CRIMINAL LAW

PLEA BARGAINING IN NEBRASKA—THE PROSECUTOR'S PERSPECTIVE

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A diversity of opinion surrounds the institution of plea bargaining. In large metropolitan areas many participants in the criminal justice system would agree that plea bargaining is a result of circumstance rather than choice. In some cities, criminal caseload has doubled in the last ten years while available judicial resources have remained constant. In the face of this administrative crisis, increasing reliance on plea bargaining, often referred to as plea negotiation, has enabled the system to remain functional. Indeed, statistics suggest a complete dependence. Roughly ninety percent of all defendants convicted of crime in state and federal courts plead guilty rather than go to trial. While this figure does not specify the number of guilty pleas that were in fact negotiated, the prevalence of the plea bargaining process is apparent. Even the American Bar Association, by attempting to improve the procedural safeguards in plea bargaining, has implicitly conceded its necessity.

Critics of plea negotiation condemn the practice as a form of judicial coercion. Not only does it encourage the innocent to

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2. See text at note 255 infra.


plead guilty, but it may place an unconstitutional burden on the right to a jury trial, the privilege against self-incrimination, and the right to confront one’s accusers. Five Equal protection and due process problems may also arise if defendants who plead guilty receive a lesser sentence than those who insist on trial. Six One commentator has even suggested that plea bargaining dilutes the protection afforded by the exclusionary rule. Seven These arguments, coupled with concern over rising crime rates and increased recidivism, led the National Advisory Commission on Criminal Justice Standards and Goals to recommend the abolition of plea bargaining by 1978. Eight The necessity of plea negotiation is also being questioned on the local level. Several jurisdictions are experimenting with various forms of abolition. Nine Despite these experiments, it is still unclear whether restrictions on plea negotiation generate an increased caseload. Ten

The theoretical benefits and burdens of plea bargaining have been thoroughly discussed. Eleven Little empirical research has been done, however, on the actual practices and attitudes of the prosecutors who plea bargain. Twelve The prosecutor’s perspective deserves special emphasis because it is he who decides whether there will be any plea negotiation and, if so, on what terms. Thirteen

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6. Id. at 1403.
9. See text at notes 250-59 infra. The Georgetown Law Center has received a two year grant from the Law Enforcement Assistance Administration to study plea bargaining. Its results, when published, will provide a descriptive profile of the various types of plea bargaining systems currently operating in the United States. Letter from Carla Gaskins to Fred Kray, Oct. 28, 1976.
10. See text at notes 251-260 infra.
This article, which focuses on plea bargaining as practiced by Nebraska county attorneys, initially will consider due process requirements for the acceptance of guilty pleas. Nebraska case law will be compared with United States Supreme Court decisions. The actual plea bargaining practices of Nebraska prosecutors will be examined through the analysis of questionnaires sent to county attorneys throughout the state. Attention will then be given to recommendations that will lend some degree of uniformity to the concessions offered to defendants for their pleas.

DUE PROCESS REQUIREMENTS FOR THE ACCEPTANCE OF GUILTY PLEAS

Knowledge of the due process requirements for the acceptance of guilty pleas is essential to an understanding of the prosecutorial perspective on plea bargaining. Constitutional structures limit the prosecutor's discretion in plea negotiation. In developing judicial safeguards, courts have attempted to protect defendants from coercion and ensure that guilty pleas are tendered to the appropriate charges with a knowing waiver of constitutional rights.

*Boykin v. Alabama* was the first United States Supreme Court decision to consider the due process requirements for the acceptance of guilty pleas in state courts. The record in *Boykin v. Alabama* was traced back to *Von Moltke v. Gillies*, 332 U.S. 708 (1948) and *Moore v. Michigan*, 355 U.S. 155 (1957). These two cases involved defendants who pled guilty without an attorney. In reversing the convictions, the Supreme Court focused on the right to counsel as guaranteed by the due process clause of the fourteenth amendment. *Id.* at 159. A plea of guilty tendered without a lawyer's assistance was invalid, it said, unless accompanied by an intelligent and competent waiver of the right to counsel. 332 U.S. at 720; 355 U.S. at 158-59. The *Von Moltke* Court quoted *Kercheval v. United States*, 274 U.S. 220, 223 (1927), to the effect that guilty pleas should "not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." 332 U.S. at 719.

The Court did not elaborate on this for nearly two decades. Then it decided *Machibroda v. United States*, 368 U.S. 487 (1962), a case involving guilty pleas under the Federal Rules of Criminal Procedure. The defendant, sentenced to forty years in prison, alleged that his guilty plea had been induced by the prosecutor's promise of a twenty year sentence. The Court focused on the coercive effect of prosecutorial promises. In overturning the defendant's conviction, it concluded that a "guilty plea, if induced by promises and threats which deprive it of the character of a voluntary act, is void." *Id.* at 493.

*Machibroda* was followed by *McCarthy v. United States*, 394 U.S. 459 (1969), a decision outlining the proper procedure for the acceptance of guilty pleas under Federal Rule 11. The Court held that the trial judge, when receiving a plea of guilty, must personally address the defendant and determine that the plea was voluntarily made with a full understanding of the nature of the charges. *Id.* at 465-67. This holding was based only on a construction of Federal Rule 11,
**CRIMINAL LAW**

kin was silent with respect to the acceptance of the defendant's plea.\(^{16}\) The accused did not address the trial court and the judge asked no questions concerning the entrance of the plea.\(^{17}\) The Supreme Court noted that three constitutional rights were waived by a plea of guilty: the right to trial by jury, the privilege against self-incrimination, and the right to confront one's accusers.\(^{18}\) It refused to infer a waiver of these important rights from a silent record.\(^{19}\) In reversing the defendant's conviction, the Court said it was error for the trial judge to accept the defendant's guilty plea without "an affirmative showing that it was intelligent and voluntary."\(^{20}\)

The due process standard for determining the validity of a guilty plea was more recently stated in *North Carolina v. Alford:*\(^{21}\) "The standard was and remains whether the plea represents a voluntary and intelligent choice among alternative courses of action open to the defendant."\(^{22}\) The Nebraska Supreme Court applied the *Alford* test in *State v. Turner,*\(^{23}\) although the concept of a voluntary and intelligent plea had been firmly established in Nebraska many years earlier.\(^{24}\)

*Boykin* and *Alford* make it clear that, to comport with due process, a guilty plea must be entered voluntarily and intelligently. Though the concepts of voluntariness and understanding are intertwined, they are distinguishable.\(^{25}\) While voluntari-

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16. Id. at 242.
17. Id. at 239.
18. Id. at 243.
19. Id. at 242 (quoting Carnley v. Cochran, 369 U.S. 506, 516 (1962)).
22. Id. at 31.
25. In Brady v. United States, 397 U.S. 742 (1970), the Supreme Court treated voluntariness and understanding as two distinct criteria. Compare id. at 749-55 (voluntariness) with id. at 756-58 (understanding). However, Henderson v. Morgan, 426 U.S. 637 (1976) suggests that a plea cannot be voluntary unless it is intelligently entered:

[The defendant's] plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense. And clearly the plea could not be
ness focuses on coercion, understanding emphasizes waiver of rights and notice of the crime charged.

The Voluntary Plea

Generally, a voluntary plea must be the "product of a free and rational choice." The United States Supreme Court, in a series of cases, has expanded the notion of a voluntary plea by limiting the circumstances which constitute coercion. For example, in *Brady v. United States*, a guilty plea entered to avoid the possibility of the death penalty was held voluntary. The defendant pled guilty to kidnapping under a federal statute which made the offense punishable by death only if the jury recommended it. A plea of guilty would therefore preclude imposition of the death penalty. The Court refused to hold the defendant's guilty plea invalid simply because it was motivated by a desire for a lesser penalty and rejected his contention that the statutory scheme had coerced his plea. It said that a guilty plea would be considered voluntary and must stand unless "induced by threats... or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business..." Since the defendant was advised by counsel and was clearly competent, the voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received "real notice of the true nature of the charges against him..."

*Id.* at 644-45 (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)).


28. *Id.* at 758.

29. 18 U.S.C. § 1201 (a) (1970). The death penalty provisions of this statute were declared unconstitutional in United States v. Jackson, 390 U.S. 570, 581, 591 (1968), because they discouraged the exercise of fifth and sixth amendment rights.

30. 397 U.S. at 750-51. The Nebraska Supreme Court dealt with a similar issue in State v. Alvarez, 165 Neb. 557, 562, 177 N.W.2d 591, 595 (1970), vacated in part on other grounds, 403 U.S. 933, 937 (1972). There the defendant allegedly pled guilty to first degree murder in order to avoid the death penalty. The defense argued that the defendant's plea was motivated by his understanding that jurors opposed to capital punishment would be dismissed for cause. The threat of such a "hanging jury," it was argued, coerced the defendant to plead guilty. The court agreed that the imposition of the death penalty when this technique of jury selection had been used had been declared unconstitutional in *Witherspoon v. Illinois*, 391 U.S. 510, 522-23 (1968). However, the court pointed out, the defendant had not actually been tried by a jury selected in this manner, and the record showed that his plea had been tendered freely, voluntarily, and with the assistance of competent counsel. 165 Neb. at 561-63, 177 N.W.2d at 594-95.

31. 397 U.S. at 755 (quoting Shelton v. United States, 242 F.2d 101, 115 (1957) (Tuttle, J., dissenting opinion)).
Court concluded that his plea was tendered intelligently as well as voluntarily.\textsuperscript{32} The defendant in \textit{Parker v. North Carolina}\textsuperscript{33} alleged that his guilty plea had been induced by an unconstitutionally coerced confession.\textsuperscript{34} The accused had confessed while in police custody without the benefit of counsel. A month later, represented by an appointed attorney, he tendered his guilty plea. It was accepted by the trial judge, who questioned the defendant as to the voluntariness of his plea.\textsuperscript{35} The Court refused to hold the plea involuntary, since it was entered a full month after the confession had been obtained, no further threats or promises had been made in the interim, and the defendant had been advised by counsel prior to entering his plea.\textsuperscript{36} These factors, the Court said, dissipated any taint of the confession by the time the guilty plea was entered, and the Court held that the defendant's plea had been freely and voluntarily entered.\textsuperscript{37}

The limits of voluntariness were indicated in \textit{North Carolina v. Alford}.\textsuperscript{38} There the Court held that a guilty plea entered with a protestation of innocence could still be voluntary.\textsuperscript{39} The opinion cautioned, however, that acceptance of such a plea required the trial judge to find independent evidence establishing a factual basis for guilt.\textsuperscript{40}

\begin{itemize}
\item \textsuperscript{32} 397 U.S. at 756.
\item \textsuperscript{33} 397 U.S. 790 (1970).
\item \textsuperscript{34} Id. at 793.
\item \textsuperscript{35} Id. at 791-93.
\item \textsuperscript{36} Id. at 796.
\item \textsuperscript{37} Id. Two years prior to \textit{Parker}, the Nebraska Supreme Court held that a guilty plea motivated by an illegal confession was voluntarily entered where the defendant was represented by counsel and where he understood the effect of the plea. State v. Cooper 182 Neb. 765, 767, 157 N.W.2d 412, 414 (1968). \textit{See also} State v. Hall, 188 Neb. 130, 132-33, 195 N.W.2d 201, 203 (1972).
\item \textsuperscript{38} 400 U.S. 25 (1970).
\item \textsuperscript{39} Id. at 38. The Nebraska Supreme Court explored the parameters of \textit{North Carolina v. Alford} in a line of cases beginning with \textit{State v. Reed}, 187 Neb. 792, 194 N.W.2d 179 (1972). Citing \textit{Alford}, the Nebraska Court held in \textit{Reed} that a plea of guilty could be accepted despite a defendant's claim of innocence. \textit{Id.} at 793, 194 N.W.2d at 180.
\item In a later case, a plea entered for the sole reason of obtaining a lighter sentence was deemed voluntary and acceptable. State v. Rubek, 189 Neb. 141, 142, 143, 201 N.W.2d 255, 257 (1972). Recently, a plea entered "to get everything taken care of as quickly as possible" was held to be voluntarily entered. State v. Nokes, 192 Neb. 844, 843, 224 N.W.2d 776, 779 (1975). However, a recent case was vacated and remanded for proceedings to determine the truth of the defendant's allegations that he was threatened with a 250 year sentence, hanging, and re-signation by his court appointed attorney if he did not accept the bargain. State v. Ford, 198 Neb. 376, 377, 252 N.W.2d 643, 644 (1977).
\item \textsuperscript{40} Because of the importance of protecting the innocent and of ensuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled
\end{itemize}
from a historical perspective because it established that an express admission of guilt was not a constitutional prerequisite for a voluntary plea. This concept had not been explicitly articulated until Alford.

Nebraska case law dealing with voluntariness is in substantial accord with United States Supreme Court decisions.\(^4\) The Nebraska Supreme Court, however, has sanctioned more overt forms of coercion. In State v. Fitzgerald,\(^4\) it held that a plea of guilty was voluntary even when induced by the prosecutor's threat to file habitual criminal charges.\(^4\) The court pointed out that a threat to prosecute when the facts warrant prosecution should not be considered coercive and held that coercion only occurs when there are threats of "illegitimate action."\(^4\) The court has also validated a guilty plea motivated by the threat to reinstate a higher charge.\(^4\)

Police coercion was examined by the Nebraska court in State v. Nicholson.\(^4\) The defendants argued that their pleas were involuntary because policemen told them they might face more serious charges and an aroused local populace threatened their safety.\(^4\) In rejecting these claims of coercion, the court noted that no overt acts against the defendants "had occurred or were threatened."\(^4\) The defendants had been advised by competent counsel and their pleas were therefore held voluntary.\(^4\)

\section*{The Intelligent Plea}

An intelligent or understanding plea is composed of many elements.\(^5\) For the purposes of analysis it will be broken down

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with claims of innocence should not be accepted unless there is a factual basis for the plea. . . .

400 U.S. at 39 n.10 (emphasis added).

41. See notes 23, 29, 37 supra.

42. 190 Neb. 436, 208 N.W.2d 688 (1973).

43. \textit{Id.} at 436-37, 208 N.W.2d at 688-89. \textit{See also} State v. Mayes, 190 Neb. 833, 834-36, 212 N.W.2d 621, 622-23 (1973); State v. Reed, 187 Neb. at 793, 194 N.W.2d at 180; State v. Putnam, 182 Neb. 185, 186-87, 153 N.W.2d 456, 457 (1967).

44. 190 Neb. at 437, 208 N.W.2d at 689 (quoting Ford v. United States, 418 F.2d 855, 859 (8th Cir. 1969)).


47. 183 Neb. at 836, 164 N.W.2d at 654-55.

48. \textit{Id.} at 836, 164 N.W.2d at 655.

49. \textit{Id.}

50. Competency is clearly a threshold requirement. In Brady v. United States, the Supreme Court said: "'The record before us also supports the conclusion that Brady's plea was intelligently made. . . . [T]here was nothing to indicate that he was incompetent or otherwise not in control of his mental facul-
into four categories: (a) intelligence as to the charge, (b) intelligence as to the waiver of constitutional rights, (c) intelligence as to the sentence, and (d) intelligence as to the factual basis for the charge. The Supreme Court has defined some of the constitutional components of an intelligent plea, but many questions and ambiguities remain. Nebraska has attempted to supplement the vagueness of United States Supreme Court decisions by adopting the American Bar Association Standards Relating to Pleas of Guilty. The actual status of these standards is unclear, however, because the Nebraska Supreme Court has required only "substantial compliance." Thus, predictability and certainty, the two major advantages of explicit procedural rules, have never been achieved.

**Intelligence as to the Charge**

In 1941, the Supreme Court said, "[R]eal notice of the true nature of the charges... [is] the first and most universally recognized requirement of due process..." Thirty-five years later, in *Henderson v. Morgan*, the Supreme Court of the United States held that the defendant, as a matter of due process, must be informed of the "critical elements" of the offense to which he is pleading. The accused in *Henderson* pled guilty to second degree murder but, after conviction, argued that he was unaware when he tendered his plea that intent to cause death was a necessary element. The Court, in holding for the defendant, noted that the second degree murder charge was never formally made, and hence there was no explanation of the offense by the judge. Nor was there an alternative basis from which to infer that the defendant had the required intent. The

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52. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE: STANDARDS RELATING TO PLEAS OF GUILTY (Approved Draft 1968) [hereinafter cited as ABA GUILTY PLEA STANDARDS].

53. "Without specifically detailing the exact procedure to be followed, we state that the Standards Relating to Pleas of Guilty promulgated by the American Bar Association outline what should be the minimum procedure in the taking of such pleas. There was substantial compliance with... [them] herein." State v. Turner, 186 Neb. 424, 426, 183 N.W.2d 763, 765 (1971) (emphasis added). The status of the standards was thus unclear at the outset. Implicit in the court's opinion was the notion that guilty pleas would be accepted despite violation of the standards provided there was "substantial compliance." Later decisions have lent credence to this interpretation of *Turner*. See text at notes 73-94 infra.


56. Id. at 647 n.18.
defendant made no statement implying intent to cause death, and his attorneys failed to explain to him that his plea represented such an admission. The Court refused to hold that "notice of the charges" required a description of every element of an offense. Intent to cause death was such a "critical element" of second degree murder, however, that notice of that element was required. 57

Nebraska has gone far beyond the notice requirement of Henderson. In State v. Turner, the Nebraska Supreme Court declared: "Before accepting a guilty plea a judge is expected to sufficiently examine the defendant to determine whether he understands the nature of the charge. . . ." 58 The Turner court did not expressly require the judge to inform the defendant of the charge. "However, since the judge must determine that the defendant understands the nature of the charge the duty to inform may be implied." 59

Intelligence as to the Waiver of Constitutional Rights

A plea of guilty constitutes a waiver of the right to trial by jury, the privilege against self-incrimination, and the right to confront accusers. 60 According to Johnson v. Zerbst, 61 a valid waiver of constitutional rights requires the "intentional relinquishment or abandonment of a known right or privilege." 62 Boykin makes it clear that waiver cannot be inferred from a silent record. 63 It also states that the defendant should be questioned by the judge to ensure that he has "a full understanding of what the plea connotes and of its consequences." 64 The judge, then, must inform the defendant of his constitutional rights and determine that the accused has intentionally relinquished them. 65

57. Id.
58. 186 Neb. at 425, 183 N.W.2d at 765 (emphasis added). The Turner decision adopted the ABA Guilty Plea Standards as the "minimum procedure" for the acceptance of guilty pleas. See note 53 supra. The court, however, did not specifically cite the standards as authority for this rule. Section 1.4(a) specifically requires the judge to address the defendant personally and determine that he understands the nature of the charge. Accord, State v. Elliott, 192 Neb. 217, 218, 219 N.W.2d 775, 775 (1974).
61. 304 U.S. 458 (1938).
63. 395 U.S. at 242 (citing Carnley v. Cochran, 369 U.S. 506, 516 (1962)).
64. 395 U.S. at 244. See also North Carolina v. Alford, 400 U.S. at 29 n.3.
65. It has been argued that dicta in Schneckloth v. Bustamonte, 412 U.S. 218 (1973), has established a more stringent intelligence requirement. Rotenberg, The ABA Standards, supra note 51, at 66-67. The Schneckloth opinion in a discussion concerning waiver and consent to search stated: "Guilty pleas have
The Nebraska Supreme Court rejected such an “extreme” construction of Boykin in State v. Turner, utilizing the ABA Guilty Plea Standards as a rationale. The defendant in Turner contended his plea was invalid because the trial judge had failed to advise him of his privilege against self-incrimination and his right to confront his accusers. The Nebraska Supreme Court held that Boykin did not require an “item by item review of constitutional rights” and a “separate expressed verbal waiver of each of them.”

As discussed earlier, the Turner decision accepted the ABA Guilty Plea Standards as the “minimum procedure” for the entrance of guilty pleas. Adoption of the standards in Turner might be viewed as a subtle attempt by the court to buttress its strict interpretation of Boykin. Section 1.4 requires the defendant to be informed of only one constitutional right— the right to trial by jury. The standards were promulgated before Boykin, however, and the Nebraska court therefore avoided an express citation to them in the Turner opinion.

The intelligence requirement for constitutional waiver was not explicitly tied to the ABA Guilty Plea Standards until State

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been carefully scrutinized to determine whether the accused knew and understood all the rights to which he would be entitled at trial and that he had intentionally chosen to forego them.” 412 U.S. at 238.

66. 186 Neb. at 424-26, 183 N.W.2d at 765.
67. Id. at 425, 183 N.W.2d at 765.
68. Id.
69. See note 53 supra.
70. Adoption of the Standards, however, had been foreshadowed as early as State v. Putnam, where the court cited § 3.1 of the 1967 tentative draft to emphasize the propriety of plea bargaining. State v. Putnam, 182 Neb. 185, 187, 153 N.W.2d 456, 457 (1967). Then in State v. Carreau, the Nebraska court noted that § 3.1 of the tentative draft had “been the law in this jurisdiction.” State v. Carreau, 182 Neb. 295, 296, 154 N.W.2d 215, 216 (1967). In a supplemental opinion to State v. Tunender, the court acknowledged that it was considering the adoption of the approved 1968 draft of the ABA GUILTY PLEA STANDARDS. State v. Tunender, 183 Neb. 242, 243, 159 N.W.2d 320 (1968).
71. “The court should not accept a plea of guilty... without first addressing the defendant personally and... (b) informing him that by his plea of guilty... he waives his right to trial by jury....” ABA GUILTY PLEA STANDARDS, supra note 52, § 1.4(b).
72. In light of the Boykin decision, the ABA has updated the constitutional waiver requirement:

The trial judge should not accept a plea of guilty... from a defendant without first addressing the defendant personally and determining that... (ii) the defendant understands that, by pleading guilty... he waives certain constitutional rights, primarily his right to persist in a plea of not guilty and remain silent, his right to a trial by jury and his right to be confronted with the witnesses against him.

ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.2(a)(ii) (Approved Draft 1972). The Nebraska Supreme Court expressly rejected these standards while generally adhering
v. Cooper. There the defendant argued that the trial judge had failed to inform him that his guilty plea constituted a waiver of the right to trial by jury. The Nebraska Supreme Court admitted that this was a technical violation of section 1.4 of the standards. It noted, however, that the defendant had signed a petition which made it clear that he was waiving his right to a jury trial and that the petition also contained a signed statement by the defendant's attorney attesting to the fact that the charges, penalties, and alternatives had been explained to the accused. The court, in upholding the validity of the defendant's plea declared, "We recommend that . . . [the standards] be . . . adhered to in all cases, but in this instance we hold that failure to do so amounted only to harmless error. . . ." The authority of the standards was thus further diluted. The "minimum standards" of Turner became merely a "recommended procedure" in Cooper.

Intelligence as to the Sentence

"The Supreme Court has not mandated an intelligence requirement as regards sentencing." The ABA Guilty Plea Standards require in section 1.4(c) that the defendant be advised by the court of the maximum possible sentence, the mandatory minimum sentence, and the possibility of additional punishment under a multiple offender statute. The Nebraska Supreme Court seemed to require strict compliance with this standard in earlier cases, although it only permitted withdrawal of pleas in cases where the defendant had no actual knowledge of possible penalties. A recent decision confirms that the defendant to the ABA Guilty Plea Standards in State v. Evans, 194 Neb. 559, 565, 561-64, 234 N.W.2d 199, 202, 201-02 (1975). It reaffirmed this rejection in State v. Alegria, 198 Neb. 750, 753, — N.W.2d — (1977).

73. 196 Neb. 728, 246 N.W.2d 65 (1976).
74. Id. at 730, 246 N.W.2d at 67.
75. Id. at 729, 246 N.W.2d at 66-67.
76. Id. at 730, 246 N.W.2d at 67.
77. See note 53 supra.
78. Rotenberg, The ABA Standards, supra note 51, at 68.
79. The court should not accept a plea of guilty. . . without first addressing the defendant personally and. . .(c) informing him: (i) of the maximum possible sentence on the charge, including that possible from consecutive sentences; (ii) of the mandatory minimum sentence, if any, on the charge; and (iii) when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment.

ABA Guilty Plea Standards, supra note 52, § 1.4(c).
ant's actual knowledge rather than compliance with section 1.4(c) is critical to the validity of a guilty plea. 81

State v. Lewis 82 was the first case to deal with section 1.4(c) after adoption of the standards in Turner. The record in Lewis established that the defendant, when entering her plea, had not been advised by the court of the possible penalties that might be imposed. 83 The Nebraska Supreme Court, citing Turner, held that substantial compliance with the standards had not been met because the trial court had failed to advise the defendant of the penalties when accepting her guilty plea. 84 While conceding that section 1.4(c) required this practice, the court also pointed out that such a procedure had been required under Nebraska law long before Turner. 85 The court remanded the case without vacating the sentence or convictions and ordered that the defendant be permitted to withdraw her plea if the trial court should find that the defendant had actually been unaware of the penal consequences of her plea. 86 This remedy was based on section 2.1 of the ABA Guilty Plea Standards, which allows withdrawal of a guilty plea to correct a manifest injustice. 87 The same result was reached under similar circumstances in State v. Shropshire. 88

In State v. Painter, the Nebraska Supreme Court upheld Painter's conviction despite the trial judge's failure to advise him of the possible penalties when accepting his plea. 89 Painter was "well aware" of the range of punishment, the court said, because his attorney testified at the preliminary hearing that he had informed the defendant of "the statute and the penalty." 90 Justice Brodkey, whose dissent was joined by Justice McCown, asserted that the "minimum" procedures outlined in section 1.4(c) of the ABA Guilty Plea Standards and even the actual knowledge standard of Lewis had not been met. 91 The dissent-

82. 192 Neb. 518, 222 N.W.2d 815 (1974).
83. Id. at 519, 222 N.W.2d at 817.
84. Id. at 520-21, 222 N.W.2d at 817-18.
85. Id. at 521, 222 N.W.2d at 818.
86. Id. at 522-23, 222 N.W.2d at 818.
87. Id. at 522, 222 N.W.2d at 818. See also State v. Kluge, 198 Neb. 115, 118-20, 251 N.W.2d 737, 739-40 (1977) (withdrawal not permitted).
89. 195 Neb. 183, 185, 237 N.W.2d 142, 143-44 (1976).
90. Id. at 185, 237 N.W.2d at 144.
91. Id. at 186-88, 237 N.W.2d at 144-45.
ers noted that the defendant's actual knowledge concerning the
range of penalties could not be reliably inferred from his attor-
ney's testimony and pointed out that the ABA's requirement
that the judge personally explain the penalties to the defendant
is designed to overcome later claims by the defendant that his
attorney gave him erroneous information. The dissent con-
cluded that the case should be remanded and the defendant
given the opportunity to withdraw his plea if the trial court
should find that Painter did not have actual knowledge of the
penalties.

The majority's failure to even mention the applicability of
the ABA Guilty Plea Standards in Painter casts doubt on their
status. As Justice McCown has noted in a different context: "If
we treat violations indulgently, we shall soon—in the words of
Pope—first endure, then pity, then embrace."

Factual Basis for the Charge

Prior to North Carolina v. Alford, a guilty plea was unac-
ceptable unless accompanied by an admission of guilt. Alford
established that this is no longer a constitutional requirement
provided a factual basis for guilt can be established through
independent evidence. In Alford, the United States Supreme
Court noted that a factual basis was one way for the trial judge
to "test whether the plea was being intelligently entered." The
decision made it clear that a factual basis was required when a
defendant's guilty plea was entered with a protestation of inno-
cence. It left unanswered, however, whether a factual basis was
required when the defendant entered a guilty plea without pro-
testing his innocence.

Henderson v. Morgan presented the Supreme Court with
an excellent opportunity to examine the factual basis require-
ment in this situation. The defendant pled guilty to second de-
gree murder, and was allegedly unaware that intent to cause

92. Id.
93. Id. at 188-89, 237 N.W.2d at 144.
v. Turner, 186 Neb. at 427, 183 N.W.2d at 766 (Carter, J., concurring).
95. See notes 38-40 and accompanying text supra.
96. "Central to the plea and the foundation for entering judgment against
the defendant is the defendant's admission in open court that he has committed
the acts charged in the indictment." Brady v. United States, 397 U.S. 742, 748
97. 400 U.S. at 38 n.10.
98. Id. at 38.
death was an element of the offense.\textsuperscript{100} If the trial judge had inquired into the factual basis for the plea, he would have discovered the defendant's misconception. The Supreme Court, however, focused on the notice of charges issue. Seven justices agreed that the defendant's conviction was entered without due process because he had not been adequately informed of the charges.\textsuperscript{101} Mr. Justice White,\textsuperscript{102} although he never mentioned the factual basis requirement, was clearly alluding to it when he wrote in his concurring opinion: "[A] guilty plea must provide a trustworthy basis for believing that the defendant is in fact guilty."\textsuperscript{103} It might be argued that the majority and the concurrence avoided \textit{Alford} and the factual basis issue because of retroactivity problems.\textsuperscript{104} If this is an accurate interpretation of \textit{Henderson}, a majority of the Court believes that a guilty plea tendered after \textit{Alford} requires a factual basis even though the defendant does not protest his innocence.

Nebraska, in accord with section 1.6 of the \textit{ABA Guilty Plea Standards}, requires a factual basis for the acceptance of any guilty plea. In \textit{State v. LeGear}\textsuperscript{105} the Nebraska Supreme Court acknowledged that sections 1.6 and 1.7 of the standards required the judge to satisfy himself as to the factual basis of a guilty plea.\textsuperscript{106} Direct questioning of the defendant, however, was not required.\textsuperscript{107} Inquiry of the county attorney or examination

\textsuperscript{100} \textit{Id.} at 639. Commentary to § 1.6 of the \textit{ABA Guilty Plea Standards} suggests that the factual basis requirement is necessary to protect defendants who "may not completely understand what mental state and acts constitute commission of the offense charge[d]. . . ." \textit{ABA Guilty Plea Standards, supra} note 52, at 31.

\textsuperscript{101} 426 U.S. at 642-43.

\textsuperscript{102} \textit{Id.} at 651-52.

\textsuperscript{103} The defendant in \textit{Henderson} was convicted in 1965, five years before the Supreme Court's decision in North Carolina v. \textit{Alford}, 400 U.S. 25 (1970). To apply the factual basis rule of \textit{Alford} would have forced the concurrence into the retroactivity issue. Arguably, the Court decided \textit{Henderson} in terms of notice of charges because very few defendants could successfully argue that they did not receive notice of charges in a post conviction proceeding. \textit{Henderson} was unusual, because the defendant was indicted for first degree murder and the second degree murder charge was never formally made. The Court might have agreed with Mr. Justice Rehnquist that a decision grounded on factual basis would "open the door to countless similarly situated prisoners to withdraw their guilty pleas many years after they were entered. . . .[T]he practical effect of the Court's ruling. . . .[would] be to release these prisoners who at one time freely admitted their guilt." 426 U.S. at 659 (Rehnquist, J., dissenting).

\textsuperscript{104} "Notwithstanding the acceptance of a plea of guilty, the court should not enter judgment upon such pleas without making such inquiry as may satisfy it that there is a factual basis for the plea." \textit{ABA Guilty Plea Standards, supra} note 52, § 1.6.

\textsuperscript{105} 187 Neb. 763, 193 N.W.2d 763 (1972).

\textsuperscript{106} \textit{Id.} at 765, 193 N.W.2d at 765.

\textsuperscript{107} \textit{Id.} at 766, 193 N.W.2d at 765.
of the presentence report, the court held, were proper alternatives. The defendant’s conviction in *LeGear* was nevertheless reversed because the trial judge had relied solely on defense counsel to determine the factual basis for the plea.  

*LeGear*, then, established that the factual basis requirement could be satisfied from a variety of sources. Later, in *State v. Leger* the Nebraska Supreme Court considered when it was necessary to establish the factual basis for a guilty plea. It rejected the contention that the judge was required to ascertain the factual basis for a guilty plea at the time of acceptance of the plea. The trial court could ascertain the factual basis for the plea, the court stated, at the time of pronouncing sentence through the presentence reports. Justice Boslaugh, concurring, pointed out that the source of the factual basis requirement in Nebraska is section 1.6 of the *ABA Guilty Plea Standards*. This section requires only that the trial judge determine the factual basis before entering judgment on the plea. Justice Boslaugh concurred on the grounds that the factual basis had been determined through the presentence report prior to sentencing.  

Thus, Justice Boslaugh and the court agree as to the minimum requirements for ascertainment of the factual basis, but the court also said it would be “good practice” for the trial court to address the defendant personally to ascertain the factual basis for a charge before accepting a plea of guilty. It would appear that the court does not plan to stress a standard higher than the minimum as, in *State v. Daniels*, it cited only to Justice

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108. Compare the commentary to § 1.6 which states: “[T]he court may satisfy itself ‘by inquiry of the defendant or the attorney for the government or by examining the presentence report . . .” *ABA Guilty Plea Standards, supra* note 52, at 33. See also *State v. Painter*, 195 Neb. 183, 185, 237 N.W.2d 142, 144 (1976) (trial judge familiar with facts sustaining the charge); *State v. St. Clair*, 194 Neb. 519, 520, 233 N.W.2d 780, 781 (1975) (defendant’s own statement and review of presentence report available to trial judge); *State v. Rubek*, 189 Neb. 141, 143, 201 N.W.2d 255, 257 (1972) (inculpatory evidence in defendant’s car coupled with affidavit of police detective available to trial judge); *State v. Reed*, 187 Neb. 792, 793-94, 194 N.W.2d 179, 180 (1972) (defendant’s admission that he was in the building coupled with the county attorney’s statement that he believed he could obtain a conviction for burglary).  

109. 187 Neb. at 766, 193 N.W.2d at 765-66.  
110. 190 Neb. 352, 208 N.W.2d 276 (1973).  
111. Id. at 353-54, 208 N.W.2d at 277.  
112. Id. at 354, 208 N.W.2d at 278.  
113. Id. at 355, 208 N.W.2d at 278.  
114. Id. (citing *ABA Guilty Plea Standards, supra* note 52, § 1.6, at 30).  
115. 190 Neb. at 354-55, 208 N.W.2d at 278.  
116. Id. at 354, 208 N.W.2d at 278.
Boslaugh’s concurring opinion in *Leger* without mentioning the better practice.¹¹⁷

Consistent with section 1.6 of the standards, the Nebraska Supreme Court seems to have left the probability of guilt standard in the determination of the factual basis to the discretion of the trial judge.¹¹⁸ It has also held that section 1.7, requiring a verbatim record of the proceedings at which the defendant enters his plea, is not violated if the trial court transcript is merely lost.¹¹⁹

**THE ACCEPTANCE OF PLEA BARGAINING**

Historically, plea bargaining has been an institution of low visibility. Prosecution and defense concessions were made off the record and both sides acted out a standard scenario to ensure court approval. The defendant convinced the judge that his plea was knowing, voluntary, and that no agreements or promises had been made by the state. This foreclosed many legitimate avenues of appeal. Since the prosecutor’s promise was off the record, breach of the plea agreement became a credibility contest between the defendant and the state. On appeal, the defendant found it impossible to get past his court testimony in which he stated his plea was voluntary and understandingly entered.¹²⁰ For these reasons it was not until the early seventies that the United States Supreme Court actually acknowledged the existence of plea bargaining.

In *Brady v. United States*¹²¹ the Supreme Court reviewed the “mutuality of advantages” accorded to the defendant and the state in the acceptance of guilty pleas.¹²² It noted that such pleas saved “scarce” prosecutorial resources, while at the same time limiting the defendant’s probable penalty.¹²³ The Court

¹¹⁸. In a number of cases in which the court has considered legitimate sources for ascertaining factual basis, it has not discussed the probability of guilt standard, which leads to the inference that that standard is within the discretion of the trial judge. See note 108 supra. See also commentary to ABA GUILTY PLEA STANDARDS, supra note 52, § 1.6, at 33.
¹¹⁹. State v. Goodrich, 194 Neb. 217, 218-19, 231 N.W.2d 142, 144 (1975); State v. Hall, 188 Neb. 130, 133-34, 195 N.W.2d 201, 204 (1972). See ABA GUILTY PLEA STANDARDS, supra note 52, § 1.7, at 34.
¹²⁰. Recently, courts have begun to look behind the defendant’s testimony in order to determine if any promises have in fact been made. See People v. Hall, 66 Mich. App. 32, 214 N.W.2d 750, 751-52 (1976); United States v. Hammerman, 528 F.2d 326, 327 (4th Cir. 1975). See also ABA STANDARDS RELATING TO THE FUNCTION OF THE TRIAL JUDGE § 4.1(b) and commentary at 51, 54, requiring that any agreements be disclosed on the record.
¹²². Id. at 752.
¹²³. Id. Finality is one of the main benefits of a guilty plea from the prosecu-
held it constitutional “for the State to extend a benefit to the defendant who in turn extends a substantial benefit to the State. . . .” The fifth amendment, it concluded, did not forbid

tor’s perspective. Santobello v. New York, 404 U.S. 257, 261 (1971). It not only avoids trial, but ensures that appeal and collateral attack will be limited. On direct appeal the only issue that can be raised is whether the plea was intelligently and voluntarily entered. Further, the Brady trilogy indicates that a guilty plea can only be collaterally attacked on grounds of ineffective assistance of counsel. Brady v. United States, 397 U.S. 742, 757 (1970); McMann v. Richardson, 397 U.S. 758, 770-71 (1970); Parker v. North Carolina, 397 U.S. 790, 797-98 (1970). Apparently the Court has concluded “[t]hat a competently counseled guilty plea . . . [can] be presumed to be knowing and voluntary.” Alshuler, The Supreme Court, The Defense Attorney, and the Guilty Plea, 47 COLUM. L. REV. 1 (1975). Such great reliance on assistance of counsel reflects “[a]n unduly optimistic view of the quality of advice that defense attorneys customarily provide in the plea negotiation process.” Id. at 2.

The test for effective assistance of counsel was set out in McMann and Parker. These cases require a lawyer’s advice to be “within the range of competence demanded of attorneys” representing defendants in criminal cases. McMann v. Richardson, 397 U.S. at 771; Parker v. North Carolina, 397 U.S. at 797-98; Tollet v. Henderson, 411 U.S. 258, 266 (1973). Accord, State v. Krider, 191 Neb. 285, 286, 214 N.W.2d 611, 612 (1974); State v. Hall, 188 Neb. 130, 132-33, 195 N.W.2d 201, 203 (1972). Both McMann and Parker dealt with an attorney’s misjudgment as to the admissibility of a defendant’s coerced confession. The two decisions illustrate that even erroneous advice can be “competent.”

In Brady v. United States, a guilty plea entered to avoid the death penalty was held to be intelligent and voluntary. One factor that led the Court to this conclusion was that the defendant had been “advised by competent counsel.” 397 U.S. at 756. McMann and Parker expanded the role of assistance of counsel. In essence, a guilty plea tendered with the assistance of competent counsel was presumed by the Court to be intelligent for purposes of collateral attack:

In our view a defendant’s plea of guilty based on reasonably competent advice is an intelligent plea not open to attack on the ground that counsel may have misjudged the admissibility of the defendant’s confession. Whether a plea of guilty is unintelligent and therefore vulnerable . . . depends . . . on whether that advice was within the range of competence demanded of attorneys in criminal cases.

McMann v. Richardson, 397 U.S. at 770-71. See also Parker v. North Carolina, 397 U.S. at 797-98.

Tollet v. Henderson further extends the effect of competent counsel in the collateral attack of guilty pleas. There the defendant pled guilty to first degree murder and on habeas corpus claimed that he had been indicted by a grand jury that systematically excluded blacks. The Court held the constitutional claim irrelevant, stating that the only issue was whether the plea had been made “intelligently and voluntarily and with the advice of competent counsel.” 411 U.S. at 265. The decision then concluded that a competently counseled plea could be presumed to be knowing and voluntary. The defendant “may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within [the range of competence demanded of attorneys in criminal cases].” Id. at 267 (emphasis added).

The issues a defendant can raise on collateral attack may be different when a state statute allows the appeal of a motion to suppress despite the defendant’s guilty plea. Such was the case in Lefkowitz v. Newsome, 420 U.S. 283 (1975). The Court held that a guilty plea under these circumstances did not preclude the defendant’s appeal based on the unconstitutionality of a loitering statute. Id. at 289-92.

124. 397 U.S. at 753.
prosecutors or judges from accepting guilty pleas in return for count or charge reductions.\footnote{125}{Id.}

\textit{Santobello v. New York}\footnote{126}{404 U.S. 257 (1971).} demonstrated the Supreme Court’s acceptance of the necessity rationale for plea bargaining:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called ‘plea bargaining,’ is an essential component of the administration of justice. . . . If every criminal charge were subjected to a full-scale trial, the State and the Federal Government would need to multiply by many times the number of judges and court facilities.\footnote{127}{Id. at 260.}

The defendant in \textit{Santobello} pled guilty to a lesser included offense in return for the prosecutor’s promise to make no sentence recommendation. At sentencing, a different prosecutor, unaware of the previous agreement, recommended the maximum penalty.\footnote{128}{Id. at 258-59.} Noting that there was no constitutional right to have a guilty plea accepted, the Court held that “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.”\footnote{129}{Id. at 262.} The decision makes it clear that even an unintentional breach of a plea agreement merits relief.\footnote{130}{Id. at 258-59.} The Nebraska Supreme Court remanded for resentencing based on defendant’s reasonable misunderstanding of bargain).

\textit{Santobello} was an important decision because it significantly limited the prosecutor’s discretion in an area rampant with abuse. The prosecution can no longer make promises it never intends to keep in order to secure a defendant’s guilty plea.

It is too late in the day to realistically contend that plea bargaining is unconstitutional.\footnote{131}{Id. at 262. The United States Supreme Court in vacating the conviction did not specify the relief to which the defendant was entitled on remand. Instead it was left to the discretion of the trial court. \textit{Id.} at 263.} \textit{But see Note, The Unconstitutionality of Plea Bargaining, 83 HARV. L. REV. 1387 (1970).} The Note was written, however, prior to the \textit{Brady} and \textit{Santobello} decisions.

Despite these safeguards the prosecutor has retained essentially unbridled discretion in plea negotiation. The ability to manipulate charges and influence the sentencing process gives the prosecution a great deal of control over the disposition of defendants in the criminal justice system. Rather than deal with prosecutorial discretion on a theoretical basis, the authors have attempted to address the issue empirically utilizing survey methodology.\textsuperscript{133} We turn now to an analysis of that survey and an examination of plea bargaining as practiced by Nebraska county attorneys.

**THE QUESTIONNAIRE**

**METHODOLOGY**

In composing the questionnaire the authors were guided by prior studies also involving questionnaires sent to county and district attorneys.\textsuperscript{134} After the issues to be covered had been determined, an initial draft of the questionnaire was circulated among colleagues and deputy county attorneys. The questionnaire was revised to incorporate their suggestions. This process was repeated, and the third version became the final draft of the questionnaire.

The questionnaire was mailed along with a cover letter to all ninety-three county attorneys in Nebraska.\textsuperscript{135} If no response was received within two weeks after mailing, a follow up letter was sent. If that did not produce a response, a telephone call was made to the county attorney's office. This procedure resulted in responses from sixty-two of the ninety-three county attorneys. Answers from five of the respondents, however, were so incomplete as to be unusable in the analysis. This left fifty-seven useable questionnaires which represents a return rate of 61%.\textsuperscript{136} Some county attorneys occasionally failed to answer one

\textsuperscript{133} See note 12 and accompanying text supra.


\textsuperscript{135} The specific source of a given answer or comment will not be identified since the cover letter stated that all replies would be kept completely confidential.

\textsuperscript{136} Although it is difficult to determine what is an acceptable response rate, one authority states that in a mail survey 50% is \textit{adequate} for analysis and
or more questions. The number of respondents answering each question varies from a minimum of fifty to a maximum of fifty-seven.

The answers to several demographic questions give an idea of the sample surveyed in this research. For example, 29% of the respondents were full-time county attorneys, while 71% were part-time. This distribution reflects the rural nature of Nebraska. Since two-thirds of the county attorneys do not hold a full-time position, it is not surprising that 95% of the sample engaged in a part-time practice to supplement their income. This 95% figure indicates, however, that some full-time county attorneys also have a part-time practice.

Nebraska county attorneys appear to have a substantial turnover rate. The median number of years spent in office was 3.8, with 44% having been in office one or two years, 32% having been in office three to ten years, and 23% having been in office more than ten years. This suggests that most people do not hold the position very long.

The characteristics of the respondents' counties are also of some importance. Twenty-one percent of the respondents were from counties with a population of less than 3,000 people. Forty-eight percent were from counties with populations from 3,000 to 10,000. Twenty-three percent came from counties with 10,000 to 25,000 population, while only 8% were from counties reporting. A response "of at least a rate of at least 60% is good. . . ." E. BABBIE, SURVEY RESEARCH METHODS 165 (1973).

137. Sixty-four percent of the respondents earned between $5,000 and $10,000 a year as county attorney.

138. "[F]ew prosecutors intend to make a career of prosecuting. Most assistants enter the prosecutor's office shortly after graduating from law school, and they remain no longer than four or five years." Alshuler, The Prosecutor's Role, supra note 7, at 111.

139. The 1970 census set Nebraska's population at 1,483,791. The state is divided into 93 counties. Douglas County, containing the city of Omaha, is most populous at 585,472 and is followed by Lancaster County (339,141) which contains the city of Lincoln. The smallest county is Arthur: population 606. U.S. BUREAU OF THE CENSUS, 1970 CENSUS OF THE POPULATION § 29, at 26-9 (Series PC1(1)-A29, 1971).

In Nebraska, felony prosecutions take place in the district court. The 93 counties are divided by legislation into 21 judicial districts. NEB. REV. STAT. § 5-105 (Cum. Supp. 1976). Two districts are single county districts (Lancaster and Douglas counties), while the remaining 19 are multi-county districts. Id. The 21 district courts are manned by 45 district judges. One district has 12 judges (Douglas County); one, five judges (Lancaster County); one three judges (Sarpy, Cass and Otoe Counties); seven districts have two judges; and the remaining 11 districts each have one judge. Id. The Supreme Court of Nebraska may assign district judges to serve in other districts to relieve congested calendars, to adjust judicial caseloads, or for any "adequate" cause. NEB. REV. STAT. § 24-303 (Reissue 1975).
with a population over 25,000. A related variable of potential
test interest was the number of felony informations filed in each
county for the year 1975. The results again reflect the rural
nature of the state in that 11% of the counties surveyed had no
felony informations filed in the previous year, and 43% had
from one to ten filings. Thirty-six percent had from eleven to
fifty felony informations in the previous year, and only 9% had
more than fifty felony informations in the past year. As might
be expected, there was a strong relationship between popula-
tion and the number of felony informations filed in 1975.140

THE PLEA BARGAINING PROCESS

Prosecutorial discretion in plea negotiation has been "widely
recognized as an effective means of implementing legislative
enactments with due regard to particular fact situations and the
individuals involved."141 At the same time, however, this flexi-
bility may encourage arbitrary and discriminatory treatment of
similarly situated defendants based on random variations in
circumstances.142 In order to assess the validity of these argu-
ments, the authors attempted to ascertain how Nebraska county
attorneys exercised their discretion in plea bargaining and to
what extent practices varied from county to county.143

140. Throughout the remainder of this article any relationship between
variables will be presented in terms of product-moment correlation coefficients.
This statistic represents the degree of linear relationship between two quantita-
tive measures, and can take on values from −1 to +1. A high positive coefficient
will be obtained if as the values of measure A go up, the values of measure B
also go up, and as the values of measure A go down, the values of measure B also
go down. The interpretation of a correlation coefficient must take into account
the probability that the coefficient could be obtained from chance factors alone.
It must be determined that a coefficient represents a real and reliable relation-
ship between two measures rather than simply a chance happening. Social
scientists have somewhat arbitrarily decided that if the probability of obtaining
a particular coefficient by chance alone is 5% (.05) or less, the coefficient will be
thought of as representing a reliable relationship. That tradition is followed in
this article. Thus, if the probability of obtaining a correlation coefficient by
chance is greater than 5%, no relationship between those variables in this sam-
ple will be reported. When reporting relationships, we will follow the customary
practice of representing the correlation coefficient with the symbol "r" and the
probability of obtaining that coefficient by chance alone with the symbols "p< ".
See W. HAYS, STATISTICS 490-577 (1963). With regard to the relationship between
county population and the number of felony informations filed in 1975, r=.63,
p< .001.

142. Cox, Prosecutorial Discretion: An Overview, 13 AM. CRIM. L. REV. 383,
391 (1976).

143. Utilization of the questionnaire format raised definitional problems. In
order to ensure that the county attorneys answered the questions with the same
understanding of the term plea bargaining, the following definition was set out
at the head of the questionnaire: "Plea bargaining relates only to those situa-
tions where the defendant pleads guilty as a result of the prosecution tendering
The Extent of Plea Bargaining in Nebraska

The threshold issue, of course is whether plea bargaining is an accepted practice in Nebraska and, if so, what type of bargains predominate. Respondents were asked, "Does your office plea bargain in terms of: (Check those your office uses) a. charge reduction; b. count reduction; c. sentence recommendation; d. office does not bargain." Only 5% of those answering indicated that their office did not plea bargain. Plea bargaining is thus an integral part of the criminal justice system in Nebraska, even though 54% of the counties surveyed filed less than ten felony informations for 1975.

Results from the above question also indicated some reluctance on the part of the county attorneys to offer a sentence recommendation in exchange for a plea of guilty. Eighty percent of those answering said they engaged in charge reduction, 75% said they engaged in count reduction, and 54% said they engaged in sentence recommendation. The fact that sentence recommendation is the least used form of bargaining is due to theoretical as well as pragmatic concerns. It has been argued that the use of sentence recommendation in plea negotiation usurps the sentencing function of the judge.

a benefi to him in terms of charge reduction or count reduction or sentence recommendation."

144. Within the definition of plea bargaining given in the questionnaire, three types of possible bargains were specified: charge reduction, count reduction, and sentence recommendation. The best way to illustrate the different bargains available to the prosecution is to examine an illustrative case. Assume a defendant is charged with five counts of open lewdness. The prosecutor might find it appropriate to allow the defendant to plead to five counts of disorderly conduct, a lesser included offense. See State v. Ashby, 195 A.2d 635, 636-37 (N.J. Super. Ct. App. Div. 1963). Charge reduction in such a case attempts to satisfy the needs of the criminal justice system while allowing the defendant to avoid the stigma of the offense. The prosecutor also dropped four counts of the open lewdness charge in exchange for the defendant's plea on the remaining count. This may be a bargain of little advantage to the defendant, since it is unclear whether the judge may take dropped charges into account when sentencing. See State v. Bridgmon, 196 Neb. 714, 718, 246 N.W.2d 57, 59 (1976); State v. Feagin, 196 Neb. 261, 263, 242 N.W.2d 124, 125 (1976); State v. Leadinghorse, 192 Neb. 485, 491, 222 N.W.2d 573, 578 (1974). Finally, the prosecutor might agree to recommend a certain sentence in exchange for a plea of guilty to the original charge. Of course, the prosecutor may utilize any combination of charge reduction, count reduction, or sentence recommendation when negotiating with the defendant.

145. Three of the 56 county attorneys who responded to the question indicated they did not plea bargain.

146. According to the respondents in this survey, the Douglas and Lancaster county attorney offices have expressly prohibited sentence recommendation as an inducement for guilty pleas.

147. The Pennsylvania survey recorded similar results: 95% of the prosecutors surveyed engaged in charge reduction, 86.4% practiced count reduction, and 57.6% engaged in sentence recommendation. Guilty Plea Bargaining, supra note 134, at 898.

148. Kuh, Sentencing: Guidelines for the Manhattan District Attorney's
standpoint, however, promises concerning a sentence may result in the reversal of a defendant's conviction on grounds that he reasonably misunderstood the terms of the bargain.\footnote{149}

To accurately gauge the prevalence of plea negotiation in any judicial system, it is necessary to know how often bargaining is utilized in the disposition of criminal cases. Thus, respondents were asked, "What percentage of the total cases processed through your office were settled through guilty pleas as a result of bargains with the defendant or defense counsel? (This does not include cases where defendants plead guilty as charged with no reduction of charges or promise of sentence recommendation.)" The respondents were then asked to check one of seven alternatives which ranged from "0%" to "greater than 90%." The results are presented in Figure I.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Distribution of Responses to Question about What Percentage of Cases Were Bargained}
\end{figure}

Only four of the fifty-four county attorneys who answered the question said they did not plea bargain at all, indicating that 93% do bargain to some extent. The most frequently given answer was 30%-60%, which is roughly comparable to results obtained in similar surveys.\footnote{150}


\footnote{150} See Kulig, \textit{Plea Bargaining, Probation, and Other Aspects of Conviction and Sentencing}, 8 Creighton L. Rev. 938 n.15 (1975), where Douglas Coun-
As noted earlier, it is the necessity rationale which is most often advanced to justify plea negotiation. If caseload is indeed the major cause of bargaining, one would expect caseload to be correlated with the proportion of cases bargained. An attempt was made to find a correlation between caseload and the percent of cases bargained by examining the statistical relationships among several questions. The best index of caseload in the survey was the question, "Because of the caseload in your district court, how long do you usually have to wait for trial time after the preliminary hearing?"\footnote{151} A less precise index of caseload was a question asking respondents how many felony informations they filed in a year.\footnote{152}

The responses showed no significant relationship between waiting time and the percent of cases bargained.\footnote{153} In addition, no relationship existed between the percent of cases bargained and the number of felony informations filed in a year.\footnote{154} Finally, no relationship could be found between the percent of cases bargained and the population of the county.\footnote{155} Thus, our data showed no evidence that caseload was related to plea bargaining.

Other authors have also concluded that plea negotiation is not necessarily caused by caseload pressure.\footnote{156} In a study comparing the plea bargaining practices of rural and urban prosecutors, it was found that rural prosecutors used more information.

\footnote{151} Respondents were asked to check one of five alternatives: no waiting period, less than one week, one week to three weeks, three weeks to six weeks, and greater than six weeks. The distribution of responses was, respectively, 7%, 0%, 13%, 47%, and 33%.

\footnote{152} This question is a less precise index of caseload because a high number of felony informations does not necessarily indicate a caseload problem. A large county with more resources to deal with a high level of crime may actually have less caseload pressure than a small understaffed county filing few felony informations.

\footnote{153} $r = .17, p < .24$.

\footnote{154} $r = .03, p < .85$.

\footnote{155} $r = .15, p < .27$. Our data failed to support the studies which suggested that plea bargaining is practiced more extensively in populous counties; see Klonoski, \textit{Plea Bargaining, supra} note 134, at 118; Note, \textit{Discretion Exercised by Montana County Attorneys in Criminal Prosecution}, 28 MONT. L. REV. 41, 52 (1966).

tion in plea negotiation and reduced charges "considerably more often" than their urban counterparts.\textsuperscript{157} The authors of that study concluded, "[N]egotiated charge reductions occur at least as often in rural, less harried court systems where the motivating factor may be something other than an over-crowded dock- et."\textsuperscript{158} It might be that rural prosecutors with lower caseloads have more time to consider the circumstances surrounding the crime and negotiate a mutually acceptable bargain. Or perhaps prosecutors just like to bargain.\textsuperscript{159} It allows them to inject some flexibility into the criminal law, while at the same time eliminating the uncertainty of trial.\textsuperscript{160}

The lack of correlation between caseload and the frequency of plea bargaining might also be attributable to the part-time nature of the prosecutor's job in Nebraska. One county attorney candidly stated: "The county attorney's salary in this county is not sufficient in light of my civil duties and misdemeanor caseload to allow me to take the time to try the cases that are plea bargained."\textsuperscript{161} The prevalence of this attitude among part-time prosecutors is difficult to determine. However, two other prosecutors in response to other questions also suggested that salary was a factor affecting plea negotiation. It is clear, then, that salary considerations exert some influence on the plea bargaining practices of Nebraska's part-time county attorneys.

Our survey further suggested that rural and urban prosecutors experience similar caseload pressures. A number of rural prosecutors in response to the waiting period question indicated that the delay between the preliminary hearing and trial was due to the limited accessibility of the judge.\textsuperscript{162} Many district judges in Nebraska must "ride the circuit" and are often avail-

\begin{footnotesize}
\begin{enumerate}
\item\textsuperscript{158} Id.
\item\textsuperscript{159} See text at note 240 infra.
\item\textsuperscript{160} See text at note 241 infra.
\item\textsuperscript{161} Nebraska prosecutors not only have the duty to file misdemeanor and felony complaints, but are also required to represent the county in various civil matters. NEB. REV. STAT. § 23-1201 (Reissue 1974). Some of the county attorney's duties include advising the county board, id. § 23-1203; auditing the personal property inventories of county officials, id. § 23-1610; representing the state in disputed property reassessments, id. § 77-313 (Reissue 1976); prosecuting violations of the Commercial Feeding Stuffs Act, id. § 54-841 (Reissue 1974); prosecuting for local discrimination in the sale of any product, id. § 59-507; prosecuting violations of the Bingo Act, id. § 9-118 and enforcing the child support statute, id. § 43-512.01.
\item\textsuperscript{162} Five prosecutors indicated that the waiting period was caused by circuit-riding judges.
\end{enumerate}
\end{footnotesize}
able only twice a month in any one jurisdiction.\textsuperscript{163} If caseload is viewed in terms of allotted court time, it might be that rural prosecutors experience some pressure to dispose of less serious cases via plea negotiation in order to devote their limited court resources to more important offenses.

\textit{Prosecutorial Discretion in the Negotiation of Guilty Pleas}

Because of the low visibility of the plea bargaining system, prosecutors are free to apply the criteria they feel appropriate and to change their standards from case to case.\textsuperscript{164} Thus the “potential for arbitrariness and inequality of treatment is indeed great.”\textsuperscript{165} The extent of prosecutorial discretion in plea negotiation was explored in a number of questions relating to the explicit and implicit rules which might govern bargaining.

As discussed earlier, Nebraska has adopted the \textit{ABA Guilty Plea Standards} as the “minimum procedure” in the acceptance of guilty pleas.\textsuperscript{166} In order to assess the impact of the standards on Nebraska prosecutors, respondents were asked: “Where do your ideas as to what is a permissible plea come from? (Rank those that have influenced you in order of importance): contact with other county attorneys, experience as private attorney, ABA guidelines, other.” Only 16\% of the prosecutors answering marked the ABA guidelines as their first choice. Thirty-one percent said experience as a private attorney was the most important source, while 29\% indicated that contact with other county attorneys was their primary source of ideas.\textsuperscript{167}

While there is no statewide consensus on plea bargaining procedures, it is realistic to assume that guidelines of some sort have been established in individual offices. To examine this possibility, respondents were asked, “Has your office established any rules or procedures with respect to plea bargaining?” Seventy-three percent of those responding answered no.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{163} See note 139 supra.
\item \textsuperscript{165} Id.
\item \textsuperscript{166} See note 53 supra.
\item \textsuperscript{167} But see the results of the Oregon study, where contact with other district attorneys was most important, while experience as a private attorney ranked second. Klonoski, \textit{Plea Bargaining}, supra note 134, at 123.
\item \textsuperscript{168} Seventy percent of the prosecutors surveyed in the Pennsylvania study also indicated that there were no office rules for plea negotiation. \textit{Guilty Plea Bargaining}, supra note 134, at 900. In our survey, a variety of rules emerged from the 30\% answering affirmatively. Many prosecutors said that their office had banned the use of sentence recommendation in plea bargaining. Several county attorneys also indicated that they would negotiate only with first offenders. Attempts to bargain shortly before trial were also frowned upon by many prosecutors.
\end{itemize}
However, when asked whether there were certain categories of crime that they hesitated or refused to bargain on, 64% of the respondents marked yes. The picture which emerges is that there are some restrictions on whether to offer the initial concession but few explicit standards beyond that. It is not surprising that the results of these two questions correlated with population. In both cases county attorneys from more populous counties more frequently answered affirmatively. It would seem that in larger jurisdictions, where a prosecutor is likely to have assistants and a diverse caseload, guidelines are established. This suggests the possibility of more arbitrary bargains in rural areas.

Since explicit rules do not seem important in the plea bargaining process, it becomes increasingly necessary to determine what factors the prosecutor considers when negotiating. The following survey question is relevant: “Of the factors listed below, which three in your opinion are the most important when considering a plea bargain? (List in order of importance by number.)” The alternatives and the percentage of respondents who rated each alternative as the most important are given in Table 1.

<table>
<thead>
<tr>
<th>Type of Crime</th>
<th>Number of Times Mentioned</th>
</tr>
</thead>
<tbody>
<tr>
<td>Violent crimes (including homicide)</td>
<td>20</td>
</tr>
<tr>
<td>Serious crimes against persons</td>
<td>8</td>
</tr>
<tr>
<td>Sex crimes</td>
<td>6</td>
</tr>
<tr>
<td>Sale of drugs</td>
<td>5</td>
</tr>
<tr>
<td>Crimes committed with weapons</td>
<td>4</td>
</tr>
<tr>
<td>Assaults of police officer</td>
<td>3</td>
</tr>
<tr>
<td>Driving while intoxicated</td>
<td>3</td>
</tr>
</tbody>
</table>

See also Klonoski, *Plea Bargaining*, supra note 134, at 121.

169. “Are there certain categories of crime that you are reluctant or refuse to bargain on?” In listing these crimes, Nebraska prosecutors answered as shown below. Only those categories mentioned more than three times are listed.

170. For the relationship between county population and responses to the question about having any rules, \( r = .43, p < .001 \). For the relationship between county population and responses to the question about there being crimes that they would refuse to bargain, \( r = .29, p < .04 \).


172. Similar questions in other surveys have yielded like results. In Oregon the top four factors were: 1) strength of case, 2) nature of crime, 3) past record of defendant, and 4) personal impression of defendant. Klonoski, *Plea Bargaining*, supra note 134, at 119. The Pennsylvania study ranked the top four factors as follows: 1) strength of case, 2) court will have adequate scope to punish on conviction of charge to which plea was accepted, 3) defendant's criminal record, and 4) nature of crime. *Guilty Plea Bargaining*, supra note 134, at 901. See also Alshuler, *The Prosecutor's Role*, supra note 7, at 53-60.
Table 1
Responses to Question Asking What Factors Are Most Important When Considering Plea Bargaining

<table>
<thead>
<tr>
<th>Factors</th>
<th>Number of Prosecutors Ranking the Factor as Most Important</th>
<th>Percentage of Prosecutors Ranking the Factor as Most Important</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nature of Crime</td>
<td>21</td>
<td>38%</td>
</tr>
<tr>
<td>Strength of Case</td>
<td>13</td>
<td>23%</td>
</tr>
<tr>
<td>Interest of Justice</td>
<td>12</td>
<td>21%</td>
</tr>
<tr>
<td>Defendant’s Criminal Record</td>
<td>8</td>
<td>14%</td>
</tr>
<tr>
<td>Caseload</td>
<td>1</td>
<td>2%</td>
</tr>
<tr>
<td>Defendant Turning State’s</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Witness</td>
<td>1</td>
<td>2%</td>
</tr>
<tr>
<td>Public Opinion</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Ability to Convict as an</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Habitual Criminal</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

The factor rated most important by the largest number of county attorneys was nature of the crime. This could be because, as noted above, the nature of the crime seems to significantly affect the initial decision to negotiate. Prosecutors have evidently decided that their limited resources should be conserved for the trial of cases involving the most serious offenses where society’s interest in obtaining an appropriate sentence is paramount.\(^{173}\) It has been argued, however, that more attractive bargains are offered in serious cases where anticipated trial time is substantial and the caseload pressing.\(^{174}\)

The factor next most frequently mentioned was strength of case. The alternative was not phrased in such a way that it could be determined whether better bargains were offered in strong or weak cases. However, when asked to list some of the advantages of plea negotiation, 27% of the county attorneys said that it enabled them to get some kind of conviction in a weak case.\(^{175}\)

For the prosecutor, plea negotiation avoids an all or nothing approach to criminal justice. When a case is weak because a witness refuses to testify or an illegal police search requires the

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\(^{173}\) Philadelphia prosecutors in 1971 divided their caseload into “major” and “non-major” crimes. The bargaining tactics for the two categories were completely different. White, *Plea Bargaining, supra* note 164, at 443. Professor Alshuler, however, argues that the distinction between “serious” and ordinary cases is unsound. Alshuler, *The Prosecutor’s Role, supra* note 7, at 107.
\(^{174}\) See id. at 55.
\(^{175}\) See also White, *Plea Bargaining, supra* note 164, at 445-48.
exclusion of important evidence, the interests of justice might be served by accepting a plea to a lesser included offense. The defendant receives some type of punishment for the crime committed, and the prosecutor is spared the uncertainty of trial. Critics argue that this leads the prosecutor to bargain hardest in weak cases. Thus, the best bargains are offered to defendants who probably could not be convicted but who sometimes accept a plea bargain because they cannot afford to gamble on a guilty verdict rendered on the original indictment.

The third most frequently mentioned consideration was the interest of justice. Prosecutors, in exercising their discretion in plea bargaining, believe they temper the harshness of the criminal law, thereby individualizing justice and adding flexibility to the system. The vast majority of the county attorneys surveyed were confident that they could decide what was just in a particular case. One prosecutor commented, “I know more about the case than the judge; why shouldn't my knowledge be used?” However, the prosecutor's role as guardian of the public interest has been questioned. The political nature of the prosecutor's office and the need for convictions often conflict with the interests of justice. The prosecution has nothing to gain from the lenient disposition of a particular offender. Critics therefore contend that an objective evaluation of the interests of justice never occurs.

It is interesting to note that caseload, felt by many to be the single most important determinant of plea bargaining, was mentioned by only four prosecutors. One marked it as the most important factor and only three ranked it anywhere in the top three most important factors. Comparable results were obtained in the Oregon and Pennsylvania surveys, where caseload ranked fifth out of five and eighth out of eleven, respectively.

**Bargaining Ethics**

Prosecutorial discretion is evident at every stage of a criminal case, from the charging decision to disposition. Such broad discretion, however, "makes easy the arbitrary, the discriminat-

177. Id. at 61.
178. In response to an open-ended question concerning the advantages of plea bargaining, 22% of the prosecutors surveyed mentioned flexibility as one of the major benefits of plea negotiation. See text at note 238 infra.
179. Alshuler, The Prosecutor's Role, supra note 7, at 105.
180. Id. at 106.
181. Id. at 111-12.
Several questions in the survey were intended to examine bargaining practices that might be considered improper or unethical. Since honest answers to these questions might be considered self-condemning, it is hard to gauge the accuracy of the results.

Overcharging is probably the most common area of prosecutorial abuse. Prosecutors, in order to improve their bargaining position, frequently charge a defendant with an unreasonable number of counts or charge a single offense at a higher level than the circumstances of the case seem to warrant. The concession subsequently offered to the defendant in plea negotiation more accurately represents the appropriate charge. One survey question addressed the overcharging issue: "When charging a defendant, do you usually anticipate that you will later lower the charge in a plea bargain?" Twenty-three percent of the respondents answered affirmatively. The Pennsylvania survey, in asking a similar question, reported that 54.6% of those answering admitted that indictments were prepared with plea bargaining in mind. Since the Pennsylvania sample was exclusively metropolitan, it might be that overcharging is more common in big cities with crowded dockets. There was no relationship in Nebraska, however, between overcharging and variables relating to county population or caseload.

Prosecutors also seemed unsure as to how active they should be in the initiation of bargaining. When asked whether it was proper for a county attorney to initiate the bargaining process, 50% of the respondents said no. Although early negotiation saves court and attorney costs, only one prosecutor indi-

184. The term "overcharging" as used in the questionnaire harbors some ambiguity. There is a distinction between charging a defendant with a crime of which he is clearly innocent and charging a higher offense than the interests of justice require. The former practice is clearly unethical. Most prosecutors, however, define overcharging in the latter sense. Thus, several county attorneys who admitted over-charging pointed out that they had enough evidence to convict on the original charge. The following response is illustrative: "I sometimes file more counts, if the facts warrant, than I want a conviction on or file a more serious charge, if the facts warrant, than I want a conviction on. By plea bargaining, I obtain a conviction on the appropriate charge and get the result I want without trial" (emphasis added). See Alshuler, The Prosecutor’s Role, supra note 7, at 85-90.
186. The actual question was: "Do you feel it is proper for county attorneys to initiate plea bargaining rather than wait for defense counsel to initiate such action? If yes, under what circumstances?" In the Oregon study, 80% of the responding district attorneys indicated that it was proper for the prosecution to initially contact the defense. Klonoski, Plea Bargaining, supra note 134, at 123.
icated that he contacted the defense to initiate bargaining as a matter of office policy. A follow up question attempted to compare theory with practice. Respondents were asked, "In what percent of cases does your office actually contact defense counsel concerning the defendant's plea?" Seventy percent estimated this percentage to be greater than 0%. This 70% figure suggests that some of the prosecutors who felt initiation was improper felt compelled to do so under certain circumstances.187

How far may the prosecutor go in attempting to induce the defendant to plead guilty? This is yet another area where ethical boundaries are vague. It is not considered coercive under Nebraska law for the prosecutor to secure a plea by threatening to file higher charges, provided he has proper grounds to do so.188

To further examine prosecutorial attempts to induce guilty pleas, respondents were asked:

When you have a strong case, do you attempt to induce guilty pleas by ways other than offering the defendant a benefit in terms of charge or count reduction or sentence recommendation? (For example, divulging the strength of your case by showing the case file to the defense.) If yes, briefly explain techniques used.

Seventy percent of those answering said yes. Many county attorneys apparently answered the question in terms of having an open file policy.189 Comments to the question, though, attest to "friendly persuasion" that takes place. "I present the weight of the testimony and evidence to the defendant and discuss with him its public effect." One prosecutor said that he sometimes let police officers and witnesses talk to defense counsel in his presence.

The final question dealing with bargaining ethics concerned the propriety of withholding information when negotiating. Many times the prosecutor's case falls apart—for example, when a star witness dies, leaves town, or refuses to testify. In

187. Comments to this question were enlightening: "Most often, if the defense counsel is not aware of a strong state's case, and I want to let him know he can't beat me, I will contact the defense. If my case becomes so weak that I can't prove anything, I may propose a bargain to salvage something." Another prosecutor noted that initial contact was justified because "[d]efense attorneys usually wait as long as they can before doing anything." The initiation of bargaining is also justified, said one county attorney, "[w]hen your investigation shows the original charge to be inappropriate."

188. See text at notes 42-44 supra.

189. Prosecutors are more likely to open their files in strong cases than in those they are likely to lose. Alshuler, The Prosecutor's Role, supra note 7, at 66 n.47.
order to salvage this type of case, a prosecutor might attempt to bluff his way through and hope the defense attorney does not discover the fatal defect.\textsuperscript{190} It could be argued that guilt or innocence can only be determined by a court of law, and such deception by the prosecutor is therefore improper. Nebraska county attorneys were asked, “Do you feel it is proper to withhold information from defense counsel when plea bargaining?”\textsuperscript{191} The response alternatives were: always proper, sometimes proper, sometimes improper, and always improper. Only 7% felt it was always proper, while 39% felt it was sometimes proper. Forty-six percent said it was always improper, with 7% indicating it was sometimes improper. If one combines the two proper alternatives with the two improper ones, it becomes apparent that Nebraska county attorneys are about evenly split in their attitudes about the propriety of this practice.

\textit{Other Participants in Plea Bargaining}

One of the most controversial issues in plea bargaining today concerns who should be involved in the actual negotiation of a plea. Many feel that participation by the judge would curb prosecutorial abuse, while others argue that this would coerce the defendant’s plea.\textsuperscript{192} One commentator has suggested that the victim be included in plea bargaining.\textsuperscript{193} Several questions were asked in the survey regarding the participants in the plea bargaining process. An attempt was made to distinguish between actual participants and those who were merely consulted or informed of the decision to negotiate.

Respondents were first asked, “Who is usually involved in the actual bargaining other than yourself?” As might be expected, 98% of the county attorneys indicated that defense counsel was actively involved. Only 23% mentioned the defendant as a participant in plea negotiation, suggesting that prosecutors avoid direct negotiation with defendants in order to preclude claims of coercion. Surprisingly, 23% of the county attorneys indicated that the sheriff was involved actively in plea bargaining. Nebraska judges were the least active participants in plea negotiation; only 14% of the county attorneys surveyed said that the judge was usually involved in the bargaining process.\textsuperscript{194}

\textsuperscript{190.} \textit{Id.} at 65.
\textsuperscript{191.} Of course, disclosure of exculpatory evidence is required when the defendant requests it. \textit{Brady v. Maryland}, 373 U.S. 83, 87 (1963).
\textsuperscript{192.} \textit{ABA Guilty Plea Standards}, \textit{supra} note 52, commentary to § 3.3(a), at 72-74.
\textsuperscript{194.} Thirty-two percent of the prosecutors responding in the Pennsylvania
To contrast active participants from those who are merely informed of the plea bargaining decision, respondents were asked, "Who do you consult with or inform of your decision concerning the plea bargain with the defendant?" A different set of actors emerged. The person most frequently consulted by the prosecutor when plea bargaining was the arresting officer, who was mentioned by 70% of the county attorneys surveyed. It would be interesting to know whether the arresting officer is consulted concerning problems of proof or merely to foster good prosecutor-police relations.\textsuperscript{195} The next most frequently consulted person was the victim.\textsuperscript{196} Fifty-one percent of the respondents indicated that they informed or conferred with the victim about their decision to bargain.\textsuperscript{197} Judges were consulted

\begin{itemize}
\item[195.] One survey question asked county attorneys about the reaction of police to plea bargaining. "How do you think police view the bargaining process?" The question was open-ended; the prosecutors were asked to answer in their own words. Responses were coded into six categories. The categories and the percentage of prosecutors whose answers were coded into each category were as follows. Forty-seven percent indicated that police simply dislike plea bargaining. Twenty percent said that police grudgingly accept the practice as a necessity. Twelve percent felt that police disliked it but were more accepting if they were consulted before the bargain was struck. Six percent of the prosecutors said that police like bargaining when the case is weak, but dislike it when the case is strong. Sixteen percent gave unique answers which did not fit into any category. No prosecutor in the survey gave an answer which could be interpreted as a perception that police favored plea negotiation. These results indicate the importance of prosecutorial consultation with police in plea negotiation. The demoralizing effect of plea bargaining on police attitudes is also reported in Arcuri, \textit{Police Perceptions of Plea Bargaining—A Preliminary Inquiry}, 1 J. OF POLICE SCI. AND ADM. 93, 100-01 (1973).
\item[196.] Interestingly, there was a correlation between population and whether a prosecutor consulted the victim and the defendant in plea bargaining. One might think that consultation would occur more frequently in smaller counties where all the participants in the bargain are more likely to know each other. However, the opposite was true in Nebraska. It was the prosecutors from the populous counties who more frequently said they consulted the victim ($r=.33$, $p<.02$) and the defendant ($r=.27$, $p<.04$). Perhaps in smaller counties the prosecution and defense attorneys are so well acquainted that the former feels no need to consult anyone.
\item[197.] In order to get some idea of the victim's perspective on plea bargaining, prosecutors were asked, "How often do victims complain to you about plea bargaining?" The response alternatives were never, rarely, sometimes, and most of the time. Forty-six percent of the respondents said that victims never complain and 33% said that they rarely do. Nineteen percent indicated that victims sometimes complain, and one respondent reported they complain most of the time. Thus, over half of the prosecutors surveyed indicated that victims complain to some extent. To determine the nature of these complaints, an open-ended follow up question was asked. "In those instances where victims do complain, what are their usual objections? (Explain briefly)." Of those answering the question, 80% said that victim complaints concerned the inadequacy of the defendant's sentence. To the extent a defendant receives the same sentence in plea negotiation that he would in going to trial, victim criticism is
about the defendant's plea by 39% of the county attorneys surveyed. It would seem that judges, while reluctant to participate in the actual bargaining, do permit some type of consultation in plea negotiation. The sheriff once again emerged as an important figure in the plea bargaining process: 23% of the prosecutors indicated that the sheriff was consulted or informed about the defendant's plea.

Next to the prosecutor, the defense attorney is the most active participant in bargaining. An attempt was made in the survey to investigate the differences in plea bargaining practices among private defense attorneys, appointed defense attorneys, and public defenders. A number of questions were also designed to examine prosecutor-defense interaction.

It has been argued that the economics of practicing criminal law strongly encourage a private attorney to bargain. Since most defendants have little or no money, the primary path to personal wealth for a criminal lawyer is to litigate a large number of cases. The obvious way to accomplish this is by pleading cases rather than trying them. There are frequent accounts of attorneys who handle a high volume of cases and yet rarely if ever go to trial. To get an indication of the extent to which this practice exists in Nebraska, respondents were asked, "Are there any privately retained defense lawyers in your county who handle a large volume of cases and always plead their client guilty?" Twenty-one percent said yes. Those who answered affirmatively were then asked to estimate the percentages of cases this type of defense attorney handled. The average estimate given by Nebraska county attorneys was between 20% and 40%, clearly a sizeable proportion of the prosecutor's caseload. Our data indicated that "cop out lawyers" may be an urban phenomenon. Even within Nebraska which has only two counties over 300,000, a statistical relationship existed between

misplaced. Victims, however, correctly surmise that defendants are offered concessions for their pleas. See text at notes 235-37 supra. Victim consultation should be encouraged in order to give those directly affected by crime the feeling that their interests are being considered in the plea bargaining process. See N. Morris, The Future of Imprisonment 55-57 (1970).

198. See text at note 234 supra.  
200. Id.  
201. Id.  
202. Id. at 1183-84.  
203. This figure compares favorably with other estimates: "Assessments of the size of the 'cop out bar' ranged from more than 50 percent of all defense attorneys to 10 percent or—very rarely—even less." Id. at 1185.
"professional pleaders" and population. Rural areas simply do not have enough felonies to profitably support the cop out lawyer.

Many criminals cannot afford to hire a private attorney. These defendants are represented by either public defenders or attorneys appointed by the court. Most rural Nebraska communities rely on the court appointment system. Appointed attorneys are paid reasonable expenses and fees as determined by the court which appointed them. To ascertain how this manner of compensation affected the plea bargaining practices of appointed attorneys, respondents were asked, "Do you notice a difference between the plea bargaining practices of privately retained counsel and appointed counsel? (If yes, explain briefly)." Thirty percent of the county attorneys answered affirmatively. Of those that noticed a difference, over half indicated that appointed counsel frequently refused to bargain even weak cases in order to "run up the bill." Attorneys who rely on court appointments for income obviously maximize their fee by going to trial. Many lawyers, on the other hand, lose money in appointment cases because fees allowed by the court are generally lower than those available in private practice. For most established lawyers, early negotiation is the only profitable alternative. One prosecutor alluded to this problem saying, "Many appointed attorneys expedite the case as fast as possible and tend to enter guilty pleas with reckless abandon."

County attorneys were also asked to compare the plea bargaining practices of public defenders with those of privately retained counsel. Ten of the prosecutors surveyed indicated that they had experience in dealing with the public defender's office. Sixty-six percent of the county attorneys surveyed saw no difference between the bargaining practices of private attorneys and the public defender. Thirty-three percent, however, said that the public defender was better able to evaluate a case.

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204. $r = .26, p < .05$.
206. See Id. § 29-1804.07.
207. Public defender offices, pursuant to id. § 29-1804 exist in only ten counties: Adams, Box Butte, Buffalo, Dawes, Douglas, Gage, Lancaster, Lincoln, Scottsbluff, and Sheridan.
208. Id. § 29-1804.12.
209. Nine of the 16 county attorneys answering the question mentioned this. One county attorney said that he initiated bargaining in these situations to save the county money. Several prosecutors noted that privately retained counsel attempted to build fees by waiting to negotiate until the last possible moment.
210. The actual question was, "Do you notice a difference between the plea bargaining practices of privately retained counsel and public defenders?"
211. See note 207 supra.
and make a reasonable bargaining proposal. This is undoubtedly due to the full-time nature of the public defender's job and the working relationship that develops between the public defender and the other participants in the criminal justice system. Two prosecutors further noted that the public defender put on "less of a show" for his client than privately retained counsel. This is not surprising since the public defender is not paid by a client, while the private defense attorney must justify his fee.

Prosecution and defense attorney interaction seems to exist on a quid pro quo basis. Implicit in the term plea "bargain" is the concept that both sides obtain some type of benefit from negotiation. Several survey questions were formulated to examine the relationship that develops between the prosecution and the defense in plea bargaining.

As noted earlier, the prosecution often resorts to bluffing when a case deteriorates in order to salvage some kind of conviction. Half of the county attorneys surveyed felt that was ethical. Do defense attorneys participate in this game of deception? Nebraska prosecutors were asked, "Do you feel defense counsel withholds information from you to protect his client and get the best deal for him?" The response alternatives were never, rarely, sometimes, most of the time, and always. Results showed that only 16% felt this happened most times or always with 54% feeling that it happened sometimes and 30% indicating that it happened rarely or never. The fact that the percentage who felt defense attorneys withheld information only rarely or never (30%) was twice as high as the percentage who felt this occurred most times or always (16%) seems to indicate that there is a fair amount of trusting of defense attorneys on the part of prosecutors. This may reflect the ongoing relationship that develops between the prosecution and defense which transcends any particular case. Defense counsel cannot afford

215. See notes 190-191 and accompanying text supra.
216. See text at note 191 supra.
217. See Alshuler, *The Prosecutor's Role*, supra note 7, at 66-70.
218. Results of the Oregon study were comparable: 29% of the respondent county attorneys indicated that defense counsel withheld information most of the time, 35% felt this occurred some of the time, and 35% said that it happened rarely. Klonoski, *Plea Bargaining*, supra note 134, at 125.
to be too deceptive in dealing with the prosecutor. Because of the institutional character of the prosecutor's office, a defense attorney must foster good relations in order to remain effective as a plea negotiator in future cases.\textsuperscript{219}

To assess the importance of prosecution-defense attorney relations in plea bargaining, respondents were asked, "Does a defense lawyer's style, personality, or past and present relation influence his ability to get a reduction for his client?" The response alternatives were definitely so, probably so, probably not, and definitely not. Sixty percent of the county attorneys answered either definitely or probably so.\textsuperscript{220} Plea negotiation, then, is clearly influenced by factors irrelevant to the needs of the state or the defendant.\textsuperscript{221}

Another extemporaneous factor that might influence plea negotiation is the defense attorney's reputation as a trial lawyer. Many commentators have argued that the defense attorneys who can intimidate the prosecutor receive better bargains than those who maintain good prosecutorial relations.\textsuperscript{222} Consequently Nebraska county attorneys were asked the question, "Does a defense lawyer's reputation as a competent trial attorney influence his ability to get a reduction for his client?" The response alternatives were the same as in the previous question. Only 37% of the prosecutors surveyed felt that a defense attorney's reputation influenced the bargaining process. These results indicate that in terms of bargaining it is better to be nice than good.\textsuperscript{223}

The defendant has the highest stake in the bargaining process and yet is rarely an active participant. As noted earlier, only 23% of the prosecutors surveyed indicated the defendant was actually involved in negotiation. Prosecutors obviously prefer to bargain with defense counsel so as to avoid any claim that the defendant's guilty plea was coerced.

The vast majority of defendants, then, bargain through their attorney. Defense attorneys, as discussed previously, often have real incentives to plead the defendant guilty.\textsuperscript{224} The issue

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{219} Alshuler, The Prosecutor's Role, supra note 7, at 179.
\item \textsuperscript{220} Compare the Oregon results where 42% of the district attorneys felt that the defense lawyer's style influenced his ability to get a reduction while 57% suggested it did not. Klonoski, Plea Bargaining, supra note 134, at 124.
\item \textsuperscript{221} See Note, Restructuring the Plea Bargain, 82 Yale L.J. 286, 292 (1972).
\item \textsuperscript{222} See G. Cole, Criminal Justice—Law and Politics 247-71 (1972).
\item \textsuperscript{223} Alshuler, The Prosecutor's Role, supra note 8, at 79. But see D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 74-75 (1966).
\item \textsuperscript{224} See notes 199-202 and accompanying text supra.
\end{enumerate}
\end{footnotesize}
becomes how much defendants are told about the "legal aspects" of their case and whether they understand the consequences of their plea. *Henderson v. Morgan* is one example of a guilty plea freely tendered without knowledge of the technical requirements necessary for conviction. To get a measure of the prosecutor's perception of the frequency with which this occurs, respondents were asked, "Do defendants involved in plea bargaining understand what is happening to them?" The response alternatives were rarely, sometimes, and most of the time. Eighty-two percent of those responding felt that defendants understood most of the time, while 14% felt they understood sometimes. Four percent felt misunderstanding was rare. In retrospect, we realize that this question was somewhat ambiguous. A defendant might "understand" what is happening to him in the sense that he is getting a concession for his guilty plea. At the same time, however, he might not understand the possible legal defenses available or the technical requirements necessary for conviction. It is suspected that the respondents answered the question in the former sense.

How do defendants view the plea bargaining process? Nebraska county attorneys were asked this open-ended question in the survey. Their responses were coded into one of three categories: defendants like it, defendants do not like it, and other. Seventy-three percent of the respondents indicated that defendants like plea bargaining. To say a defendant "likes" plea negotiation, however, does not mean that he respects the system. This dichotomy was illustrated by numerous comments: "Many defendants feel the system can be worked, which probably contributes to some feelings of cynicism about the criminal justice system." Another prosecutor noted, "Defendants in most cases feel the law is 'soft' and are tempted to recidivism." One county attorney expressed these sentiments:


226. The Oregon study produced similar results. All twenty prosecutors surveyed indicated that the defendant understood what was happening to him. Klonoski, *Plea Bargaining*, supra note 134, at 127.

227. The actual question was "How do you think defendants view the plea bargaining process? (In your own words)."

228. Twenty-seven per cent of the responses could not be coded as either liking or disliking and were thus put into the "other" category.

229. The defendant's viewpoint of the criminal justice system is examined in J. Casper, *American Criminal Justice: The Defendant's Perspective* (1972). Casper argues that plea negotiation generates disrespect for the legal system because defendants believe that cases are decided on the basis of bargaining skill and luck rather than legal principles. *Id.* at 77-86.
“Defendants like plea bargaining because it offers the prospect of something for nothing and allows them to extract a price for their nuisance value.”

One of the most controversial issues surrounding the plea bargaining process is whether judges should actively participate in negotiation. The ABA Guilty Plea Standards take the position that “judicial participation in plea discussions is undesirable.”

Judicial involvement in plea negotiation, it is argued, impairs the judge’s objectivity in passing upon the voluntariness of the plea when it is offered. In addition, “the risk of not going along with the disposition apparently desired by the judge may seem so great to the defendant that he will be induced to plead guilty even if innocent.” Despite these arguments, many judges continue to participate in plea negotiation. In the Pennsylvania study, 32% of the prosecutors surveyed indicated that the judge was present in plea bargaining sessions. Nebraska judges are reluctant to participate in bargaining; only 14% of the county attorneys responding said that the judge was actually involved in plea negotiation. More commonly, judges were consulted about or informed of the prosecutor’s bargaining decision. Thirty-seven percent of the county attorneys reported this practice.

To further define the type of consultation that occurred, respondents were asked, “Will judges discuss sentencing with you in relation to your plea bargaining prior to trial?” The response alternatives were never, sometimes, and often. Forty-five percent of those surveyed said that judges never discussed sentencing prior to trial, while 46% indicated that pretrial sentence discussion sometimes occurred. Only 9% of the county attorneys said that judges often conferred with them about sentencing before trial. Thus, while Nebraska judges do not nor-

230. ABA Guilty Plea Standards, supra note 52, commentary to § 3.3(a), at 72-73. The ABA Standards Relating to the Functions of the Trial Judge (Approved Draft 1972) expand the role of the judge in plea negotiation slightly. Section 4.1(a) permits the trial judge to “facilitate fulfillment of the obligation of the prosecutor and defense counsel to explore with each other the possibility of disposition without trial.” Id. at 51. One member of the Advisory Committee opposed even this change on the grounds that “any involvement of the trial judge prior to tender of a plea agreement constitutes an undesirable risk of coercion. . . .” Id. at 53-54 (commentary to § 4.1(a)).

231. Id. at 73 (commentary to § 3.3(a)); see also United States ex rel. Elksnis v. Gilligan, 256 F. Supp. 244, 255 (S.D.N.Y. 1966).

232. ABA Guilty Plea Standards, supra note 52, commentary to § 3.3(a), at 73. See also Gallagher, Judicial Participation in Plea Bargaining—A Search for New Standards, 9 Harv. C. R.—C. L. Rev. 29, 45 (1974); Gallagher, Voluntary Trap, 9 Trial 23 (1973); Davis, No Place for the Judge, 9 Trial 43 (1973).


234. The Oregon study reported similar results to an analogous question.
mally participate actively in bargaining, the data indicates that, in half of the jurisdictions surveyed, judges will discuss sentencing alternatives. It would be interesting to know if the prosecutor informs defense counsel of the judge’s prediction of the defendant’s sentence. If this is indeed the case, it could be argued that the judge is, in effect, “participating” in plea negotiation through the prosecutor.

Even when the judge is not directly involved, he has an indirect effect on plea negotiation in terms of sentencing. If the prosecution refuses to bargain, the defendant can usually expect some type of sentencing consideration from the judge in exchange for his guilty plea. Although this may violate concepts of equal protection, many judges do consider the defendant’s plea a relevant factor in sentencing. Indeed, the ABA Guilty Plea Standards state it is proper in certain circumstances for the court to grant charges and sentence concessions to defendants who plead guilty. In order to examine the sentencing practices of Nebraska judges in this respect, we asked the following question: “In your jurisdiction, does a defendant who pleads guilty receive a lesser sentence than a defendant who pleads not guilty, goes to trial and is found guilty of the same charge?” The response alternatives were never, rarely, sometimes, most of the time, and always. The results were as follows: 20% never, 37% rarely, 28% sometimes, 15% most of the time, and 0% always. Thus, 80% of the prosecutors surveyed indicated that judges considered the defendant’s plea relevant in sentencing to some extent. This seems to confirm the existence of implicit plea bargaining. When the prosecution refuses

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Fifty-nine percent of those surveyed indicated that pre-trial sentencing discussion never occurred, while 41% said it varied. Klonoski, Plea Bargaining, supra note 134, at 129.

235. This “implicit” plea negotiation is further discussed in Heumann, A Note on Plea Bargaining and Case Pressure, 9 Law & Soc'y Rev. 515, 524 (1975); Note, The Elimination of Plea Bargaining in Black Hawk County: A Case Study, 60 Iowa L. Rev. 1053, 1064 (1975); Church, Plea Bargains, Concessions and the Courts: Analysis of a Quasi-Experiment, 10 Law & Soc’y Rev. 377, 390 (1976).

236. The questionnaire sent by the Yale Law Journal to Federal District Court Judges showed that 66% of the 140 judges surveyed considered the defendant’s plea relevant in sentencing. Note, The Influence of the Defendant’s Plea on Judicial Determination of Sentence, 66 Yale L. J. 204 (1956). Sixty-three percent of the prosecutors surveyed in the Oregon study felt that judges gave harsher sentences for the same offense when a case went through the trial process. Klonoski, Plea Bargaining, supra note 134, at 130. In the Pennsylvania study, 55% of the prosecutors indicated that defendants who pled guilty received lesser sentences than those who pled not guilty. Guilty Plea Bargaining, supra note 134, at 907.

237. ABA Guilty Plea Standards, supra note 52, § 1.8, at 36-37.
to negotiate, the defendant may plead guilty as charged in order to secure a sentencing break from the judge. Since most Nebraska judges apparently consider the defendant's plea relevant in sentencing, this would frequently be a successful tactic.

**Prosecutorial Attitudes Toward Bargaining**

Thus far we have discussed the various plea bargaining practices of Nebraska county attorneys and their perceptions of other participants in the process. In addition to these issues, the survey also included questions about prosecutors' overall attitudes toward bargaining. The major question in this group was, "What is your personal opinion concerning plea bargaining? Do you view it as a necessary evil, would you abolish it, or does it serve the interests of justice?" Respondents were asked to answer in their own words. Since the wording of the question suggested three alternative ways of answering, most county attorneys gave answers which could be coded into one of three categories. Only 8% of the prosecutors responding felt that plea bargaining should be abolished, while 17% felt it was a necessary evil. The vast majority, 65%, indicated that plea negotiation served the interests of justice. This suggests yet another reason why rural Nebraska county attorneys bargain just as often as their urban counterparts. Prosecutors simply feel that plea bargaining serves the interest of justice. One prosecutor noted, "I believe it serves the interests of justice, as it allows salvaging a bad case, it lets defense counsel show the defendant he is doing something for him, and still allows the judge the freedom to sentence as he would in the first place."

In order to further examine what prosecutors liked about plea bargaining, we asked, "In your opinion, what are the advantages of plea bargaining?" The question was open-ended, and most respondents gave more than one answer. The responses were coded by determining which topics were frequently mentioned and considering these to be response categories. The proportion of prosecutors who mentioned each of these categories was then calculated. The most frequently mentioned advantages of plea bargaining were "saves trial time" and "saves money," which were mentioned by 44% and 43% of respondents, respectively. The fact that these two factors

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238. Ten percent of the answers did not fit any of these categories.
239. See text at notes 153-160 supra.
240. The responding prosecutor came from a rural county. See also text at notes 178-181 supra.
241. These two factors also emerged as the most important in the Oregon study. Klonoski, *Plea Bargaining*, supra note 134, at 131.
emerged as most important attests to the scarcity of prosecutorial resources. It is unclear, however, whether this "scarcity" stems from caseload or the part-time nature of the prosecutor's job. In this respect it is interesting to note that only 23% of the prosecutors surveyed mentioned reduction of caseload as an advantage of plea bargaining. This suggests that caseload is either not important in plea negotiation, or prosecutors are reluctant to admit its significance.

Another advantage of bargaining that appeared with some regularity was that it enabled the prosecutor to obtain some kind of conviction in a weak case; 27% mentioned this. Twenty-five percent noted that plea negotiation obtained the same result as trial in terms of sentence, without the uncertainty inherent in going to trial. Finally, 22% of the county attorneys mentioned that plea bargaining gave prosecutors flexibility in dealing with defendants. This enabled them to better effectuate the interests of justice in a particular case.

Nebraska county attorneys were also asked an open-ended question concerning the disadvantages of plea bargaining. Responses were coded in the same manner as the previous question. The answers given most frequently were those indicating that plea negotiation adversely affected the image of the criminal justice system. Specifically, 50% of the prosecutors mentioned that participants in plea negotiation often felt that the interests of justice had been compromised. Victims and police believed their interests were ignored, while defendants who bargained felt the system was corrupt and could be manipulated. Twenty-one percent of the prosecutors also indicated that the public had negative perceptions of plea bargaining. One county attorney commented, "To the public, as well as myself, plea bargaining is the self destruct button of the criminal justice system." Another prosecutor noted, "To many responsible citizens the present method of handling criminal cases creates the impression of all pervasive corruption. Plea bargaining compromises the dignity of the courts and the bar, and is deleterious to all of society." These two county attorneys, as might be expected, believed that plea bargaining should be abolished. The vast majority of prosecutors who mentioned public misunderstanding as a disadvantage of plea negotiation noted that attempts should be made to educate the public as to the equities of

242. See text at note 161 supra.
243. See text at note 182 supra.
244. See notes 195, 197 and accompanying text supra.
245. See text following note 274 supra.
Several county attorneys suggested that utilization of the term plea negotiation instead of plea bargaining would create a more favorable image of the practice in the minds of the public.

Another disadvantage, mentioned by 23% of the county attorneys surveyed, was that plea negotiation was subject to abuse by lazy prosecutors. This is a surprisingly high figure in light of the fact that 93% of the respondents were prosecutors who did in fact bargain. An unsurprising result, given the interests of the respondents, was that only 8% felt that bargaining led to overcharging by the prosecutor.

SUMMARY

An attempt has been made in this article to examine plea bargaining in Nebraska from the prosecutor's perspective. Attention was first given to the due process requirements for the acceptance of guilty pleas, since these constitutional strictures represent the primary limitations on prosecutorial discretion in plea negotiation. The concept of the voluntary and intelligent plea as developed by the United States Supreme Court was compared with Nebraska law, which has generally relied on the ABA Guilty Plea Standards. The impact of the judicial acceptance of plea bargaining was also discussed. It was concluded that the safeguards developed by the United States Supreme Court do little to limit prosecutorial discretion in plea negotiation.

Prosecutorial discretion in plea bargaining was then examined empirically through the analysis of questionnaires sent to county attorneys throughout Nebraska. An examination of various demographic variables indicated that the sample was predominantly rural. Nevertheless, the data showed that bargaining was fairly extensive: guilty pleas accounted for 30%-60% of the prosecutor's caseload. There was no correlation between the percent of cases bargained and caseload variables. This suggests that rural prosecutors bargain just as often as their urban counterparts.

The results of the survey confirmed that prosecutors have essentially unbridled discretion in plea negotiation. Most offices have no formal rules for bargaining, although some prosecutors indicated a reluctance to negotiate certain offenses. There seemed to be some consensus among Nebraska prosecutors,

246. See also Klonoski, Plea Bargaining, supra note 134, at 136-37.
247. But see text at note 134 supra.
however, concerning the factors to be considered in deciding to bargain. The nature of the crime, the strength of the case, and the interests of justice were considered relevant by most county attorneys.

Prosecutorial discretion was also examined in terms of bargaining ethics. In focusing on plea bargaining practices that might be considered improper, the boundaries between ethical and unethical behavior seemed vague. Overcharging, the propriety of which depends on how it is defined, was practiced by 25% of the county attorneys surveyed. Nebraska prosecutors seemed evenly split, however, on the propriety of initiating negotiation and withholding evidence from defense counsel when bargaining.

The survey also attempted to determine who was actively involved in the plea bargaining process. The data revealed that the defense attorney, the sheriff, the judge, and the defendant participated in bargaining to different degrees. A further examination of the actual participants in plea negotiation brought more interesting results. Prosecutors seemed to notice a difference in the bargaining practices of privately retained counsel, appointed attorneys, and public defenders. There was also some evidence of the “cop out lawyer” phenomenon in Nebraska, especially in larger counties. Judges, while reluctant to participate in bargaining, often discussed sentencing alternatives with the prosecutors prior to trial.

Prosecutorial attitudes toward plea bargaining were also examined in the survey. The vast majority of the county attorneys felt that plea bargaining served the interests of justice. This suggests that prosecutors plea bargain simply because it offers flexibility and certainty in the disposition of defendants within the criminal justice system. The advantages and disadvantages of plea negotiation as perceived by the respondent prosecutors were also illuminating. The most frequently mentioned advantages were that it saves time and money. The most frequently mentioned disadvantage was that plea bargaining creates a negative image of the criminal justice system.

RECOMMENDATIONS

Before making recommendations to improve the system of plea bargaining, serious consideration must be given to abolishing it altogether. 248 Many prosecutors, in light of pervasive pub-

248. See note 8 and accompanying text supra. See also Alshuler, The Prosecutor's Role, supra note 7, at 52.
lic mistrust, soaring crime levels, and high recidivism rates, have adopted policies prohibiting certain forms of plea negotiation. An examination of the jurisdictions experimenting with abolition, however, leads only to more ambiguity concerning the necessity rationale for plea bargaining.

The state of Alaska has undertaken the most comprehensive experiment in plea bargaining to date. The Attorney General, through a memorandum to all district attorneys, has banned sentence recommendation as an inducement for guilty pleas. Predictions by several members of the bar that the state court system would be hopelessly clogged with cases have failed to materialize. Maricopa County, Arizona, in the prohibition of charge reduction, count reduction, and sentence recommendation for certain crimes, has also reported no increase in trials. The reason seems to be that a guilty defendant faced with certain trial will plead to the original charge and attempt to secure a sentencing consideration from the judge. Similar results were obtained in Multnomah County, Oregon, where a prohibition on charge reduction for certain “impact offenses” had no discernible effect on caseload.

Other data, however, suggests that increased caseload can be expected when plea negotiation is curtailed. In New York, for example, plea bargaining restrictions based on new drug laws have increased the median age of the pending caseload approximately forty-five days. Similarly, Black Hawk County, Iowa, in banning count reduction, charge reduction, and sentence recommendation, has experienced a 50% increase in the number of cases going to trial. In a suburban county in the midwest, a

249. See, e.g., id. at 51.
250. See Memorandum to judges of the Alaska court system from Attorney General Avrum M. Gross (July 7, 1975). Sentence recommendation is clearly banned, but the status of other forms of plea negotiation is not clear. Id. See also 17 CRiM. L. REP. 2308 (July 16, 1975).
251. Todd, Alaska Continues Year-Old Ban on Plea Bargaining, Washington Post, August 20, 1976, at A10, cols. 1-2. At the present time, empirical data for the Alaska experiment is still being compiled. The results, when available, will merit detailed analysis since Alaska is the largest jurisdiction and the only state to adopt such a policy.
253. See note 235 and accompanying text supra.
policy of no charge reduction on drug sales created a substantial increase in the trial rate. A plea bargaining ban in Pima County, Arizona, brought a complete halt to the hearing of civil cases. Both El Paso and Belton, Texas, have also experienced burdensome dockets as a result of the elimination of plea bargaining. These results tend to confirm the importance of caseload in plea bargaining.

It is this basic uncertainty as to the effects of abolition that makes it such an unattractive alternative. If defendants begin to exercise their right to trial in great numbers, will the prosecution have sufficient funding and resources to deal with the additional load? Or will efficient use of pretrial diversion, arbitration, and perhaps even decriminalization of victimless crimes be enough to offset the increase? Case pressure may taper off as more defendants bargain implicitly with the judge for sentence considerations. However, rather than operate with these unknown quantities, most commentators urge improvements of the plea bargaining process which would basically maintain the status quo. The authors join these ranks.

258. Rotenberg, The ABA Standards, supra note 51, at 86 n. 269.
259. Letter from Patrick Ridley, Bell County Attorney, to Fred Kray (Jan. 24, 1977).
260. Other jurisdictions which have attempted to reduce the use of plea bargaining include Baltimore, Los Angeles, Philadelphia, and San Diego. Rotenberg, The ABA Standards, supra note 51, at 86.
261. The abolition of plea bargaining presents both rural and urban areas with problems concerning the scarcity of prosecutorial resources. The necessity rationale for plea negotiation is clearly not as strong in Nebraska rural communities as it is in New York City. However, even in agricultural areas, the abolition of plea bargaining would require a substantial increase in funding for the criminal justice system. More judges and court personnel would be needed to hear the additional cases, and prosecutors would have to be hired full time. See text at note 161 supra.
262. See generally National Pretrial Intervention Service Center of the American Bar Association Commission on Correctional Facilities and Service: Descriptive Profile on Selected Pretrial Criminal Justice Intervention Programs (April 1974); Pretrial Criminal Justice Intervention Techniques and Action Programs (May 1974); Note, Pretrial Diversion from the Criminal Process, 83 YALE L. J. 827-54 (1974).
263. See generally Stulberg, A Civil Alternative to Criminal Prosecution, 39 ALB. L. Rev. 359-92 (1975). Arbitration programs currently operate in Rochester, N.Y.; Philadelphia, Pennsylvania; Cleveland, Ohio; East Cleveland, Ohio; Akron, Ohio; Elyria, Ohio; Columbus, Ohio; and San Francisco, California. They handle approximately 5% of each jurisdiction's caseload. Letter from Joseph Stulberg to Fred Kray (Jan. 27, 1977).
264. See note 235 supra and text at note 253 supra.
265. Recommendations for plea bargaining abound. See, e.g., note 3 supra. One commentator has equated plea negotiation with sentencing and argued that a formal judge-supervised hearing should be held. Note, Restructuring the Plea
with recommendations aimed at ensuring consistency in the prosecutorial concessions offered to defendants in exchange for their guilty pleas. The model presented is based on a number system used for sentencing in El Paso and Belton, Texas, and guidelines issued by Richard Kuh while serving as New York City District Attorney.

The number system originated as a sentencing standard in El Paso, Texas, when plea negotiation was abolished. The El Paso system was subsequently adopted in Belton, Texas, by judicial fiat. A memorandum to the Bell County Bar Association authored by the district court judges of Belton, Texas, states, "No plea negotiations will be recognized by any of the courts...." In the same memorandum, the court promulgated a number system to give some indication of when it would grant probation. The court said that it would be disposed to grant a probated sentence to a defendant who scores less than nine points when all relevant factors are added together. If probation is not granted, such defendant would be permitted to withdraw his guilty plea.

The system takes into consideration the nature of the crime, aggravating circumstances surrounding the offense, the defendant's criminal record, and the number of counts charged. Quantification of these factors in plea negotiation would foster consistency in the prosecutorial concessions offered to similarly situated defendants. Consequently, the authors recommend the following guidelines.

1. **Sentence Recommendation**

Prosecutorial concessions for pleas of guilty should be limited to charge and count reduction, subject to the limitations set


266. *See generally Appendix.*


268. Appendix, part 1.

269. *Id.* part 3 § VII.

270. *Id.* part 1.

271. *Id.*

272. *Id.* Defendants scoring more than nine points will not be permitted to withdraw their pleas as they should know that they are unlikely to receive probation. *Id.*

273. *Id.* part 2.
out in 3(i) and 3(ii) below. Agreements to make a certain sentence recommendation in exchange for a defendant's guilty plea should be prohibited on the grounds that the sentencing decision belongs solely to the judge. The prosecutor may indicate, however, the extent of the defendant's cooperation or any other factor that may be relevant in sentencing.

2. CHARGING

To curtail overcharging, plea bargaining should begin with a provable offense rather than with a charge which is probably not provable but which is made with the intention of dropping it for something that is provable.

3. THE DECISION TO NEGOTIATE

The initial decision to negotiate with a defendant should be made with reference to the number system. In accord with 2 above, the crime to be considered in utilizing the number system is the provable offense rather than the crime originally charged. If a defendant scores less than nine after adding together the relevant considerations involved in the offense, a charge or count reduction as specified in (i) and (ii) below is in order. If the defendant scores higher than nine, there should be no plea negotiation. Society's interest in obtaining an appropriate sentence is paramount under these circumstances, and the prosecutor should therefore take the case to trial or accept a plea only to the offense charged.

(i) Charge Reduction

Charge reduction should be limited to one lesser included offense. If further reduction is sought, the defendant should be required to submit to a prepleading report. If the prosecutor, in reviewing the report, decides that further reduction is jus-

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274. In Nebraska, Lincoln and Omaha have prohibited sentence recommendation. Alaska has also banned sentence recommendations. See text at note 250 supra. See also Kuh, Sentencing Guidelines, supra note 148, at 63.
275. Id. at 64.
276. See Appendix, part 2.
277. Prosecutors could make the cut-off point higher or lower depending on their caseload and resources.
278. The major problem in applying the Texas system to plea negotiation is that it fails to account for the strength of case factor. If the defendant is charged with murder, which is given a value of 10, he is precluded from bargaining even if the probability of conviction is only 50%. To a degree, this problem can be avoided by starting negotiation with the provable offense. Practically speaking, however, a prosecutor is going to offer some type of concession to a defendant when a strong case deteriorates.
tified, the reasons for the reduction should be entered on the court record.280

(ii) **Count Reductions**

Judges normally give concurrent sentences for each count charged and frequently consider the dropped charges in sentencing.281 Thus the only limit to prosecutorial discretion in this area is that a defendant charged with a series of crimes taking place at different dates and different places should be required to plead to each count.282

(iii) **Consultation**

The prosecutor should always make an effort to consult the victim and the police concerning his decision to negotiate.283 Both the victim and the police must feel that their interests are being considered in bargaining. Consultation is necessary if plea negotiation is to become acceptable to the public.

4. **DISCLOSURE OF THE PLEA AGREEMENT IN COURT**

The prosecutor should make a full disclosure of the plea agreement in open court.284 Reasons for the concessions offered to the defendant should be read into the record. If a charge was reduced solely because investigation showed that the initial charge was too high, this should also be disclosed.285

The number system, coupled with the above guidelines, is a feasible way for large offices to standardize the concessions offered by its many prosecutors. In small offices, adherence to the number system would unify the bargains offered over time. At the very least the system would provide a basis on which to ground uniformity in bargaining and point out the various elements that should be considered by the prosecution in plea negotiation.

280. Id.
281. See note 144 supra.
283. See notes 195, 197 supra.
284. Kuh, Plea Bargaining Guidelines, supra note 267, at 60.
285. Id.
APPENDIX

PART 1

TO: BELL COUNTY BAR ASSOCIATION

As of October 8th, 1976, the 146th, 169th, and 27th District Courts will terminate the use of plea recommendations on guilty pleas in criminal cases in our courts.

In order to be of some benefit to both the defense and prosecuting attorneys we submit herewith an outline of our thinking on sentencing which includes the point system draft for your use in judging how you should advise your client to plea. Please do not interpret the point system to mean that we are going to judge cases arithmetically; however, what the point system does is indicate that if your client scores 9 points or less according to the chart, we will be inclined to grant a probated sentence, but if we should for some reason decide against probation in that case where the defendant only scores 9 points or less, he will be permitted, if he wishes to withdraw his plea which of course can't be used in evidence against him in a later jury trial. If your client, however, scores more than 9 points, the chances of a probation being granted would not be as good and if probation is not granted, the defendant would not be allowed to withdraw his plea since he is aware before the plea is entered of what the probable consequences will be.

In order for the administration of justice to work without a plea bargaining process, there must be first of all a consistency on the part of judges in regard to what they do with cases. For these reasons we submit the following principles of sentencing that will govern our handling of sentencing.

1. Each case stands on its own merits. This, of course, means that sentencing for the same crime may vary from case to case because the factors to be considered are always different. It will also be expected and incumbent upon the defense and/or prosecutor to apprise the court of what the basic facts of the case are.

2. Factors we will consider:
   a. The nature of the crime.
      
      Crimes involving violence, threats of violence and dangerous conduct (such as arson).
      
      There is a need for the court's reaction to crime to show that the law is concerned about the victim and for society as a whole. Sometimes, especially in cases of violence, this factor absolutely precludes the court's granting a probated sentence. This is true of all first degree felonies in-
volving violence or the threat of violence: murder, rape, aggravated robbery, first degree arson. In cases such as aggravated assault where a weapon is used, a defendant with no prior convictions can expect at least a 30 day jail sentence now provided under the Probation Law and a reluctance by the court to grant a probated sentence. In voluntary manslaughter, DWI manslaughter, and attempted murder cases, the defendant, except where there is a real and obvious element of self defense, or extreme provocation of some kind, can expect time to serve in the penitentiary. Amount of time to serve in these cases will vary widely in each case. Where the crime is a situation type crime, which indicates a temporary loss of emotional control (as opposed to evidence indicating habitual violent nature), the sentence need not necessarily be particularly long; up to 10 years incarceration will be sufficient for many of them because the sentences are imposed mainly to show that the system of justice is concerned about the victims of crime. This is so because the type of crime involves very low recidivism [sic] rate and there is almost no general deterrent, that is, deterrent of others involved in emotional situations they can't handle. The reason for time to serve is to keep down private vengeance [sic] and vigilante action. In aggravated cases of violence, the defendant can expect severe sentences: 10 years and up to life.

b. Commercial controlled substance cases.
Where the evidence indicates, as from that amount, that the defendant was dealing in controlled substances, whether he is so charged or not, the defendant cannot reasonably expect a probation sentence. Strong evidence of/or conviction of commercial transactions in prohibited substances will result in severe sentences: Where marijuana is involved and the defendant was dealing in a commercial transaction or the evidence is strong to that effect, jail time can be expected or penitentiary time depending upon the amount.

c. Prior record of the defendant.
Where the defendant has one or more prior felony convictions or serious misdemeanor record, we will be particularly unwilling to grant probation. Previous criminal record will also cause much longer sentences. If indictment has an enhancement count, the defendant can expect a sentence of fifteen (15) years unless there is some aggravating factor that could call for a higher sentence.
d. Multiple charges.

If the defendant is *indicted* at the time for several offenses and the same are different indictments, the court will not (except in those rare instances when the point totals on the chart are 9 or less) grant probation [or will the court accept a plea to just part of the charge]. You should consider carefully the provisions of Sections 3.03 and 3.04, Penal Code, before deciding to sever multiple charges filed under a single episode type indictment. You can, of course, under a recent holding of the Court of Criminal Appeals, possibly obtain from juries a series of probated sentences. However, you should note that in the event the cases are severed, the sentences need not run concurrently when the cases are considered together.

e. Plea bargaining for evidence and information.

The court recognizes that there are sometimes valid reasons for extending leniency to defendants in return for information or evidence; and the court may, on proper written application by the District Attorney, grant immunity as permitted by law. However, offering judicial favors and making judicial threats to obtain testimony has the intrinsic tendency to degenerate to a kind of judicial bribery in the one case and a kind of judicial extortion in the other. For this reason, that a defendant is helpful as a witness or informer, will not by itself be a reason for granting a probated or otherwise unduly lenient sentence, but will be considered as an element in deciding the case.

f. In the cases of burglary of a habitation in which there were people in the house at the time of the burglary and/or the burglary occurred at night, then the court will look unfavorably upon granting a probation.

3. Probation.

In accordance with the near unanimous opinion of judges, jurors and professional penologists, we will be prone to probate sentences where the following factors exist:

a. Defendant has no prior felony or serious misdemeanor record.

b. The crime does not involve violence, the threat of violence, or commercial involvement with controlled substances.

c. The defendant is indicted with only one crime.

When a defendant receives probation by way of a jury, the law restricts terms of probation into those few defined by statute. When a defendant is assessed probation by the judge, addi-
tional valuable conditions such as imposing curfews, prohibiting drinking, requiring drug and alcohol abuse treatment, requiring job training, sentencing to jail of up to 30 days and many other conditions may be imposed. The result is a more effective and beneficial control over the defendant. Your client should be advised that the court will impose, as the cases indicate, conditions of probations such as the following:

1. Curfew
2. Prohibiting the use of alcohol
3. Requirement of participation in rehabilitation and employment training programs
4. Confinement in jail up to 30 days
5. Restitution to the victim
6. Reimbursement to the county for expenses paid by court appointed counsel and PR bond fees.

Any reduction of the primary offense to a lesser included offense will be looked at unfavorably by the court and scrutinized closely as to the reason for a reduction.

Our Penal Code in Section 12.44 permits the court, upon request of the District Attorney, to permit prosecution of a third degree felony as a class “A” misdemeanor and this may also be done upon petition by the defense counsel and the new provision of Article 42.12, Section 3D provides for deferred sentence probation without an adjudication of guilt and these amply take care of the cases in which one might think could be plead as a lesser included offense.

You will find attached a point system as well as certain charts which reflect the thinking of these courts and which these courts retain the privilege of reviewing and any changes that are to take place will be sent to you promptly.

The court recognizes that there may be exceptional cases that require some plea recommendations and if the District Attorney and the Defense Counsel will make the court aware of the reasoning behind the need for recommendation prior to the hearing to avoid any surprises, then if approved beforehand, the recommendation will be allowed.

This system was adopted by El Paso County and we invite you to consult with the courts and/or attorneys of that County on how well the system works and their reaction to such a system.
PART 2

Probation Chart

Murder 10 points
Aggravated Rape 10 points
Aggravated Arson 10 points
Aggravated Robbery 9 points
Burglary of Habitation 8 points
2nd Degree Felony 5 points
3rd Degree Felony 4 points
Aggravated Assault
  Bodily Injury to Peace Officer 4 points
  Deadly Weapon 5 points
  Serious Bodily Injury 6 points
Aggravated Kidnapping
  Ordinary 10 points
  Victim Released 8 points
Aggravated Perjury 6 points
Aggravated Sexual Abuse 9 points
Use of Firearm 4 points
Use of Other Prohibited Weapon 2 points
Serious Injury to Victim in Carrying Out
  Crime 4 points
Minor Injury to Victim in Carrying Out Crime 2 points
Little Possibility of Restitution Because of
  Amount of Loss 4 points
Inability to Supervise Probation 3 points
Bad Residivism [sic] Prediction of Psychological
  Test 1 point

Each Previous Felony Conviction in Previous
  5 years 6 points
Each Previous Felony Conviction More than
  5 years Prior to Act in Question 4 points
Each Previous Class A Type Misdemeanor
  Conviction 3 points
Each Previous Class B Type Misdemeanor
  Conviction 2 points
Multiple Charges—Each Over One
  3 points
Evidence Indicating Professionalism 4 points
Evidence Indicating Dealing in Prohibited
  Substances 5 points
Jumped Bond on the Case or Another Case
  Pending 4 points
Had any kind of Probation Revoked 4 points

PART 3

I. All criminal cases will be given an arraignment date at
which time the attorney may waive arraignment and
make official appearance in the case in writing prior to
the arraignment date and need not be present. If arra-
ignment is not waived and no attorney is officially on record
in the case, the defendant needs to be present with his
attorney if he has one.

II. At the same time the notices are sent on the arraignment
date, there will also be notice as to a pre-trial date and a
trial week. The cases will be distinguished by jail cases
and non-jail cases as of the time of the indictment. The
pre-trial also serves as a docket call. All pre-trial motions
should be filed within 10 days of pre-trial, unless good
cause is shown. Anyone who files a motion must give a
copy to opposing counsel.

III. The state and defense counsel must be present at the pre-
trial/docket call along with the defendant.

IV. All attorneys are required to make announcement at the
pre-trial/docket call on the cases where they have made
appearance.

V. No attorney will be allowed to withdraw from a case
without there first being a hearing to determine the rea-
son and if the motion is granted so the defendant can
fully be advised of his rights.

VI. Anyone who wishes the court to consider probation, if
the court is to assess punishment, is encouraged to have
his client report to the Probation Department at least two
weeks prior to the hearing date and then to return for a
follow-up interview on the date of the hearing; however,
should your client desire not to answer any of the ques-
tions until after the plea of guilty has been entered, you
may then make application with the Probation Depart-
ment on the date that the plea has been found guilty and
punishment will be reset for approximately two weeks
from that date.

VII. No plea negotiations will be recognized by any of the
courts—you are encouraged to read and familiarize your-
self with the procedure adopted by the courts in a written
order dated September 28, 1976 on file with the District
Clerk’s Office.

VIII. No cases will be continued without a written Motion for
Continuance, unless the attorneys for both sides agree to
a continuance, and then only upon receiving a resetting
date from the court coordinator or the court.
Part 4

DWI  4 points
Misdemeanor DWI 2 points

Statement regarding DWI's that were not originally included in the original statement on case heard before the 169th, 27th and 146th District Courts sent out on September 28, 1976, are that no matter how many points are accumulated on a defendant charged with a DWI, where no one was seriously injured, if strong proof is offered as to a need and possible success of a rehabilitative [sic] program for the alcohol problems probation will be considered, including the rehabilitation program as a condition. There will also be a good bit of use made of our weekend work release program with corresponding rehabilitation programs. It is strongly suggested that if your client has more than 9 points on a DWI case that you work closely with the Probation Department in trying to work out some feasible program for your client to participate in and that your client has been evaluated and is eligible for the program.