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DEFENDER, PROSECUTOR, DEFENDANT

Plea Bargaining - Three Perspectives

BY JULIE HORNEY*

In recent years the administration of criminal justice in this country has become increasingly dominated by the process known as "plea bargaining." In plea bargaining a defendant waives the right to trial by pleading guilty in return for certain advantages offered by the state. The state benefits in terms of the time and money saved by avoiding a trial. The practice is so pervasive that in many jurisdictions fewer than 10 percent of the criminal defendants ever stand trial.

Plea bargaining may be thought of as a complex decision making process involving three individuals—the prosecutor, defense attorney, and defendant—who must make judgments on a number of factors related to the case in order to reach some agreement. The present study looked at plea bargaining in Douglas County, Nebraska from those three perspectives.

Plea Bargaining Practice

Two basic types of plea bargaining can be differentiated according to the nature of the offer made to the defendant. In the first type of plea bargaining the prosecutor's offer is a concession on the sentence to be imposed. In some jurisdictions the prosecutor offers a particular sentence which has already been agreed to by the judge. In many jurisdictions, however, the judge does not actively participate in the process. In that case any sentence concession by the prosecutor is merely an offer either to recommend a particular sentence to the judge or to make no recommendation (e.g., promising not to ask for capital punishment in a murder case).

In the second type of plea bargaining the defendant agrees to enter a guilty plea, and in return the prosecutor reduces the charges filed against the defendant. The reduction may either be in terms of seriousness of the charge (e.g., reducing a felony charge to a misdemeanor or a first degree murder charge to second degree murder) or in terms of the number of charges filed (when the person is charged with several different crimes or with charges representing multiple elements of one criminal act).

From the defendant's point of view, of course, the motivating factor in both types of plea bargaining is the same—the belief that the final consequence will be less serious if he/she pleads guilty. In one case a lighter sentence is directly promised; in the other the assumption is made that reduction of the charges will result in a lighter sentence.

One issue in plea bargaining is whether defendants in fact get anything of value in return for pleading guilty. Alschuler (1968) suggested that when a prosecutor dismisses some of the charges in a multicharge indictment, he is giving the defendant the "sleeves from his vest" (p. 95). In many jurisdictions judges seldom sentence consecutively; instead, sentences for multiple charges would be served concurrently. Also, even though the prosecutor has dropped or reduced charges, the judge is aware of the original charges and may still use that information in sentencing. The latitude in sentencing allowed by most legislatures (e.g., robbery carrying 3 to 50 years) may enable the judge to give exactly the same sentence he/she would have given for the original charge. Alschuler stated that for these reasons most prosecutors feel that they are not giving up anything in terms of sentence severity in return for certainty of conviction.

One question which may be raised in connection with this issue is whether the value of a deal systematically varies with the type of deal. Another is to what extent the prosecutor, defense attorney, and defendant agree on the value of a deal.

Research on Plea Bargaining

Most of the research on plea bargaining has dealt with the factors which determine (Continued on Page 2)
Plea Bargaining

(Continued from Page 1)

when bargaining will occur and how the parties involved arrive at particular deals. Factors which have been suggested as determinants of whether or not a plea bargain is entered include the strength of the state's case, the nature of the crime charged, the defendant's record, the interests of justice and equity, cost of a trial, the ability of the defense attorney, the relationship between prosecutor and defense attorney, and the workload of the attorneys. Generally interviews or questionnaires have been used to ask prosecutors or defense attorneys what factors they consider in making their decisions.

A recent survey of Nebraska prosecutors (Kray and Berman, 1978) presented a number of factors related to the plea bargaining decision and asked respondents to rank the three factors they thought were most important. Those which received the greatest percentages of "most important" rankings were nature of the crime (ranked first by 38 percent of the respondents), strength of the case (23 percent), interest of justice (21 percent) and defendant's record (14 percent).

The practice of plea bargaining is so pervasive that in many jurisdictions differences ten of 1 percent of the criminal defendants ever stand trial.

A further question is how the various factors relate to the value of a deal. Although (1969) suggested that the weaker the prosecutor's case against a defendant the better the deal offered. No studies, however, have been conducted to determine how valuable they are to plea bargain.

The evidence to date on plea bargaining has been largely anecdotal or else based on broadly phrased questions about general plea bargaining practice. The present research, as we shall see, will look at plea bargaining and the perspectives on plea bargaining of the prosecutor, defense attorney, and defendant in a more precise manner, with regard to actual cases, and in a way that would allow direct comparison of those perspectives. It was also designed to obtain data on the value of deals, to measure the participants' judgments on the relevant factors in each case, and to allow an assessment of the relationship between those factors and the value of deals.

Methods Used

This research examined plea bargaining practice in Douglas County, Nebraska. The county attorney's office seven deputy county attorneys rotate weekly in the job of filing charges for new arrests. The prosecutor who files the charges then handles that case until a disposition occurs. Fire assistant public defenders for Douglas County rotate in a similar manner.

By keeping in regular contact with their attorneys a defendant's attempt was made to interview the three individuals involved in a case as close as possible to the time the plea was entered or a decision to go to trial was reached. This study was conducted for all felony cases coming through the prosecutor's office for a two month period in 1978. A total of 99 cases were included in the study. The prosecutor and defense attorney were interviewed in every case, as was the defense attorney if that person was a private defender. In a few cases contact with the private defense attorney was not possible. Out of the 99 cases, 60 involved public defenders and 39 involved private defense attorneys. The private defense attorneys (19 different attorneys) were interviewed for 29 of those cases.

In many of the cases an interview with the defendant was not possible. Many of the defendants were not being held in jail, and their only contact with their attorneys was the time at which they pleaded guilty or at trial. Because the entering of guilty pleas was not scheduled and often occurred on the spur of the moment, the interviewer could not always be present at that time. Often these interviews were being held in the prosecutor's courtrooms at the same time. For as many cases as possible, however, the interviews were tape-recorded, and the time of entering a plea or within the next two or three days in the case of those dealing held in jail. A total of 28 defendants were interviewed.

Defendants were given a letter explaining the purpose of the research and assuring them that their participation was voluntary and that all of their responses would be confidential. Only one defense attorney agreed to be interviewed.

Standardized Interviews

The interviews were standardized, and all respondents gave a series of ratings by using a point on a portable graphic scale. The scale was marked for the respondent, but for every question the experimenter labeled the endpoints with x 5 inch card each with appropriate phrases written on them. The back of the scale was marked off in 1 mm units from 1 to 100 so that the experimenter could record the scale value directly. All of the attorneys were asked the same questions (with slight wording changes for each prosecutor or defense attorney). They were asked to use the portable scale to provide ratings on the following:

1. Likelihood of defendant's conviction at trial (endpoints marked "certain conviction" and "certain acquittal")
2. Value of the deal to the defendant
3. Seriousness of the crime
4. Likelihood of defendant's guilt
5. Seriousness of defendant's prior record
6. Likelihood of defendant's committing another felony in the future
7. Degree of punishment deserved by defendant
8. Ability of other attorney as a trial advocate
9. Personal relationship with other attorney
10. Work load
11. Publicity received by case
12. Satisfaction with case outcome

In addition to the questions calling for ratings responses attorneys were also asked to estimate the number of days the trial might take for a trial, the sentence they expected the defendant to receive if convicted at trial, and the sentence expected for pleading guilty to the charged crime(s) if the charge(s) had been reduced.

Defendants were also asked to use the portable scale to give ratings on the following dimensions:

1. Likelihood of conviction at trial
2. Value of deal
3. Job done by defense attorney
4. Relationship with defense attorney
5. Satisfaction with way in which case was handled

Findings and Discussion

Four major categories can be used to describe plea bargaining offers by the prosecutor: 1) no deal, 2) reduction of charges, 3) not filing additional charges, and 4) promise of sentence. Table 1 shows the number of cases which fell into each category.

Table 1

<table>
<thead>
<tr>
<th>Type of Bargain Offered</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>No Deal</td>
<td>27</td>
</tr>
<tr>
<td>Reduction of Charges</td>
<td>57</td>
</tr>
<tr>
<td>Filing Additions</td>
<td>35</td>
</tr>
<tr>
<td>Promise of Sentence</td>
<td>10</td>
</tr>
<tr>
<td>Total</td>
<td>99</td>
</tr>
</tbody>
</table>

In category 1, a total of 99 cases no deal was offered by the prosecutor. In other words, the defendant's only choice was to plead guilty or plead guilty to the original charge(s).

In 63 cases the prosecutor offered to reduce the charges in return for a plea (Continued from Page 3) of guilty. In 24 of these cases a charge which might have been reduced was offered to a misdemeanor (e.g., from burglary to trespassing). In 18 cases involving different charges, no deal was offered in 1 case (i.e., in one case no deal was offered in 13 cases (e.g., from shooting with intent to kill, wound, or maim, to simple assault) the defendant's only choice was to plead guilty or plead guilty to the original charge(s).

In only eight of the 99 cases did the defendant plead not guilty. Four of the not guilty pleas were in cases where no deal had been offered. The other four not guilty pleas were refusals of deals offered by the prosecutor.

Value of Deals

Do these different kinds of deals offered to defendants differ in value to the defendant? Ideally the actual outcome after a plea bargain should be compared with what would have happened to the defendant if he/she had been convicted on the original charge. Because of the wide range of possible sentences, a priori it is not clear what decision the judge would have if not for the plea bargain is impossible to determine from the statutory sentencing provisions. Therefore the value of the deal was determined by questioning the prosecutors and defense attorneys who based their judgments on their experience in the system. First they were asked to use the graphic scale to rate the value of the deal to the defendant. Then they were also asked to predict the sentence which would follow the plea bargain and to rate the value of what sentence would have followed conviction at trial. The difference between these estimates also serves as a measure of value. Table 2 presents these data.

The categories described above represent the offers made by the prosecutors. In only eight of the 99 cases did the defendant plead not guilty. Four of the not guilty pleas were in cases where no deal had been offered. The other four not guilty pleas were refusals of deals offered by the prosecutor.

"SERVICE TO COMMUNITIES" is the title of a brochure just published by the Center for Applied Urban Research. The pamphlet describes the scope of the Center's activities in applied research, the technical assistance it is able to offer groups and communities, and its role in community education. Copies of this brochure may be obtained by writing to the Center for Applied Urban Research, University of Nebraska at Omaha, Annex 15, Omaha, Nebraska 68128. Shown above is one of the illustrations for the brochure, the former Storz mansion at 6625 Dodge Street where the Center has its offices.
TABLE 2

<table>
<thead>
<tr>
<th>Felony</th>
<th>Misemeanor</th>
<th>No</th>
<th>Historical Criminal</th>
<th>Laser</th>
<th>Drop</th>
<th>Charges</th>
<th>Drop</th>
<th>Counts</th>
<th>No Additional</th>
<th>Counts</th>
<th>P</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prosecutors' ratings</td>
<td>66.0</td>
<td>77.0</td>
<td>64.5</td>
<td>44.8</td>
<td>33.6</td>
<td>42.5</td>
<td>3.21</td>
<td>.06</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defense attorneys' ratings</td>
<td>82.3</td>
<td>76.0</td>
<td>65.2</td>
<td>54.4</td>
<td>4.44</td>
<td>.06</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Sentence differential</td>
<td>0.5</td>
<td>6.3</td>
<td>9.1</td>
<td>2.2</td>
<td>0.7</td>
<td>0.7</td>
<td>0.57</td>
<td>.06</td>
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</tbody>
</table>

The prosecutors were more satisfied with cases than the defense attorneys or judges. A result which probably reflects accurately the way in which the cases were stacked in the prosecutor's favor. Prosecutors, defense attorneys, and defendants showed considerable agreement on particular cases, as is shown by the large, significant correlations between their judgments of seriousness of crime, value of the deal, seriousness of prior record, and likelihood of future felony. The extent of their agreement is not surprising given their experience in the same system; it is especially understandable in the case of public defenders and prosecutors who work so closely together.

Defense Attorneys Rated High

Contrary to popular notions, defense attorneys were rated relatively high by defendants in terms of how well they had handled the cases and in terms of the personal relationship between attorney and client. Since Carpenter (1971) has described the very negative attitude of defendants toward public defenders, the defendants' ratings may reflect the slight more optimistic; their ratings on likelihood of conviction were closer to those of the prosecutors.

A difference was found in ratings of workloads, with defense attorneys rating their workloads higher than judges, and, finally, a slight but significant difference was found between prosecutors' and defense attorneys' perceptions of the number of days a trial would take. In the other ratings prosecutors and defense attorneys did not differ significantly. For example, there were no groups which were very certain of the defendants' guilt. This fact is not surprising in light of the screening which occurs before cases reach this point.

(Continued from Page 4)

TABLE 3

<table>
<thead>
<tr>
<th>Type of Deal</th>
<th>Future</th>
<th>Policy</th>
<th>Relationship</th>
<th>Work</th>
<th>Load</th>
<th>Publicity</th>
<th>Satisfaction</th>
</tr>
</thead>
<tbody>
<tr>
<td>Conviction</td>
<td>Crime</td>
<td>Guilt</td>
<td>Record</td>
<td>Felony</td>
<td>Punishment</td>
<td>Ability</td>
<td>Personal</td>
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<td>&lt; .01</td>
<td>.05</td>
<td>.06</td>
<td>.07</td>
<td>.08</td>
<td>.09</td>
<td>.10</td>
<td>.11</td>
</tr>
</tbody>
</table>

The correlation coefficients in Table 3 represent the extent of agreement between prosecutor and defense attorney on the dimensions rated. Correlation analysis can also indicate how those dimensions were related to each other within those groups. These higher order factors related to the value of the deal offered. In Tables 4 and 5 the intercorrelations of all factors are presented separately for prosecutors and defense attorneys. Table 4 shows that prosecutors' judgments of degree of punishment delivered were strongly related to their perceptions of seriousness of prior record, the defendant's prior record, and the likelihood of the defendant's committing another felony in the future. Table 6 shows that these factors were all related for defense attorneys as well, although the relationship between prior record and punishment deserved was not as strong. For both prosecutors and defense attorneys, judgments of publicity related to the case and number of days a trial would take were quite appropriately correlated with the seriousness of the crime.

Decision Making

In trying to understand the decision-making process involved in plea bargaining, one strategy is to compare the attorneys' ratings of the value of the deal offered with their ratings of the factors relating to the defendant and the case. This analysis should show whether better deals are given when likelihood of conviction is low, for example, or when the defendant is viewed as unlikely to commit another felony or as deserving little punishment. Caution must be observed in making any causal inference from the correlations, but they may give some indication of an idea of the factors which contribute to the outcome.

Tables 4 and 5 show that none of the correlations between values of the deal and other factors is very large. The correlation between ratings of likelihood of conviction and value of the deal by the prosecutor (.18) is in the direction predicted by Alsheier (the weaker the case the better the deal offered), but it is not significant at the .01 level. From these results how the value of a deal is determined is far from clear. One possibility is that some other factors not considered here may influence the process. Possibly a large random factor is simply involved. Still another possibility is that in some cases the factors rated here may be relevant to bargaining decisions while other cases may involve deals which are so routine that none of these factors is considered. Evaluating cases in groups could mask the relationships existing for some cases. A larger sample will be necessary for testing that hypothesis.

(Continued on Page 8)
Summary

The present study provides a look at the plea bargaining process from three perspectives—those of the prosecutor, the defense attorney, and the defendant.

Attorneys’ ratings and predictions of sentencing outcome allowed a comparison of the value of the major types of deals. Reducing felonies to misdemeanors, charging with lesser felonies, and promising not to file habitual criminal charges were viewed as the most valuable deals for defendants.

Comparisons of judgments by the prosecutor, defense attorney, and defendant on a number of issues related to the case were also made. The correlations between prosecutors’ and defense attorneys’ ratings of the defendant were generally quite high (e.g., r=.68 for ratings of the seriousness of the defendant’s prior record and r=.64 for ratings of the likelihood of defendant’s committing another felony). High positive correlations were also found between their ratings on likelihood of conviction and on the value of the deal offered to the defendant. Differences occurred, however, in the absolute ratings with prosecutors as a group relative to defense attorneys judging crimes as more serious, defendants as deserving more punishment, and deals as less valuable to defendants.

Defendants’ ratings of their attorneys were surprisingly high, and no significant difference between ratings of public defenders and private attorneys occurred.

The ratings on different dimensions were related to each other in meaningful ways. In the judgments of prosecutors and defense attorneys, for example, degree of punishment deserved by a defendant was strongly related to seriousness of the crime, the defendant’s prior record, and the likelihood of the defendant’s committing a felony in the future. No significant correlations were found, however, between the various factors relating to the case and the value of the deal as measured by judgments of prosecutors and defense attorneys. Therefore conclusions about what factors determine the value of a plea bargain are impossible.

REFERENCES


Casper, J. D. Did you have a lawyer when you went to court? No, I had a public defender. *Yale Review of Law and Social Action*, 1971, 1, 1-49.


1. The category “lesser felony” has been greatly influenced by two homicide cases in which charges were reduced from second degree murder to manslaughter, thus reducing the predicted sentence from life (counted as 50 years) to 10 years. This is essentially the only kind of deal that would be made in murder cases. To deal with such problems a measure which controls for the length of the trial conviction sentence rather than the simple difference score could be more appropriate if the sample size were larger.

2. Tests of significance were performed only for differences between prosecutors’ and defense attorneys’ ratings because of the small number of defendants interviewed. For the same reason correlation coefficients were computed only for the prosecutor-defense attorney comparison.