes that any disclosure must be made "at the earliest feasible opportunity."²³⁸ The judge should ensure that if, indeed, there is exculpatory material of which the prosecutor is aware, that the defendant is so informed before any plea is entered, and that the judge, before he decides what plea bargain would be appropriate, is also apprised of such evidence.

For any defendant to intelligently assess the advisability of pleading guilty, (and it *is* the defendant who has the "ultimate authority" to determine whether or not to plead guilty)²³⁹ it is absolutely crucial that he be able to assess the strength of the case against him.²⁴⁰ For counsel to advise his client appropriately, the counsel must be aware of problems

236. MODEL RULES OF PROF'L CONDUCT, *supra* note 165. The House of Delegates of the ABA adopted the Model Rules of Professional Conduct in August of 1983 after years of study and draft recommendations by the ABA Commission on Evaluation of Professional Standards. *See id.* The ABA expected and intended the Model Rules of Professional Responsibility to replace the Model Code of Professional Responsibility. *See id.* The Model Code of Professional Responsibility was designed both as an inspirational guide to attorneys as well as a basis for disciplinary action and consisted of three separate, but interrelated, parts: Canons, Ethical Considerations, and Disciplinary Rules. *See* PROF'L RESPONSIBILITY, *supra* note 165, at x, 1. The Model Code of Professional Responsibility replaced the ABA's Canons of Professional Ethics, which was adopted in 1908. *See id.* at ix.

237. MODEL RULES OF PROF'L CONDUCT, *supra* note 165, at R. 3.8(d); *see also* PROF'L RESPONSIBILITY, *supra* note 165, at DR 7-103(B); NATIONAL PROSECUTION STANDARDS Standard 25.4 (National District Attorneys Ass'n, 1991) (requiring prosecutors to "disclose the existence or nature of exculpatory evidence pertinent to the defense").

238. PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, at Standard 3-3.11(a).

239. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

240. *See, e.g.,* PLEAS OF GUILTY, *supra* note 7, at Standard 14-1.3(b) cmt. (understanding the defenses available to a defendant to the charges is an important factor in assuming that a plea is knowing and voluntary).

of proof and possible defenses.²⁴¹ Yet a prosecutor, in the hurried atmosphere of America's urban criminal courts, may be disinclined to impart any information to defense counsel that might inhibit plea agreement negotiations.²⁴² Furthermore, the judge, instead of ensuring the prosecutor's compliance with his ethical²⁴³ and legal²⁴⁴ duties, may be so desirous of the plea bargain that the judge will instead attempt to impress upon the defendant the high likelihood of conviction after trial. Any evidence that may be exculpatory for the defendant may well be regarded as an obstacle toward obtaining the guilty plea.²⁴⁵ Certainly, at the least, the judge's pressure on all parties to quickly come to a resolution of the matter does not produce an atmosphere that is conducive to the defendant becoming aware of the existence of exculpatory evidence.

On rare occasions, the judge may be confronted with a prosecutor whom the judge considers to be unreasonably rigid and therefore preventing an appropriate plea by the defendant to a charge which is less than the one he currently faces. For this dilemma, the judge has a trump card.²⁴⁶ He could make it clear to both sides that if the defendant were to

241. See, e.g., *id.* at Standard 14-3.2 cmt. (requiring counsel's assistance to help the defendant assess the likelihood of conviction).

242. Cf. PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, at Standard 3-3.11 cmt. A proper and ethical judge would not accept any guilty plea without confirming that the defendant's counsel had been effective. The judge, therefore, should inquire about the extent of investigation done, the degree of communication between counsel and the defendant, and the sufficiency of discovery material supplied by the prosecutor.

243. See *id.* at Standard 3-3.11(c). It is, in fact, unprofessional for a prosecutor to remain intentionally ignorant of, or to improperly refrain from investigating, leads that may weaken the prosecutor's case. See *id.*

244. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the defendant's due process rights are violated when the prosecutor suppresses evidence favorable to the accused, and that the defendant's constitutional rights are violated "irrespective of the good faith or bad faith of the prosecution").

245. See, e.g., *Sanchez v. United States*, 50 F.3d 1448, 1453 (9th Cir. 1995); *White v. United States* 858 F.2d 416, 422-23 (8th Cir. 1988).

246. See, e.g., 725 ILL. COMP. STAT. ANN. § 5/103-6 (West 1992); LA. CODE CRIM. PROC. ANN. art. 780 (West 1998); MASS. GEN. LAWS ANN. ch. 218, § 26A (West 1993). This approach would not work in the federal courts nor in more than half of the states where a prosecutor's consent is required in order for the defendant to waive a jury. See, e.g., IND. CODE ANN. § 35-37-1-2 (West 1998); MICH. COMP. LAWS ANN. § 763.3(1) (West 2000); TEX. CRIM. PROC. CODE ANN. art. 1.13 (Vernon 1977 & Supp. 2004). Since the imposition of the United States Sentencing Guidelines governing the federal courts, there have been many unsettling and, perhaps unexpected, ramifications.

[Since] certain material "facts," so called, now mathematically drive every sentencing decision, fact bargaining is today central to plea negotiation in federal court. Everyone involved knows it. Prosecutors and defense counsel are knowingly involved in this fraud

waive his right to a jury trial and proceed with a bench trial, the judge would not convict the defendant of the highest count. In some felony trial courts, the prosecutor may agree for a variety of reasons with the judge that the best way to proceed is with the trial.²⁴⁷ The prosecutor, for example, due to his office's "no reduced-plea" policy, may be prohibited from agreeing to a reduced charge in exchange for a guilty plea by the defendant.²⁴⁸ Yet the prosecutor does not wish a jury trial on the highest count and understands that in exchange for the defendant's jury waiver, the judge will find the defendant guilty for an offense less serious than the highest charge.²⁴⁹ Since all parties understand what the outcome of the "trial" will be, some refer to these curtailed trials as "long pleas."²⁵⁰

Judges must be guardians of the constitutional rights of those defendants who appear before them.²⁵¹ Our system of federalism not only requires that state courts protect the rights afforded by the Constitution,²⁵² but the state courts are to be "the primary guarantors of constitutional rights."²⁵³ Virtually every state in the country requires that a judge upon taking office take an oath to "support, protect and defend"

and courts—now largely stripped of the powers to make fully informed sentencing decisions—tacitly acquiesce when satisfied with the negotiated plea. As a result, sentencing under the Sentencing Guidelines today is, as one of my colleagues so aptly puts it, "a massive exercise in hypocrisy."

Berthoff v. United States, 140 F. Supp. 2d 50, 62-64 (D. Mass. 2001) (footnotes omitted). Fact bargaining exists even though it is not appropriate for the parties to engage in it. U.S. SENTENCING GUIDELINES MANUAL § 6B1.4 cmt. (2003) ("It is not appropriate for the parties to stipulate to misleading or non-existent facts, even when both parties are willing to assume the existence of such 'facts' for purposes of the litigation.").

247. See Court, *supra* note 2, at 56.

248. *Id.*

249. See *id.*

250. *Id.*

251. In fact, even prosecutors have some obligations in this regard. See PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, at Standard 3-3.1 cmt. (stating that prosecutors "must take the lead in assuring that investigations of criminal activities are conducted lawfully and in full and ungrudging accordance with the safeguards of the Bill of Rights"). When it comes to the adversarial in-court relationship with an overburdened defense counsel, the prosecutor is more likely to exploit defense counsel's ineffectiveness than focus on the defendant's Sixth Amendment right to effective assistance of counsel. See Bruce A. Green, *Practice Context: Criminal Neglect: Indigent Defense From a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1171 (2003). See generally Vanessa Merton, *What Do You Do When You Meet a "Walking Violation of the Sixth Amendment" If You're Trying to Put That Lawyer's Client in Jail?* 69 FORDHAM L. REV. 997 (2000).

252. See, e.g., *Batchelor v. Cupp*, 693 F.2d 859, 862 (9th Cir. 1982).

253. *Id.* (quoting PAUL M. BATON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 359 (2d ed. 1973)).

the Constitution of the United States.²⁵⁴ Some states, such as Tennessee, go further and require that the judge “solemnly swear”²⁵⁵ to “administer justice without respect to persons, and do equal rights to the poor and the rich.”²⁵⁶ All too often, counsel for the indigent do not provide the defendant with the constitutionally-mandated assistance of counsel.²⁵⁷ A 2002 report, funded in part by the American Bar Association’s Standing Committee on Legal Aid and Indigent Defense concluded that the promise of *Gideon*²⁵⁸ was far from realized and that “public defense too often means a lawyer who is overwhelmed, unqualified, or politically compromised.”²⁵⁹ If a United States Attorney General was aware of the severity of the problem,²⁶⁰ and if state prosecutors are aware of the

254. See, e.g., MONT. CONST. art. III, § 3 (2001), reprinted in THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE (2001); see also, e.g., CAL. CONST. art. XX § 3 (West 1996) (requiring judges to pledge to “support and defend” the Constitution); HAW. CONST. art. XVI, § 4 (1993) (requiring judges to swear to “support and defend” the Constitution).

255. TENN. CODE ANN. § 17-2-120 (1994). Some states require the judges to use the word “swear,” others permit a judge merely to “affirm.” E.g., CAL. CONST. art. XX § 3 (West 1996) (requiring the judge either to swear or to affirm); HAW. CONST. art. XVI, § 4 (1993) (requiring the judge either to swear or to affirm); MONT. CONST. art. III, § 3 (2001), reprinted in THE MONTANA STATE CONSTITUTION: A REFERENCE GUIDE (2001) (requiring the judge either to swear or to affirm); see also, e.g., MASS. CONST. amend. art. VI (2003). In Massachusetts, if the judge be of the “denomination called Quakers,” the judge can omit the words “So help me God,” and substitute: “This I do under the pains and penalties of perjury.” *Id.*

256. R.I. GEN. LAWS § 8-3-1 (1997); TENN. CODE ANN. § 17-2-120 (1994).

257. See Green, *supra* note 251, at 1169–70 (referring to the “systemic neglect of indigent defendants” by counsel whose practice violate professional norms). The problems of insufficient resources and overburdened defense counsel have, for a long time, plagued the criminal justice system, but in recent years, when the recession has led to severe economic problems for local and state governments, representation of indigent defendants has been especially hard hit. See NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, LOW-BID CRIMINAL DEFENSE CONTRACTING: JUSTICE IN RETREAT I, 6 (1997) (concluding that “criminal defense for the poor . . . has deteriorated markedly in recent years”); Memorandum From Michael N. Gambrell, District Public Defender, Baltimore, Md. to the Circuit Court for Baltimore City (June 22, 1998) (informing the circuit court that due to a 20.8% increase in cases at the Circuit Court level between 1997 and 1998 “the attorneys’ ability to provide adequate representation is seriously challenged”).

258. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

259. TASK FORCE ON IMPROVING PUBLIC DEFENSE SERVICES IN MICHIGAN, MODEL PLAN FOR PUBLIC DEFENSE SERVICES IN MICHIGAN 3 (2002); see also ALLAN K. BUTCHER & MICHAEL K. MOORE, COMM. ON LEGAL SERVICES TO THE POOR IN CRIMINAL MATTERS, MUTING GIDEON’S TRUMPET: THE CRISIS IN INDIGENT CRIMINAL DEFENSE IN TEXAS 18, 22 (2000) (reporting that the system of criminal defense representation for the indigent is in a state of crisis largely because of inadequate funding).

260. See U.S. Attorney General Reno Demonstrates Her Commitment to Indigent Defense Issues, SPANGENBERG REP. (The Spangenberg Group, West Newton, Mass.), Nov. 1997, at 14 (detailing Attorney General Reno’s work with other members of the Justice Department relating to the funding of indigent defense).

problem,²⁶¹ then certainly trial judges are as well.²⁶² And in the legislative fiscal years 2003 and 2004, the recession and the budget crisis confronting local and state governments led to nationwide reductions in expenditures for indigent defense.²⁶³

It is certainly the case that one way that reduced staffs, with reduced funding and more cases per attorney than in the past, try to minimize their caseloads is to have their clients enter guilty pleas.²⁶⁴

[T]he promise of *Gideon* is not completely fulfilled. Indigent defendants do not invariably receive effective assistance of counsel. . . . Sometimes it is caused by a lack of resources. . . . such failings inevitably erode the community's sense of justice and the aspiration of our system to equal justice under the law.

Janet Reno, *Legal Service for Poor Needs Renewed Vigilance*, U.S.A. TODAY, Mar. 18, 1998, at 13A.

261. See *State Bar Completes Survey on the Status of Indigent Defense in Texas: The Prosecutors' Perspective*, SPANGENBERG REP. (The Spangenberg Group, West Newton, Mass.), June 1998, at 10. The State Bar of Texas conducted a study focusing on how district attorneys throughout the state perceived the quality of indigent defense representation. See *id.* Ninety percent of the prosecutors believed that counsel for the indigent spent less time on their clients' cases than did retained counsel and sixty-five percent of the district attorneys felt that indigent defendants received a less vigorous defense. See *id.*

262. A 2002 report on indigent defense in America prepared for the ABA concluded that the prime cause for the failure of states to adequately fund defense services was the declining percentage of lawyers in state legislatures. ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS ET AL., REPORT TO THE HOUSE OF DELEGATES: TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM Intro. (2002) [hereinafter REPORT TO THE HOUSE OF DELEGATES]. The report concluded that lawyers would have a better understanding than lay people of the need to provide quality legal representation for criminal defendants. See *id.*

263. See *Fiscal Year 2004 Legislative Scorecard: Developments Affecting Indigent Defense*, SPANGENBERG REP. (The Spangenberg Group, West Newton, Mass.), Nov. 2003, at 1. Budget cuts caused states such as Tennessee to layoff public defenders. See *id.* at 5. The failure of Massachusetts to pay money owed to court-appointed counsel for the indigent led to those attorneys rejecting new cases. See *id.* at 13. Diminishing resources for defense services was, in part, responsible for the adoption in 2002 by the ABA House of Delegates of *Ten Principles of a Public Defense Delivery System*. The Report calls for "parity" between defense counsel and the district attorneys' offices with respect to workload, salaries and other resources such as benefits, support staff, paralegals, investigators. REPORT TO THE HOUSE OF DELEGATES, *supra* note 262, at Principle 8; see also ABA JUVENILE JUSTICE CENTER & MID-ATLANTIC JUVENILE DEFENDER CENTER, MARYLAND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 31 (Elizabeth Cumming et al. eds., 2003) [hereinafter MARYLAND: AN ASSESSMENT] (indicating that defender offices lack investigators and social workers, unlike the states attorney's office which utilizes the police to assist in investigations); Rita Fry, *Gideon at Forty: The Promise Comes With a Price Tag*, CORNERSTONE (Nat'l Legal Aid & Defender Ass'n), Winter 2002-2003, at 2, 24 (calling on Public Defenders to actively seek increased funding from legislative bodies).

264. An investigative team working on behalf of the ABA Standing Committee on Legal Aid and Indigent Defendants analyzed the operations of the San Francisco Public Defender Office. NORMAN LEFSTEIN, ABA STANDING COMMITTEE ON LEGAL AID AND INDIGENT DEFENDANTS, CRIMINAL DEFENSE SERVICES FOR THE POOR: METHODS AND PROGRAMS FOR PROVIDING LEGAL REPRESENTATION AND THE NEED FOR ADEQUATE FINANCING 31-39 (1982). The Report of the Committee concluded that the public defenders indeed did have excessive caseloads and "Public

Lawyers in public defender offices simply lack sufficient resources to prepare each and every case for trial,²⁶⁵ so the selection process causes counsel in many instances to push a plea because the lawyer simply is unprepared for trial on that case.²⁶⁶ One would hope that most defense counsel don't go quite as far as those in Detroit, who were reported to be "pounding the crap out of their clients" in order to get them to plead guilty.²⁶⁷

The lawyer who has not prepared the matter for trial has probably also violated his obligations to his client regarding possible plea recommendations because, as the Supreme Court held in *Von Moltke v.*

Defender attorneys acknowledged that sometimes, due to lack of time, *cases that probably should be tried* terminate with the client pleading guilty on the advice of counsel." *Id.* at 35 (emphasis added). A Connecticut study concluded that the tremendous caseloads of the public defenders precluded the counsel from being able to devote the time required on each case and led most defendants to plead guilty. *See* JONATHAN D. CASPER, AMERICAN CRIMINAL JUSTICE: THE DEFENDANT'S PERSPECTIVE 103, 108 (1972). Due to their excessive caseloads, court-appointed counsel as well as public defenders encourage clients to plead guilty. *See, e.g.,* ABA JUVENILE JUSTICE CENTER ET AL., THE CHILDREN LEFT BEHIND: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN LOUISIANA 58 (Gabriella Celeste & Patricia Puritz eds., 2001) (defenders' grueling caseloads seriously compromise the quality of representation); LAVAL S. MILLER-WILSON & PATRICIA PURITZ, ABA JUVENILE JUSTICE CENTER ET AL., PENNSYLVANIA: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS 3, 31 (2003) (excessive caseloads of defenders prevented meaningful contact with their clients); TEXAS APPLESEED FAIR DEFENSE PROJECT ON INDIGENT DEFENSE PRACTICES IN TEXAS, SELLING JUSTICE SHORT: JUVENILE INDIGENT DEFENSE IN TEXAS 22 (2000) [hereinafter SELLING JUSTICE SHORT].

265. A study of 399 defender offices revealed that the rate of guilty pleas increased as the caseloads of the attorneys increased. *See* NAT'L LEGAL AID & DEFENDER ASS'N. INDIGENT DEFENSE SYSTEMS ANALYSIS (1978); *see also* LEFSTEIN, *supra* note 264, at app. at F-1.

266. *See, e.g.,* Glen Wilkerson, *Public Defenders as Their Clients See Them*, 1 AM. J. CRIM. L. 141, 143-44 (1972) (concluding, after a study conducted in Denver, that pressure by lawyers to plead guilty was a common complaint of defendants that led to their lack of confidence in their counsel); Note, *Comparison of Public Defenders' and Private Attorneys' Relationships with the Prosecution in the City of Denver*, 50 DENVER L.J. 101, 123 (1973) (describing the situation at the Denver Public Defender Office as follows: "[t]he overflowing dockets make it necessary that most of [the defenders'] cases be disposed of as quickly as possible").

267. Court, *supra* note 2, at 56. The failure of this country to provide adequate resources for counsel for the indigent has led academics, bar association committees, and criminal defense attorneys to try to outdo one another for titles of articles or reports that convey the failure of *Gideon v. Wainwright* to lead to the type of representation for indigent defendants that was expected. *See, e.g.,* Douglas L. Colbert, *Thirty Five Years After Gideon: The Illusory Right to Counsel at Bail Proceedings*, 1998 U. ILL. L. REV. 1, 2-7 (1998); Steven Keeva, *Gideon's Unmet Ideal: Panel Charges Resources Are Lacking for Indigent Defense*, 77 A.B.A. J. 40 (1991); Richard Klein, *The Emperor Gideon Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625 (1986); Victoria Nourse, *Gideon-A Generation Later: Gideon's Muted Trumpet*, 58 MD. L. REV. 1417, 1419 (1999); Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2062-63 (2000).

Gillies, “an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and *then* to offer his informed opinion as to what plea should be entered.”²⁶⁸ Although it may well be that the obligations of the attorney to a client who pleads guilty is less than that due a client whose case will go to trial, counsel must still “provide his client with an understanding of the law in relation to the facts, so that the accused may make an informed and conscious choice between accepting the prosecution’s offer and going to trial.”²⁶⁹ Whereas it is clear that a plea which is entered *because* counsel is unprepared for trial would be considered involuntary, it is most difficult for the defendant to prove, on appeal, that he entered the guilty plea strictly because he feared going to trial with counsel who was not prepared for trial.²⁷⁰

Judges, by failing in their roles as watchdogs over the constitutionality of the court proceedings, become parties to the travesty of justice.²⁷¹ Consider, for example, the trial judge in a death penalty case who just stood by while the defendant’s attorney, according to court observers, “seems to have slept his way through virtually the entire trial.”²⁷² The Houston newspaper which was covering the trial described the defense attorney: “His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch

268. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948) (emphasis added). Even though counsel has the duty to advise a client as to the desirability of a proposed plea bargain, the client must make the ultimate decision. See PROF’L RESPONSIBILITY, *supra* note 163, at EC 7-7.

269. *Wofford v. Wainwright*, 748 F.2d 1505, 1508 (11th Cir. 1984) (per curiam).

270. See *supra* notes 257–67 and accompanying text. The reductions in funds available for defense of the indigent impacts most of the individuals prosecuted in our criminal courts. In the year 2000, eighty-two percent of felony defendants in large state courts had either public defenders or court-appointed counsel as their attorneys. See HARLOW, *supra* note 79, at 1.

271. One reason perhaps why judges are unsympathetic to claims by counsel for the indigent that they have too many cases to be able to provide the constitutionally-mandated level of competent representation is that the judges themselves may feel that they are the ones who are truly overburdened. See, e.g., *Dade County v. Baker*, 362 So. 2d 151, 153–54 (Fla. Dist. Ct. App. 1978) (quashing a trial court’s order granting the public defender’s motion to withdraw due to his and the public defenders office’s excessive caseload), *rev’d sub nom.*, *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980). An appellate court, in ruling that the defender need not be permitted to withdraw, frankly commented that “[w]e are influenced in this decision by the fact that there are many offices of the judicial branch which consider themselves overworked.” *Baker*, 362 So. 2d, at 154 (emphasis added). The exact connection between a decision to permit individuals to be denied effective assistance of counsel and the judicial branch being overloaded was not spelled out.

272. John Makeig, *Asleep on the Job?*, HOUSTON CHRON., Aug. 14, 1992, at A35. When a journalist asked the lawyer why he had fallen asleep repeatedly, the counsel explained: “It’s boring.” *Id.* The lawyer added that he customarily takes “a short nap in the afternoon.” Bruce Shapiro, *Sleeping Lawyer Syndrome*, NATION, Apr. 7, 1997, at 27.

himself and sit upright. Then it happened again. And again. And again. Every time he opened his eyes a different prosecution witness was on the stand”²⁷³ This judge was explicit in *his* understanding of the constitutional rights of those on trial before him: “‘The Constitution doesn’t say the lawyer has to be awake.’”²⁷⁴ Not only did the judge fail to preserve the due process rights of the defendant, but two days after the verdict was returned in this three-day long trial, the judge sentenced the defendant to death.²⁷⁵ Lest one think that this was an anomaly, judges in at least three death penalty cases in Texas have presided over trials in which the defendant’s counsel slept during significant portions of their trials.²⁷⁶ Judges clearly have the duty to prevent miscarriages of justice that are occurring before their very eyes.

And it’s certainly not just Texas,²⁷⁷ although a report prepared for the State Bar of Texas concluded that, “[s]imply put the state of Texas is a national embarrassment in the area of indigent legal services.”²⁷⁸ In the California case of *People v. Garrison*,²⁷⁹ defense counsel not only “consumed large amounts of alcohol each day of the trial,”²⁸⁰ but on the second day of the jury selection process was arrested for driving to court with a .27 blood-alcohol reading, well over the legal limit.²⁸¹ What was the response of the trial judge to the defendant’s concern about having been appointed a counsel who was too intoxicated to provide competent

273. Makeig, *supra* note 272.

274. *Id.* (quoting District Judge Doug Shaver).

275. *See* Shapiro, *supra* note 272.

276. *See id.* Texas appellate courts offer little remedy for the failures of the trial courts. In fact, the Texas Court of Criminal Appeal has, at times, been more anxious than prosecutors to let death penalty sentences stand. *See, e.g., Ex parte Smith*, 977 S.W.2d 610 (Tex. Crim. App. 1998) (denying an extension to the defendant’s counsel to file an appellate brief, despite the district attorney’s recommendation to the court to grant the extension); Editorial, *A Disgraceful Vote*, AUSTIN AMERICAN-STATESMAN, Apr. 27, 1998, at A1. One of the dissenting judges stated that the court’s decision “‘borders on barbarism.’” *Ex Parte Smith*, 977 S.W.2d at 614 (Overstreet, J., dissenting).

277. *See, e.g., People v. Tippins*, 570 N.Y.S.2d 581, 582–83 (App. Div. 1991) (rejecting defendant’s ineffective assistance of counsel claim where defense counsel also slept during the trial).

278. BUTCHER & MOORE, *supra* note 259, at 22.

279. 765 P.2d 419 (Cal. 1989).

280. *Id.* at 440. The bailiff testified on an appeal of the conviction that the lawyer “always smelled of alcohol,” and it was reported that the counsel “drank in the morning, during court recesses, and throughout the evening.” *Id.*

281. *See id.* *See generally* Jeffrey L. Kirchmeier, *Drink, Drugs, and Drowsiness: The Constitutional Right to Effective Assistance of Counsel and the Strickland Prejudice Requirement*, 75 NEB. L. REV. 425 (1996) (likening sleeping counsel cases to *Strickland*-based claims where defendants’ counsel were under the influence of alcohol or drugs).

representation? The trial judge reassured the defendant that "I personally can assure you that you probably have one of the finest defense counsel in this country."²⁸² The defendant upon conviction was sentenced to death,²⁸³ his counsel died as a result of his chronic alcoholism.²⁸⁴

In another sleeping counsel case, *Javor v. United States*,²⁸⁵ one is again left wondering just how a judge could have permitted the criminal trial to proceed, given the clear Sixth Amendment violation that was occurring in open court. At a habeas corpus petition hearing, the federal magistrate found that

[P]etitioner's trial counsel was asleep or dozing, and not alert to proceedings, during a substantial part of the trial of petitioner and his two co-defendants; that by reason thereof petitioner was not assisted by counsel at a substantial portion of the trial, including some occasions when evidence relevant to the prosecution case against defendant and very likely to his defense was being elicited and the participation of trial counsel (to observe witnesses, listen to testimony, consider the posing of objections, prepare cross-examination of witnesses, consider the preparation of rebuttal evidence, and prepare argument on such evidence) was proper.²⁸⁶

Judges may, in fact, be at times *directly* responsible for the defendant being represented by ineffective counsel. In another death penalty case, this time in Louisiana,²⁸⁷ the judge appointed as counsel a lawyer who had recently been convicted of a felony and sentenced to a three year suspended sentence and 416 hours of community service.²⁸⁸ The judge insisted, over the objections of the lawyer, that the lawyer

282. *Garrison*, 765 P.2d at 440 (internal quotation marks omitted). An expert witness who testified on appeal, however, concluded that a chronic alcoholic such as this counsel is unable to make proper judgment calls or to think through problems. *See id.* at 441.

283. *See id.* at 422. The appellate court did ultimately set aside some parts of the judgment and reversed the death sentence. *See id.* at 446.

284. *See id.* at 440.

285. 724 F.2d 831 (9th Cir. 1984).

286. *Id.* at 832 (quoting the magistrate's findings from an evidentiary hearing). The Ninth Circuit found that the defendant's right to effective assistance was violated by the counsel's sleeping during a "substantial portion of the trial." *Id.* at 833-34. The court did not indicate whether its concern was the amount of time counsel had been sleeping or that what had occurred at trial while counsel slept was "substantial" (i.e., highly significant). The same court, just one year later, declined to find ineffective assistance because it had not been shown that that counsel had actually slept during a "substantial" portion of the trial. *United States v. Peterson*, 777 F.2d 482, 484 (9th Cir. 1985) (per curiam).

287. *State v. Wille*, 595 So. 2d 1149 (La. 1992).

288. *See id.* at 1151. The conviction of the defendant was for conspiracy to defraud an agency of the United States. *See id.*

fulfill his community service by representing the defendant in this capital case.²⁸⁹ Counsel had no experience or training in the representation of individuals in death penalty cases and had been a former state senator whose indictment and sentencing had received "substantial media coverage" in the local area of Louisiana where the trial occurred.²⁹⁰ The judge not only never informed the defendant of his counsel's notoriety, but never even questioned the jurors about their knowledge of the counsel's felony conviction.²⁹¹ Counsel in this case had clearly communicated to the judge that he did not wish to be appointed to represent this defendant, but his wishes were ignored.²⁹² Even where a counsel in a Georgia court²⁹³ had stated publicly "I despise [this appointment], I'd rather take a whipping," the court was so unconcerned about the quality of lawyering that would be provided the defendant that the judge, nevertheless, refused to relieve that attorney of the court-assigned representation.²⁹⁴

The need for judges to ensure that defendants who are ready to plead guilty have not had their due process rights violated is made all the stronger because of the defendant's overall inability to appeal.²⁹⁵ The rationale for the loss of the right to appeal is that, "[b]y definition, a defendant who pleads guilty relinquishes his defense."²⁹⁶ The Supreme Court in *Tollett v. Henderson*²⁹⁷ held that once a defendant pleads guilty he cannot subsequently raise claims alleging that he was deprived of constitutional or procedural rights that occurred prior to his guilty plea.²⁹⁸ The record of the court proceedings typically reflects little more

289. *See id.* at 1152.

290. *Id.* at 1151.

291. *See id.* It certainly is within the realm of possibility that a juror who was aware of the felony conviction of defendant's lawyer would not have believed that counsel's arguments were credible, as normally would be the case. The counsel explained that he didn't raise the issue of whether jurors were familiar with his legal difficulties on voir dire because he was too embarrassed. *See id.* at 1152.

292. *See id.* at 1152.

293. *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985).

294. *Id.* at 1522 (internal quotation marks omitted).

295. *See Frank v. Blackburn*, 646 F.2d 873, 882 (5th Cir. 1980) (en banc), *modified on other grounds*, 646 F.2d 902 (5th Cir. 1981) (per curiam) (indicating that the only grounds whereby a federal court will set aside a guilty plea entered in state court is if the defendant was denied his right to due process). Most of these claims get to federal court in a habeas proceeding and the district court can, therefore, conduct an evidentiary hearing.

296. *Stano v. Dugger*, 921 F.2d 1125, 1148 (11th Cir. 1991).

297. 411 U.S. 258 (1973).

298. *See id.* at 266.

than the defendant's waiver of his right to a jury trial,²⁹⁹ his statement admitting the factual allegations that support the crime to which he has pled guilty,³⁰⁰ that the plea was entered voluntarily,³⁰¹ and that the defendant was aware of the elements of the crime to which he has offered a plea of guilty.³⁰²

Quality of lawyering is certainly not on the minds of those judges who punish a defendant when counsel for the defendant files a motion claiming, for instance, that the defendant's Fourth or Fifth Amendment rights had been violated by the police. For example, in *Goss v. State*,³⁰³ the Mississippi trial court judge had told the defendant, who was charged with burglary, and his counsel that if *any* pretrial motions were presented to the court then the defendant would not be permitted to enter into any plea bargain agreement.³⁰⁴ The judge added that were the defendant to be convicted at trial, the judge's sentence would be the maximum possible: life without the possibility of parole.³⁰⁵ This sentence contrasted radically with the ten-year sentence the defendant would receive if he were to plead guilty.³⁰⁶ Apparently even motions for discovery were included—motions that could yield crucial information for the defendant to use in assessing the strength of the case against him and therefore the likelihood of conviction at trial.³⁰⁷ Such information could of course be of great import in formulating an informed decision about whether to plead or risk conviction at trial.

The judge's purpose in threatening retaliation for any motion that was to be filed is clear: to avoid having to deal with time-consuming

299. See, e.g., *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), *superseded by* FED. R. CRIM. P. 11(h) (West 1986 & Supp. 2004).

300. See PLEAS OF GUILTY, *supra* note 7, at Standard 14-1.6 cmt. (requiring the court to assure itself that, even if the defendant clearly wishes to plead guilty, there exists sufficient evidence to convict the defendant had he chosen to go to trial). The Commentary warns that "[u]nless the court inquires into the factual basis for the plea, there is a risk of innocent persons being adjudicated guilty." *Id.* But see *North Carolina v. Alford*, 400 U.S. 25, 37-38 (1970) (holding that the plea was properly accepted even though the defendant had refused to admit to the facts of the crime with which he was charged).

301. See *Boykin*, 395 U.S. at 242-43 (acknowledging that due process is violated if a plea of guilty was entered involuntarily).

302. See, e.g., *Henderson v. Morgan*, 426 U.S. 637, 646-47 (1976).

303. 730 So. 2d 568 (Miss. 1998).

304. See *id.* at 571-72.

305. See *id.* at 570.

306. See *id.*

307. One comprehensive research study analyzing "judicial expectations" of defense counsel, concluded that lawyers who file "too many motions are seen as 'overly aggressive' or 'overly adversarial'" and may well not receive court appointments in the future. SELLING JUSTICE SHORT, *supra* note 264, at 16.

hearings and research. The Supreme Court of Mississippi, in approving this judge's threat to the defendant, was absolutely clear about the justification for the judge's policy: "This court notes that this procedure promotes judicial efficiency in that the court does not spend time hearing pretrial motions."³⁰⁸ Certainly, such a statement by the supreme court of a state can only encourage trial court judges to adopt clear policies to penalize defendants whose counsel may choose to "waste" the court's time by providing effective, professionally-mandated, assistance.³⁰⁹

In the federal courts, judicial participation in the plea bargaining process is in fact, prohibited. Former Rule 11(e)(1) of the Federal Rules of Criminal Procedure regarding plea negotiations is clear and absolute: "The court shall not participate in any such discussions."³¹⁰ There is no doubt that the Rule's "purpose and meaning are that the sentencing judge should take no part whatever in any discussion or communication regarding the sentence to be imposed prior to the entry of a plea of guilty or conviction."³¹¹ The District Court judges are prohibited from even presenting a guideline to the prosecutor and defense counsel as to what plea arrangement worked out between the two adversaries would be acceptable by the court.³¹² Rule 11(e)(1) "states a standard for *federal* courts"³¹³ and is not a constitutional rule,³¹⁴ therefore, Rule 11 is

308. *Goss*, 730 So. 2d at 572.

309. Two researchers conducted an analysis of what traits indigent criminal defendants deemed to be most indicative of an "effective" lawyer. Three separate categories of traits were deemed to be most significant: 1) loyalty to the client and not to the state which appointed them and paid them; 2) lawyering skills including legal knowledge, experience, research skills and trial preparation; and 3) client-relations skills, especially keeping the client informed of developments in the case. See Marcus T. Boccaccini & Stanley L. Brodsky, *supra* note 19, at 98-100.

310. FED. R. CRIM. P. 11(e)(1) (1987), *reprinted in* FEDERAL CRIMINAL CODE AND RULES (West 1987). The Federal Rules of Criminal Procedure were amended, and the admonition to the court not to participate in plea negotiations is currently codified at Rule 11(c)(1). See FED. R. CRIM. P. 11(c)(1) (West 1986 & Supp. 2004).

311. *United States v. Werker*, 535 F.2d 198, 201 (2d Cir. 1976).

312. See *United States v. Fleming*, 239 F.3d 761 (6th Cir. 2001) (recognizing that Rule 11(e)(1) is violated when a judge attempts to amend a plea agreement reached by both sides); *United States v. Kraus*, 137 F.3d 447, 454 (7th Cir. 1998) (concluding that a judge's indication that any plea agreement found acceptable by the Court would have to include more prison time than did the proposed agreement constituted a violation of Rule 11(e)(1)); *United States v. Miles*, 10 F.3d 1135, 1139 (1993).

313. *Blackmon v. Wainwright*, 608 F.2d 183, 184 (5th Cir. 1979) (*per curiam*) (emphasis added).

314. See *Alvarez v. Straub*, No. 00-1738, 21 Fed. Appx. 281, 283 (6th Cir. 2001) (unpublished opinion); *Frank v. Blackburn*, 646 F.2d 873, 880 (5th Cir. 1980) (*en banc*), *modified on other grounds*, 646 F.2d 902 (5th Cir. 1981) (*per curiam*).

unfortunately not deemed to be controlling or even applicable to state courts.³¹⁵

The defendant who pleads guilty gives up his right to claim an illegal search or that his confession was coerced.³¹⁶ He can challenge neither the composition of the grand jury that indicted him,³¹⁷ nor the legal or factual sufficiency of the indictment.³¹⁸ The defendant is also precluded from claiming that his right to a speedy trial was violated.³¹⁹ A defendant who enters a guilty plea unaware of what rights he is giving up,³²⁰ is certainly not acting with the knowledge that due process requires.³²¹

Justification for tolerating plea bargaining must rely on the supposition that a knowledgeable defendant is engaging in a voluntary choice when rationally contrasting the punishment he would receive were he to plead guilty with that which he'd be likely to receive were he to be convicted after trial.³²² Standard 14-1.4 of the ABA Standards for Criminal Justice instructs the court to inform the defendant that by pleading guilty he is waiving his right to appeal,³²³ and the basis and

315. Some states, following the federal courts' lead, have barred trial judges from engaging in plea bargaining. *See, e.g., State v. Bukalew*, 561 P.2d 289, 292 (Alaska 1977) (holding that judges in Alaska are "totally barred from engaging in either charge or sentencing bargaining").

316. *See Tollett v. Henderson*, 411 U.S. 258, 267 (1973) (holding that a defendant who pleads guilty in open court "may not thereafter raise independent claims [alleging violations of his] constitutional rights that occurred prior to his plea"). *But see People v. Bowman*, 782 N.E. 2d 333, 341 (Ill. 2002) (holding that when a defendant "enters a guilty plea but maintains his innocence of the crime, as permitted by *Alford* . . . the defendant may collaterally attack" in a post conviction proceeding, the voluntariness of the confession) (citing *North Carolina v. Alford*, 400 U.S. 25 (1970)).

317. *See Parker v. North Carolina*, 397 U.S. 790, 799 (1970); *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966).

318. *See Russell v. United States*, 369 U.S. 749, 764, 772 (1962) (recognizing that an indictment that fails to inform the defendant of the facts on which the charges are based may be quashed).

319. *Tiemens v. United States*, 724 F.2d 928, 929 (11th Cir. 1984) (*per curiam*).

320. It may, in fact, often be required to explain to a defendant the principle that evidence obtained in violation of his constitutional rights cannot be used against him at trial first. The ever-increasing complexities of the exclusionary rule may escape the common knowledge even of most practicing attorneys.

321. For an explanation by the Supreme Court as to what is required for a guilty plea to be "knowingly" entered, see *Tollett*, 411 U.S. at 266-67.

322. *See Bousley v. United States*, 523 U.S. 614, 618 (1998) (stating that a valid plea of guilty must be both "'voluntary' and 'intelligent'" (quoting *Brady v. United States*, 397 U.S. 742, 748 (1970))).

323. *See PLEAS OF GUILTY*, *supra* note 7, at Standard 14-1.4(a)(vi) (indicating that the defendant would still have the right to appeal a motion that has been made and denied as long as the judge expressly reserved the right for the defendant to appeal the its denial).

inherent assumption of this requirement is that the defendant knows what rights he would have *if he chose not to plead guilty*.³²⁴ The import of Standard 14-1.4, entitled, "Defendant to be Advised," which informs the court what it must advise the defendant of before accepting any plea of guilty, is highlighted in the Commentary: "This advice is *critical* to the operations of the standards as a whole."³²⁵ The judge must personally and directly address the defendant "to ensure that the plea is made with appropriate knowledge and understanding."³²⁶

"Knowledge" certainly mandates more than the defendant just understanding that the plea offer is "for today only."³²⁷ Clearly, a defendant who is pleading guilty to a particular charge should be aware of the elements of the offense. The Supreme Court noted in the landmark case of *Powell v. Alabama*³²⁸ that trial courts ought not to rely on any expectation that the defendant possesses information about the law that is relevant to the charges against him:

Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. . . . He lacks both the skill and knowledge adequately to prepare his defense, even though he had a perfect one. . . . [H]e faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.³²⁹

324. The comprehensive plea colloquy which is provided for in Rule 11 of the Federal Rules of Criminal Procedure, constitutes the minimum standards for the entry of a knowing and voluntary plea in the federal courts, but Rule 11's requirements are not binding on state courts. *Gaddy v. Linahan*, 780 F.2d 935, 943 n.8 (11th Cir. 1986). Some states have enacted firm requirements for a judge to satisfy before accepting any guilty plea. *See, e.g., Ohio v. Filchuck*, 688 N.E. 1063, 1065 (Ohio 1996) (requiring judges to advise the defendant that: 1) the defendant has a right to a trial by jury, 2) if the defendant were to choose to go to trial, the prosecution would have to prove him guilty beyond a reasonable doubt, 3) the defendant would have the right to cross-examine the accusers, 4) the defendant has a right not to testify at any trial, and 5) the defendant has a right to "compulsory process").

325. PLEAS OF GUILTY, *supra* note 7, at Standard 14-1.4 cmt. (emphasis added).

326. *Id.* The Model Code of Pre-Arrestment Procedure, the Federal Rules of Criminal Procedure P. and the Uniform Rules of Criminal Procedure all require the judge to personally address the defendant in court. *See* FED. R. CRIM. P. 11(c) (1986 & supp. 2004); MODEL CODE OF PRE-ARRESTMENT PROCEDURE § 350.4(1) (1975); UNIF. R. CRIM. P. 444(c)(1) (1987). Too often, however, the plea colloquy between the judge and defendant is ritualistic and perfunctory.

327. *See* Official Court Transcript, *supra* note 3.

328. 287 U.S. 45 (1932).

329. *Id.* at 68-69.

The Supreme Court did hold in *Henderson v. Morgan*³³⁰ that where a defendant is unaware that “intent” was an element of the crime to which he pled guilty, that plea was not one which was knowingly and voluntarily entered.³³¹ Without such crucial knowledge, a defendant might plead guilty to a crime when although he did do the act that caused the harm, he had no “mens rea” and is legally not guilty of the offense.³³²

However, even though the Supreme Court held in *Smith v. O’Grady*³³³ that an explanation to the defendant of the nature of the charge was “the first and most universally recognized requirement of due process,”³³⁴ the Court has not specifically held, unfortunately, that an explanation by the judge to the defendant of all the elements that comprise the offense is constitutionally required. Common sense, however, would seem to require that the trial court be assured that the defendant does understand all the elements that comprise the offense because a plea of guilty represents, in essence, an admission to *each and every* element of the offense.³³⁵ The Supreme Court itself has explained that “[d]etermining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom a simple and easy task for a layman.”³³⁶ The ABA’s Pleas of Guilty Standards do require that the judge, before accepting any guilty plea, determine that the defendant does understand the nature and elements of the offense that he is pleading guilty to.³³⁷ A judge whose focus is on getting the pleas as quickly as possible is not going to partake in any time-consuming process to ascertain whether, in fact, the individual understands all that is required.³³⁸

The purpose of determining whether there is a factual basis for the plea—whether the plea reflects what actually occurred—is to protect our

330. 426 U.S. 637 (1976).

331. See *id.* at 646.

332. *United States v. Broce*, 488 U.S. 563, 570–71 (1989) (stating that a defendant who enters a plea of guilty is admitting more than just that he engaged in the specific acts detailed in the indictment, “he is admitting guilt of a substantive crime”).

333. 312 U.S. 329 (1941).

334. *Id.* at 334.

335. See *McCarthy v. United States*, 394 U.S. 459, 466 (1969), *superseded by* FED. R. CRIM. P. 11(h) (West 1986 & Supp. 2004).

336. *Von Moltke v. Gillies*, 332 U.S. 708, 721 (1948).

337. See PLEAS OF GUILTY, *supra* note 7, at Standard 14-1.4.

338. The problem may be particularly acute if the defendant has waived counsel; the burdens upon the judge to ensure the plea is being entered intelligently are all the greater.

system from having innocent defendants pleading guilty.³³⁹ There's no requirement, however, that a particular standard, such as "probable cause" to believe the defendant did commit the crime he is pleading guilty to, be followed by the court. The recommendation of the American Law Institute³⁴⁰ that a plea not be accepted unless the judge finds that there is "reasonable cause" to believe the defendant did do the crime³⁴¹ is not adhered to and neither is the National Advisory Commission's position that a plea of guilty not be accepted when the "admissible evidence is insufficient to support a guilty verdict on the offense" for which the plea is being offered.³⁴² The requirement that the finding be based on "admissible" evidence would prohibit the court's reliance on hearsay or illegally obtained evidence.

A study of the National Institute of Justice³⁴³ found that the factual basis most commonly utilized by courts is "simply to ask the defendant if he committed the offense" to which he's pleading.³⁴⁴ By the time of the plea allocution it is clear that the defendant has decided to take the plea bargain and knows or has been instructed by counsel to tell the court that he did indeed do the crime.³⁴⁵ Predictably, the National Institute of Justice survey found that judges rejected guilty pleas in only two percent of cases.³⁴⁶ Since efficiency and speed is the name of the game, it is not unexpected that meaningful questioning of the defendant does not occur and it is not surprising that the Institute concluded that the plea allocution procedure is "close to being a new kind of 'pious fraud.'"³⁴⁷

An excellent example of the meaninglessness of the plea allocution, as well as the fraudulent nature of the process, is the following example

339. See *Beaman v. State*, 221 N.W.2d 698, 700 (Minn. 1974) (per curiam) (recognizing the basis for the factual basis requirement is to ensure that the defendant is guilty of a crime that is at least as serious as the offense to which he's pleading guilty).

340. MODEL CODE OF PRE-ARREST PROCEDURE, *supra* note 326.

341. *Id.* at § 350.4(3).

342. NAT'L ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS & GOALS, *supra* note 14, at 3.7(8).

343. WILLIAM F. McDONALD, U.S. DEP'T OF JUSTICE, PLEA BARGAINING: CRITICAL ISSUES AND COMMON PRACTICES (1985).

344. *Id.* at 135.

345. See *id.* at 133-34. Fifty-two percent of the defendants interviewed reported that their counsel had advised them how to answer the judge's questions. See *id.*

346. See *id.* at 135.

347. *Id.* at 134.

of a question the court in *Ohio v. Higgs*³⁴⁸ asked the defendant, the answer to which must be “Yes” for the plea to be accepted:

“[THE COURT]: Do you know you have the right to have a jury of twelve people sitting over there hear this case and in order for you to be convicted they would have to find as to the principal offense and as to the specification that you did in attempting or committing a theft offense or in fleeing immediately after that attempt or offense use or threaten the immediate use of force against another in this county and that in the commission of Robbery you did have a firearm on or about your person; do you understand that?”³⁴⁹

Defendants are often confused and bewildered in the courtroom setting to start with, having to listen and attempt to comprehend a question such as this hardly helps.

The plea allocution—the colloquy between the court and the defendant—must also include the defendant’s clear statement that he is choosing to enter the plea voluntarily.³⁵⁰ This concept of voluntariness is, however, ambiguous and has been the subject of quite varying interpretations. A plea will be found, by some courts, to be “voluntary” if the defendant is acting “knowingly,” i.e., if he is aware of what rights he is relinquishing by not going to trial. By this understanding, there is no significant process in which the court must engage to substantiate that the plea was in fact “voluntarily” entered.³⁵¹

It is more common, however, for courts to view the voluntariness requirement of a constitutional guilty plea as meaning that the defendant was not threatened, pressured, or coerced to enter the guilty plea. The Supreme Court firmly stated in *Machibroda v. United States*³⁵² that “[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.”³⁵³ The Supreme Court held in *Boykin v. Alabama*³⁵⁴ that a plea, which was not “voluntary and

348. 704 N.E.2d 308 (Ohio Ct. App. 1997).

349. *Id.* at 310. In this instance, the defendant did in fact tell the judge that he did not understand, and the judge simplified his explanation. *See id.* at 310–11.

350. *See, e.g.,* OHIO R. CRIM. P. 11(c)(2)(a) (Anderson 2003).

351. *See, e.g., id.* at 11(c)(2)(a) (instructing courts to determine whether a defendant who pleads guilty “understand[s] . . . the nature of the charges and of the maximum penalty involved, and, if applicable, that the defendant is not eligible for probation”).

352. 368 U.S. 487 (1962).

353. *Id.* at 493.

354. 395 U.S. 238 (1969) *superseded by* FED. R. CRIM. P. 11(c) (West 1986 & Supp. 2004) (codifying the plea bargain admonishments stated in *Boykin*).

knowing,” violates due process and is void.³⁵⁵ The Court also determined that the record of the trial court proceeding must affirmatively reflect that the defendant voluntarily entered the guilty plea.³⁵⁶ It is therefore required by the Pleas of Guilty Standards³⁵⁷ that the judge personally address the defendant to determine if the plea was, in fact, voluntarily entered,³⁵⁸ i.e., whether the defendant had been, “in any way, threatened, coerced, or pressured into pleading guilty.”³⁵⁹

The problem, then, is in one respect clear. Since in a great percentage of pleas the defendant has been told by the judge, or the prosecutor, or his counsel, or knows on his own that he’ll serve more jail time if he gets convicted after trial than if he were to plead guilty, how is that *not* “pressure”? And when the judge is involved, then there so often is a threat and coercion—whereas a prosecutor is not in a position to actually determine the sentence after trial, the judge is. When the judge informs the defendant that if he were to go to trial he would be sentenced to the maximum possible incarceration if convicted, the judge is fully able to carry out that threat. It is perhaps for that reason that the court in *State v. Cross*³⁶⁰ stated categorically: “A plea induced by the influence of the judge cannot be said to have been voluntarily entered.”³⁶¹

When the plea bargain has been initiated by the judge, there is an additional and serious concern. It is the judge’s responsibility before finally accepting any guilty plea to determine the voluntariness of the plea. How can the judge be the objective and impartial arbiter that is required when assessing whether *he* had improperly pressured, threatened, or coerced the defendant to enter the plea? Yet this is exactly what occurs. Is one to expect that the judge, in making the required determination of whether the plea was voluntary, would rule that *he*

355. *Id.* at 243 n.5 (emphasis added) (quoting *McCarthy v. United States*, 394 U.S. 459, 466 (1969), *superseded by* FED. R. CRIM. P. 11(c) (West. 1986 & Supp. 2004)). Here, it would seem that the court clearly does differentiate between voluntary and knowing, yet the decision continues to explain that a plea “cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts,” i.e., knowingly pleads guilty. *Id.*; *see also* *North Carolina v. Alford*, 400 U.S. 25, 31 (1969) (requiring that the guilty plea represent a “voluntary and intelligent choice among the alternative courses of action open to the defendant”).

356. *See Boykin*, 395 U.S. at 244 & n.6.

357. *See supra* note 7.

358. *See id.* at Standard 14-1.5.

359. *Id.* at Standard 14-1.5 cmt.

360. 240 S.E.2d 514 (S.C. 1977) (per curiam).

361. *Id.* at 516; *see also* *Commonwealth v. Evans*, 252 A.2d 689 (Penn. 1969) (stating that a plea cannot be considered voluntary if the judge has participated in the sentencing agreed to as part of the plea bargain); *State v. Wolfe*, 175 N.W.2d 216, 221 (Wis. 1970) (asserting that “[t]he vice of judicial participation in the plea bargaining is that it destroys the voluntariness of the plea”).

improperly threatened the defendant? The judge must be the neutral, impartial, and objective adjudicator of the voluntariness of the plea, and his involvement in the plea deal prohibits him from appropriately fulfilling that judicial duty.³⁶²

The system's response, however, to the clear need to prohibit judicial involvement in the very process which the judge must review, is that if the plea allocation reveals that the defendant's decision to plead was voluntary, then there is no cause for concern. However, any participant in the criminal justice system knows that the colloquy between the judge and the defendant is scripted, ritualistic, perfunctory, pro forma, and quite meaningless. The mere fact that the defendant's answer to the judge's question, "Did anyone threaten or pressure you to get you to plead guilty?" is "No," is not necessarily an accurate reflection of what has occurred.³⁶³ The transcript of the colloquy discussed previously between Judge Rothwax and the defendant, where the judge told the defendant, "[today,] 2 to 4 . . . [and] after, that it's 4 to 8"³⁶⁴ would reveal the very simple response of "No" to the judge's question as to whether there had been threats or pressure that caused the defendant to plead guilty. And since the defendant in a post-conviction challenge to the voluntariness of the plea bears the burden of persuading the court that the plea in fact was not a voluntary one,³⁶⁵ it is likely that that very limited exchange of question and answer between the judge and the defendant during the allocation will control and the defendant will not be able to meet his burden.

When a defendant is told by a judge that if he doesn't admit his guilt he will receive many more years in prison if convicted after trial, even the innocent defendant³⁶⁶ may well be influenced.³⁶⁷ Especially

362. *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (describing the judge's obligation when assessing the propriety of an offered plea of guilty, where there was a waiver of counsel, as one requiring a "penetrating and comprehensive examination of all the circumstances under which such plea is tendered"). Certainly, there is a need to be just as thorough and careful in assessing the voluntariness of the entry of a guilty plea.

363. *See Galbraith v. United States*, No. 01-cv-4012, 2001 U.S. Dist. Lexis 24939, at *9 (S.D. Ill. Nov. 14, 2001) (recognizing that, even though the plea hearing may reveal the facial validity of the plea, the plea still may have not been voluntary due to factors not revealed during the allocation or the hearing).

364. *Roberts*, *supra* note 87 and text accompanying notes 87-93.

365. *See Galbraith*, 2001 U.S. Dist. Lexis at *8.

366. It is necessary here to distinguish between "factual innocence" (for example, where the defendant is simply the wrong person) and "legal innocence" (where the defendant did commit the act in question, but the state is unable to prove the case beyond a reasonable doubt, or where there is a valid defense, such as self-defense, to explain and justify the defendant's actions).

when it is clear that that person in the robes who is convinced the defendant is guilty will be the trial judge.³⁶⁸ Especially when the accused's counsel is not only unprepared for trial but is also doing his utmost to persuade the defendant to plead guilty.³⁶⁹ The threat of a huge sentence awaiting the individual who opts for trial can be all-controlling, even to the innocent. The power of the judge to persuade anyone to do as the judge says is far greater, and far more problematic, than when the prosecutor is conducting the plea negotiations. When a judge believes, as did the judge in *United States v. Hutchings*,³⁷⁰ that a trial would be a "total waste of public funds and resources,"³⁷¹ the defendant who chooses to go to trial will pay.

It would be naive to believe that a judge who has reacted with such displeasure at the defendant who has not taken his advice and pled guilty will be the fair and impartial arbiter that is required.³⁷² Certainly in the defendant's eyes, that judge who was perceived to be an adversary pressing a guilty plea is hardly then to be expected to be the guarantor of a fair trial and of a fair, non-punitive sentence. And it is this perception that well might lead the innocent defendant to feel coerced to enter a guilty plea and avoid the risk of trial.

367. The *Restatement of Contracts* realizes the power of the threat to overcome one's free will. A threat may well "arouse such fear as precludes a party from exercising free will and judgment" and may lead a party to agree to what is being demanded. Commentary to Section 175 of the *Restatement (Second) of Contracts*, quoted in *United States v. Speed Joyeros*, 204 F. Supp. 2d 412, 425 (2002).

368. See *McMahon v. Hodges*, 225 F. Supp. 2d 357, 374 (S.D.N.Y. 2002) (providing an example where the "trial judge . . . leveraged [defendant's] fear that [the judge] had prejudged [the case and was biased against the defendant] to induce [the defendant] to waive his right to a jury [trial]").

369. See LEFSTEIN, *supra* note 264, at app. at F-1. The lack of vigorous advocacy seems to be the case for those representing juveniles being prosecuted for criminal offenses. For example, an ABA analysis of juvenile courts in Ohio in 2003 found that only fifty-seven percent of individuals with court-appointed counsel viewed their lawyer to be actually "on their side." ABA JUVENILE JUSTICE CENTER ET AL., JUSTICE CUT SHORT: AN ASSESSMENT OF ACCESS TO COUNSEL AND QUALITY OF REPRESENTATION IN DELINQUENCY PROCEEDINGS IN OHIO 56 (Kim Brooks & Darlene Karmine eds., 2003). This is in contrast to eighty-one percent of those with privately retained counsel who believed that their counsel was working for them. See *id.*

370. 757 F.2d 11 (2d Cir. 1985).

371. *Id.* at 13 (quoting Judge Robert L. Carter).

372. See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 1, Canon 3(E)(1) (mandating disqualification when "the judge's impartiality might reasonably be questioned"). The Supreme Court "repeatedly has recognized [that] due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Schweiker v. McClure*, 456 U.S. 188, 195 (1982), superseded by 42 U.S.C. § 1395ff(b) (2003); see also *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (plurality opinion) (recognizing that "[t]he right to an impartial adjudicator, be it judge or jury, is . . . a right" "so basic to a fair trial that [its] infraction can never be treated as harmless error").

To some extent, the judge whose plea offer was not accepted has an interest in the outcome of the trial that is totally divergent from that of the defendant; if there's an acquittal the judge will be shown to be wrong and the defendant right in refusing to plead guilty.³⁷³

There are many ways that a judge can affect the likelihood of the jury returning a guilty verdict. The judge's charge to the jury, not only in content but in manner of delivery,³⁷⁴ can be of great import. Judges have discretion in their evidentiary rulings as they have in marshaling the evidence and charging the jury. They also typically have at least some discretion in determining to grant or deny, for example, discovery motions. It is hardly conceivable that a judge who had been promoting a pre-trial plea will seriously consider a defendant's motion for a judgment of acquittal during the trial, regardless of its merits. The same would hold true regarding a post-trial motion for the judge to overturn a guilty verdict.

The judge's attitude towards and lack of respect for the defendant's case can be easily discerned by a jury based on the judge's treatment of defense witnesses, or defense counsel or, if the defendant testifies, of the defendant himself. It is not only through verbal behavior such as friendly (or hostile) questioning of certain witnesses, but via non-verbal facial gestures or expressions as well that a judge can influence jurors. Such prejudicial judicial misconduct is unreviewable by appellate courts, unless defense counsel attempts to place it on the record as was done in *People v. Stiglin*.³⁷⁵

"I want to state for the record that I wish your Honor would cease making these remarks, that he would cease smiling and frowning and doing things which might lead the jury to believe he has an opinion as to the facts in this case, and I ask the Court to please instruct the jury to disregard any such smiles or frowns or what-not as the jury may see the Court make."³⁷⁶

373. See *State v. Falcon*, 793 A.2d 274, 277 (Conn. 2002) (stating that a trial judge is expected to be unaware of the details of unsuccessful plea negotiations and holding that a trial judge's participation in the plea negotiations is plain error for which actual prejudice need not be shown).

374. For example, while the judge is required to inform the jurors that in order to convict the prosecution must prove its case "beyond a reasonable doubt," the judge either swallows those words, reads them as though they are just a part of the required litaney and without real meaning, or emphasizes, highlights, and directs attention to the phrase.

375. 264 N.Y.S. 832 (App. Div. 1933).

376. *Id.* at 847.

Even if the judge is determined to be fair and impartial during the trial, in the defendant's eyes the judge who has attempted to get the defendant to plead guilty has determined that the defendant is indeed guilty and will be "an advocate for the resolution he has suggested to the defendant."³⁷⁷ Don't we all resent, somewhat at least, an individual who refuses to take our advice? In the defendant's view, the judge will not be commencing the trial with the "presumption of innocence" that the judge must, ironically, instruct the jurors is required. In some cases, the judge who has promoted a plea has assumed guilt from the start, but other times, as part of the negotiations, the defendant will have made incriminating statements which might well impact the judge as he conducts the trial.

It would certainly be of some help if there were a policy that any judge who participated in plea negotiations with the defendant would not then proceed to be the trial judge as well.³⁷⁸ However, it appears that the trend is, if anything, in the opposite direction as court administrators are increasingly assigning one judge to follow a case from beginning to end. For example, a Minnesota court system adopted a "one judge-one case" calendar specifically to get early resolution of criminal cases.³⁷⁹ The plan was initiated on July 1, 2002 and within six months it was deemed to be successful: whereas in the last quarter of 2001, 162 cases had been set for jury trial, there were only twenty-seven cases in the comparable period for 2002.³⁸⁰ This eighty-three percent reduction was considered to be the standard for success—more pleas, fewer trials had occurred when the defendant understood that the judge who would know of his refusal to accept the plea deal would stay on as the trial judge.

377. *United States v. Werker*, 535 F.2d 198, 203 (2d Cir. 1976).

378. *See, e.g., Revelo*, 775 A.2d 260, 268 n.25 (Conn. 2001) (stating that Connecticut has a clear practice of transferring a case to a second judge for trial if plea negotiations were unsuccessful). This commentator is certainly aware that this is an imperfect solution at best. The trial judge would surely become aware of the pre-trial history of the case. In this commentator's experience as a defense attorney in the Manhattan courts for ten years, a judge who has been pressuring the defendant for a plea will make it clear to the defendant that in case he were not to be the trial judge, he will indicate the defendant's rejection of the plea offer on the court papers that go to the trial judge. In some cases, the pre-trial judge will add that if the defendant is convicted at trial, he should be sentenced to the maximum sentence authorized.

379. Press Release, Sherburne County Courts, Sherburne Court Initiatives Improve Access to Justice (Feb. 12, 2003), at <http://www.courts.state.mn.us/cio/Story/SCIIA.htm> (last visited June 30, 2004).

380. *See id.*

It is clearly unconstitutional for a judge to explicitly punish a defendant for choosing to go to trial. As the Supreme Court stated in *Bordenkircher v. Hayes*:³⁸¹

To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort, and for an agent of the State to pursue a course of action whose objective is to penalize a person's reliance on his legal rights is "patently unconstitutional."³⁸²

Even before the Supreme Court was so forceful, the Circuit Courts of Appeal had been equally explicit. The Eighth Circuit, stated in *Hess v. United States*,³⁸³ that it was joining a "host of other courts"³⁸⁴ in ruling that "whether a defendant exercises his constitutional right to trial by jury to determine his guilt or innocence *must have no bearing* on the sentence imposed."³⁸⁵

The Supreme Court's decisions regarding permitted disparities in sentence between pre-trial offer and post-conviction sentences have certainly created a conundrum leading, this commentator would suggest, trial courts to be somewhat disingenuous about their imposition of post-trial sentences. The Court has deemed it constitutionally acceptable in *Corbitt v. New Jersey*³⁸⁶ for courts to extend leniency in exchange for a guilty plea and not to extend leniency on those who insist on trial.³⁸⁷ Somehow, this ruling is not to conflict with Supreme Court rulings prohibiting trial courts from imposing a harsher sentence on a defendant

381. 434 U.S. 357 (1978).

382. *Id.* at 363 (citations omitted) (quoting, ultimately, *United States v. Jackson*, 390 U.S. 570, 581 (1968)).

383. 496 F.2d 936 (8th Cir. 1974).

384. *Id.* at 938.

385. *Id.* (emphasis added); see also *Baker v. United States*, 412 F.2d 1069, 1073 (5th Cir. 1969) (stating that "[a]n accused cannot be punished by a more severe sentence because he unsuccessfully exercised his constitutional right to stand trial rather than plead guilty"); *United States v. Araujo*, 539 F.2d 287, 291-92 (2d Cir. 1976); *People v. Accolla*, 508 N.Y.S.2d 43, 45 (App. Div. 1986); *People v. Patterson*, 483 N.Y.S.2d 55, 57 (App. Div. 1984) (imposing a higher sentence simply because the defendant chose to go to trial rather than plead guilty is impermissible); *State v. Cannon*, 387 S.E.2d 450, 451 (N.C. 1990) (finding the sentence of trial court improper because it was based in part on defendant's refusal to plea bargain and insistence on a jury trial).

386. 439 U.S. 212 (1978).

387. *Id.* at 226; see also *People v. Latto*, 710 N.E. 2d 72, 82 (Ill. App. Ct. 1999) (concluding that it is proper to grant concessions to the defendant pleading guilty, but a defendant should not be penalized for asserting his right to trial). But see *People v. Superior Court (Felmann)*, 130 Cal. Rptr. 548, 552 (Ct. App. 1976) (recognizing that "a court may not offer any inducement in return for a plea of guilty or nolo contendere. It may not treat a defendant more leniently because he foregoes his right to trial or more harshly because he exercises that right.")

because he has exercised his constitutional right to trial.³⁸⁸ The apparent inconsistency is explained in that the defendant who exercised his right to trial is *NOT* being sentenced more harshly because he chose trial, he is just not being provided the leniency that he would have received had he pled guilty.³⁸⁹ The untenability of this explanation, especially perhaps to a convicted defendant, is illustrated by the comment of the trial judge in *In re Lewallen*:³⁹⁰

I think I want to emphasize there's no reason in having the District Attorney attempt to negotiate matters if after the defendant refuses a negotiation he gets the same sentence as if he had accepted the negotiation. It is just a waste of everybody's time, and what's he got to lose. And as far as I'm concerned, if a defendant wants a jury trial and he's convicted, he's not going to be penalized with that, but on the other hand he's not going to have the consideration he would have had if there was a plea.³⁹¹

And punish defendants, courts do. Sometimes it is very explicit as in *State v. Scalf*.³⁹² The trial judge told the defendant after the jury came back with their guilty verdict: "We had the police and the prosecutor sitting down here for three days to convict you and impanel this jury and try it, and *for that you're going to be punished*."³⁹³ Suppose the trial lasted five days, or ten days, would the punishment increase for each day that the trial lasted? The punishment in this case for the three days of trial time was eighteen months in prison.³⁹⁴ As the judge explained to the jurors: "[L]adies and gentlemen, I want you to know, had he been willing to enter a plea on this case, he would have been afforded probation. He wouldn't have gone to the institution. But now you're going to the institution."³⁹⁵ The defendant was to be jailed for not doing what the man on high had told him he should have done—pled guilty pre-trial.

388. See, e.g., *Alabama v. Smith*, 490 U.S. 794, 801 (1989).

389. Cf. *Lowe*, *supra* note 59 (reporting that Judge Ruskin stated that the higher fine was not because the defendant wore jeans to court, but because he could not be afforded the same leniency had he not worn jeans that day).

390. 590 P.2d 383 (Cal. 1979).

391. *Id.* at 385, 388 (internal quotation marks omitted) (vacating the sentence, remanding for resentencing, and holding that the trial judge based his sentence on the defendant's decision to plead not guilty).

392. 710 N.E.2d 1206 (Ohio Ct. App. 1998).

393. *Id.* at 1212 (internal quotation marks omitted) (emphasis added).

394. See *id.* at 1208–09.

395. *Id.* at 1212 (internal quotation marks omitted).

It is more typical for judges at sentencing merely to impose a harsh sentence without stating clearly that the sentence constitutes punishment for the defendant exercising his constitutional right to trial.³⁹⁶ Additionally, appellate courts have commonly upheld such sentences and rejected defendant's claim that the sentence constituted punishment as long as the court does not explicitly state that the harsh sentence was motivated by the defendant's choice to go to trial. Therefore, one finds such unsupportable reasoning as was adopted by the court in *People v. Ralon*.³⁹⁷ "It is true that a sentencing judge commits reversible error by punishing a defendant for exercising his right to trial by jury. By contrast, *where the sentencing court denies imposing sentence as punishment for exercising the right to trial, there is no error.*"³⁹⁸ Denial that the higher sentence was for demanding a jury trial is apparently all that is required for the violation of the defendant's rights to be constitutional.³⁹⁹ In fact, even if there was no express denial, as long as there was no affirmative statement that the post-trial sentence was designed to punish the defendant for not taking the plea offer, courts may find the sentence appropriate and not punitive.⁴⁰⁰

The Supreme Court in *Alabama v. Smith*⁴⁰¹ set out the difficult path for the defendant. The Court held not only that there is no presumption that the sentencing judge acted vindictively simply because the

396. See generally, e.g., *In re Cox*, 680 N.E.2d 528, 530 (Ind. 1997) (per curiam) (suspending Judge Cox for his policy of sentencing defendants to lengthier sentences simply because they demanded time-consuming jury trials rather than just pleading guilty). For some judges it is absolutely not necessary to state in every case that the post-conviction sentence was influenced by the defendant's refusal to plead guilty; it's a given. For example, one trial judge in Indiana had a policy for ten years of giving convicted defendants lengthier sentences because those defendants had demanded time-consuming jury trials instead of bench trials or entering guilty pleas. *Id.*

397. 570 N.E.2d 742 (Ill. App. Ct. 1991). The co-defendant had pled guilty and waived his right to a trial in exchange for a sentence of seven years; the twelve year sentence Ralon received after trial was upheld by the Appellate Court of Illinois. See *id.*

398. *Id.* at 765 (emphasis added). The co-defendant had pled guilty and waived his right to a trial in exchange for a sentence of seven years; the twelve year sentence Ralon received after trial was upheld by the Appellate Court of Illinois. See *id.*

399. But see *Fraley v. State*, 426 So. 2d 983, 984-86 (Fla. Ct. App. 1983) (holding that the twenty-five year sentence imposed after trial was presumptively unlawful because the record revealed that the judge had full knowledge of the evidence and defendant's criminal record when the judge repeatedly promised a term of six years to the defendant were he to have entered a guilty plea pre-trial).

400. See, e.g., *United States ex rel. Hawkins v. Haws*, No. 98 C 1103, 1999 U.S. Dist. LEXIS 9985, at *52 (N.D. Ill. June 24, 1999) (mem.) (finding that the sentence was proper where the petitioner could offer no proof, other than the disparity between the pre-trial and post-trial conviction sentences, that the higher sentence was a penalty for not pleading guilty).

401. 490 U.S. 794 (1989).

defendant received a harsher sentence after trial⁴⁰² but that the defendant had the clear burden to prove vindictiveness.⁴⁰³ The Court offered little illumination on how exactly the defendant could prove the motivation of the sentencing judge.

Courts have, knowing that they can't explicitly "punish" the defendant for having chosen to go to trial, developed varying justifications for sentencing the defendant after trial more harshly than the sentence that was offered if the defendant would have pled guilty. First and foremost is the claim that the defendant who shows remorse, and accepts responsibility for what he has done, is on his way toward rehabilitation.⁴⁰⁴ The Court in *Hooten v. State*⁴⁰⁵ expressed the comment found in many court decisions: "[G]uilty pleas are recognized as a significant step toward rehabilitation."⁴⁰⁶ The defendant who pleads guilty, therefore, is not, according to the Ninth Circuit in *United States v. Stockwell*⁴⁰⁷ "an intransigent and unrepentant malefactor."⁴⁰⁸

Any seasoned court watcher knows, however, that the guilty plea by a defendant is generally given because the defendant has engaged in a cost-benefit analysis and decided not to risk going to trial. The defendant pleads guilty to reduce his punishment; it's a matter of expediency. Remorse has very little to do with it, and judges, who, if anything, are more cynical than the rest of us, are fully aware of that.

Consider the case of *United States v. Wiley*.⁴⁰⁹ Wiley was charged, along with four others, with possession of stolen goods, and the evidence showed that Wiley, in all likelihood, was the least guilty of the three.⁴¹⁰ The other defendants accepted the judge's plea bargain offer but Wiley did not. Of Wiley's co-defendants, three received sentences of one year

402. See *id.* at 801-02.

403. See *id.* at 799. When the transcript "is devoid of any indication that the court punished defendant for exercising his right to trial, defendant's sentence must be affirmed." *People v. Latto*, 710 N.E.2d 72, 83 (Ill. App. Ct. 1999).

404. See *Vincent & Pron*, *supra* note 23 (indicating that Canadian criminal courts also equate pleading guilty with contrition). The equating of "pleading guilty" with "contrition" seems to exist in Canadian jurisprudence as well. For example, the policy manual for the crown attorneys, who are the prosecutors in the Toronto criminal courts, instructs that "[a]n early guilty plea generally signals remorse." *Id.*

405. 442 S.E.2d 836 (Ga. Ct. App. 1994).

406. *Id.* at 840.

407. 472 F.2d 1186 (9th Cir. 1973).

408. *Id.* at 1187.

409. 184 F. Supp. 679 (N.D. Ill. 1960).

410. See *id.* at 680, 687. The judge himself characterized Wiley as only a "minor participant" in the crime. *Id.* at 687.

and a day, and one was sentenced to a term of two years.⁴¹¹ The judge, in justifying the sentence of three years for Wiley, wrote that Wiley's choice to go to trial indicated that he was not "actually repentant"⁴¹² and not "seriously concerned with rehabilitation which is generally true when a defendant pleads guilty."⁴¹³ The four defendants who pled guilty, on the other hand, "did stand conscience-stricken in repentance before the court," as revealed merely by the plea.⁴¹⁴ Yet the judge admitted that the real reason for sentencing the *least* guilty to the *longest* term was that he believed that if an individual chooses to go to trial, the court should not be lenient upon sentence.⁴¹⁵ The judge explained that the Assistant United States Attorney, as did several investigators, spent three days preparing for the trial and one day on trial.⁴¹⁶ The judge's denial of Wiley's application for probation may have had, in reality, nothing to do with Wiley's greater need for rehabilitation but rather the decision according to the judge, was "rightfully motivated in part by the fact that he stood trial."⁴¹⁷ After all, the judge commented, "I myself spent one half day in preparation for trial and then one day on trial and accordingly the Court was totally occupied for a day and a half."⁴¹⁸ Perhaps that's the real reason why the judge had a "'standing policy' not to consider probation where a defendant has exercised his constitutional right to trial."⁴¹⁹

411. *See id.* at 680–81.

412. *Id.* at 685. The judge added that "there was no remorse in this man" *Id.* at 687.

413. *Id.* at 685.

414. *Id.* at 687; *see also, e.g.,* United States v. Mazzaferro, 865 F.2d 450 (1st Cir. 1989) (providing another example of a large disparity between a co-defendant's guilty plea, which resulted in a shorter sentence, and Mazzaferro's sentence, which followed a post-trial conviction). Mazzaferro's co-defendant, who accepted the plea bargain, received a sentence of ten years, whereas Mazzaferro, who had gone to trial, received a twenty year sentence, even though his involvement in the drug operation was less than his co-defendant's, and Mazzaferro had only a minimal criminal record. *See id.* at 452–53; *see also* Vickers v. State, 17 S.W.3d 632, 636 (Mo. Ct. App. 2000) (stating that defendant's twenty year sentence was much greater than his co-defendant's and it was clear that the sentence was motivated by the defendant's rejection of the plea offer and choice to go to trial).

415. *Wiley*, 184 F. Supp. at 685.

416. *See id.* at 685.

417. *Id.* at 686.

418. *Id.* at 685.

419. *Id.* at 684. The New York State Commission on Judicial Conduct has commented on judge's setting policies affecting sentencing: "Judicial discretion, which is at the heart of a judge's powers, is nullified when a judge imposes a 'policy' that will dictate sentences in future cases." Tracy, (N.Y. State Comm'n on Judicial Conduct, Nov. 19, 2001), *available at* http://www.scjc.state.ny.us/Determinations/T/tracy_edward.htm. Judge Tracy's policy was to impose strict sentences on all defendants in certain drunk driving cases. *See id.*

There has been no empirical research that this commentator is aware of that demonstrates that the “contrite” defendants who have “taken responsibility for their crimes” and entered into a plea bargain have a lower rate of recidivism than do those defendants sentenced after conviction at trial. A court’s conclusion that the guilty plea shows “repentance” by the defendant is not supportable by any research which shows that such an individual will “transgress no more.” Yet even the United States Sentencing Guidelines Manual has provided a benefit for an individual who has shown remorse because it “clearly demonstrates acceptance of responsibility for his offense.”⁴²⁰ Can a court really conclude that the defendant who took two-to-four today because next time the offer would be three-to-six shows that this individual is well on his way towards being rehabilitated?

What might very well be the case is that the system which allows judicially-coerced plea bargaining creates a disrespect for the criminal justice system and its laws that hardens and embitters both the defendant who finally took the plea deal because of judicial threats, as well as the defendant who is sentenced to a greater period of incarceration because he chose to go to trial. To talk of reformation or rehabilitation in such a context might well be foolhardy. Furthermore, it is no longer widely believed that rehabilitation is a goal of our prisons; the focus today of imprisonment is incapacitation (keeping the individual off the streets), retribution (the criminal should be punished because of the harm he has inflicted), or deterrence (citizens must know that if they commit a crime,

420. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1(a) (2003). The Sentencing Commission had initially considered a proposal to reward defendants who pled guilty with a reduction of 10–15% in the sentences they’d receive. See William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 190 n.61 (1988). The data utilized by the Commission showed that defendants who had pled guilty typically received a 30–40% reduction in the time they would have gotten had they gone to trial. See *id.* at 190. The automatic sentencing reduction was rejected in favor of giving a benefit to any defendant who showed remorse. See *id.* The 1987 Commentary to the Guideline on acceptance of responsibility stated that a “defendant may manifest sincere contrition and take steps toward reparation and rehabilitation even if he exercises his constitutional right to trial.” GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH* 228 (2003) (emphasis added) (quoting U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. (1987)). The Commission’s commentary was amended and switched gears and informed that the downward adjustment of sentence “is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse.” U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 cmt. n.2 (2003) (emphasis added). It would be the rare case, according to the commentary, where the defendant “clearly demonstrate[s] an acceptance of responsibility for his criminal conduct even though he exercises his constitutional right to a trial.” *Id.*

they will be punished). The fundamental reason for the decline of the “rehabilitative ideal” has been that there’s a growing acceptance of the belief that rehabilitative attempts simply are not effective. Attempts to develop scientific evidence that rehabilitative programs reduce recidivism have not proven successful.⁴²¹

But even if there were to be a return to the rehabilitative model, and there is some evidence that this is occurring,⁴²² how can a judge read a defendant’s mind and assume that the defendant who chose a jury trial, clearly needs more years of incarceration in order to become rehabilitated than the defendant who pled guilty? One answer to that question that some courts have provided is that when a defendant who chose to testify at trial gets convicted, it is clear that the defendant lied and therefore is not ready to assume responsibility for having committed the crime. The Supreme Court in *United States v. Grayson*⁴²³ expressed the view that a “defendant’s truthfulness or mendacity while testifying on his own behalf, almost without exception, has been deemed probative of his attitudes toward society and prospects for rehabilitation and hence relevant to sentencing.”⁴²⁴

A court’s decision to punish a defendant not only because he opted for trial but also because he compounded the error of his ways by testifying at the trial is bound to have a doubly chilling effect on the exercise of one’s constitutional rights.⁴²⁵ A defendant, who wants to go to trial, but is fearful of a greater sentence, may simply engage in a cost/benefit analysis and be persuaded not to testify.⁴²⁶ As we have seen

421. See *People v. Adams*, 425 N.W.2d 437, 450 n.6 (Mich. 1988) (Levin, J., dissenting) (quoting Francis A. Allen, *Central Problems of American Criminal Justice*, 75 MICH. L. REV. 813, 321 (1977) (footnotes omitted)).

422. For examples of the programs experimenting with alternatives to incarceration, see Drake Bennett & Robert Kuttner, *Crime and Redemption: States are Using Fiscal Scarcity to Find More Creative Approaches to Reducing Crime*, THE AM. PROSPECT, Dec. 2003, at 36 (reporting on programs that focus, especially on those charged with possession of small amounts of drugs, on rehabilitative programs designed to deal with the addictive, psychological, and educational concerns and needs of the particular individual).

423. 438 U.S. 41 (1978).

424. See *id.* at 50.

425. Under our Constitution, the defendant has the right to testify as well as to remain silent. See U.S. CONST. amend. V; *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972) (recognizing a defendant’s right to testify). But see *State v. Pereira*, 805 A.2d 787, 811 (Conn. App. Ct. 2002). (rejecting the idea that any “chilling effect” on the right to testify overrides the need to consider all evidence relevant to the issue of rehabilitation).

426. See *People v. Moriarty*, 185 N.E.2d 688, 689 (Ill. 1962); see also *People v. Young*, 314 N.E. 2d 280, 281 (Ill. App. Ct. 1974) (resentencing the defendant because the trial judge tacked on extra year to the sentence as punishment for the defendant’s choice to go to trial); see, e.g., *State v. Thornton*, No. E2001-0249, 2002 Tenn. Crim. App. LEXIS 818, at *22 (Sept. 30, 2002) (stating that

in a different context⁴²⁷ threats by the court don't have to be expressly stated in each instance to be of great influence. A lawyer's warning to his client to the effect that "this judge adds time to your sentence if you testify" will do the trick.⁴²⁸ It is required that judges be clear that the sentence is not "punishment" for the crime of perjury,⁴²⁹ which would require the prosecution formally charging an individual with perjury, presenting the case to a grand jury, and offering the defendant the right to a trial before a jury of one's peers on the perjury charge,⁴³⁰ but rather that the lying is reflective of the defendant's prospects for rehabilitation.⁴³¹ As the court in *People v. Adams*⁴³² explained, the false testimony "circumstantially indicates the absence of a character trait for being law-abiding that bears on the appropriate sentence."⁴³³

But where should the line be drawn? Should the judge expressly consider as an indication of poor character the fact that the defendant permitted his lawyer to conduct a cross-examination of a witness that the jury, as shown by their verdict, found to be credible? And what exactly does it indicate about the defendant's readiness for rehabilitation that

the trial court concluded that because the defendant testified on his own behalf but was found guilty, he had lied under oath and the sentence imposed would reflect defendant's lack of candor). The sentencing judge, if he so chooses, can punish *every* defendant who testified at trial and now stands before him to be sentenced, since the defendant's testimony in support of his innocence was obviously not accepted by the jury as truthful. *See id.*

427. *See Moriarty*, 185 N.E.2d at 689; *Young*, 314 N.E. 2d at 281; *supra* note 34 and accompanying text.

428. *Cf. Grayson*, 438 U.S. at 54 (concluding that "[a]ssuming, arguendo" that there might be a chilling effect in permitting a judge on sentencing to consider the defendant's untruthful testimony, "that effect is entirely permissible"). Years later, the Court unanimously reaffirmed that there was no right for any individual to give false testimony. *See Nix v. Whiteside*, 475 U.S. 157, 173 (1986).

429. Perjury statutes do apply to defendants who testify on their own behalf. *See Nix*, 475 U.S. at 173; *Grayson*, 438 U.S. at 54.

430. These safeguards are vital components and protections afforded by our Constitution and criminal justice system. The United States Sentencing Guidelines authorize an enhancement in the defendant's sentence for willful obstruction of justice which includes committing perjury at trial. U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 cmt. n.4(b) (2003). Although there is some dispute amongst the federal courts as to the proper evidentiary standard for the courts to use in making factual determinations that the defendant lied under oath, it appears that the preponderance of the evidence standard is most commonly utilized. *See, e.g., United States v. Jasper*, 291 F. Supp. 2d 248, 259-60 (S.D.N.Y. 2003) (adopting the preponderance of the evidence standard while noting that other courts in the Second Circuit are using the clear and convincing standard).

431. *See State v. Huey*, 505 A.2d 1242, 1247 (Conn. 1986); *Banks v. United States*, 516 A.2d 524, 530 (D.C. 1986); *State v. Degen*, 396 N.W.2d 759, 760 (S.D. 1986) (allowing consideration of the defendant's false testimony when the judge is determining sentence).

432. 425 N.W.2d 437 (Mich. 1988).

433. *Id.* at 444. The Supreme Court of Michigan added that "character is always at issue." *Id.* at 448.

witnesses testified on his behalf who the judge did not believe were telling the truth? The more of a case the defendant puts forward, and perhaps the greater the number of days that the defense “uses up” both in direct and cross-examination of witnesses, the less cooperative and the less receptive to rehabilitation he may be thought to be—and therefore, the need for greater punishment. It is not just the *choice* to go to trial that is endangered, it is the exercise of the very mechanisms of the trial process itself that may be at risk.⁴³⁴

Some appellate courts in approving the plea bargaining policies engaged in by the trial courts have been quite frank in justifying their perspective. The court in *People v. Selikoff*, for instance, stated that trial court’s policy aimed at obtaining guilty pleas was “acutely essential to relieve court calendar congestion In budget-starved urban criminal courts, the negotiated plea literally staves off collapse of the law enforcement system.”⁴³⁵ The Preliminary Draft of the Sentencing Guidelines⁴³⁶ for federal courts stated as its first purpose for rewarding guilty pleas: “to conserve the resources of the criminal justice system.”⁴³⁷ Additionally, the Supreme Court, in *Santobello v. New York*,⁴³⁸ one of its first decisions approving of plea bargaining, stated that “[i]f every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”⁴³⁹

One problem with focusing on the positive attributes of plea bargaining is that the trial-level judges get the clear message that those in charge want the pleas and rapid disposal of cases. And that is all too often the case. The most valued judge is the one who can clear the calendar the quickest, process the greatest number of cases, get the most pleas. A study by the Association of the Bar of the City of New York⁴⁴⁰ concluded that “judicial performance is measured by the ability to move cases” and that “intense pressure on judges to keep pace with volume

434. See *id.* at 452 (Levin, J., dissenting).

435. *People v. Selikoff*, 318 N.E.2d 784, 788 (N.Y. 1974) (citation omitted).

436. U.S. SENTENCING GUIDELINES (Preliminary Draft 1986).

437. *Id.* at § B322 cmt. Whatever happened to the idea that “[a]n affluent society ought not be miserly in support of justice, for economy is not an objective of the system?” *Mayer v. City of Chicago*, 404 U.S. 189, 201 (1971) (Burger, C.J., concurring); see also Warren E. Burger, *No Man Is an Island*, 56 A.B.A. J. 325, 325 (1970) (arguing that defendants must be provided with full due process and “full measure of days in court” regardless of expense).

438. 404 U.S. 257 (1971).

439. *Id.* at 260.

440. REPORT ON THE CASELOAD CRISIS, *supra* note 128.

leads sometimes to injustice.”⁴⁴¹ The situation in Chicago has been described in a like manner; the judges there were so concerned about how their rate of dispositions compared to that of their colleagues that they would greet each other with the inquiry, “How are your dispositions this month?”⁴⁴² An examination of the California criminal courts revealed that the administrative judge would reprimand any criminal court judge who was not processing his calendar rapidly enough.⁴⁴³

One problem that has occurred as a result of both administrative pressure and pressure by colleagues to rapidly dispose of cases is the creation of a culture that defines “effectiveness” by one criterion only—and it would not be a measurement of the level of persistence in preserving the rights of defendants.⁴⁴⁴ In fact, one system for the administrative evaluation of criminal court judges was developed to “measure judicial productivity more effectively”⁴⁴⁵ and defined (or redefined) “quality”⁴⁴⁶ as follows: there were to be “three appropriate objective measures of quality . . . [and they] are reasonably prompt average disposition times, limited numbers of court appearances and manageable calendar sizes.”⁴⁴⁷ This method of evaluating judges means

441. *Id.* at 17.

442. Albert W. Alschuler, *The Trial Judge's Role in Plea Bargaining, Part I*, COLUM. L. REV. 1059, 1100 (1976) (internal quotation marks omitted).

443. See Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 55 (1967).

444. The pressures and problems of the courts that prosecute juveniles for criminal offenses are very similar those existing in the criminal courts. The culture of the juvenile courts has been described as one which is “driven by case-processing statistics” where the “refusal to acknowledge the importance of adhering to due process and the role of defense counsel results in a culture that relegates defense counsel to little more than a decorative ornament in a process that often results in unfair outcomes.” MARYLAND: AN ASSESSMENT, *supra* note 263, at 4.

445. Sam Roberts, *State to Adopt One-Case, One-Judge System*, N.Y. TIMES, Oct. 12, 1985, at 1.

446. Merriam-Webster's Online Dictionary defines “quality” as “degree of excellence” or “superiority in kind.” See <http://www.m-w.com/cgi-bin/dictionary>.

447. *Id.* (quoting statements issued by the supervising panel, lead by Judge Robert J. Sise) (internal quotation marks omitted). What is so shocking about this list of three indications of quality is that they all require the “quality” judge to spend as little time as possible on each case. Several states, however, are engaged in judicial evaluation schemes which differ radically from this New York approach. For a discussion of the various states' judicial evaluation programs, see generally Seth Anderson, *National Summit on Improving Judicial Selection: Judicial Retention Evaluation Programs*, 34 LOY. L.A. L. REV. 1375 (2001). New Mexico's Statewide Judicial Performance Evaluation Program, for example, sends questionnaires to litigants, witnesses, jurors, and attorneys who have had contact with a particular judge who is being evaluated. The questions asked will deal with fairness, knowledge of the law, preparation and attentiveness, temperament, and administrative skills. See *id.* at 1383. Attorneys will be asked a greater number of questions that relate to the legal ability of the judge. See *id.* at 1383–84.

that the judge who *does* move his calendar by threatening to impose the maximum sentence unless the defendant pleads guilty, is evaluated positively. The defense counsel, defendant, court observers, and quite possibly even the prosecutor might regard this judge quite poorly, but the court administrators know only that the judge is rapidly disposing of his cases. The Chief Judge of the felony trial courts in Detroit has been explicit about his appreciation of the judges who are most able to get pleas and expedite the processing of cases. Those judges are referred to as “executive floor judges” and are so assigned because, as the Chief Judge stated: “We want the threat [of drawing a stiff sentence] to stay here.”⁴⁴⁸

This culture of the criminal courts, which values rapid processing of cases above all else, can even lead to situations such as that of *In re Sardino*.⁴⁴⁹ Judge Sardino, who was found to have routinely denied defendants their rights, attempted to present to the State Commission on Judicial Conduct⁴⁵⁰ that was considering possible discipline of the judge, evidence to show that his practices were “consistent with the general practice” of other judges of his court system.⁴⁵¹

One other factor appears at times as a justification for why a defendant who insists on trial should be sentenced more severely than the defendant who pleads guilty pre-trial. The trial judge in *State v. Sandefer*⁴⁵² made the case for the sentence he imposed post-conviction:

I know that defendants who do enter pleas of guilty, in cases of this nature, it saves the parent and the child a lot of grief, in that they don't have to go through this experience, this heart rendering experience in the courtroom in having a poor little girl testify in front of a whole bunch of strangers about what happened to her.

448. Court, *supra* note 2, at 56 (quoting Dalton Roberson, Chief Judge of the Recorder Court).

449. 448 N.E.2d 83 (N.Y. 1983).

450. The New York State Commission on Judicial Conduct was created in 1974 when the Legislature created a temporary commission to investigate and prosecute cases of judicial misconduct. See <http://www.scjc.state.ny.us>. The Commission is authorized to initiate its own complaints, conduct investigations and formal hearings, and subpoena witnesses and documents. See N.Y. CONST. art. VI, § 22(a) (2001). If the Commission determines that disciplinary action is appropriate it can impose one of the following sanctions: admonition, censure, removal, or retire a judge for disability. See *id.* The disciplined judge can request review by the Court of Appeals. See *id.* All fifty states have created commissions to insure compliance with the established ethical and professional standards for judicial behavior. See <http://www.scjc.state.ny.us>.

451. *In re Sardino*, 448 N.E.2d at 85. The Court of Appeals accepted the determined sanction of the Commission and ordered the judge removed from office. See *id.*

452. 900 P.2d 1132 (Wash. Ct. App. 1995).

Mr. Sandefer, if you entered a plea of guilty, I very possibly would have given you a more lenient sentence towards the lower end of the range, because of saving the victim being victimized by going through this court process. You didn't, and I'm not going to give you that break.⁴⁵³

Punishing the defendant for making the state prove its case (which of course entails calling the alleged victim as a witness) is a clear punishment for the defendant's exercising his constitutional right to trial.

In order for judges to properly comply with the responsibilities and obligations of their office, they must be free from the influence not only of politicians, but from their supervisors who are demanding the rapid processing of cases. Judicial independence means independence from the pressure of those who have power over them.⁴⁵⁴ As an 1872 Supreme Court decision stated: It is of the "highest importance . . . that a judicial officer . . . shall be free to act upon his own convictions, without apprehension of personal consequences to himself."⁴⁵⁵ It is appropriate that judges act in accordance with the state and United States constitutions that they've taken an oath to uphold,⁴⁵⁶ that they follow judicial precedent, adhere to the state and federal laws, and comply with their ethical responsibilities.⁴⁵⁷ The very first Canon of the Model Code of Judicial Conduct informs that "[a]n independent and honorable judiciary is indispensable to justice in our society."⁴⁵⁸ And a 2003 amendment to the Commentary for that Canon states: "An independent judiciary is one free of inappropriate outside influences."⁴⁵⁹

453. *Id.* at 1133 (quoting the transcript of the lower court). The Court of Appeals of Washington upheld the sentence. *Id.* at 1135; see also SENTENCING GUIDELINES, *supra* note 436, at § B322 cmt. (1986) (providing leniency for pleading guilty is warranted in part because "witnesses (particularly victims) are spared the stress of trial").

454. See Alfred P. Carlton, Jr., *Preserving Judicial Independence—An Exegesis*, 29 FORDHAM URB. L.J. 835, 839 (2002); see also ABA, AN INDEPENDENT JUDICIARY: REPORT OF THE ABA COMMISSION ON SEPARATION OF POWERS AND JUDICIAL INDEPENDENCE (1997) (finding certain problems exist in federal courts, but that the most serious threats to the independence of the judiciary existed at the state court level), available at <http://www.abanet.org/govaffairs/judiciary/execprob.html>.

455. *Bradley v. Fisher*, 80 U.S. 335, 347 (1872).

456. See *supra* notes 252–56 and accompanying text.

457. See Penny J. White, *Special Series: Judicial Independence: Judging Judges: Securing Judicial Independence by Use of Judicial Performance Evaluations*, 29 FORDHAM URB. L.J. 1053, 1061–62 (2002).

458. MODEL CODE OF JUDICIAL CONDUCT, *supra* note 1, at Canon 1(A) (emphasis added).

459. *Id.* at Canon 1(a) cmt. Alfred Carlton, Jr., the ABA's President in 2003, had "made judicial independence a primary focus of his presidency." See Robert A. Stein, *Standing Up for Judges*, 89 A.B.A. J. 67 (July 2003).

This commentator suggests that the pressures on the judge to clear his calendar, and the rewards to the judges that do, most certainly are “inappropriate” influences on a judge. Career-based self-interest may often lead to policies and decisions that will not conform to the ethical and constitutional requirements of office that should be paramount. The path to advancement is to impress those in control of the judge’s future path—court administrators or county executives—and a judge accomplishes that by efficiently and cost-effectively processing the caseload.⁴⁶⁰ Judges are all-too-much like the rest of us, they respond to incentives,⁴⁶¹ and incentives can include promotion, preferred assignments within the court structure, re-nomination, or just the respect of one’s peers.⁴⁶²

Judicial independence demands that a judge follow the rule of law—including ensuring the due process rights of the defendant—when making any decision, especially one that relates to the liberty of an individual who is prosecuted in his courts. Pressure on the judge to do otherwise comes not only from senior court officials or governmental offices concerned with limiting expenditures which too often is translated into restricting trials, the media can exert influence as well. This is not the appropriate forum to discuss the pressures that may generally exist from the media to be “tough on crime,”⁴⁶³ but rather to highlight the media’s emphasis at times on the desirability of the courts’ budgets being as low as possible to save money. So, for example, the *Dallas Morning News* in endorsing a candidate for reelection to the criminal court emphasized that the judge had “reduced the court backlog significantly and saved taxpayers money,”⁴⁶⁴ i.e., pressed for guilty pleas and avoided trials. It is certainly rare to see a judge championed in the

460. See BUTCHER & MOORE, *supra* note 259, at 20 (indicating that in some places in the country, judges feel great pressure from county commissioners to control expenses in their criminal courts, which, of course, means to obtain pleas instead of conducting costly trials).

461. See Neil S. Siegel, *Sen and the Heart of Jurisprudence: A Critique of the Economic Analysis of Judicial Behavior*, 89 CALIF. L. REV. 1581, 1583 (1999) (reasoning that standard economic theory would expect that judges would act rationally, that is, engage in behavior to maximize their self interest).

462. See Roundtable Discussion, *Is There a Threat to Judicial Independence in the United States Today?*, 26 FORDHAM URB. L.J. 7, 26 (1998) (Second Circuit Court of Appeals Judge Guido Calabresi commented regarding federal judges: “If I were to identify the single greatest threat to judicial independence today, it would be the fact that judges want to move up.”).

463. Nor is this the appropriate time to examine how the Feeney Amendment, which Congress passed in the Fall of 2003, and which reduces the discretion of federal judges in sentencing defendants, impacts upon the independence of the judiciary.

464. Editorials: *Judicial Elections; Ballot Strong for Dallas County Voters*, DALLAS MORNING NEWS, Feb. 27, 1998, at 34A.

press for his focus on the due process rights of those charged with crime. But a judge's sworn obligations cannot take second place to the desire to please the media, even if a potential endorsement for re-election is at stake.

The only instance where this commentator concludes it is appropriate to impose a greater sentence post-trial than that which was offered to the defendant were he to have pled guilty pre-trial is if the judge did indeed learn of some aggravating factors during the course of the trial that he had not known of during plea negotiations. It is certainly true at times that upon hearing the testimony of witnesses, especially the victim of the crime, the actions of the defendant will appear to be more heinous than originally thought. However, it may often be the case that the prosecutor had overcharged the defendant or exaggerated the gravity of the defendant's conduct to strengthen the prosecutor's hands during plea negotiations and the trial testimony does not fully support the charge or the prosecutor's claims. If such be the case, the sentence ought be *less* than was suggested pre-trial. A judge who wishes to sentence the defendant more harshly after trial ought to be required to justify on the record what it was that the judge had now become aware of that was unknown pre-trial that would warrant the harsher sentence.

CONCLUSION

A poor, uneducated defendant is brought from the cell he has been in since his arrest to the court for arraignment. He meets his counsel for the first time; the lawyer has just received information concerning the charges against the defendant. The counsel relates to the defendant the offer of the prosecutor; the defendant maintains his innocence and he does not want to plead guilty. The judge becomes aware that the case is not "going to go away" unless he intervenes. The judge calls defense counsel and prosecutor to the bench for an off-the-record discussion after which counsel goes back to his client and tells him that there's a one-time-offer on the table; if he doesn't take it, the offer at the next court appearance will entail twice as much incarceration. The lawyer, overloaded with an unmanageable caseload, tells the defendant he should take the plea. The defendant continues to insist he's innocent and the judge then tells defense counsel that that judge will be staying with the case for its duration and if the defendant does choose to go to trial, the judge will sentence him to the maximum incarceration possible. No one has asked the defendant to provide his account of the criminal charges against him; everyone assumes his guilt. The prosecutor, of

course. The defense counsel is no advocate; the judge is no impartial arbiter. It is a given that bail would be set at an amount the defendant could not possibly meet.⁴⁶⁵

This is an inherently coercive atmosphere; one which could well cause even an innocent individual to realize that his most sensible option, indeed perhaps his only option, is to take the plea deal that will never be offered again. The setting and the pressures are strikingly similar to those the Supreme Court found to be intolerable in *Miranda v. Arizona*, where the entire thrust of the suspect's interrogation "was to put the defendant in such an emotional state as to impair his capacity for rational judgment. . . . [T]he compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak."⁴⁶⁶

The pressure and intervention of the *judge* is, this commentator suggests, the tipping point. If the defendant could *at least* hope for a fair trial before an impartial judge, and if the defendant could *at least* expect a judge who would guarantee his right to effective assistance with a lawyer who prepared his defense and conducted the requisite investigation,⁴⁶⁷ then perhaps the defendant's "will to resist"⁴⁶⁸ would not have been overpowered. The Supreme Court's remedy to the coercive atmosphere of in-custody police interrogation was to require the Miranda-warnings be given and to establish the right of an individual to have counsel present.⁴⁶⁹ The remedy for the courtroom coercive atmosphere should be to prohibit the judge's involvement in trying to persuade the defendant to plead guilty. As the court stated in *Euziere v. United States*, "[A] plea of guilty interposed as the result of coercion is not consistent with due process"⁴⁷⁰

It is qualitatively different when it is the judge, and not the prosecutor, who engaged in plea negotiations with the defendant. Our adversarial system of justice assumes that the judge is a neutral, detached, impartial arbiter and not a partner with the state's

465. On the walls of the U.S. Department of Justice is an inscription: "The U.S. wins its point whenever justice is done its citizens in the courts." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). We all lose when injustice such as the scenario described is allowed to occur. As the Supreme Court stated, "our system of the administration of justice suffers when an accused is treated unfairly." *Id.*

466. *Miranda v. Arizona*, 384 U.S. 436, 465 (1966), *superseded by* 18 U.S.C.A. § 3501(b) (West 2000) (codifying *Miranda* rights).

467. See PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, at Standard 4-4.1.

468. *Miranda*, 384 U.S. at 467.

469. See *id.* at 473.

470. *Euziere v. United States*, 249 F.2d 293, 295 (10th Cir. 1957).

prosecutorial arm seeking to have the defendant adjudicated guilty. The Separation of Powers doctrine deems the prosecutor to be part of the executive branch, and the judicial branch is not to usurp the powers of the executive. As the court stated in *Francolino v. Kuhlman*, “the mere appearance of partiality, even if unfounded, greatly undermines the credibility of the criminal justice system.”⁴⁷¹ Certainly the judge who clearly lets the defendant know that he will pay a price in terms of a harsher sentence for failing to heed the judge’s advice to plead guilty, will not *appear* to be the impartial guarantor of the fair trial as required by the Constitution.⁴⁷²

There is, of course, some degree of inducement when the prosecutor is the party who is negotiating a possible plea agreement with the defendant. It is a given that the district attorney is the defendant’s adversary, and it is “accepted as constitutionally legitimate the simple reality that the *prosecutor’s* interest at the bargaining table is to persuade the defendant to forego his right to plead not guilty.”⁴⁷³ But whereas the prosecution and the defense “arguably possess relatively equal bargaining power,”⁴⁷⁴ such is certainly not the case for “His Honor” (who holds the power ultimately to determine to a very significant degree one’s liberty) and the defendant. When it is the prosecutor who is doing the negotiating, there *is*, theoretically, a crucial check on whether there was coercion which led to the plea: the judge must determine the voluntariness of the plea.⁴⁷⁵ When the judge, however, is the active solicitor, there is no independent source, no third party to assess whether

471. See *Francolino v. Kuhlman*, 224 F. Supp. 2d 615, 630 (S.D.N.Y. 2002). Although the right to be tried before an impartial judge is not specifically stated in the Constitution, the Supreme Court acknowledged the vital nature of this right. See *Tumey v. Ohio*, 273 U.S. 510, 523 (1927); see also *Hawkins v. Le Fevre*, 758 F.2d 866, 875 (2d Cir. 1985) (referring to the trial judge as “the system’s bastion of neutrality”); *Gayle v. Le Fevre*, 613 F.2d 21, 24 (2d Cir. 1980) (Oakes, J., dissenting) (arguing that “[b]ias or partiality of the judge goes right to the core of due process”); *People v. De Jesus*, 369 N.E.2d 752, 755 (N.Y. 1977) (instructing that “the Bench must be scrupulously free from and above even the appearance or taint of partiality”); *Frischling v. Schrank*, 260 N.Y.S.2d 537, 538 (App. Div. 1965) (recognizing that “[t]he right to be tried by a Judge who is reasonably free from bias is a part of the fundamental right to a fair trial”).

472. See *J.E.B. v. Alabama*, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting) (explaining that “[w]ise observers have long understood that the appearance of justice is as important as its reality”).

473. *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (emphasis added).

474. *Parker v. North Carolina*, 397 U.S. 790, 799 (1970) (Brennan, J., dissenting).

475. See *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969), *superseded by* FED. R. CRIM. P. 11(c) (West 1986 & Supp. 2004) (codifying the plea bargain admonishments stated in *Boykin*); *McCarthy v. United States*, 394 U.S. 459, 466 (1969), *superseded by* FED. R. CRIM. P. 11(c) (West 1986 & Supp. 2004); *Machibroda v. United States*, 368 U.S. 487 (1962); see also *supra* notes 352–56 and accompanying text.

the plea was freely and voluntarily given; the same judge, whose involvement led to the plea, is the one who determines the propriety of those very tactics.⁴⁷⁶

Judicial involvement in plea negotiations can violate the due process rights of defendants in a number of very significant ways. The judge who threatens to and does enhance the defendant's sentence because he chose to exercise his constitutional right to trial is punishing the defendant not only for the exercise of that right,⁴⁷⁷ but also because he claimed his Fifth Amendment privilege to remain silent, not to incriminate himself, to plead not guilty.⁴⁷⁸ The defendant's Fourth Amendment rights may well be violated because the judge often is insisting on an immediate plea and the defendant is unable to have a hearing to determine if the evidence against the defendant was illegally obtained.⁴⁷⁹ The same applies to the defendant's challenge to the prosecutor's claim that the defendant "confessed"—there is no opportunity for the defendant to show that he was never informed of his *Miranda* rights.⁴⁸⁰ Perhaps most significantly, the Sixth Amendment right to effective assistance of counsel is often denied. The judge does not afford counsel the opportunity to provide "counsel" as required under the Sixth Amendment of the Constitution, the ABA Model Code

476. See *Von Moltke v. Gillies*, 332 U.S. 708, 724 (1948) (describing the judge's obligation when assessing the propriety of an offered plea of guilty, where there was a waiver of counsel, as one requiring a "penetrating and comprehensive examination of all the circumstances under which such plea is tendered").

477. See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978); *Hess v. United States*, 496 F.2d 936, 938 (8th Cir. 1974). Our criminal justice system has historically placed great import on the right to a jury trial. THE FEDERALIST NO. 83 (Alexander Hamilton) (noting that "[t]he friends and adversaries of the [Constitutional Convention], if they agree in nothing else, concur at least in the value they set upon the trial by jury"), available at <http://www.law.emory.edu/FEDERAL/federalist/feder83.html> (last visited July 26, 2004). The Supreme Court stated that "the right of an accused to a trial by a constitutional jury [must] be jealously preserved." *Patton v. United States*, 281 U.S. 276, 312 (1930); see also *Singer v. United States*, 380 U.S. 24, 35 (1965) (quoting *Patton*, 281 U.S. at 312, when it described jury trials as the "normal and . . . preferable mode" of resolving criminal cases). Our increasing emphasis on obtaining guilty pleas has *diminished* instead of preserved the right of a jury trial.

478. See *United States v. Jackson*, 390 U.S. 570, 581–82 (1968); *State v. Boone*, 239 S.E. 2d 459, 465 (N.C. 1977).

479. See, e.g., *Goss v. State*, 730 So. 2d 568, 570–71 (Miss. 1998); SELLING JUSTICE SHORT, *supra* note 264, at 16. The judge may even penalize the defendant as to the plea which is to be offered if the defendant pursues motions. See *supra* notes 303–09 and accompanying text.

480. 384 U.S. 436, 467–68, 473 (1966), superseded by 18 U.S.C.A. § 3501(b) (West 2000) (codifying *Miranda* rights).

of Professional Responsibility⁴⁸¹ and Rules of Professional Conduct,⁴⁸² or the ABA Standards for Criminal Justice.⁴⁸³

The adversarial process suffers when the judge departs from his neutral role in that the lawyer is not able to provide effective representation for his client because counsel has typically not had time to develop any familiarity with the case. The judge relies on the often-inaccurate and incomplete police report and the prosecutor's claims to form the basis for the court's assumption of guilt and there is no work on behalf of the defense to counter this. There is no adversarial testing of or challenge to the accusations; the lawyer has been reduced to the role of conveyor of the judge's offer and, possibly, the judge's threats. The result is what the Supreme Court warned against in *United States v. Cronin*:⁴⁸⁴ "[I]f the process loses its character as a *confrontation* between adversaries, the constitutional guarantee [to effective assistance of counsel] is violated."⁴⁸⁵ The judge does not permit counsel to engage in the adversarial testing which our system requires, and in which our citizens put their faith.⁴⁸⁶ The result of such a proceeding is simply "unreliable because of a breakdown in the adversarial process that our system counts on to produce just results."⁴⁸⁷

The fact that these rights are being denied in the name of the efficiency and economy which are "needed" in order to enable the courts to deal with their overload of cases⁴⁸⁸ does not make the violation of these basic due process rights "just a little bit unconstitutional." As the Supreme Court stated years ago, "the Constitution recognizes higher values than speed and efficiency."⁴⁸⁹ And when the violator is not just

481. See PROF'L RESPONSIBILITY, *supra* note 163.

482. See MODEL RULES OF PROF'L CONDUCT, *supra* note 163.

483. See PROSECUTION FUNCTION AND DEFENSE FUNCTION, *supra* note 25, at Standard 3-3.11(a).

484. 466 U.S. 648 (1984).

485. *Id.* at 656-57; see also *Ferri v. Ackerman*, 444 U.S. 193, 204 (1979) (explaining that it is counsel's responsibility to oppose the government in adversary litigation).

486. See *Polk County v. Dodson*, 454 U.S. 312, 318-19 (1981); *Anders v. California*, 386 U.S. 738, 743 (1967) (Our adversarial system requires that the accused has "counsel acting in the role of an advocate.").

487. *Strickland v. Washington*, 466 U.S. 668, 696 (1984).

488. See Jerome H. Skolnick, *Social Control in the Adversary System*, 11 J. CONFLICT RESOLUTION 52, 55 (1967); Roberts, *supra* note 445.

489. *Stanley v. Illinois*, 405 U.S. 645, 656 (1972). The Court continued: "Indeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy . . ." *Id.*

the state, but the judge who is required under our Constitution⁴⁹⁰ and the Model Code of Judicial Conduct⁴⁹¹ to be the very individual who must safeguard and protect these rights, the situation is intolerable. The rule of law that too often is followed by the judge is his own: "In my court, if you don't take the plea I have offered you, I will sentence you much more harshly upon conviction after trial."⁴⁹² The judge's rule of law, in many instances, need not be repeated in every case to every defendant; the rules followed in that court become well known to all.

The Supreme Court, when it held that plea bargaining between a prosecutor and defense counsel did not violate the defendant's constitutional rights, offered a caveat: "Of course, the agents of the State may not produce a plea by actual or threatened physical harm or by *mental coercion* overbearing the will of the defendant."⁴⁹³ The Court must realize what is patently clear: in at least some situations, judicial involvement in plea negotiations *can* constitute mental coercion. The most appropriate way of dealing with that possibility is to adopt a prophylactic rule, a "bright-line" prohibition. Such a ban on the judge negotiating a plea with the defendant exists in the federal courts,⁴⁹⁴ the time is long overdue for it to apply to the state courts as well.

490. See *Glasser v. United States*, 315 U.S. 60, 71 (1942).

491. See MODEL CODE OF JUDICIAL CONDUCT, *supra* note 1.

492. See, e.g., *Corbitt v. New Jersey*, 439 U.S. 212, 226 (1978).

493. *Brady v. United States*, 397 U.S. 742, 750 (1970) (emphasis added).

494. See FED. R. CRIM. P. 11(c)(1) (West 1986 & Supp. 2004).
