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).

Plea bargaining, generally a poorly understood process, seems to be receiving more scrutiny as its use widens.

Providing for formalized plea bargaining practices is the aim of a bill introduced in the Nebraska Legislature by Senator Larry Stoney of Omaha.

Stoney's bill, LB 371, grew out of a meeting held last year by the National Advisory Commission on Criminal Justice Standards and Goals.

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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 multicount 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)
The practice of plea bargaining is so pervasive that in many jurisdictions few exceptions exist of those who defend negotiated deals ever standing trial.

A further question is how the various factors relate to the value of a deal. Although (1968) suggested that the weakest of the prosecutor's case against a defendant the better the deal offered. No study, however, has attempted to determine how varied with such factors.

The evidence on plea bargaining has been largely anecdotal or else based on broadly phrased questions about general plea bargaining practice. The present research attempts to describe the views on 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 the participants and the battlegrounds' 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. Four deputy county attorneys rotate weekly in the job of filing charges for new felony cases, and any deputy county attorney who files the charge then handles that case until a disposition occurs. Fire assistance public defenders for Douglas County rotate in a similar manner.

In many of the cases an interview with the defendant was not possible. Out of the 99 cases, 60 involved public defenders and 39 involved private defense attorneys. The private defense attorneys were interviewed for 19 of the cases. In a few cases, where the independent defense attorney was not present, plea bargaining was not scheduled and often occurred on the spur of the moment, the interview could not always be present at that time. Often these defendants were being held in portable courtrooms at the same time. For many as possible, however, the interviews were terminated shortly after the entering of a plea or at trial. Because the time of entering guilty plea was not scheduled and often occurred. The average responses for prosecutors and defense attorneys were also asked to estimate the number of days the particular case was on the calendar, and the sentence expected for pleading guilty to the charged charge(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 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. certainty 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. workload
11. publicity received by case
12. satisfaction with case outcome

In addition to the questions calling for numerical values, defendants were also asked to estimate the number of days the particular case was on the calendar, and the sentence expected for pleading guilty to the charged charge(s) (if the charge(s) had been reduced).

Findings and Discussion

**Four major categories can be used to classify the bargains offered by the prosecutor:**

1. no deal, no reduction of charges, no promise of sentence.
2. no deal, reduction of charges, no promise of sentence.
3. no deal, no reduction of charges, promise of sentence.
4. reduction of charges, no promise of sentence.
5. reduction of charges, promise of sentence.
6. no deal, reduction of charges, promise of sentence.

For each case, 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>26</td>
</tr>
<tr>
<td>Felony to Misdemeanor</td>
<td>10</td>
</tr>
<tr>
<td>Lesser Felony</td>
<td>8</td>
</tr>
<tr>
<td>Non-Filing Additional Charges</td>
<td>3</td>
</tr>
<tr>
<td>No Additional Counts</td>
<td>2</td>
</tr>
<tr>
<td>No Conviction</td>
<td>1</td>
</tr>
<tr>
<td>Promises of Sentence</td>
<td></td>
</tr>
<tr>
<td>Total Cases</td>
<td>100</td>
</tr>
</tbody>
</table>

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 refused 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 offer come 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, each case assumes an amount of discretion left to the judge what would have happened if not for the plea bargain is impossible to determine from the statutory sentencing provisions. Therefore the value of the deal was determined by asking the prosecutor and defense attorneys who based their judgments on their experience in the system. First they were asked to use the graphical scale to provide ratings on the following variables, and then they were also asked to predict the sentence which would follow the plea bargain and to use the graphical scale to provide ratings on the following variables, and then they were also asked to predict the sentence which would follow the plea bargain and to use the graphical scale to provide ratings on the following variables.

**Conclusion**

The difference between these estimates also serves as a measure of value. Table 2 presents these data. The average responses for prosecutors and defense attorneys to the question, "How would you rate the value of this deal to the defendant?" are classified according to the nature of the deal (100 represented "extremely valuable" and 0 represented "not at all valuable"). The average differences between the plea bargain sentence and trial conviction sentence are also presented. In almost all cases (99 out of 100), the plea bargain was estimated to be near the actual value (value averaged together for prosecutors and defense attorneys). In almost all cases (99 out of 100), the plea bargain was estimated to be near the actual value (value averaged together for prosecutors and defense attorneys). In all cases the values assigned to the various deals are significantly different from one another. In terms of ranking by direct rating of value to the defendant, please note that the "felony to misdemeanor" reduction, "less felony," and "less guilty" are the most valuable deals. Drop counts and "no additional counts" were seen as the least valuable.

The ranking by sentence differential is similar to that by rated value. One ranking by sentence differential is similar to that by rated value. One ranking by sentence differential is similar to that by rated value. One ranking by sentence differential is similar to that by rated value. One ranking by sentence differential is similar to that by rated value. One ranking by sentence differential is similar to that by rated value. One ranking by sentence differential is similar to that by rated value. One ranking by sentence differential is similar to that by rated value. One ranking by sentence differential is similar to that by rated value.
The prosecutors were more satisfied with cases than the defense attorneys or the defendants. A result which probably reflects accurately the way in which the cases are stacked in the prosecutor's favor. Prosecutors are probably more inclined to believe innocence in close cases, and so they usually screen cases carefully before filing charges. A pessimistic outlook of defense attorneys may also explain the fact that they rated the likelihood of conviction higher than the prosecutors did. Alternatively, this finding may reflect the defense attorney's wish to see done some good for his/her client. A plea bargain is always more valuable if conviction at trial is 4 certainty. The defendants seemed to be slightly more optimistic; their ratings on likelihood of conviction were closer to those of the defendants.

A difference was found in ratings of workloads, with defense attorneys rating them as heavier, and, finally, a somewhat but significant difference was found between prosecutors' and defense attorneys' ratings of the number of days a trial would take. In the other ratings prosecutors and defense attorneys did not differ significantly. For example, defense attorneys were more certain of the defendants' guilt. This fact is not surprising in light of the screening which occurs before cases reach this point. In general, prosecutors' and defense attorneys showed considerable agreement on personal cases, as is shown by the large, significant correlations between their judgments of seriousness of crime, value of degree, 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 Capers (1971) has described the very negative attitude of defendants toward public defenders, the data could be interpreted as evidence of type of defense attorney in order to determine whether the high ratings were due primarily to defendants' appreciation of defense attorneys. Although private attorneys were rated somewhat higher as to how well they had handled the cases (an average rating of 78.8 as opposed to 68.7) would be expected to be related to each other within those groups. In the case of the correlations between value of the deal offered, we find that these correlations are not significant at the .05 level. From Table 4 and Table 5 the intercorrelations of all factors are presented separately for prosecutors and defense attorneys. Table 4 shows that prosecutors' judgments of degree of punishment deserved were strongly related to their perceptions of seriousness of crime, the defendant's prior record, and the likelihood of the defendant's committing another felony in the future. The evidence is that these same 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 public defenders were related to the case and number of days a trial would take were quite appropriately correlated with the seriousness of crime.

Deal 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 his 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 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 (.15) is in the direction predicted by Alschuler (the weaker the case the better the deal offered), but it was not significant at the .01 level. From these results how the value of a deal is determined is unclear. One possibility is that 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, in cases together, would make the relationships existing for some cases. A larger sample would be necessary for testing that hypothesis.

(Continued from Page 5)

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TABLE 3

MEASURES OF THE VALUE OF PLEA BARGAINS OFFERED BY TYPE OF DEAL

<table>
<thead>
<tr>
<th>Felony to Malicious</th>
<th>No Felony Malicious</th>
<th>Laser Deal</th>
<th>Drop Charges</th>
<th>Drop Counts</th>
<th>No Additional Counts</th>
<th>F</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>
</tr>
<tr>
<td>Defense attorneys' ratings</td>
<td>85.4</td>
<td>77.0</td>
<td>66.5</td>
<td>52.0</td>
<td>37.4</td>
<td>3.10</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>
</tr>
</tbody>
</table>

(Continued from Page 3) or second most valuable deal. The value of a deal is not based only on the sentencing differential. The relation of a felony to malice was viewed as quite valuable because it avoids a felony conviction on the person's record, and reduction was often offered in cases in which the person was very likely to be given probation anyway so that the sentencing differential would be zero.

Comparison of Three Perspectives

In order to compare the perspectives of the prosecutor, defense attorney, and defendant the average ratings for those groups obtained through the interview items can be examined. In addition an analysis of the correlation between prosecutors' ratings and defense attorneys' ratings provides a measure of the extent to which they agree on the ordering of cases along each dimension.

Table 3 presents the mean ratings for prosecutors, defense attorneys, and defendants, the results of significance tests for differences in the means, and the correlations between ratings. Popular notions of the difference in prosecutorial and defense orientations are supported in the ratings of seriousness of crimes and value of degree. As expected, defendants viewed crimes as more serious than did the defendants. Although this result is not conclusive because of the small number of cases, it is in the direction which might indicate that defendants think they are getting better deals than they really are.

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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, 4-9.