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# Plea Bargaining in North Carolina

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# PLEA BARGAINING IN NORTH CAROLINA

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## INTRODUCTION

Plea bargaining practices, as described by twenty of the thirty North Carolina district attorneys who answered the questionnaire reproduced in the Appendix, vary widely. In one district, for example, the prosecutor does not bargain at all although in eighty-five percent of his cases the defendant nonetheless pleads guilty. In another district the prosecutor estimates that he bargains for four-fifths of the guilty pleas that defendants enter in ninety-five percent of his cases. Those prosecutors who regularly negotiate pleas (and that includes three-quarters of the district attorneys who responded) do not invariably offer similar defendants similar inducements although most do use at one time or another the three standard inducements: charge dismissal, charge reduction and sentence recommendation. Some prosecutors, for example, regularly recommend sentences while others rarely recommend one. Beyond the strength of the government's case and the character and past record of the defendant, all of which most prosecutors recognize as relevant factors, the prosecutors do not agree upon those other factors that influence the decision to negotiate or to agree to a particular disposition pursuant to a plea. The prosecutors also organize their offices differently for plea bargaining purposes: a few district attorneys insist on negotiating or at least approving all bargains; most, however, give staff attorneys wide discretion to negotiate pleas. A few prosecutors have established some minimal guidelines for negotiating pleas, but most have not. Varying degrees of judicial participation in the bargaining process further differentiate practice from one district to another and, indeed, within districts. This very variety in plea bargaining practices within North Carolina demonstrates that practices here parallel those in other jurisdictions, since similar surveys have shown similar diversity in plea bargaining practices within other jurisdictions.[1]

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1. *E.g.*, Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 SUFFOLK U.L. REV. 292, 301 (1969) (the percentage of guilty pleas varies from eighty percent in one county to thirteen percent in another); Klonoski, Mitchell & Gallagher, *Plea Bargaining in Oregon: An Exploratory Study*, 50 ORE. L.

In addition to showing that plea bargaining practices in North Carolina vary as do practices elsewhere, the survey highlighted the existence here of several problems, common to other jurisdictions, that merit extended discussion. These problems may be grouped into two broad categories. The first are "process" problems and include the role the judge should play in the process and the degree to which a defendant who pleads guilty should receive a less severe sentence than the otherwise similarly situated defendant who is convicted after contesting his guilt at trial. The second are "internal management" problems and include the question of who within the prosecutor's office should have responsibility for negotiating pleas and the question whether procedural and substantive guidelines for bargaining should be established within the prosecutor's office. While some of these problems—most notably, the problem of judicial participation in the bargaining process—have generated considerable professional debate,[2] others—particularly, the problems of internal management—have not.[3] All must be discussed, however, because the survey responses reveal not only different practice in all these areas but also doubt about the legitimacy or at least desirability of some of the prevailing practices. Practices may, of course, differ and yet be equally justified and reasonable. On the other hand, practices may differ for irrational reasons, and one practice may be demonstrably preferable to another.

## PROCESS PROBLEMS

### *Judicial Participation in Plea Bargaining*

The North Carolina legislature has recently authorized judicial participation in plea bargaining despite the recommendation of the

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REV. 114, 118 (1971) (the incidence of plea bargaining varies from zero percent in one county to ninety-five percent in another); Note, *Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas*, 112 U. PA. L. REV. 864, 898 (1964) (different prosecutors offer different inducements to secure guilty pleas).

2. *E.g.*, Ferguson, *The Role of the Judge in Plea Bargaining*, 15 CRIM. L.Q. 26 (1972); Gallagher, *Judicial Participation in Plea Bargaining: A Search for New Standards*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 29 (1974); Hoffman, *Plea Bargaining and the Role of the Judge*, 53 F.R.D. 499 (1972); Recent Development, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082 (1967); Note, *Judicial Participation in Guilty Pleas—A Search for Standards*, 33 U. PITT. L. REV. 151 (1971); Note, *Criminal Procedure—Plea Bargaining—Trial Judge's Participation in Plea Negotiations Does Not Render Plea Involuntary*, 24 VAND. L. REV. 836 (1971).

3. Although internal management problems are occasionally mentioned in the vast and growing literature of plea bargaining, they are seldom thoroughly discussed. Two exceptions are Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A.L. REV. 1 (1971), and White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439 (1971).

Criminal Code Commission that it be forbidden.[4] While every professional panel that has studied the role of the judge in the bargaining process has recommended against permitting his participation,[5] the most thorough and prestigious of these study panels would permit the judge to indicate whether he approves a particular bargain prior to the defendant's entry of a guilty plea pursuant to the agreement.[6] The United States Supreme Court, however, has recently recommended and Congress has adopted a procedure that apparently proscribes such "ratification" of negotiated pleas in the federal courts.[7] Since North Carolina

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4. N.C. GEN. STAT. § 15A-1021 (Supp. 1975) states:

**Plea conference; improper pressure prohibited; submission of arrangement to judge.**—(a) In superior courts, the prosecution and the defense may discuss the possibility that, upon the defendant's entry of a plea of guilty or no contest to one or more offenses, the solicitor will not charge, will dismiss, or will move for the dismissal of other charges, or will recommend or not oppose a particular sentence. If the defendant is represented by counsel in the discussions the defendant need not be present. The trial judge may participate in the discussions.

5. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PLEAS OF GUILTY, Standard 3.3(a) (Tenatative Draft, as amended 1968) ("The trial judge should not participate in plea discussions.") [hereinafter cited as PLEAS OF GUILTY]; NATIONAL ADVISORY COMM'N ON CRIMINAL JUSTICE STANDARDS AND GOALS, TASK FORCE ON COURTS, Standard 3.7 (1973) ("The court should not participate in plea negotiations."). *See also* ABA Comm. on Professional Ethics, *Informal Opinions* (#779), 51 A.B.A.J. 444 (1965) (judge should not become a party to any advance arrangement for the determination of a sentence).

6. PLEAS OF GUILTY, Standard 3.3, provides:

**Responsibilites of the trial judge.**

(a) The trial judge should not participate in plea discussions.

(b) If a tentative plea agreement has been reached which contemplates entry of a plea of guilty or nolo contendere in the expectation that other charges before that court will be dismissed or that sentence concessions will be granted, upon request of the parties the trial judge may permit the disclosure to him of the tentative agreement and the reasons therefor in advance of the time for tender of the plea. He may then indicate to the prosecuting attorney and defense counsel whether he will concur in the proposed disposition if the information in the presentence report is consistent with the representations made to him. If the trial judge concurs, but later decides that the final disposition should not include the charge or sentence concessions contemplated by the plea agreement, he shall so advise the defendant and then call upon the defendant to either affirm or withdraw his plea of guilty or nolo contendere.

(c) When a plea of guilty or nolo contendere is tendered or received as a result of a prior plea agreement, the trial judge should give the agreement due consideration, but notwithstanding its existence he should reach an independent decision on whether to grant charge or sentence concessions under the principles set forth in section 1.8.

7. FED. R. CRIM. P. 11(e) states:

(1) **In General.**

. . . .

The court shall not participate in any such discussions.

(2) **Notice of Such Agreement.** If a plea agreement has been reached by the parties, the court shall, on the record, require a disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

General Statutes section 15A-1021 does not specify the degree of permissible judicial participation, the question remains: how extensively may the judge participate without running afoul of due process restraints on his participation? And even if due process does permit judicial participation beyond that permitted in the federal courts or recommended by the ABA, is any such additional judicial involvement desirable?

The answer to these questions must be explored because some North Carolina judges do participate actively in the bargaining process. One district attorney reported that some judges strike bargains without his consent and that he could only "digress therefrom at his peril." Another estimated that perhaps one-quarter of the judges in his district might "suggest a good disposition" to counsel gathered in their chambers. "Sometimes," answered one prosecutor, "a judge will recommend a particular disposition after hearing some evidence." Of course, the degree of judicial participation depends, as many of the district attorneys pointed out, on the attitude of the particular judge. While most judges do not participate actively, some do, at least occasionally. And more may be tempted to do so since the General Assembly has now given active judicial participation its legislative blessing.

Due process may, however, restrict judicial participation that would otherwise be permissible under section 15A-1021. Because the judge has the final say on the defendant's sentence, a judge who participates in negotiations may coerce the defendant into pleading guilty. In a few reported cases, judges have delivered ultimatums to defendants who then capitulated and pleaded guilty.[8] When the judge actually threatens the defendant, his plea can scarcely be characterized as voluntary under any conceivable definition of that term.[9] Such judi-

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Although this rule does not necessarily reflect a constitutional command, federal practice rules are often transformed over time into constitutional commands. *See, e.g.*, Boykin v. Alabama, 395 U.S. 238, 247 (1969) (Harlan and Black, JJ., dissenting) ("What is now in effect being held is that the prophylactic procedures of Criminal Rule 11 are substantially applicable to the states as a matter of federal constitutional due process.").

8. *E.g.*, United States v. Tateo, 214 F. Supp. 560 (S.D.N.Y. 1963) (judge stated that he would impose consecutive maximum sentences if defendant went to trial and was found guilty); People v. Clark, 183 Colo. 201, 515 P.2d 1242 (1973) (judge warned defendant that he would put him away "forever" if he did not accept bargain); Letters v. Commonwealth, 346 Mass. 403, 193 N.E.2d 578 (1963) (judge threatened to impose a "life on life" sentence upon conviction unless defendant pleaded guilty).

9. "[T]he term [voluntariness] is an exceedingly ambiguous term. This stems not only from the difficulties involved in trying to discover a past state of mind but also from the fact that we do not even have a clear idea of what, if any, psychological facts or experiences we are looking for." ENKER, TASK FORCE REPORT: THE COURTS 108 (1967).

cial bullying, which coerces a defendant into pleading guilty and thereby violates his constitutional rights, is impermissible regardless of section 15A-1021.

At the same time, several district attorneys recognized, as other observers have elsewhere insisted,[10] that a defendant must know the judge's attitude before he can intelligently plead.

> "Sometimes the defense lawyer must have knowledge of what the judge is going to do to his man. This information seems to be necessary before some defendants will plead."

As one fatalist pointed out, "There is no need to reach a plea bargain if the judge will not agree."

The judge's attitude toward the proposed bargain may be ascertained in different ways, however.

> "Obviously, a sentence bargain requires participation of the judge."
>
> "[The judge] should be present because in a true plea bargain case the punishment should be agreed upon."
>
> "The judge should be willing to state what punishment he will impose. . . ."
>
> "The judge should be approached by both counsel after they have agreed to a proposed disposition."
>
> "Though he should not participate in negotiation, the judge has the authority finally to either accept or to reject such negotiations."

The preceding comments illustrate the many different ways in which counsel can ascertain the judge's attitude toward any proposed disposition.

Basically, these answers reflect two different views of the appropriate role of the judge in the bargaining process. Some see him as a "ratifier"; others see him as a "mediator." As a ratifier, the judge would not actively participate in the bargaining itself. Instead the prosecutor and the defense counsel would work out an agreement satisfactory to them and thereafter present it to the judge for his approval. Presumably, the judge might then exercise any one of three options: he might reject the deal; he might approve it; or he might approve it tentatively, subject to his receipt and review of the presentence report. If either defense counsel or prosecutor is familiar with the judge's usual

10. *E.g.*, Gollaher v. United States, 419 F.2d 520, 530 (9th Cir. 1969) (justice is better served by a forthright disclosure of the state of mind of the judge). *See also* Recent Development, *Judicial Plea Bargaining*, 19 STAN. L. REV. 1082, 1091 (1967) (failure to explain sentencing policy may undercut the understanding with which the defendant pleads).

sentencing policies, they should normally be able to work out an agreement that will satisfy him as well as themselves. The judge would then approve their agreements as a matter of course.[11] Even if the judge gave only his tentative approval, as might seem the more prudent course,[12] that practice would not usually yield different results except when the defendant has withheld pertinent information from his lawyer or when new information unexpectedly comes to light after the agreement has been presented to the judge.

The ratifying judge who simply disapproves the bargain may find himself mediating, however. Counsel will doubtless ask why he has rejected their agreement. His explanation may suggest the terms that would satisfy him. In practice, then, the distinction between ratification and mediation may make no difference because the judge will find himself inevitably drawn into the bargaining process.[13] If the judge explicitly assumes a mediating function, he will certainly go beyond the discrete "suggestion" or "hint" inherent in any disapproval during the ratification process. He may offer the defense counsel a particular sentence for his client's plea.

Unfortunately, such judicial mediation may impermissibly induce guilty pleas. Since the judge alone has the power to impose sentence, he does possess, after all, much greater power than does the ordinary mediator to induce acceptance of his terms. Indeed one surmises that the prosecutor's awareness of the judge's ultimate authority underlies the general distaste for judicial presence during the plea bargaining discussions because any opinion the judge expresses will circumscribe the prosecutor's ability to negotiate more favorable terms.[14] Even if the judge does not bully or threaten, the defendant will probably conclude

11. In many jurisdictions the judge uniformly follows any recommendation the prosecutor makes in order to reinforce the prosecutor's bargaining authority.

12. *E.g.*, United States v. Needles, 472 F.2d 652 (2d Cir. 1973). FED R. CRIM. P. 11(e)(2) permits the judge to withhold approval of any agreement until he has had an opportunity to see the presentence report.

13. Heberling, *Judicial Review of the Guilty Plea*, 7 LINCOLN L. REV. 137, 197 (1972) ("A system of ratification may indirectly result in judge participation through the successive submission and rejection of plea bargains."); *cf.* Brown v. Peyton, 435 F.2d 1352, 1356 (4th Cir. 1970) ("Continued bargaining, with repeated submission of agreements to the judge for his ratification, would involve the judge in the formulation of the final agreement."); Scott v. United States, 419 F.2d 264, 279-80 (D.C. Cir. 1969) (concurring opinion) (judicial ratification is "inherently coercive").

14. One respondent simply said: "I prefer not to have a judge present." Another alleged that his presence "at plea negotiations is generally counter-productive." *Cf.* White, *A Proposal for Reform of the Plea Bargaining Process*, 119 U. PA. L. REV. 439, 452 (1971) ("[T]he judge's presence actually inhibited meaningful negotiation and decreased the chances of reaching a plea bargain.").

that he will get a worse sentence if he declines the judge's offer, goes to trial, and is convicted. The voluntariness of the defendant's guilty plea in such circumstances is debatable.

Moreover, the judge who mediates risks compromising his obligations to the system. As an official in the system, he must see that justice is done, and he therefore has responsibilities apart from facilitating agreement between the prosecutor and the defendant. The defendant is presumably interested in securing the lightest possible sentence while the judge is presumably interested in imposing an appropriate sentence. In such cases, the judge's interests do not coincide with those of the defendant. The judge thus faces a dilemma: he must either pressure the defendant into accepting a particular agreement, or he must shirk his duty to see that justice is done.[15]

If the bargaining in which the judge has participated fails to produce any agreement and the defendant goes to trial, the judge's prior participation in the bargaining may preclude his trying the case fairly. Having assumed that the defendant is guilty, the judge must now presume him innocent. Having already decided what sentence the defendant deserves, the judge must now act as if he had never decided that question. Whether the average judge can summon that degree of impartiality is doubtful even though some judges have vigorously asserted that they can.[16]

Finally, as several district attorneys pointed out in their responses, judicial participation in the bargaining process may create the appearance of impropriety. Every judge who participates in bargaining subjects himself to charges of partiality if he subsequently finds the defendant guilty or imposes a stiff sentence on him after trial. Judges, who must always guard against even the appearance of impropriety,[17] may therefore conclude that they should decline any invitation to mediate a bargaining impasse.[18] One of the district attorneys observed: "In order to preserve his judicial authority the judge should steer as clear of bargaining as possible."

The latter two problems—partiality and the appearance of impro-

15. *See* note 8 *supra.*

16. *See* Lambros, *Plea Bargaining and the Sentencing Process*, 53 F.R.D. 509, 517 (1972).

17. ABA CODE OF JUDICIAL CONDUCT, Canon 2 states: "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities."

18. "'If a judge allows himself to get into [plea bargaining] he may do some good in the odd case, but in the long run he disparages himself and he disparages the administration of justice.'" Ferguson, *supra* note 2, at 46.

priety—may be solved short of banning judicial participation in bargaining, at least in multi-judge courts. One judge could do all the bargaining while his colleagues tried cases not "dealt out"; or, alternatively, a defendant's case would be assigned to a judge other than one with whom he bargained if he decided to contest rather than to concede his guilt.[19] The point here is that North Carolina judges who actively involve themselves in bargaining do not follow either of these procedures, and these procedures are not prescribed by the statute that permits judicial participation.

*Judicial Imposition of Different Sentences*

Judicial absence from the bargaining process itself does not eliminate the possibility that other judicial practices may still coerce pleas. In particular, the judicial practice of sentencing defendants who go to trial and are convicted more severely than otherwise similarly situated defendants who plead may illegitimately induce pleas.[20] The practice of differential sentencing is admittedly widespread among North Carolina judges because roughly three-quarters of the prosecutors agreed that in their jurisdiction a defendant who pleaded guilty generally received a lesser sentence than a similar defendant who was convicted after pleading not guilty. A very large percentage of defendants probably plead guilty solely because they believe they will be treated more leniently than if they contested the charges and lost. The unspoken promise of a lighter sentence may thus tempt the defendant to forego exercising his constitutional right to a trial, yet the federal courts have consistently admonished officials against practices which "chill" exercise of constitutional rights.[21]

Tacit plea bargaining, as the practice of pleading guilty in expectation of a lenient sentence has come to be known, is defended by many.[22]

19. *Cf.* United States v. Gallington, 488 F.2d 637, 639 (8th Cir. 1973) ("After rejecting a plea . . . a judge may excuse himself from further involvement in the case . . . ."); Brown v. Peyton, 435 F.2d 1352, 1359 (4th Cir. 1970) (dissent) ("If a plea bargain is rejected, it should be a simple matter for the judge to disqualify himself and send the parties to another judge for consideration of their revised agreement.").

20. *E.g.*, Scott v. United States, 419 F.2d 264, 274 (D.C. Cir. 1969) (trial judge may not "create incentives for guilty pleas by a policy of differential sentences").

21. *E.g.*, Thomas v. United States, 368 F.2d 941, 946 (5th Cir. 1966) ("When [the defendant] received harsher punishment than the court would have decreed had he waived his Fifth Amendment rights, he paid a judicially imposed penalty for exercising his constitutionally guaranteed rights.").

22. The basic defense is a practical one. Unless a defendant gains a tangible benefit from entering his plea, he will decline to do so; and the system will collapse under the burden of the resulting trials. *But see* Newman & NeMoyer, *Issues of Propriety in*

The common defenses were repeated in the survey responses. First, some view the plea of guilty as the "first admission of guilt and step in rehabilitation."[23] From that point of view, "no one gets *more* time than he should by pleading not guilty and going to trial [but] most people by pleading guilty get *less* time than the facts of the crime would ordinarily call for because they have just taken the first step forward in their own rehabilitation." The judgment that one who pleads guilty has taken the first step toward rehabilitation is, however, widely disputed.[24] The experienced defendant may simply weep crocodile tears of remorse because he knows that that is the role he is expected to assume in exchange for the light sentence. In any case, the defendant who goes to trial and is convicted may not understand the distinction between a fellow prisoner's being punished less severely and his own being punished more severely, and one ought not to discount the importance for purposes of rehabilitation of the defendant's belief that he was treated fairly.[25]

A second explanation for the sentencing differential is also thought to justify imposition of a more serious penalty. As one prosecutor observed: "Almost invariably more detrimental information comes out about the defendant at a full scale trial." Another made the same point more vividly: "Generally when the defendant pleads guilty it does not come out what a sorry S.O.B. the defendant is." The judge who sees the defendant only briefly at a plea taking does not have much of an opportunity to form any opinions based on his personal observation of the defendant, whereas the presiding judge may have considerable opportunity to observe the defendant during the course of a trial. Can one doubt that the defendant's leaping across the counsel table to attack the judge, as Mr. Manson did in his celebrated trial, affected the judge's assessment of Mr. Manson's dangerousness? On the other hand, it is possible that a defendant who conducts himself decorously during his trial might well receive a lighter sentence than one who pleads guilty.

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*Negotiated Justice*, 47 DEN. L.J. 367, 375 (1970) (the thesis that abolition of plea bargaining would result in many more trials is only an assumption).

23. *E.g.*, Gollaher v. United States, 419 F.2d 520, 530 (9th Cir. 1969) ("It is almost axiomatic that the first step toward rehabilitation of an offender is the offender's recognition that he was at fault.").

24. *E.g.*, Scott v. United States, 419 F.2d 264, 271 n.33 (D.C. Cir. 1969) ("A glib willingness to admit guilt in order to 'secure something in return' may indicate something quite the opposite of repentance. . . .").

25. *See generally* Ohlin & Remington, *Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice*, 23 LAW & CONTEMP. PROB. 495 (1958).

In any case, the judge's imposing a stiffer sentence at least partly on the basis of negative personal observations seems wholly defensible. Imposition by the judge of a stiffer sentence on the basis of negative information other than his personal observation seems less defensible, however, because that action suggests that the parties did not fully disclose to the judge either the pleading defendant's background or the circumstances of his crime.[26] Regrettably, the survey respondents did not specify the source of the additional negative information that in their judgment justified imposition of a stiffer sentence on the defendant who contested his guilt and lost.

What emerges from the trial may not be additional detrimental information about the defendant's character or criminal conduct but rather a judicial conviction that the defendant has lied. Many criminal defendants do tell tall tales which, if true, would make the maxim that truth is stranger than fiction a gross understatement. The judge may therefore increase the defendant's sentence to punish him for perjuring himself. Whether he should be thus punished for "committing" a crime with which he has not been charged (much less convicted) is questionable, however.[27] Even more questionable is the contention that the defendant should be punished for *needlessly* forcing the state to prove its case. One prosecutor put this point bluntly: "A defendant who obstinately forces the state to trial when his guilt is overwhelmingly apparent receives a heavier sentence than if he had admitted such obvious guilt." He added: "If a defendant has a plausible defense and there are substantial issues regarding guilt or innocence, the defendant is not penalized by carrying his question to the jury." The right to a trial is a constitutional right to which all defendants are entitled. Its exercise is not—and probably ought not to be—conditioned on the existence of a "colorable" factual claim of innocence. One can scarcely imagine the courts sustaining the constitutionality of a statute authorizing additional

26. If the judge felt compelled to impose upon a pleading defendant a heavier sentence than previously agreed to because new information had come to light, he might well permit the defendant to withdraw his plea. *Contrast* Vanater v. Boles, 377 F.2d 898 (4th Cir. 1967), United States v. Norstrand Corp., 168 F.2d 481 (2d Cir. 1948), *and* State v. Ramos, 85 N.M. 438, 512 P.2d 1274 (1973) (a guilty pleading defendant who has been advised that judge may impose a different sentence cannot complain if judge does so), *with* United States *ex rel.* Culbreath v. Rundle, 466 F.2d 730 (3d Cir. 1972), *and* People v. Morgan, 21 Cal. App. 3d 33, 98 Cal. Rptr. 165 (1971) (a guilty pleading defendant who has been advised that judge may impose a different sentence may nevertheless withdraw his plea if judge does so).

27. United States v. Bell, 457 F.2d 1231 (5th Cir. 1972) (greater sentence cannot be imposed at retrial just because a comparison of defendant's testimony at trial and before a grand jury indicated perjury at one or the other).

punishment for the defendant's "frivolous" exercise of the constitutional right to trial. What legislatures cannot do formally, judges ought not to do sub rosa.[28]

## INTERNAL MANAGEMENT PROBLEMS

### *Substantive Plea Bargaining Policies*

Most North Carolina prosecutors, like their counterparts elsewhere, have not reduced their plea bargaining practices to written policies, and most do not wish to formalize their practices in that manner.[29] Although one prosecutor did say that he thought he ought to establish bargaining guidelines, a fellow district attorney probably summarized the views of most North Carolina prosecutors when he said: "Every case is different; every defendant is different. There can be no hard and fast rules in this business." The self-evident truth of the preceding premise may not justify its conclusion, however.

The assertion that every case is different is an unilluminating truism. Of course, every case is different if for no other reason than that the specific offense has occurred at a particular time and place different from any other. In that sense every murder is different. Yet few would opt for a statute which defines murder as simply the "unlawful killing of a human being" subject to a penalty ranging from a suspended sentence to death to be imposed at the judge's (or jury's) discretion. While such a statute would impose no "hard and fast" rules, it would also permit such divergent treatment of similarly situated defendants that our sense of justice would be offended. Most of us would therefore opt for a statutory classification of different kinds of murder with a specified range of penalties more narrowly gauged to some judgment about the relative evil of the respective categories of homicide. The question is not then whether every case is different, but whether admittedly different cases nevertheless fall into categories which may be usefully defined for purposes of similar treatment.

On the latter question what North Carolina prosecutors do speaks

28. United States v. Stockwell, 472 F.2d 1186, 1187 (9th Cir.), *cert. denied*, 411 U.S. 948 (1973) (imposition of additional punishment "for taking the court's time with a trial" chills defendant's constitutional rights).

29. The American Bar Association has, however, recommended that every prosecutor's office should develop and reduce to writing guidelines on plea bargaining. ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION, Standard 2.5 (Tentative Draft 1970) [hereinafter cited as THE PROSECUTION FUNCTION].

more loudly than what they say. For despite prosecutional reluctance to formalize their bargaining policies, most district attorneys concede that they regularly consider some common factors when bargaining with a defendant. The most frequently mentioned factor is the strength of the government's case: the stronger the government's case, the less willingly the prosecutor bargains. The second most frequently mentioned factor was the defendant's general character and past record. The nature of the charge against the defendant and his willingness to assist law enforcement officials in their work were two other factors repeatedly mentioned by survey respondents. Several prosecutors said that they also took into account the feelings of the victim and law enforcement officers. The prosecutor presumably adopts a tougher bargaining stance where the victim and/or the police "demand" it. The identity of the judge and the defense attorney also apparently influences the prosecutor's judgment about the likelihood of prevailing at trial or getting a particular sentence. And while only two prosecutors explicitly identified expense as a relevant factor, the time and energy that any trial consumes must be an omnipresent factor. The variety of factors that prosecutors weigh in their bargaining decisions was perhaps best summarized by the district attorney who simply, if somewhat unilluminatingly, responded, "I consider a multitude of factors."[30]

While many of the factors cited above may be appropriate considerations, others may not be. Many commentators, for example, criticize prosecutors for relying so heavily on the strength of their cases. The legitimacy of the prosecutor's relying on the strength of his case may depend on his motivation: he may be interested in holding out for an appropriate disposition of the offender whose guilt is clear, or he may be interested in securing conviction of an offender whose guilt may or may not be clear. The most questionable aspect of the prosecutor's emphasis on the strength of his case is, however, the implicit assumption that "weak" cases should be dealt out rather than tried. Arguably, "weak" cases are the very ones that ought to be tried, at least where the weakness stems from conflicting evidence on the question of guilt.[31]

30. In a similar survey two-thirds of the responding prosecutors said that they weighed at least six factors in deciding whether to bargain and what to offer, and twelve percent said that they weighed ten or more factors. Note, 112 U. PA. L. REV., *supra* note 1, at 902.

31. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. CHI. L. REV. 50, 62 (1968); Specter, Book Review, 76 YALE L.J. 604, 606 (1967). A case may be "weak" for any of several reasons, of course, and the nature of the weakness may determine whether the case should be compromised or tried. *See generally* White, *supra* note 3, at 450-52.

Even the reliance upon character and past record, which most critics concede are relevant considerations (presumably, because they bear some relation to the defendant's culpability and need for punishment), poses difficult questions. On the basis of his background, the white, middle class defendant will qualify for lenient treatment far more often than will the black, ghetto defendant. Even if that result does not offend equal protection strictures, it may trouble the conscientious prosecutor.[32] And while few would dispute the prosecutor's considering the seriousness of the charge, many would dispute how he determines the seriousness of the charge. Does he look solely to the table of punishments? Or should he weigh community attitudes toward the crime? Again, the conscientious prosecutor may be troubled by whatever answer he gives to the preceding questions. If he looks beyond the table of punishments, he may feel that he is subverting the legislative will. If he ignores community sensibilities, he may feel as if he is a latter day Moloch.[33]

In spite of the difficulty of framing satisfactory bargaining guidelines, a few prosecutors have articulated relatively fixed policies in a small number of frequently recurring situations. One prosecutor states that "often in cases of first offenders, we reduce felonies to misdemeanors." Another insists that any DUI case "dealt out" must be dealt out at the district court level. In the superior court the prosecutor then tries every DUI case and thereafter opposes any plea for a restricted license. A second prosecutor also said his office had adopted formal rules for dealing with DUI cases but declined to specify their nature.

The prosecutor's reluctance to articulate substantive bargaining policies formally or even to explain those that are followed is understandable. Each case *is* different; moreover, the district attorney realizes that the articulation of rules will inevitably constrain his exercise of discretion. Particularly when the policies are published or otherwise become public knowledge, he faces two threats to his discretion. First, courts may scrutinize the validity of the policies either generally or as applied to a particular case. Second, defense counsel may insist on application of specific policies to his case even though his is a doubtful

32. *See* State v. Ashby, 43 N.J. 273, 204 A.2d 1 (1964) (per curiam) (gainfully employed college graduate who was married and had three small children agreed to seek private psychiatric care in exchange for nolle prosequi of indictments charging open lewdness).

33. *See generally* Brezner, *How the Prosecuting Attorney's Office Processes Complaints*, 27 DET. LAW. 3 (1959).

case for application, or alternatively, on their non-application because his case is arguably different even though it clearly falls within the category to which the policy applies.

Additionally, the prosecutor is an elected official who must periodically answer to a public that believes in the myth of full and effective enforcement. He risks losing his job if he admits that he does not always fully prosecute every criminal. Similarly, he risks losing his job if he does not convict a very high percentage of those whom he prosecutes. This need to build a prosecutional record that will satisfy the public may well explain many prosecutional bargaining policies. If the prosecutor, for example, tried only or even primarily the "weak" cases, his conviction rate—which is widely regarded as the one accurate measurement of his effectiveness—would probably drop dramatically.

The last example may nevertheless demonstrate the need for formally articulated bargaining policies. The disagreement over whether to bargain or try weak cases reflects a disagreement over the nature and purpose of the bargaining process itself. Some other bargaining policies reflect a greater emphasis on the practical need to move cases than on the fulfillment of the purposes of the criminal law.[34] Unless and until the prosecutor formally articulates his bargaining policies, neither the public nor the profession can fairly evaluate his priorities and practices. By refusing to articulate his bargaining policies, the prosecutor insulates himself from the public and professional criticism that is essential to the healthy functioning of the criminal justice system.[35]

And if the criminal justice system is, in fact, more administrative than adversary,[36] then those bureaucracies primarily responsible for its administration—the police and the prosecutor—may have to be subjected to the same kind of controls imposed on other administrative agencies.[37] That change would necessarily entail the articulation of bargain-

34. *Cf.* Scott v. United States, 419 F.2d 264, 277 (D.C. Cir. 1969) (prosecutor may not offer inducements "because his limited resources convince him he must deter defendants from demanding a trial"). The fact that a bargain serves the systemic need for efficiency is irrelevant so long as it is primarily motivated by rational judgments about the appropriateness and the effectiveness of the disposition.

35. THE PROSECUTION FUNCTION, *supra* note 29, at 66 ("[t]he public interest will be best served by having general policies, procedures, and guidelines known to the bar and, indeed, to the courts").

36. *See* Packer, *Two Models of the Criminal Process*, 113 U. PA. L. REV. 1 (1964).

37. *See* K. DAVIS, DISCRETIONARY JUSTICE 188-214 (1969); *cf.* Environmental Defense Fund, Inc. v. Ruckelshaus, 439 F.2d 584, 598 (D.C. Cir. 1971) ("Courts should require administrative officers to articulate the standards and principles that govern their discretionary decisions in as much detail as possible.") (footnote omitted).

ing rules and regulations subject to judicial review.[38]

*Office Procedures for Negotiating Pleas*

Although the public may be less interested in how the prosecutor organized his office for plea bargaining purposes, those procedures, no less than substantive policies, can affect the bargaining process.[39] Here again the survey showed a wide disparity in office practice. Some prosecutors retain nearly absolute control over all plea bargains, particularly in superior court cases.

> "In Superior Court, the District Attorney is the only one who [bargains]."
>
> "Normally, I participate [in bargaining] as a District Attorney."
>
> "The D.A. has the last word."

Other district attorneys delegate complete authority to the staff member handling the case.

> 'Each staff member has this authority [to determine the terms of an agreement]."
>
> "Each Superior Court prosecutor has full authority and discretion to dispose of any matter assigned to him for prosecution."

In fact, the actual practice in most offices probably varies between these two extremes. Several district attorneys who gave a subordinate wide latitude emphasized that they remained available for consultation.

> "It is not uncommon for the Assistant District Attorney to talk to me about a proposed disposition."
>
> "When possible, staff members consult each other for information or advice before making the decision."

Others pointed out that their subordinates reached agreements "within the limits prescribed by the District Attorney," "according to the policy of the District Attorney," or "with the consent of the District Attorney."

While a variety of factors such as the personality of the individual district attorney, the experience of his staff, and past practices may determine internal office organization, the single most important factor is probably the size of the office. In a small office, a district attorney may retain complete control over all bargaining while in a large office he cannot. In large offices, the district attorney must delegate bargaining authority to his subordinates, and he must therefore decide what procedures, if any, are necessary to insure uniform disposition of cases.

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38. I have elsewhere questioned the wisdom of such an approach. Bond, Book Review, 15 ARIZ. L. REV. 1031 (1973).

39. *See generally* White, *supra* note 3, at 442-43, 447.

Most district attorneys in this state, as elsewhere, rely on an informal percolation of questions upward to them from their staff and an equally informal percolation of answers downward from them to their staff. This informal process may well still be satisfactory in even the largest offices in this state because they do not exceed ten or twelve members. In other states where some prosecutional staffs run into the hundreds, more formal procedures may be necessary. These more formal procedures might include designation of one or more attorneys as sole negotiators and/or a requirement that each attorney who negotiates a plea write a short opinion for office files explaining why he agreed to the particular disposition. However burdensome such procedures may seem, they may be necessary in larger offices. And if the judiciary ever begins to scrutinize plea agreements as it scrutinizes other administrative decisionmaking, they may become necessary in the smallest offices.

Prosecutors—even those whose staffs are small—might nonetheless profitably follow such procedures. Maintaining an office file of bargaining opinions might serve several useful purposes. The collected opinions will over time provide the office with more thorough and sophisticated guidance as the general bargaining policies are interpreted and applied. They may insure continuity of treatment for defendants despite personnel changes on the staff. The need to justify the bargain in writing may also force the prosecutor to consider his decision more carefully than he otherwise would. He will necessarily be forced periodically to reconsider the assumptions implicit in his bargaining policies. All these consequences seem desirable although some prosecutors may conclude that they cost too much in time-consuming paperwork.

## CONCLUSION

This article has had a two-fold purpose: first, to describe plea bargaining practices in North Carolina and, second, to raise questions about the legitimacy and desirability of those practices. I have not sought to answer definitively the questions raised although my preference for "rationalization" of the plea bargaining system through adoption of office bargaining policies doubtless showed through the discussion and colored it. The complexity of the problems posed by plea bargaining and the debatability of solutions proposed probably precludes definitive answers.

But neither the complexity of the problems nor the debatability of solutions should preclude a search for answers, however illusive they

may presently seem. Plea bargaining is a central feature of the criminal justice system, and lawyers have a professional obligation to insure its fair and just operation. For too long the bar has ignored the troublesome questions inherent in many common plea bargaining practices. And now that public concern about the propriety of plea bargaining has forced the bar to acknowledge its existence, the bar has discussed it in sweeping generalizations that obscure rather than illuminate the difficult questions that must be answered. The rural prosecutor whose light caseload permits him to try every case does not contribute intelligently to the debate by condemning all plea bargaining as inherently bad. And city prosecutors cannot justify every plea bargaining practice by insisting that the criminal justice system would break down if all plea bargaining were prohibited. Hopefully, this article will stimulate reflections on some of the narrower and more specific questions, for society need not choose between no plea bargaining or "lawless" plea bargaining. Rather, the plea bargaining process must be structured so that it facilitates rather than frustrates the purposes of the criminal justice system.

## APPENDIX[40]

1. Approximately what percentage of all pleas handled through your office are guilty pleas?

| | | | |
|---|---|---|---|
| A 90-95% | F 50% | K 66⅔% | P 80% |
| B 60% | G 33⅓% | L 80-90% | Q 50% |
| C No answer | H 75% | M 50%[41] | R 75% |
| D 70% | I 85% | N 85-90% | S 95% |
| E 90% | J 60% | O 54%[41] | T 50%[41] |

40. This appendix summarizes the responses to each of the questionnaire inquiries. As each district attorney was assured that his individual answers would be treated confidentially, each respondent is identified solely by a letter designation.

Because the questionnaire inquiries invited "free form" answers, summarization required editing. A "sure" is reported as a "yes"; a "once in awhile," as an "occasionally." Although such editing probably does not mislead, other editing decisions might create a slightly different nuance from the actual response. For example, an answer that the violence of any crime was a factor in the prosecutor's bargaining decision was listed as a "nature of the crime" response. Other answers are sometimes reported without the qualifications or explanations that respondents added. The answers to question six, for instance, do not reflect the subtlety of the actual answers. In such instances, however, the answers are either explored fully in the text itself or explained in the notes to this appendix. Occasionally a respondent did not answer a question, or his answer defied summarization. In those instances, the respondent is recorded as not answering.

The questions parallel those asked in a survey conducted over a decade ago by the editors of the Pennsylvania Law Review. Using basically the same questions facilitated comparison between results of the present survey with that earlier one. *See* Note, 112 U. PA. L. REV. *supra* note 1.

41. These respondents specified that their estimates applied only to superior court cases.

2. Is it the practice of your office to make agreements with criminal defendants (or their counsel), when appropriate, in order to obtain pleas of guilty?[42]

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| A | Yes | F | Rarely | K | Yes | P | Yes |
| B | Yes | G | Yes | L | Yes | Q | Yes |
| C | Yes | H | Yes | M | Generally not | R | No |
| D | Yes | I | No | N | Yes | S | Yes |
| E | Yes | J | Rarely | O | No | T | Yes |

3. What type of agreements does your office make?

| | a. Do you agree to reduce the charges? | b. Do you agree to drop charges? | c. Do you agree to recommend a particular disposition? |
|---|---|---|---|
| A | Yes | Frequently | Sometimes |
| B | 15% | No | 15% |
| C | Yes | Yes | Yes |
| D | Yes | Yes | Infrequently |
| E | Yes | Yes | Yes |
| F | Sometimes | Yes | Rarely |
| G | Yes | Yes | Yes |
| H | Sometimes | Rarely | No more |
| I | Occasionally | No | No |
| J | Yes | Yes | Rarely |
| K | Yes | Sometimes | Yes |
| L | Sometimes | Seldom | Frequently |
| M | Generally not | Yes | No |
| N | Yes | Yes | Yes |
| O | Occasionally | Occasionally | Occasionally |
| P | Yes | Yes | Yes |
| Q | Yes | Yes | Yes |
| R | Yes | Seldom | Sometimes |
| S | Yes | Yes | Yes |
| T | Yes | Rarely | Yes |

4. Out of all guilty pleas handled through your office, approximately what percentage are bargained pleas?

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| A | 80% | F | 20% | K | 15% | P | 50% |
| B | 15% | G | 50%[43] | L | 50% | Q | 75% |
| C | 50%[43] | H | 70% | M | No answer | R | 15% |
| D | 20% | I | 10% | N | 40-50% | S | No answer |
| E | 50% | J | 10% | O | 50%[43] | T | 15% |

5. Would the percentage of guilty pleas decrease if plea bargaining were eliminated?

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| A | Yes | F | No | K | Yes | P | Yes |
| B | No | G | Yes | L | Yes | Q | Yes |
| C | Yes | H | Yes | M | Yes | R | Yes |
| D | No | I | No[44] | N | Yes | S | Yes |
| E | Yes | J | No | O | Yes | T | Yes |

6. Has your office established any formal rules or procedures with respect to plea bargaining? If so, what kind?[45]

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| A | No | F | No | K | One | P | No |
| B | No answer | G | Some | L | Yes | Q | Some |
| C | Yes | H | No | M | No | R | No |
| D | No | I | No | N | No | S | One |
| E | No | J | No | O | Yes | T | No |

42. Numerous respondents emphasized that they negotiated pleas only *when appropriate.*

43. These respondents specified that their estimates applied only to superior court cases.

44. This respondent predicted that the number of guilty pleas would increase if prosecutors refused to bargain. He reasoned that if the hope of negotiating a plea were removed, "defense attorneys would go ahead and plead (their clients) guilty and argue punishments to the court."

45. See text accompanying notes 29-30 *supra* for a fuller discussion of the answers to this question.

7. Are the terms of a particular agreement determined solely by the staff member prosecuting the case?[46]

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| A | Yes | F | Yes | K | Most of the time | P | No |
| B | Yes | G | Usually | L | Yes | Q | Yes |
| C | Usually | H | By and large | M | Yes | R | No |
| D | No | I | No | N | Not always | S | Mostly |
| E | Yes | J | Yes | O | Yes | T | No |

8. What factors will influence staff members to plea bargain with a particular defendant?[47]

| | 1 Nature of charge | 2 Defendant's past record | 3 Strength of case | 4 Feelings of victims | 5 Identity of judge | 6 Feeling of law enforcement officers | 7 Expense of case | 8 Willingness of defendant to help | 9 Fairness of sentence | 10 Recommendation from police/probation officer/lawyer | 11 Availability of witnesses | 12 Number of charges against defendant |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| A | X | X | X | X | | | | | | | | |
| B | | | | | | | | | | | | |
| C | | | | | | | | | | | | |
| D | | | | | | | | | | | | |
| E | X | X | X | X | X | X | X | | | | | |
| F | | | | | X | | | | | X | | |
| G | X | X | X | | | | | | | | X | |
| H | | X | X | | | | | X | | | | |
| I | | | | | | | | | | | | |
| J | | | X | | | | | X | | | | |
| K | | | X | | | | | X | | | | |
| L | | X | | | | | | X | | | | |
| M | X | X | X | | | | | X | | | | |
| N | | | X | | | | | | X | | | |
| O | | | X | | | X | X | | | | | |
| P | X | X | | | | | | | | | | |
| Q | | X | X | | | | | | | | | |
| R | | X | X | | | | | X | | | | X |
| S | | | X | | X | | | | | | | |
| T | | X | X | | | | | | | | | |

46. See text accompanying note 39 *supra* for a fuller discussion of the answers to this question.

47. See text accompanying notes 29-38 *supra* for a fuller discussion of the answers to this question.

9. Who normally initiates the first bargaining discussion between defendant and his representative and the state's (government's) representatives?

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| A | Usually Defendant | F | Defendant | K | Defendant | P | Defendant |
| B | Usually Defendant | G | Defendant[48] | L | Defendant | Q | Defendant |
| C | No answer | H | 90% Defendant | M | Defendant | R | Defendant |
| D | Defendant | I | Defendant | N | Both | S | Defendant |
| E | Both | J | Both | O | Defendant | T | Defendant |

10. (a) Before counsel is retained or appointed, is it your office's practice to plea bargain with a defendant?
(b) After counsel is retained or appointed, is it your office's practice to plea bargain with a defendant?[49]

| | a. | b. | | a. | b. |
|---|---|---|---|---|---|
| A | No | No | K | Rarely | No |
| B | No | No | L | Not normally | No |
| C | No | No | M | No | No |
| D | No | No | N | Not if he desires an attorney | No |
| E | No | No | | | |
| F | No | No | O | Not if he desires an attorney | No |
| G | No | No | | | |
| H | No | No | P | Sometimes | No |
| I | No | No | Q | Seldom | No |
| J | No | No | R | No | No |
| | | | S | No | No |
| | | | T | No | No |

11. Does your office ever prepare indictments with plea bargaining in mind?

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| A | No | F | Yes[51] | K | Yes | P | Yes |
| B | 5% | G | Yes[51] | L | Yes | Q | Yes |
| C | No | H | No | M | Occasionally | R | No |
| D | No | I | No | N | Yes[51] | S | Rarely |
| E | Yes[50] | J | No | O | No | T | No |

48. This respondent probably explained the reluctance of most prosecutors to broach the subject of a plea: "It's always better for the defense lawyer to initiate. The State never negotiates from a position of strength, but from weakness."

49. This was an embarrassing question to ask because negotiating directly with a defendant after he has counsel is unethical. All the respondents recognized that; indeed, very few prosecutors will talk to a defendant before he has counsel even though that is permissible in some circumstances.

50. This respondent emphasized that he never "overcharged." Distinguishing "overcharging" from "full prosecution" is difficult, if not impossible, of course.

51. What most prosecutors usually do, as these respondents explicitly state, is charge the highest offense which the evidence will sustain.

12. What roles does the judge play in the bargaining process?

| | a. (a) Is a judge ever present at plea bargaining sessions? | b. (b) Should a judge be present at plea bargaining sessions? | c. (c) Do you advise him of any agreement prior to or at the time of pleading? | d. (d) Does he demand that any agreement be made a matter of record? |
|---|---|---|---|---|
| A | Sometimes | No | Yes | Yes |
| B | No | No | Yes | Yes |
| C | Sometimes | No | Yes | Yes |
| D | Sometimes | Sometimes | Yes | Yes |
| E | Yes | Yes | Yes | Yes |
| F | Frequently | Sometimes | Sometimes | Sometimes |
| G | Yes | No | Yes | Yes |
| H | Sometimes | No | Yes | Yes |
| I | No | No | No | No answer |
| J | Occasionally | Yes | Yes | Yes |
| K | No | No | Yes | Yes |
| L | No | No | Yes | Yes |
| M | Occasionally | Occasionally | Yes | Yes |
| N | Sometimes | Yes | No | No |
| O | Rarely | No | Yes | Yes |
| P | Yes | Yes | Occasionally | Yes |
| Q | Rarely | No | Yes | Yes |
| R | No | No | Yes | Yes |
| S | Yes | Yes | Yes | Yes |
| T | Yes | Yes | Yes | Yes |

13. In the absence of any agreement, does a defendant who pleads guilty generally receive a lesser sentence than a similar defendant who pleads not guilty and goes to trial and is found guilty?[52]

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| A | Sometimes | F | Sometimes | K | Yes | P | Yes |
| B | Yes | G | Usually | L | No answer | Q | Yes |
| C | No answer | H | Yes | M | No | R | Yes |
| D | Usually | I | Yes | N | Yes | S | Yes |
| E | Yes | J | No | O | Yes | T | Yes |

14. Will the new statutory authorization of bargaining (N.C. GEN. STAT. § 15A-1021 (Supp. 1975)) alter your bargaining practices at all?[53]

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| A | No | F | No | K | Yes | P | No |
| B | No | G | No | L | No | Q | No |
| C | No | H | Yes | M | Possibly | R | No |
| D | No | I | No | N | No | S | No |
| E | No | J | No | O | No | T | No |

52. See text accompanying notes 20-28 *supra* for a fuller discussion of the answers to this question.

53. See text accompanying notes 4-10 *supra* for a fuller discussion of the answers to this question.