

Trial by Plea Bargain: Case Settlement as a Product of Recursive Decisionmaking

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Through presentation of ethnographic research findings on court-appointed defense attorneys, this article examines plea bargaining as a component of a recursive process for deciding whether a case should be settled immediately or proceed further. The decisionmaking process has three types of activities: assessing the offer for a guilty plea, negotiating the terms of a plea bargain, and counseling the defendant and deciding on a course of action. Until a criminal case is actually settled either through a final plea agreement or a jury trial, this decisionmaking process occurs over and over again. Viewed as a component of this recursive process, plea bargaining encompasses multiple episodes of negotiating behavior as well as a wide range of formal litigation proceedings. Perhaps more important, plea bargaining and trial procedures can actually be seen to converge. I conclude that this mode of plea bargaining is not merely an effective method for representing defendants but perhaps equally or more effective than trial. Some important limitations of the findings are also discussed.

A great deal of research has focused on the settlement of criminal cases through guilty pleas.¹ Among this research, the vast majority portrays plea bargaining primarily as a single episode of negotiating behavior.² Scant attention is paid to the facts that many criminal cases are not immediately plea bargained,

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¹ E.g., Albonetti 1992; Alschuler 1975; Blumberg 1967a, 1967b; Farr 1984; Feeley 1979; Harris & Springer 1984; Heumann 1975, 1978; Holmes, Daudistel, & Taggart 1992; LaFree 1985; Mather 1979; Maynard 1984a, 1984b, 1988; McConville & Mirsky 1990; McDonald 1985; Mileski 1971; Neubauer 1974; Padgett 1990; Pritchard 1986; Rosett & Cressey 1976; Ryan & Alfini 1979; Skolnick 1967; Sudnow 1965; Uhlman & Walker 1979; Utz 1978.

² E.g., Albonetti 1992; Alschuler 1975; Blumberg 1967a 1967b; Church 1976; Eisenstein & Jacob 1977; Eisenstein, Flemming, & Nardulli 1988; Farr 1984; Feeley 1979; Mather 1979; McConville & Mirsky 1990; McDonald 1985; Mileski 1971; Rosett & Cressey 1976; Skolnick 1967; Sudnow 1965; Uhlman & Walker 1979.

that attorneys often negotiate plea bargains numerous times on behalf of a single client, or that plea bargaining may at times actually parallel the adversarial proceedings of trial.³

By focusing on findings generated through ethnographic research on a private, nonprofit corporation of court-appointed defense attorneys (hereinafter referred to as “Defenders”),⁴ this article examines plea bargaining as part of the defense attorney’s recursive consideration of whether a case should be settled immediately or proceed further. “Proceeding further” means that, until an attorney achieves an acceptable plea bargain, s/he proceeds to litigate a case throughout various court hearings that could ultimately lead to a jury trial and sentencing. Viewed in this manner, plea bargaining can be seen to encompass not only multiple episodes of negotiating behavior but also a wide range of formal litigation proceedings. As such, distinctions made between plea bargaining and taking a case to trial can actually be seen as relatively minor.

Methods

This study was part of a larger study that focused on the everyday defense behavior of a private, nonprofit corporation of court-appointed defense attorneys situated in a southern California location I refer to as “Smith County.” The study was conducted between September 1984 and September 1988. The data were collected through qualitative research techniques.

At the time, the system for defending indigent persons in the area consisted of a limited Public Defender’s Office, a Central Office of Defense Services, and a private contract system. The corporation studied was one of the many private contract groups in the area. It differed from the others, however, in at least one crucial way: This corporation had a reputation in the criminal justice community for providing high-quality defense service to indigent persons (for further discussion on this issue, see Emmelman 1993).

The population studied consisted of all the attorneys employed at the downtown branch of this corporation. About 15 attorneys were employed at any given time in that office. Approximately half of the attorneys were men and half were women. Their ages ranged from the early 30s to the early 50s; the average

³ One exception to this is Maynard’s (1984a, 1984b) discourse analysis on misdemeanor plea bargaining. He finds that delays through continuances or the setting of trial dates are used in some negotiations as important bargaining strategies to mitigate or enhance a defendant’s penalty. He also notes (1984b:101) that requests for delays often result in *rounds* of negotiation that usually produce guilty pleas or dismissals. Precisely how Maynard’s study differs from or is similar to the current one is discussed throughout this article.

⁴ The names of individual Defenders as well as the county in which the studied corporation is located are pseudonyms.

age was in the late 30s. With the exception of one African American attorney, who worked at this office for only a brief time, all the attorneys were white. All but one of the attorneys handled felony cases.

Entry into the setting was gained through an internship program carried out between the university and the defense corporation. (I was a graduate student at the time.) Once permission had been received to conduct research, both formally (from the university's Human Subjects Committee) as well as informally (from the attorneys who participated in the study), I initially collected data through participant observation: For an average of about eight hours per week, I observed the Defenders' behavior while serving as a student intern and law clerk.

As a student intern and law clerk, I was permitted to observe virtually every aspect of the Defenders' behavior—including that which occurred in such behind-the-scenes places as the attorneys' offices, judges' chambers, and jail. I was also accepted by these attorneys as an "insider" to the extent that some invited me to their homes for parties or other get-togethers. Only one attorney appeared to regard me with any suspicion.

Throughout the observation period, I recorded field notes, which I later analyzed through a grounded theory methodology (see Glaser & Strauss 1967 and Lester & Hadden 1980 for further details on the use of this methodology). To clarify and refine these preliminary research findings, I conducted in-depth interviews toward the end of the study.

The interviews were designed to ascertain the manner in which the Defenders routinely defend criminal cases. To avoid predisposing responses and thereby biasing the findings, questions were open-ended and phrased as neutrally as possible. After some preliminary questions regarding attorneys' background and general perceptions of other court actors, for example, I began the interview with "What do you typically do with a case once you have received it? How do you typically handle it?"

All the attorneys who were then employed by the corporation (five men and six women) as well as four former Defenders (three men and one woman) participated in the interviews. The interviews lasted between three and a half and four hours. About half of this time was devoted to the topic of plea bargaining. All the interviews were taped, transcribed, and then later analyzed.

The importance of these interviews in the research process and especially their value in this study cannot be overemphasized. While I *observed* cases being plea bargained at virtually every point in the career of criminal cases, it never occurred to me that such apparent irregularity in plea bargaining was actually part of the Defenders' plea bargaining strategy. It was only while interviewing that I discovered that the Defender's decision to plea bargain a criminal case is always tentative, frequently recur-

ring, and may actually result in a completed jury trial! The interview material presented in this study reveals this silent, taken-for-granted plea bargaining strategy that transcended the researcher's observations.

Clearly, a major weakness in this study is that the research population is not representative of either all criminal defense attorneys or even all criminal defense attorneys who represent indigent persons. However, an important strength of the study is that it sheds light on a largely elusive and previously unstudied decisionmaking process that may very well be prevalent among a substantial number of other defense attorneys. It is hoped that this study will inspire further and more systematic research on larger, more representative samples of attorneys.

An Overview of Smith County's Plea Bargaining System

In Smith County, a "plea bargain" is an agreement made between the prosecuting attorney and the defendant (usually through the defendant's attorney) which stipulates that the defendant will plead guilty to or not contest a fixed number of criminal charges in exchange for some sort of reduction in the number and/or the seriousness of the original criminal charges. Although the Smith County District Attorney maintains that s/he does not do sentence bargaining, one stipulation frequently added to plea bargains refers to the District Attorney's lack of opposition to time in custody being spent in the local jail rather than in the state prison. This stipulation is represented in agreements by the acronym "N.O.L.T.," which means "no opposition to local time."

Unlike judges in some other jurisdictions, Smith County judges are encouraged to facilitate case settlements (see also Maynard 1988; Ryan & Alfini 1979). Consequently, when the prosecutor and Defender agree on the terms of plea bargains, judges generally accept those terms (cf. Skolnick 1967)).⁵ When the attorneys encounter problems in reaching agreements, however, judges act as arbiters. In this arbitration, the judge typically exerts pressure on, or makes promises regarding sentencing to, either attorney in order to reach a settlement.

As may be apparent, plea bargain negotiations in Smith County typically involve the defense attorney, the prosecuting attorney, the judge, and the defendant. They may at times also involve co-defendants and (even more rarely) an alleged victim.

⁵ On those rare occasions when a judge rejected a plea bargain agreed on by the prosecutor and the Defender, the two attorneys generally took the case before another judge who presided over court hearings further along in the adjudication process (cf. Utz 1978). Rarely if ever did the Defenders challenge judges for plea bargaining issues. This was because attorneys are allowed only one preemptory challenge to a judge per case and the Defenders usually wanted to save that challenge in case they were forced to take the case to trial in front of an unfavorable trial judge.

Regardless of who they involve, however, rarely if ever do the Defenders carry out all aspects of plea bargaining in the presence of all the actors involved. Instead, their activity among prosecution allies and the judge is usually separated in time and space from their activity among defense allies.

Plea bargains in Smith County are also negotiated almost anywhere and at almost any time throughout the life of an ongoing criminal case. It most obviously occurs on the date of scheduled settlement hearings when one can observe blatant negotiating behavior in the judge's chambers, in the hallways outside of courtrooms, and/or in the courthouse "holding tanks" where incarcerated defendants await scheduled court appearances. However, as will be discussed below, plea bargains may also be deliberately and sometimes clandestinely negotiated before, during, or after other types of court hearings.

Wherever or whenever plea bargaining takes place, the successful negotiation is always followed by a public hearing wherein the agreement is formalized and officially sanctioned.

Findings

The Defenders' goal throughout the course of any criminal case is to mitigate the harm that could befall a defendant (for further discussion on this issue, see Emmelman 1990, 1993). The Defenders maintain that because the prosecutor is unlikely to file charges in cases where the evidence is weak, trials are rare and plea bargains are the most likely method through which they seek their goal. Nevertheless, although plea bargaining is the most common method for case disposal, *it is always considered in light of the alternative of proceeding further with the case.*⁶ This ultimately means that many cases are not immediately plea bargained, that some cases involve multiple episodes of plea bargaining, and that the negotiation of plea bargains sometimes entails a wide range of formal litigation proceedings.

The process of deciding whether a case should be settled immediately or proceed further involves three types of activities. These are (1) assessing the offer for a guilty plea, (2) negotiating the terms of a plea bargain, and (3) counseling the defendant and deciding on a course of action. While these activities are in-

⁶ In discussing misdemeanor plea bargaining, Maynard (1984b:78) states: "For each case, the defense and prosecution must determine some disposition (which may be anything from a dismissal to a jail sentence), or must agree to a trial date, or must agree to continue the case for reconsideration at a later time." The concept of "proceeding further" differs in that it is a less formal outcome of a plea bargaining episode and does not specifically mean that a case will be scheduled for trial or that another settlement hearing will be scheduled. (All the Defenders' cases have tentative trial dates when they are received, and nonserious felonies have two settlement hearings scheduled automatically.) Instead, it means that a case will simply proceed to whatever formal proceeding it ordinarily would if it had been scheduled for trial.

terrelated, they do not necessarily emerge in the sequence presented here and they may be more apparent at some times than at others. Sometimes the Defender counsels the defendant prior to intercepting an actual offer, for example, and sometimes the attorneys negotiate the terms of a plea bargain before conferring with the defendant. In addition, sometimes the Defender makes an offer and the DA's acceptance of it precludes any subsequent need for assessment as well as perhaps any further negotiation. Regardless of the order in which the types of activities occur, however, the Defenders always consider the bid for a guilty plea, always confirm the terms of a plea bargain through some type of negotiation technique, and are obligated to counsel the defendant prior to deciding on a course of action.

The discussion below examines the details of this decision-making and how it can lead to multiple episodes as well as rather unique modes of plea bargaining.

Assessing the Offer for a Guilty Plea

Assessing the offer for a guilty plea entails two types of evaluations. The first involves the Defenders' understanding of the "value of a case." The second involves matters associated with the temporary postponement of settlement. Ultimately, both types of evaluations involve consideration of whether a case should proceed further. Thus, while Maynard (1984b) argues that case disposition delays are bargaining strategies, they can also constitute part of the defense attorneys' tacit repertoire of strategies which they contemplate *prior to and apart from* interactional negotiation.

Assessing the Offer in Light of "the Value of a Case"

In assessing the offer for any defendant's guilty plea, the Defenders rely on their understanding of "the value of a case." The value of a case is determined by (1) the seriousness of the crime (which means both how serious the charge itself is as well as how serious or atypical the actual crime is), (2) the strength of the evidence (which entails an evaluation of the evidence on both sides of the issue), and (3) the defendant's background characteristics (which include but are not limited to the defendant's prior criminal record) (cf. Eisenstein & Jacob 1977; Maynard 1984a; McDonald 1985; Neubauer 1974; Rosett & Cressey 1976; Utz 1978).

In determining the value of a case, the Defenders distinguish between cases they believe might be won at trial, those in which the evidence against the defendant appears quite strong, and those that have some weaknesses but not enough to completely win a case (cf. Emmelman 1996; Mather 1979). These estimates result in tentative conclusions that some cases should be plea bargained immediately, others should proceed further, and others

should be tried. This was explained by Kathy in the following comments:

There are cases that you know [in the beginning] are gonna settle. . . . You know that there's simply no defense to the case—not a defense that's gonna be worthwhile in terms of having, exposing the person to a state prison sentence and drawing out the procedures for three to six months. . . . There's [another] category of case where it's not a triable case. You see it's not a triable case. However, the [first] offer is bad. Something may shake out at the [preliminary hearing] that is useful. Or the offer may be better in Superior Court than in Municipal Court. Or there's a motion that needs to be run . . . you do whatever needs to be done and you settle the case in Superior Court. But all along you know this case isn't going to trial. . . . The third case is the case you know is going to go to trial. You know from the day that you get the case that it's going to be tried. That's because your client has no record and it's clear from talking to the client and reading the discovery that a jury could acquit.⁷

Although the Defenders tentatively conclude at this juncture how cases might best be handled, they reach no final conclusion yet. Instead, they are obliged to consider further the virtues of plea bargaining and to relay that information to their clients (cf. American Bar Association 1986:70). In carrying out this task, the Defenders consider what offer for a guilty plea they should expect to receive in a case.

The value of a criminal case indicates to the Defenders what offer or reduction in penalties they should expect to receive for their client's guilty plea (cf. Feeley 1979; Mather 1979; McDonald 1985; Neubauer 1974; Rosett & Cressey 1976).⁸ As Ingmar explained,

The factors that you take [into account when deciding if the District Attorney's offer is good] are what did the client really do. Did he do anything that terrible? What's his record like? Is he on probation? Are there evidentiary issues in the case that you can point out to the DA maybe sometime later—that you can show him his case isn't that good even though you know you'll probably lose at trial? Will the case look better or worse

⁷ Indented excerpts are transcripts of taped interviews. Because this is not a conversational analysis, however, I have omitted such things as silences and overlapping talk as well as nonessential repetitive or digressive comments (these are indicated by ellipses). Information in brackets refers to interviewer comments (as noted), to information translated from the Defenders' somewhat opaque argot (e.g., references to a "459" has been translated into "burglary" where appropriate) or to other contextual information necessary to understand certain comments.

⁸ Sudnow (1965) found that public defenders employ concepts of "normal crimes" which signify "typical reductions" (or offers for guilty pleas) during plea bargaining. The Defenders employ similar concepts. However, the Defenders' concept of a "normal" crime is equivalent to their understanding of a case *whose value* is average or typical. This understanding presupposes and is juxtaposed beside their understanding of cases whose values are "better" or "worse" than average and thus signify better or worse offers for guilty pleas.

after the preliminary hearing? And the other thing is just having been there before and knowing what you're probably gonna get offered. And if you haven't been there before, you've talked to other people. You say "I got this case, and these are the facts, and this is his record, and what do you think a good offer is?"

Based on their understanding of what offer or penalty a case is worth (i.e., the value of a case), the Defenders assess the DA's *actual* offer for a guilty plea. The issue in this assessment is *not* whether the DA offers any reduction in potential costs to the defendant but instead whether the reduction is "fair" or "reasonable" given the value of the case (cf. Feeley 1979; Mather 1979; McDonald 1985; Neubauer 1974). If it is not, Defenders deem it unacceptable. As Mindy explained,

[A] first time [auto theft] is worth a misdemeanor. They might not give it to you. They might not offer it to you. But that's all its worth. . . . If [the DA says] we'll offer you a felony and we won't oppose local time, that's an offer where you can say "stuff it." Because there's no reason not to go to trial on that offer. Because if your guy loses after trial, if he's a first time offender he's not gonna be hurt. So they haven't offered you anything. [Interviewer: How do you know he's not going to be hurt?] Because there's not a judge around here who's gonna give prison on first offense auto theft.

As Mindy's comments suggest, when an offer is deemed "unreasonable," the Defenders tentatively conclude that a case should proceed further rather than settle immediately.

Assessing the Offer in Light of Temporary Postponement

Even when the DA makes a reasonable offer for a guilty plea, the Defenders consider whether an offer might get better further along in the adjudication process. Among other matters, the Defenders consider whether a subsequent DA or judge is more lenient (cf. McDonald 1985; Utz 1978). As Janet explained:

If the offer can't get worse—and you know that because you've been doing [plea bargains] for awhile [and] you know what the standard offers are—the question then sometimes becomes are you judge shopping. Is it better to take the offer now because you have this particular judge that you're in front of, or is it better to wait 'til later when they're probably gonna make you the same offer, and have that judge sentence you? . . . It also depends on who the District Attorney is in that department who's settling the cases. I think I mentioned before that sometimes that District Attorney who is kind of like a boss—a higher-up person in the DA's office who's handing out all the offers—gets burned-out and the offers get real bad.

All other things being equal, the Defenders generally believe that unless an initial offer is better than average, offers for guilty pleas will not get any worse and could become more favorable to

the defendant further along in the adjudication process. They explain that this occurs because either the prosecutor loses witnesses or better evidence eventually turns up on behalf of the defense. As Robert explained,

[Plea bargaining is] pretty similar [in municipal and superior courts]. Personalities are different. You have a different prosecutor and a different judge. And that often makes a difference. . . . Then there's always the possibility that you've developed some additional information during the interim that affects how you're gonna plead. First, what the offer might be, then also evaluating the offer. . . . [W]hat the prosecutor tells you is that the deals are never going to get any better. [That the] inducement to plead early is that that's the best deal you're going to get, and it's going to get tougher on you if you proceed further. In fact, it doesn't seem to be the case. The defendant can get pretty much the same deal [in superior court]—although there are no guarantees about that.

Nevertheless, sometimes the prosecution case gets stronger further along in the litigation process, and the prosecutor will offer a defendant less incentive to plead guilty than previously. In response to my question, "Do plea bargains tend to get better in superior court?" Janet lamented,

It depends. . . . For example, I have a case now, I think the client was offered local time [in municipal court]. They just came up with 2 prison priors on this guy. He swears they aren't his. I don't believe him. I think they're his. I'm afraid they're his. In which case the deal's gonna get a lot worse. So he's gonna go to trial. And that's okay. But a lot of times they do get better. [Interviewer: Most of the time?] They don't usually get worse. They very rarely get worse. They usually either stay the same or get better.

When the Defenders deduce that the offer for a guilty plea either will not or could not get any worse but could get better, they tentatively conclude that the defendant should proceed further with the case. No final conclusion is reached until after they counsel the client, however. The details of this interaction and its possible outcomes are discussed later.

Negotiating the Terms of Plea Bargains

Before any decision is actually made either to settle a case immediately or to proceed further with a case, the actual terms of a plea bargain are somehow corroborated or confirmed. The Defenders do this through various types of negotiation techniques.

In his study on misdemeanor plea bargaining, Maynard (1984a, 1984b) examines plea bargain negotiations as a discourse phenomenon. He finds that some negotiations (i.e., unilateral opportunity negotiations) involve very little verbal maneu-

vering and appear to involve a “concerting of expectations” or the ability of participants to read situations similarly and infer mutually acceptable resolutions. Other negotiations (i.e., bilateral opportunity and compromise negotiations) involve less consensus and more verbal maneuvering. In addition, delays through continuances or the setting of trial dates are important bargaining strategies used by attorneys to mitigate or enhance a defendant’s penalty.

In another related study, Maynard (1988) finds that some negotiations involve no narratives (or storytelling). These cases result in routine processing. Others include narrative components or subcomponents which assess character, dispute facts, or argue subjectivity.

Although the Defenders handle primarily felony cases, their negotiating behavior appears to be largely consistent with Maynard’s characterizations of misdemeanor plea bargaining: Many of their negotiations involve no narrative and an apparent concerting of expectations, while other negotiations entail less consensus and more narrative. The Defenders also use impending litigation proceedings as a bargaining strategy.

However, the Defenders’ behavior appears to diverge from Maynard’s characterization of plea bargaining in three ways. First, the Defenders’ *tacit, taken-for-granted understanding of the value of a case* structures their negotiation techniques. As discussed below, this may also be the case among the attorneys studied by Maynard (1984a, 1984b, 1988). Second, instead of continuances and the setting of trial dates, the Defenders use the somewhat veiled threat of proceeding further as a bargaining tool *during* negotiations. In other words, issues related to further case litigation are incorporated into their discourse as caveats to increase bargaining leverage. Third, the Defenders also negotiate the terms of plea bargains by making good on their threats and using other types of litigation proceedings to engender more acceptable terms for guilty pleas.

When an offer for a guilty plea is better than expected, the Defenders typically engage in “routine processing” (Maynard 1988) or “consensus bargaining” (cf. Eisenstein et al. 1988): They accept the offer with little or no comment. However, as suggested in the earlier discussion, there is an unspoken understanding that the offer is acceptable *given the value of the case*. As Robert explained in response to my question, “How do you typically plea bargain a case?”

Well, it depends on what the offer is and what the case of the DA is and who the judge is. But having said all that, essentially the DA makes you an offer. It is rare, but on occasion the offer is much lower, a better offer *than you expected*. In which case, grab it. Usually, almost always you hope that it could be better. (Emphasis added)

When an offer for a guilty plea is not better than average, the Defenders typically engage in “explicit bargaining.” Explicit bargaining means that attorneys openly negotiate the terms of plea bargains (cf. Eisenstein et al. 1988; Mather 1979; McDonald 1979).

The Defenders’ goal in explicit bargaining is to persuade the prosecutor and perhaps the judge to make a more acceptable offer for a guilty plea. One way in which they do this is by *negotiating the value of a case*.

Negotiating the value of a case does not mean that negotiation participants review all information pertinent to determining the value of a case or that specific information is always discussed (cf. Maynard 1984a:108). Instead, it means that the Defenders engage in a type of “information control” (Goffman 1963) in order to evoke a more positive assessment of the value of their client’s case. More specifically, they informally emphasize, overstate, deemphasize, ignore, or perhaps even put forth new information concerning any of the factors (i.e., the seriousness of the crime, the strength of the evidence, and the defendant’s background characteristics) pertinent to determining the value of a case. This strategy appears to be consistent with the narrative structure Maynard (1988) found to characterize misdemeanor plea bargaining. However, “negotiating the value of a case” is perhaps best viewed as the largely tacit, *general* principle (or strategy) that underlies discourse. This principle is illustrated in the following elaborations:

Kathy: I go in [to the judge’s chambers] and say [to the prosecutor] “What’s the offer on this case, Rick?” He tells me, and I usually respond “Geez, Rick! You can give me something better than that!” And give the DA information about the client, information about the case—mitigating factors in essence. [Interviewer: For example?] . . . “This man’s worked all his life and now after 20 years this whatever, this embezzlement happened.” Or y’know, “This woman was going through medical problems.” [or] “There was spousal abuse.”

[Interviewer: What is your typical case like in the disposition department?] Mindy: I go to the dispo department, you wait your turn, you go in and talk to the DA and the judge at the same time. The DA makes you an offer. And I do different things: If I want my client to take the offer, I think he’s got a lousy case and he’s not gonna be able to win, sometimes what I’ll do is I’ll puff [i.e., inflate the value of] my case. You say “Hey, these are the weaknesses in your case, and I think I could win at trial and this is the reason why.” Or “this is a lousy search issue, and I’m gonna get the evidence suppressed. Give me some reason not to do the suppression motion”—which in the back of my mind I’m saying there’s no way I’m ever gonna win this case. But you kind of puff it, and then maybe the DA will come down a little bit.

As apparent in the latter attorney's comments, the Defenders often attempt to coerce DAs and judges into making more acceptable offers by insinuating that they might proceed further with a case. This is also clear in two other Defenders' comments:

Robert: Generally speaking, [in plea bargaining] you try and point out certain advantages that you may have in a case, exploit whatever leverage you have. [For example,] "It's in everybody's best interest to get this thing over with and couldn't they do a little better for a defendant?" Hope that the judge is listening while you're talking.

[Interviewer: How does the offer change?] LuAnn: Well, the DA will try to get you to plead to something worse if they have you by the balls. [And then I say,] "We can win this case, your Honor. Why should we even plead this case out?" [or] "So, okay, if you want to clutter up the courts with cases, that's fine. Make me an offer that I won't go to trial."

It should be noted here that the Defenders' use of veiled threats to proceed further as a bargaining tactic presupposes the understanding that other court actors, if not the Defenders as well, prefer plea bargaining over other types of litigation procedures. One explanation frequently offered for this apparent preference is "case pressure." Specifically, either the overwhelming volume of cases the criminal court handles is said to precipitate plea bargaining or (conversely) plea bargaining is said to alleviate such case pressure (e.g., Alschuler 1968; Blumberg 1967a; Church 1976; Holmes et al. 1992; Kingsnorth & Jungsten 1988; Padgett 1990; Utz 1978).

While most Defenders indicated that judges and DAs experience a great deal of case pressure to plea bargain, only one Defender admitted to feeling any such pressure himself. Consistent with studies arguing that other, more ethical factors take precedence in decisions to plea bargain (e.g., Feeley 1973, 1979; Heumann 1975, 1978; McDonald 1985; Skolnick 1967), the remaining Defenders argued that the primary reason they plea bargain cases is simply because it is in the client's best interest. As two Defenders explained,

[Interviewer: Why not take every case to trial?] Nora: Because most people are guilty. And it's overwhelmingly evident. And a lot of defendants just want out as fast as possible. . . . The courts couldn't accommodate them all either. [Interviewer: Are you limited by your resources here?] We can get as much resources as we need. If we had more cases going to trial, we could get more resources. The county would have to pay for it if we went to trial. It's just that they don't have the courtrooms and the judges to accommodate it. . . . That's why the DA's office pleads as well as overcharges.

[Interviewer: Why not take every case to trial?] Mindy: Because it's not in the client's best interests. [Interviewer: Why not?] Because if the defendant has no good case and he's gonna be

found guilty, and—say he’s charged with a whole bunch of forgery counts, and he’s got ten counts, and he’s gonna be found guilty of all of them, and the DA says instead of taking this case to trial, I’ll give you one count. Obviously it’s better to have him plead guilty to one count and have the others dismissed than to go down on all counts. . . . [In addition,] not that many are going to go to trial because the District Attorney can’t try everything. And they have an incentive to offer you something because they can’t try everything.

In spite of the facts that they handled the largest percentage of criminal cases in the jurisdiction and that they believed judges and DAs experienced a great deal of case pressure to plea bargain cases, the Defenders never threatened DAs or judges with the peril of taking *all* their cases to trial. This may have been because, unlike the public defenders studied by Skolnick (1967) and McDonald (1985), the Defenders represented a smaller percentage of the criminal caseload in their jurisdiction than Skolnick’s public defenders and they consequently had fewer resources and less power to muster (cf. Utz 1978). Nevertheless, they did employ the threat of proceeding further *with individual cases* to increase their leverage during informal negotiations.

When the Defenders are unable to negotiate acceptable plea bargain terms through the techniques described above, they *actually* proceed further with a case. In the next scheduled hearing, they may then attempt again to negotiate informally a more acceptable offer prior to the formal proceeding. If unsuccessful, they attempt to negotiate an acceptable offer during the formal litigation proceeding.

Plea bargain negotiations conducted during litigation proceedings intended for other purposes actually parallel the adversarial proceedings that ordinarily occur in these hearings. However, the Defenders keep in mind the goal of achieving an acceptable plea bargain. Consequently, they often put forth information in these hearings that affects the value of a case but may not be entirely relevant to the formal issue at hand (e.g., present sentencing information at a preliminary hearing).⁹ They also continue informally to solicit an incentive to settle. This negotiation strategy was revealed by two Defenders in the following comments:

Tom: [S]ometimes I will look at a case and say, “This is a case which I want to settle,” and I will be pushing for settlement [throughout] the entire [litigation process]. I will try to put enough equitable information before the judge during prelim just so the DA gets the idea. I will file motions in Superior

⁹ It is important to distinguish this type of plea bargaining technique from that of the “slow plea” described by Mather (1979). In “slow pleas,” the outcome of the court hearing is predetermined by the judge, the prosecutor, and the defense attorney in the case. This does not occur when the Defenders “proceed further” with a case and subterfugeously attempt to negotiate plea bargains through other types of court hearings.

Court sometimes . . . knowing that the purpose of that motion is twofold: Trying to get the charge dismissed—which is probably unlikely given the way the [law] is interpreted, and to . . . educate the deputy [i.e., Assistant District Attorney] on the upper level [i.e., in superior court] that he’s dealing with a shitty case. . . . And sometimes I’ll get better offers.

William: I will research [search and seizure issues] for the preliminary hearing with the hopes that I can beat the DA’s case or at least parts of it. Again, *that will affect the value of the case as it goes through the system*. . . . [During preliminary hearings, I will] try to undermine the DA’s case as much as I can. Try to nip and tuck any evidence that I can. Try to get rid of it. Try to show the DA that his witnesses have problems. Try to set the scene for my theory of the defense later on, and at the same time, try to make that transcript stand out [with problems] so my plea bargain later will be the best one that I can get. (Emphasis added)

As the above discussion indicates, important issues in plea bargaining emerge during litigation proceedings formally intended for other purposes. This suggests a reciprocal relationship between plea bargaining and other pretrial and trial proceedings. It also lends credence to Neubauer’s (1974) depiction of plea bargaining as a “mini-trial” and Maynard’s (1984b:114) suggestion that plea bargain negotiations “are rehearsals of scenes that participants would be willing to portray before a jury.” Perhaps most important, it makes the distinctions between plea bargaining and trial seem less significant.

The latter in particular is apparent in Kathy’s discussion on how she handles settlement cases differently from trial cases. Although she states clearly in this discussion that *some* type of distinct difference exists in the way she handles the various types of cases, it is not entirely obvious even to her what that difference always is. On final analysis, it would appear that the difference is related to the differing strengths of evidence in the cases—a difference that influenced the Defender’s original opinion of whether a case is triable or should be plea bargained in the first place! In other words, the only real difference appears to be that which made plea bargaining desirable initially.

Kathy: I think basically for an experienced attorney, you basically know what kind of case you’ve got when you see it. You say this is a negotiation case, this case is gonna cop out. And some cases you look at them, and after you interview the client, you know this case is gonna be tried. Those cases you know are on a trial track, I handle differently. Other cases, you basically go through the same steps, but for a different reason. A case that’s on a trial track, you’ll do a different kind of investigation. The other cases, basically you’re planning the sentencing from the day you get the case because you know the guy’s gonna cop out. Trial track cases you’re not looking so much *just for* mitigating sentencing issues [but instead are] thoroughly investigating the

facts of the case. *Now you do that with the other cases too*, but for some reason—basically the evidence of the case and a clear showing of guilt on part of the defendant—you realize that this is not a case that can be tried. But trial track cases, you do a much more involved investigation [and] you do the prelim differently. I do extensive prelims on trial track cases. I subpoena witnesses which I do not ordinarily do—although I have been subpoenaing witnesses in to get sentencing issues in on the preliminary transcript so that they're on the record. That's a new technique—I don't do it real often, but sometimes I do. If it's a complicated case or a very serious case, then I will call witnesses in for the prelim just for purposes of mitigating circumstances. But the trial track cases, you're doing comprehensive preliminary hearings to find out what the witnesses are gonna say. *You also sometimes do that on negotiating cases* so that the DA will know the problems with the case—putting people on notice. (Emphasis added)

To what extent the Defender actually proceeds further with a case depends on when or whether s/he receives an acceptable offer for a guilty plea. The role the defendant plays in this decisionmaking is discussed below.

Counseling the Defendant and Deciding on a Course of Action

On developing a professional opinion of an offer for a guilty plea, the Defenders proceed to advise their clients. The Defender's primary goals in this interaction are to educate (or counsel) the defendant concerning what s/he can reasonably expect in the case and to ascertain the defendant's desires concerning the ultimate outcome of the case. *Never* do the Defenders insist that a defendant accept or reject an offer for a guilty plea, and any final decision to plea bargain or proceed further with a case *always* rests with the client.

For the most part, the Defender's stance while counseling defendants appears to be consistent with that which Flemming (1986) found to be typical of other defense attorneys who represent public clients. Specifically, Flemming found that in order to win their clients' confidence as well as to avoid allegations of professional incompetence, attorneys who represent public clients play an advisory rather than a stronger, more insistent recommendatory role. This actually results in public clients' greater involvement in the development of their cases.

Similarly, the Defenders are careful never to dictate to their clients, to assume they have complete control over their clients' cases, or to assume that their clients trust them (cf. also Skolnick 1967). Indeed! Their approach may be best described as conciliatory. This is apparent in Ingmar's discussion of how he counsels defendants. In this discussion, it appears that Ingmar seeks not merely to instill trust and confidence among his clients but more-

over to circumvent any possible claim of unethical conduct. He does this by meticulously if not too eagerly asserting through conversational techniques his role, their rights, and the status of their cases. In particular, he is especially careful not to suggest plea bargaining too strongly.

I don't have a set function, but I don't say, "Did you do it?" I do say, "What happened? What do you know about all this? They say you did it. And they charged you with such and such. What do you know about it?" Before that, I preface it with a lot of stuff. I make sure that he understands his rights and that he understands what my place is—why I'm there . . . in terms of that I'm here, I'm on your side, I'm your advocate, what I'm gonna do, what I see my role as, that everything he tells me is confidential and that it's best if he tells me everything he knows about the case. . . . Some cases where you see that it's not gonna do this guy any good to plead out, you don't want necessarily to hear that he's guilty—unless he's ready to tell you. You don't want to—you're not the prosecutor. You've got to have a good relationship with this guy. And you don't want to come on strong and say, "I want to know if you're guilty or not guilty" because he's gonna think, "Well, you're supposed to defend me whether I'm guilty or not guilty, and if you're asking me that question right away, you're just a prosecutor. You're just gonna dump me." That's what they're gonna think, so you don't want to come on that way. You say, "Tell me what you know." And maybe later in the case you say, "Look. I've got this, that, and the other thing, and you say this, and nothing makes sense. All the evidence that comes up points to such and such. I think *maybe* you should be taking the deal. And if you are guilty, you're *probably* better off to admit it right now. Here's why." . . . [I explain to defendants my] evaluation of the case, and what all the possible things that could happen to him are. What the sentence ranges are. What I would expect that he would get within a range—usually. There's no guarantee. And what I think he should do. Then I ask him what he thinks and what questions he has. (Emphasis added)

While the Defenders are careful to maintain an advisory stance toward their clients, they often find themselves confronted with clients who have slightly different agendas and are especially resistant to their advice. In these cases, the Defenders appear to behave much like the divorce attorneys studied by Sarat and Felstiner (1986). Specifically, the Defenders employ discourse as well as other strategies which conduce to the choices they deem appropriate. As acknowledged by two Defenders:

[Interviewer: How do you counsel the defendant regarding the offer?] Janet: Well I usually tell them, "Look. This is the offer. And this is a good offer or this is a bad offer. It's your choice whether you plead guilty or not." That's—there's certain things that only the defendant decides. One of them is whether or not to plead guilty. . . . Sometimes you have to put it stronger than

that because the guy may be looking at ten more years if he goes on. He's got all these priors—prior convictions that are gonna [inaudible] later on. So you say, "You know, these priors are gonna come in against you if you testify. And if you're convicted, it's gonna make this burglary sixteen years instead of six. So they're offering you six now so maybe you should seriously think about it."

Steve: The people in custody are the ones that have a lot of run-in's with the law. [Sometimes] they think you're a public defender and you're gonna try to force them into taking a quick deal. . . . You have a different attitude with them. Your gesture, your approach to them in your attitude—not in what you *do* for them, but in how you explain what their options are. Sometimes using reverse psychology if you think a person should take the deal. . . . You explain the reality of the situation as I just did to you, and you say, "but I'm ready to go to trial." Once they realize you're not resisting their demand to go to trial and their demand that they pay you some attention, and you indicate to them by whatever way that you'll take their case to trial and that's why you're doing this type of work—because you like to do trial work and that's more fun than filling out a change of plea form, then they will drop their resistance to a plea bargain based specifically on you as the dump truck who doesn't care about them.

Contingent on the defendant's expressed desires after being counseled, the Defender then commences to finalize a plea bargain, to negotiate further the terms of a plea bargain, or to "proceed further" with the case. If successful in the second instance, a plea bargain agreement proceeds to final form. Otherwise, the case proceeds further.

As outlined in Table 1, there are five possible combinations of Defender-client input that result in one of two actual outcomes to a plea bargaining episode. I observed all these combinations in use to some extent. The following discussion provides rough estimates of their prevalence and describes at least some of their essential ingredients.

Both Defender and Client Agree on Plea Bargain

The easiest and probably most frequent mode of interaction is when the Defender establishes that the defendant should accept an offer and the defendant agrees. In these instances, the case is settled immediately.

A case that illustrates this type was one involving a male defendant charged with burglary and providing false identification to a police officer. The defendant was apprehended inside the bathroom of a restaurant; two other co-defendants were caught outside the building. The only things found missing were donuts. The defendant wanted to take full responsibility for the crimes, but the Defender told him that a plea bargain meant that all

Table 1. Types of Defender-Client Input and Outcomes to Plea Bargaining Episodes

Defender's Recommendation	Client's Desire	Actual Outcome
Plead	Plead	Settlement
Proceed further	Plead	Settlement
Plead	Different terms	Settlement or proceed further
Plead	Trial	Proceed further
Proceed further	Proceed further	Proceed further

three defendants would have to admit some sort of guilt. The Defender also stated that all the defendants *could* be sent to prison for burglary if found guilty by a jury. All three defendants ultimately decided they would plea bargain to second-degree burglary as a misdemeanor—the standard offer. I helped the defendant complete a plea agreement form while the Defender negotiated the terms with the DA. The defendants were then sentenced the same day.

Defender Recommends Proceeding Further and Client Desires a Plea Bargain

Another frequent mode of interaction is when the Defender recommends proceeding further with a case and the defendant desires to plea bargain. As Feeley (1979) has found, many defendants are not interested in taking their cases to trial because it entails costs that otherwise would not be incurred. For the Defenders' clients, these costs are typically believed to be increased jail time. As stated by two Defenders:

Karl: Sometimes—it's usually me coming to [defendants] with an offer. [However,] there are many clients that realize that they are in a very bad situation factually—versus the prosecution. And they bring up plea bargaining. I had a client bring up plea bargaining to me just yesterday, wanted to know what kind of deal we could get real quick. [Interviewer: What was he interested in?] He was interested in getting out of jail.

[Interviewer: Why not take every case to trial?] Nora: . . . [A] lot of defendants just want out [of jail] as fast as possible. They don't want to stay in as long as possible. They want out faster. They want to get rid of it, be done with it, serve the time, and get out.

One case which illustrates this type of interaction involved a defendant charged with commercial burglary. The Defender believed the defendant had a triable case because (arguably) the alleged victim had actually reneged on a business deal in which he had agreed to sell some merchandise for the defendant. The Defender believed he could assert that the defendant was merely attempting to regain control over his own merchandise. However, the defendant did not want a trial because he feared public

humiliation and because he wanted to go home to another state. Consequently, the case was settled immediately.

In another case of commercial burglary, however, the defendant insisted that all he wanted was to get out of jail and go home (again, to another state) as soon as possible. Although this case was eventually dismissed, the prosecutor later refiled the charges when more evidence and a rather serious prior record was discovered. Thus, in retrospect, it appeared that this defendant's desire to dispose of the case as quickly as possible was actually motivated by the desire to avoid more serious penalties.

Regardless of the defendant's actual reasons for desiring to plea bargain, in cases where the defendant wants to plea bargain in spite of the Defender's advice to proceed further, the case is settled immediately.

Defender Recommends Plea Bargain and Client Desires Different Terms

If not the most typical, another very frequent mode of interaction is when the Defender recommends a plea bargain but the defendant prefers plea agreement terms other than those initially offered. When this occurs, the Defenders usually engage in explicit negotiations in order to make a guilty plea acceptable.

A case characteristic of this type of input involved a defendant who was initially charged with using force and inflicting injury on a police officer and obstructing a public officer in the discharge his duty. The defendant was offered a felony which would be reduced to a misdemeanor after a year's successful probation and up to one year in jail. The defendant bemoaned having a felony on his record and worried about losing his job by spending time in jail. The Defender in this case returned to the judge's chambers and reported that the defendant did not want the deal. The Defender argued that the defendant did not *intend* to harm anyone (the prosecutor was responsible for proving intent). The judge then intervened by promising to give the defendant a misdemeanor at sentencing if he paid restitution beforehand. (The Defender later informed me that he knew the defendant would also get work furlough because "this judge would not want the defendant to lose his job.")

If a Defender is unsuccessful in negotiating more acceptable plea bargain terms in these cases, the defendant then decides whether to accept the offer for a guilty plea anyway (which often occurs) or to "proceed further" with the case (which usually occurs because the Defender concludes that a different DA or judge will be more amenable). If the latter occurs, another decisionmaking process occurs again later on and another episode of plea bargaining takes place. If an acceptable offer is ever made to the defendant, a plea bargain agreement proceeds to be finalized. Otherwise, the attorney could engage in *rounds* of plea bar-

gaining¹⁰ and ultimately litigate the case completely in front of a jury.

Defender Recommends Plea Bargain and Client Desires Trial

When counseled about the small chance they have of winning their cases, some defendants *insist* not merely that they are innocent but also on taking their cases to trial. Among those cases that I observed taken to trial, this type of case appeared to be the most frequent. These defendants fall into that category described by Sudnow (1965) and Neubauer (1974) as “stubborn.”

These cases typically proceed further down the litigation path toward trial. However, as the case proceeds, the Defenders remain open to and may actively pursue offers for guilty pleas. They also continue to advise their clients about the virtues of plea bargaining. If an acceptable offer is ever made to the defendant, the case proceeds to settlement. This usually occurs when the defendant concedes that s/he could suffer more severe consequences by being found guilty through trial.

A case illustrating this mode involved a defendant charged with three counts of burglary. The defendant insisted that he was innocent in spite of his previous confession and other very incriminating evidence against him. Convinced that the defendant would be seriously hurt through trial, the Defender went directly into the judge’s chambers immediately prior to the preliminary hearing in order to negotiate a plea bargain. The Defender then met with the defendant and told him the offer (i.e., one count of aiding and abetting credit card forgery, reduced to a misdemeanor in 18 months).

Although the defendant in this case continued to resist plea bargaining initially, the Defender reiterated the strong evidence against him and the possible penalties associated with a plea bargain versus a trial. Eventually, the defendant requested and accepted slightly revised plea bargain terms (i.e., receiving stolen property instead of aiding and abetting credit card forgery).

If a defendant in such a case is never convinced that plea bargaining is desirable, the Defender engages in rounds of plea bargaining episodes and the case is completely litigated in front of a jury. And although I never actually witnessed such an instance, I heard several horror stories about defendants who got seriously hurt by severe sentences after trial because they refused to plea bargain.

¹⁰ Maynard (1984b:101) makes this observation about the attorneys he studied. The primary difference here is that rounds of negotiation occur not because the attorneys have continued a settlement hearing but because the Defenders continue to solicit offers and negotiate plea bargains as a case proceeds further.

Defender Recommends Proceeding Further and Client Desires to Proceed Further

A final mode of interaction occurs when the Defender advises the defendant to proceed further with the case and the defendant agrees. This usually occurs because the DA does not make the defendant a "reasonable" offer for a guilty plea (cf. also Utz 1978).¹¹ This appeared to be the second most likely type of case to go to trial.¹² Like the former type, the Defenders in such cases remain open to and may actively pursue guilty plea offers. If an acceptable offer is ever made to the defendant, the case is settled. Otherwise, these cases may be completely litigated in front of a jury.

One example of such a case involved a defendant accused of two counts of assault with a deadly weapon, one count of brandishing a weapon against a police officer, and one count of being under the influence of PCP. According to the Defender, the DA would not offer the defendant anything due to the seriousness of the crime and the defendant's prior record. On the day of the preliminary hearing, the DA asked that the case be "trailed" (a shorter and more tentative delay than a continuance) because two of her witnesses had not shown up. Fearing that a dismissal would result simply in the case being refiled again later, the Defender seized the opportunity to pursue a plea bargain. To the Defender's dismay, the DA refused to deal and the two missing witnesses showed up while other witnesses were testifying. The case did ultimately plead out, however, when the formerly missing witnesses became reluctant to testify against the defendant, who was one's brother and the other's friend.

A final note should be added here regarding interaction in which the Defender advises an agreeable client to take a case to trial because the case is actually triable. This is the rarest mode of interaction and is often said to bypass plea bargaining altogether (see, for example, Kathy's earlier discussion on types of cases and

¹¹ This also includes cases in which the DA refuses to plea bargain. In these instances, the defendant does not have any choice but to take the case to trial. See Pritchard (1986) for a discussion regarding the effect of crime news on prosecutors' decisions to plea bargain cases. Also see Farr (1984) for a discussion regarding the effect of certain policies in the DA's office on plea bargaining.

Another relevant observation that should be made here concerns the more serious sentences that defendants receive after convictions at trials than for the same offenses after plea bargaining. Although LaFree (1985) and Uhlman & Walker (1979, 1980) found that defendants who plea bargain generally receive less severe sentences than those who are convicted after trial, the findings reported in this study suggest that perhaps the latter defendants sometimes receive more severe sentences, not as punishment for taking their case to trial, but because the defense attorneys were for some reason unsuccessful in negotiating more acceptable offers.

¹² This is somewhat supported by Harris and Springer's (1984) finding that attorneys who represent clients with serious prior records will be more likely to go to trial than to plea bargain. Their finding may reflect the fact that for defendants whose cases have little value, prosecutors offer little incentive to plea bargain. Consequently, these defendants have little or nothing to lose by taking their case to trial.

Mather's 1979 discussion on the decision to plea bargain versus taking a case to trial). However, I observed that these cases rarely proceed to trial completion because the DA either drops the charges against the defendant or offers the defendant "a very good deal" (see also Farr 1984:311). Consequently, even when the Defenders advise their clients to take their cases to trial and they agree, it is perhaps better viewed as simply another instance of "proceeding further."

Summary, Evaluation, and Conclusion

This article has examined plea bargaining as a component of the Defenders' recursive decisionmaking either to settle a case immediately or to proceed further. It has been found that this decisionmaking consists of three types of activities: (1) assessing the offer for a guilty plea, (2) negotiating the terms of a plea bargain, and (3) counseling the defendant and deciding on a course of action.

The Defenders assess the offer for a guilty plea in light of the value of a case as well as the potential costs of temporary delay. In both instances, the Defenders interject factors related to impending litigation proceedings into their evaluations. Specifically, they compare the costs associated with the current offer with those the defendant is likely to incur after a trial, after other pretrial litigation proceedings, and/or from another DA or judge. If they foresee that the defendant is not likely to be hurt by such action, they tentatively conclude that the defendant should proceed further with the case.

Before any decision is actually made, the Defenders corroborate or confirm the actual terms of an offer. They do this through various types of negotiation techniques. Underlying the use of all these techniques is the Defenders' understanding regarding "the value of a case."

When offers are better than average, the Defenders typically engage in "routine processing" (Maynard 1988) or "consensus bargaining" (Eisenstein et al. 1988): They accept an offer with little or no comment. However, it also means an offer is acceptable given their understanding of the value of the case.

When an offer is not better than average, the Defenders typically engage in "explicit bargaining" (cf. Eisenstein et al. 1988): They attempt to engender desirable plea bargain terms by asserting information that leads to an increased valuation of the case. In addition, they often employ somewhat veiled threats of proceeding further to increase their bargaining leverage.

When unsuccessful in negotiating acceptable terms through either consensus or explicit bargaining techniques, the Defenders proceed to negotiate plea bargains through litigation proceedings intended for other purposes. In these negotiations, the

Defenders once again put forth information that will conduce to a higher valuation of their cases. Perhaps ironically, it appears that such a tactic actually results in only minor modifications from that which would otherwise occur in the proceeding. In other words, plea bargaining increasingly comes to resemble the actual trial of a case. If the case proceeds long enough, the jury renders a verdict and plea bargaining actually becomes trial.

While the Defenders possess the expertise and skill to assess and negotiate plea bargains, it is ultimately the defendant who decides whether a case will be settled immediately or proceed further. Consequently, prior to their decisions, the Defenders carefully counsel their clients regarding their rights and the status of their cases. Whether or not the clients heed the Defenders' advice, the Defenders then proceed to carry out the clients' wishes.

Ultimately, there are two types of outcomes to any plea bargaining episode: immediate settlement or proceeding further. When the defendant opts for immediate settlement, a plea bargain agreement proceeds to final form. Otherwise, the case proceeds to the next scheduled hearing as if it were bound for trial. On the date of that hearing, another decisionmaking process occurs. If at the end of that plea bargaining episode the defendant again decides to proceed further with the case, yet another decisionmaking process occurs on the date of the next scheduled hearing. Unless an acceptable offer is at some point made to the defendant, the case proceeds until the defendant is ultimately tried before a jury and then sentenced or acquitted.

Viewed as a component of recursive decisionmaking, plea bargaining can be seen as including multiple episodes of negotiating behavior as well as a wide range of litigation proceedings. Perhaps most important, plea bargaining and trial can actually be seen to converge: not only are plea bargain negotiations "rehearsals of scenes that participants would be willing to portray before a jury" (Maynard 1984b:114), but pretrial and trial proceedings are oftentimes precursors for case settlement.

This article has elucidated a mode of plea bargaining that can provide defendants with a great deal of latitude in deciding their own fates. Not only are defendants' rights to due process protected, but they are also provided with numerous opportunities to limit what may be unwarranted penalties.¹³ Consequently, this mode of plea bargaining can be not merely an effective

¹³ It is important to note here McConville's (1986) contention that trials do not guarantee that truth (or perhaps "justice") will prevail. Insofar as adversarial procedures do not guarantee that the guilty will be convicted or the innocent set free, and because our judicial system holds that defendants should be given the benefit of doubt (i.e., presumed innocent until proven guilty), it seems this type of plea bargaining system can ensure justice as much or more than trials.

method for representing defendants but also a method perhaps equally as effective or more effective than trial.

An important limitation of this research, however, is that the number of attorneys studied is quite small and hardly representative of the entire population of defense attorneys. Consequently, although Utz (1978) finds that plea bargaining is clearly more adversarial in one city than another, it cannot be stated with any great precision how extensive this decisionmaking process is. Future research should consider whether or to what extent other defense attorneys make decisions similarly.

Nor do the findings presented here take into account what organizational conditions engender this type of decisionmaking. Certainly, some studies have made inroads regarding this matter. Utz (1978), for example, finds that a poorly organized, relatively powerless, and private system of criminal defense appears to result in adversarial plea bargaining. Similarly, Eisenstein and Jacob's (1977) study suggests that an adversary spirit is the result of a more anonymous, less cohesive courtroom climate. In addition, I have argued elsewhere (Emmelman 1993) that this plea bargaining posture is encouraged by the very organizational structure of the defense corporation I studied. However, more information is still required if such a plea bargaining system is to be reproduced on a large scale.

Finally, this study does not—and cannot—address the issue of whether this type of decisionmaking is actually desirable. From the standpoint of those who fear tyranny from the powerful (or from what Packer (1968) might call the “Due Process” perspective on justice), such a system of plea bargaining may seem warranted. From the standpoint of those who fear abuse from the disaffected (or from what Packer might call the “Crime Control” perspective on justice), this system might seem only to bring about greater injustice. From the standpoint of those who completely trust neither, however, this system offers only a partial solution; more research needs to be conducted on the problem of bringing about justice for everyone.

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