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Calling Your Bluff: How Prosecutors and Defense Attorneys Adapt Plea Bargaining Strategies to Increased Formalization

Deirdre M. Bowen

This ethnographic work examines the inner workings of a highly formalized plea bargaining unit in a large urban prosecutor's office from the lawyers' point of view. Observations of forty two plea negotiations between prosecutors and defense attorneys along with both formal and informal interviews reveal how the legal actors adapt to institutional rules in the pursuit of the both efficiency and justice. In the face of ever increasing prosecutorial power, defense attorneys find ways to equalize the balance when cases do not fit the "normal crimes" model. Examination of negotiating strategy and discourse give further insight into whether prosecutors and defense attorneys behave differently under highly rationalized systems of plea-bargaining compared with traditional models previously studied.

Keywords formalization; defense attorneys; plea bargaining; prosecutors

Introduction

Social scientists and legal scholars have long debated the suitability of plea-bargaining as the dominant method for disposing of cases in the criminal justice system. This debate has lead to a qualified defense of the practice by some (Bar-Gill & Ayal, 2006 Goodman & Porter, 2002; Heumann, 1978; Lee, 2005; McDonald & Cramer, 1992; Rosett & Cressey, 1978; Utz, 1978) while others have

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called for plea-bargaining to be abolished (Easterbrook, 1992; Langbein, 1992; Schulhofer, 1992; Lynch, 2003.) Yet the majority of academics and policymakers have argued that the system is badly in need of reform (Barkow, 2006; Borden & Basset, 1985; Bibas, 2001, 2004; Bohm, 2006; Brown, 2005; Dubber, 1997; Gorr, 2000; Guidorizzi, 1998; Ma, 2002; Mather, 1979; Zacharias, 1998; Wright & Miller, 2002; Stunts, 2004; Wright, 2005). Recent discussion has centered on the idea that an all-or-nothing approach is inappropriate, but instead alternative methods of bargaining may be useful (Bibas, 2001, 2004; Dubber, 1997; Gorr, 2000; Ma, 2002; Schulhofer, 1992; Uviller, 2000). While reform methods of plea-bargaining have been created and studied over the years, it is unclear whether recent models are an improvement over the traditional models. (See e.g., Acevedo, 1995; Schulhofer, 1984.) As yet, no one has completed an ethnographic examination of these approaches. Only Wright and Miller's (2002) empirical exploration of case screening as an alternative to plea bargaining in the New Orleans District Attorney's Office comes close.

In a review of Fisher's (2003) work on plea bargaining from a prosecutorial point of view, Bibas (2004c) suggests that the nature of plea bargaining reform should not focus on creating alternative systems, or eliminating plea bargaining, or reducing prosecutorial power in plea negotiations, but should instead create a balance of power by enhancing the power of other legal actors. Bibas (2004c) agrees with Uviller's (2000) suggestion that setting the criminal charges and negotiating pleas should be handled dispassionately and institutionally separately from the trying of cases. However, Bibas (2004c) also adds that limits should be placed on the types of plea offers made available.

In this ethnographic work, I concentrate on a rationalized approach to plea-bargaining that the Superior Court in Seattle, Washington adopted, a system which happens to incorporate some of the ideas Bibas (2004c) and Uviller (2000) discuss. I examine the organizational structure and background of the Early Plea Unit (EPU) where non-drug felony plea negotiations take place and explore the rules, the actors, and their perceptions of this model. I specifically focus on two questions: (1) whether and how attorneys create a balance of power in the pursuit of justice; and (2) whether attorneys behave differently under a new, highly rationalized model of plea bargaining compared to the models studied thirty years ago.

Literature Review

Much of the empirical work during the late 1960s and early 1970s led to severe criticisms of plea bargaining. The social science academic community shifted its attitude toward plea bargaining by the late 1970s (Brereton, 1981.) Soon after this shift in attitude, empirical work in plea bargaining steadily dropped off. Criticisms and suggested reforms of plea bargaining, however, have remained a popular topic for commentary in the legal literature in particular (Barkow, 2006; Bibas, 2004; Bohm, 2006; Brown, 2005; Colquitt, 2001; Ma, 2002; Perschbacher

& Bassett, 2004; Stunts, 2004; Uviller, 2000; Wright, 2005; Wright & Miller, 2002). Yet, two problems exist in relying on this empirical work.

First, while the empirical work used to support the legal debate over plea bargaining was ground breaking in providing a first-time view of how the process worked, who the players were, how the system came to exist and its effect on the criminal justice system, it is now almost thirty years old (Alschuler, 1968; Blumberg, 1967; Heumann, 1978; Jacob, 1978; Jones, 1979; Miller & McDonald, 1978; Rubenstein & White, 1979.) Second, with the exception of Emmelman (1996), Heumann (1978), Mather (1979), Maynard (1983), and Utz (1978), much of the research in this area uses data collected from criminal files rather than observing the legal actors and the negotiating process first hand. An informed debate on the status of plea bargaining as it now occurs in the criminal justice system requires updated ethnographic work on the process of negotiations.

More recently, the legal and policy debate over plea bargaining has narrowed its focus to prosecutorial power within the criminal justice system. This shift in focus occurred both in the Supreme Court's observation in *Bordenkircher v. Hayes* (1978) as well as in the literature. The Court became increasingly concerned about the prosecutor's power to threaten more severe punishment or charges in retaliation for a defendant's rejection of a plea in favor of a trial. Specifically, as legislatures have responded to the public's call to get tough on crime measures by increasing prosecutorial powers, legal scholars have increased their criticisms over the use of these prosecutorial tools (Barkow, 2006; Bibas, 2004a; Stunts, 2004).

A division exists on how to respond to these plea bargaining criticisms. One camp advocates an outright ban on plea bargaining while the other suggests reform of a system that it is here to stay. One such reform idea calls for a restructuring of the prosecutorial office from within. Uviller (2000) advocates for a three tiered prosecutorial approach to case disposition. This approach would address the concerns for achieving justice in an adversarial model of unbalanced power. He suggests that a case should be processed in a bifurcated manner. The investigation, where the appropriate charge is identified, and adjudication, where the appropriate punishment in exchange for a guilty plea is meted out, should occur in a neutral fashion with a dispassionate prosecutor who is not responsible for trying the case (1695: 2000.) Only if and when the negotiations fall apart should a prosecutor take on a zealous advocacy role.

Wright and Miller (2002) propose a model akin to Uviller's (2000) approach, but place more emphasis on case screening resources as opposed to neutrality. The intended effect is to reduce the need for plea bargaining. Indeed, the results of their analysis demonstrated that plea bargains by charge or sentence reduction decreased substantially when prosecutors screened cases more effectively. Bibas (2004a) builds on these ideas by arguing that the best reforms will come from building a system of checks and balances that constrain prosecutorial power and have the effect of increasing defense attorneys' power (Bibas, 2004b). Prosecutors should focus on filing only the most serious and provable charges, stop charge bargaining, write down all plea offers, and get approval for

them from a supervisor. And more generally, Ma (2002) advocates that the United States follow a continental model of plea bargaining as found in France, Germany and Italy. Again the emphasis is on restricting prosecutorial power by increasing control and supervision.

All of these writers stress that plea bargaining under an imbalanced system does not achieve justice, much less arrive at something akin to empirical or legal truth. While the criticisms and suggested reforms of plea bargaining have remained relatively consistent, the nature of the plea bargaining process in the current criminal justice system has not. Changes in legal careers (increased professionalization and specialization), in criminal law (specifically, criminal legislation such as sentencing reform and sentence enhancements), in political movements (like victims' rights) and in the overt organization and institutionalization of plea bargaining have occurred in the past three decades. In essence, the "iron cage" of rationality that Weber (1968) predicted would emerge in modern society took a particular stronghold in the criminal justice system. Ritzer's (1993) work on McDonaldization of society, inspired by Weber's (1968) thoughts on "formal rationality," can be effectively applied to the institutionalization of plea bargaining. Specifically, institutionalized plea bargaining embodies the criminal justice system's desire to create efficiency, calculability, predictability and control¹ in the processing of defendants (Ritzer, 1993.)

Wright and Miller (2002) observe that empirical studies have ignored the inner workings of justice agencies and what values emerge in the production of justice. Yet, understanding the culture of these agencies within the context of these new approaches to plea bargaining is essential to developing policies around case processing reforms. As Mather (1979) observed almost 30 years ago, to understand the process of "sorting cases" that legal actors engage in, it is essential to describe the court behavior.

In this work, I examine an approach to plea bargaining that adopts some of the ideas suggested by Bibas (2004c) and Uviller (2000) at the King County Prosecutor's Office in Seattle Washington. The King County Prosecutor's Office created the Early Plea Unit (EPU) originally in 1990 to increase efficiency in processing cases. The Prosecutor's Office revised the EPU again in 1999 to incorporate a highly rationalized process of negotiation that exists independently from the Trial Unit. This particular organizational approach happens to follow a lot of the recommendations of Uviller (2000) and Bibas (2004c): the charging and plea negotiating are handled institutionally separately from the trying of

1. These four concepts define the basic scope of the fast food industry. Ritzer (1993) argues these concepts apply to many of the technological institutions that make up modern industrial society. Ritzer (1993) was motivated by Weber's (1968) argument that societies while initially benefiting from increased rationality would soon be taken over by it. Individuals would become alienated and overcome by the rules and regulations of the institutions in which they exist. In the end, the goals of coherency, efficiency and predictability would be undermined as the individuals in these social structures become dehumanized and dispassionate. Shichor (1997) asserts that McDonaldization exists in the three strikes sentencing policies currently in use in many jurisdictions. He concludes in his work that these McDonaldized policies have fallen the way of Weber's predictions-increased irrationality (Shichor, 1997.)

cases; the prosecutor charges conservatively, a supervising attorney reviews each action; and all plea agreements are written down.²

While in King County all of the cases are being processed in the same institution, the charging attorney and plea negotiating attorney exist in independent units from the trial attorney and are not invested in trying the case. Therefore, according to Uviller (2000), these prosecutors are more likely to be dispassionate about the case. Only when it reaches the trial team should zealous advocacy appear. However, a key prosecutorial tool, the trial penalty, is available in King County, which tips the balance of power Bibas (2004c)³ and Uviller (2000) advocate for. If the defendant declines to accept the offer given at the EPU, she or he not only faces the possibility of no plea negotiations with the trial prosecutor, or at least no better offer than the EPU offer, the defendant also faces the threat of additional charges, enhancements, or a recommendation of the high end of the sentencing range if convicted at trial.⁴

In this work, I give a brief history, purpose, and general outline of the procedure of the EPU. I discuss the norms of the unit with particular attention paid to the bureaucratic rules of the organization, and how the actors adapt to this increased rationality within the workgroup in order to accomplish their tasks. Finally, I examine whether the defense attorneys and the EPU prosecutor perceive this institutionalized separation of case processing as creating a balance of power. If they do not, I explore whether the actors engage in any adaptive behavior to create a balance of power. Furthermore, I explore the more fundamental question of whether the norms and behavior of these actors operating under this highly rationalized model is different from the traditional models previously studied.⁵

Methods

This study came out of a larger research project examining new systems of plea bargaining and comparing them to the traditional model of plea negotiations at the King County Superior Courthouse in Seattle, Washington. I collected data from three sources in the King County Prosecutor's Office from February through December 2000. I chose this location for my research because it is one

2. It should be noted, however, that when asked about these changes to the EPU, the prosecutor's office stated that they were not influenced by any particular academic work on the subject. Rather, they were motivated by an organic desire to find ways to use their resources more efficiently in the processing of cases.

3. Bibas argues that attempts to eliminate prosecutorial power are fruitless. He observes "[t]he more promising possibility is to create a balance of power, by giving other actors more power to check line prosecutors." (Bibas, 2004c, p. 1039).

4. The Supreme Court has expressed concern about the use of trial penalties, but has not ruled them as unconstitutional. See *Bordenkircher v. Hayes* (1978).

5. I specifically consider the actor interaction studies on plea bargaining conducted by Emmelman (1996), Feeley (1979), Heumann (1978), Mather (1979), Maynard (1984), Nardulli (1978), and Utz (1978).

of only a handful of jurisdictions that is employing more rationalized and institutionalized systems of plea bargaining.

The population consisted of the prosecutors and their superiors who were part of the felony trial team, and the Early Plea Unit (EPU). In addition, private attorneys and the public defenders from the four corporations that are under contract with the Public Defender's Office were included in the study. Every attorney was Caucasian, almost evenly split between male and female and in the 30-50 years-of-age range.

Gaining access was a time consuming process. It took approximately a year to negotiate with the agencies that contract with the public defender's office and the prosecutor's office to ensure confidentiality of the offenders. Ultimately, it was up to the defense attorneys as to whether they wished to participate. During the course of the study only three attorneys declined to have me observe them negotiate. None of them was private counsel.

Three approaches were used to gather data for this research. First, direct observation was used to watch attorneys negotiate and process pleas of 42 cases in the Early Plea Unit. Second, I interviewed a number of times, both formally and informally, over twenty five attorneys involved in the plea system, and finally, I collected data on the characteristics and disposition of each case I observed from court documents, and created a database to both qualitatively and quantitatively analyze them. These observations occurred over a five-month period.

Using an unstandardized interview, I asked the attorneys to reflect on what they perceived was an important part of the plea bargaining system. In all cases, I focused the interview on what the attorneys thought about the negotiation process, their opponents, the balance of power, and the organization in which they worked. These informal interviews lasted anywhere from ten to thirty minutes, depending on the wait time to get into EPU, and whether additional attorneys showed up, which made some of the attorneys feel self-conscious and want to stop the conversation. The formal interviews occurred in the attorneys' offices for about forty-five minutes to an hour with a set series of questions focusing on their demographic background, legal experience, and debriefing of the cases I had observed them negotiate.

I analyzed the data under the lens of both Bibas' (2004c) and Uviller's (2000) structural recommendations and projected outcomes of those recommendations. Specifically, I asked: in a system that adopts the procedures outlined by these authors, do the actors in the negotiation process perceive an equal playing field? If not, I looked for strategies employed by the actors to create a balance of power. In addition, I examined the actors' language, behavior, and relationships to determine if the same concepts articulated in earlier studies around the sorting of cases into "dead bang"⁶ versus "reasonable doubt"⁷ exist; if actors engage in

6. Dead bang refers to those cases where both the prosecutor and the defense attorney agree on the defendant's guilt, the appropriate charge and sentence (Mather 1979.)

7. Reasonable doubt cases are cases where questions of evidence arise making it less likely that the prosecutor and defendant can agree on the defendant's guilt, charge or sentence (Mather, 1979.)

explicit and implicit or consensus negotiations;⁸ whether “normal crimes”⁹ still occurred in routine processing; and whether “going rates”¹⁰ were still present under “theoretical exposure.”¹¹ I also explored the consistency in bargaining sequence with regard to adding case value by using information control strategies;¹² whether a shared understanding existed around behavior that would be rewarded or sanctioned in the negotiation process; if the same assessment procedures were used in determining whether to accept a plea offer in terms of substantive versus formal justice; and finally, whether any new behaviors had emerged in response to this more rationalized system of negotiation.

This study took place over a limited period of time, examining a finite number of cases in one urban setting. It is not meant to provide results that are generalizable to all prosecutors’ offices, nor can it, given the unique population of crimes, criminals, attorneys, judges, and policies found in this particular jurisdiction. The study is further limited by the narrow focus of the specific felonies that are handled in the plea bargaining system that I observed. These are generally class B and C non-violent felonies. However, an important strength of this study is that it contributes to the very limited knowledge-base of alternative forms of plea bargaining. It gives insight into the internal workings of one prosecutor’s office that has adopted some reform. Finally, this study allows for a more informed discussion of whether plea bargaining reforms should be enacted and for what purpose.¹³

Results

Bureaucratic Organization of the King County Prosecutor’s Office

The King County Prosecutor’s Office (“KCPO”) is located in the financial district of downtown Seattle. The Office occupies a number of floors in the King County

8. Maynard (1984) observed that attorneys engage in two types of negotiations. They use explicit negotiations when they are less likely to be in agreement about the nature of the case. They will raise particular issues to attempt to establish an agreed upon worth of the case. Alternatively, when the parties agree on the nature of the charge and appropriate sentence, they will use implicit bargaining, where charge or sentence is offered up and readily agreed to.

9. Sudnow (1965) identified normal crimes as those routine offenses that prosecutors and defense attorneys encountered and easily agreed on the appropriate charge and sentence.

10. Going rates refers to the agreed upon appropriate sentence that would be offered in an implicit bargain. Both Feeley (1979) and Sudnow (1965) observed this phenomenon in their work.

11. Feeley (1979) refers to theoretical exposure as the maximum sentence a defendant could receive, but rarely does, from all their charges and then treating each sentence consecutively. Defense attorneys use this technique to demonstrate their own worth and the value of the plea agreement being offered.

12. Maynard (1984) observed this technique of highlighting or ignoring certain language, evidence, or characteristics of a case or defendant in the hopes of increasing the value of it. The value refers to the legal significance of the case. The more complex the defendant or case, the more likely a better deal can be made using information control.

13. While defendants play a significant role in the decision to accept a plea or go to trial, their role in the process was beyond the scope of this study.

Superior Court Building. It is the largest prosecutor's office in Washington State. Over 500 people are employed there, 240 of whom are prosecuting attorneys.

An executive group manages the four divisions that make up the Prosecutor's Office: Civil Division, Fraud Prevention, Family Support Division and Criminal Division. The Criminal Division, the largest of the four divisions, has 156 attorneys. It comprises ten highly specialized units, one of which is the EPU.

After an arrest is made and the investigation is complete, the charge is filed by the King County (KC) Prosecutor's Office. The prosecutor's office has a specific set of internal guidelines on the rules used in filing charges and disposing of cases. These guidelines are used by the junior deputy prosecuting attorneys to assist them in filing the appropriate charges. In general, the guidelines advise that the defendant should be charged only for what can be reasonably proven and that the prosecutor should charge conservatively.

The KC Prosecutor's Office only files charges on the offenses that it is quite confident it can win at trial. It does not add additional charges just because the facts may allow for it, and it does not add enhancements. As part of its carrot and stick approach, the Prosecutor's office encourages defendants to plead guilty early in the process of disposing of the case because it offers the best chance of receiving the lowest sentence for the fewest and least serious offenses. If the defendant decides not to plead guilty, and the case is assigned to trial, the KC Prosecutor's Office reserves the right to file additional charges and enhancements based on the facts of the case. Thus, the "stick" part of the process emerges as the trial penalty.

The philosophy behind this strategy reflects the point made by Feeley (1979) that defense attorneys assess their skills through their ability to get a reduction in "theoretical exposure" for their client. According to a senior prosecutor at the KC Prosecutor's office: "Padding enhancements and overcharging for the purpose of creating a reason to negotiate creates an unnecessary theatrical drama where defense attorneys are given to believe that they have legal skills they don't really possess."

Under the conservative charging approach, the prosecutor's office asserts that the defense attorney knows exactly what to expect. If their client pleads guilty, then the low range of the appropriate sentence will be recommended.¹⁴ The defense attorney can advise their client as such, and the case can move forward without any continuances. Thus, defense attorneys are forced to accept the offer as-is unless they have truly identified legal challenges or evidentiary issues that require further attention. If the defendant chooses to not to plead earlier on, the State will apply the "stick." Additional charges and enhancements are filed in preparation for trial, where both prosecutor and defense attorney have more time to investigate their legal worthiness.

14. Washington State uses sentencing guidelines for all felonies. A sentence range is determined by looking at two variables on a grid, the defendant's offender score and the offense seriousness level associated with the criminal charge.

After the arrest, the charges are set first by less experienced prosecutors in the Charging Unit. They investigate the case for the purpose of conservatively identifying only those charges that can be easily proven at trial. An experienced supervising prosecutor reviews each charge. If the case is a non-drug, nonviolent class B or C felony, it is then transferred to the Early Plea Unit. The prosecutor's sole task in EPU is to negotiate a plea for these cases. The pleas are written down and reviewed by a supervisor. If the case is not successfully negotiated at the EPU, the case is transferred to a third unit, the Trial Unit. There, it's assigned to the trial team to prepare for litigation, with clearly defined limitations on plea offers. Each stage is organizationally separate from the other.

Background and Purpose of the EPU

On its face, the charging guidelines as well as the purpose of the EPU seems to follow Uviller's (2000) proposal of dispassionate assessment of a case's worthiness for trial. According to the prosecutor, who negotiates within the EPU, it is to act as a checkpoint. Again, the language mirrors the goals articulated by both Bibas (2004c) and Uviller (2000): "To protect the process. The objective is to make sure we've got the right stuff for trial. If the case does not negotiate at EPU, then I give a heads up to the trial team about a potential issue" (EPU Prosecutor).

The defense community believes the real goal is efficiency. While their understanding is that the KCPO created the unit to increase efficiency in the processing of cases, one defense attorney observed: "They could devote more resources if they really wanted to negotiate, but I think they are just as happy to go to trial" (Public Defender).

The Criminal Division Supervising Prosecutor stated in an interview that the KCPO established the EPU in 1990, indeed, as an efficiency measure. He observed that a review of cases showed that plenty of negotiations were occurring between prosecutors and defense attorneys, but the cases were staying in the system too long. The goal was to get cases processed in 30-45 days instead of 8-10 weeks. The KCPO developed internal standards to improve consistency, increase fair results, and to create greater access to the prosecutors for negotiations. The EPU, in its current form, emerged in 1999.

Defense Attorneys

With the exception of the three private counsel in the study, all the defense attorneys were public defenders who worked for one of the four agencies contracted by the Office of Public Defense. The public defenders are paid annual salaries fairly comparable to, but somewhat lower than the prosecutors' salaries. Two of the private counsel in the study charged their clients on an hourly basis. The third private defender used a two-tiered billing approach. He

charged a lower fee for resolving a case through a plea negotiation, and then gave an estimate on a fee if a case were to go to trial.

EPU Case Characteristics

In its present form, the EPU consists of one prosecutor who negotiates all non-drug, non-preassigned (to the trial team) nonviolent felony cases. These cases are known as mainstream cases. They largely consist of Class C and some Class B felonies. The supervising prosecutor of the EPU and the Trial Team makes decisions on an ad hoc basis as to whether a case should be preassigned to the trial team or sent to the EPU. The decision-making process seems to follow the supervisor's initial assessment as to whether they can be quickly negotiated based on the legal characteristics of the case, and the personal characteristics of the individuals involved in the case.

Institutional Rules, Process and Norms of the EPU

The word "unit" is a bit of a misnomer as only one prosecutor negotiates with all the defense attorneys handling EPU cases. After the arraignment, in theory, the case is supposed to be plea bargained or set for trial at the case setting hearing within two weeks. This schedule is rarely followed. Defense attorneys as well as the EPU prosecutor requested an average of two continuances with each one lasting two weeks. Sixty percent of the cases seem to take a minimum of 6 weeks to process.

When the defense attorney is assigned the case, they go to the records department to request the case file for the EPU.¹⁵ In general, most defense attorneys don't go to EPU until a day or two before the case setting hearing. The defense attorney waits outside the EPU prosecutor's office until she's available to discuss the case.¹⁶ Negotiations with the EPU prosecutor can occur over several weeks. Continuances are used to allow time to examine any issues raised by the parties. The general issues raised tend to surround the offender score,¹⁷ whether the charge is supported by the facts, a clarification of the

15. A key indicator that a defense attorney is not a regular member of the workgroup is their ignorance of the rule that they must request the case. They enter the room to start the negotiations after waiting for some period of time to meet with the EPU prosecutor, and have to leave to go find the case from the records department.

16. The wait time could be anywhere from ten minutes to over an hour. As the study wore on, tension increased significantly amongst the defense attorneys over the amount of time they were required to wait to meet with the EPU prosecutor. At one point, a chart was posted listing the time each defense attorney had waited. On occasion, the EPU prosecutor came out and made comments on the sheet.

17. The offender score reflects the number of prior convictions a defendant has. The correlation is one point for each offense but in certain cases involving repeat sex or drug offenses, the crime can be assigned three points. The offender score in combination with the level of seriousness of the current offense will determine the defendant's sentencing range.

facts from witnesses or victims, consultation with the victim,¹⁸ or search and seizure issues.

The EPU process, as arranged by the institution in its present form, seems relatively straightforward to the newcomer. The organizational structure of the system, however, is teeming with frustration for the defense community. It creates what Utz describes as, "an atmosphere of cooperation under conditions of organizational conflict." (Utz, 1978, p. 4.)

From the defense attorneys' perspectives, three factors prevent them from doing their job effectively. First, only one prosecutor is assigned to negotiate with approximately 50 attorneys who do business with the EPU on a regular basis. This increases the wait time significantly. In addition, when other defense attorneys are waiting outside the EPU office, the defense attorneys feel that the EPU prosecutor shortens their negotiation time and is quick to suggest a continuance for any issues raised. When defense attorneys are trying to assess whether a deal is likely, a continuance just creates a delay that must now be factored into the assessment of whether to pursue a plea. If a deal can't be made, defense attorneys would like to quickly move on to the trial team. Continuances come at the expense of their clients, particularly those that are in pretrial detention. On occasion, the time taken to dispose of their case is longer than the sentence given. Finally, it is sometimes the case that no one is available to negotiate at all when the EPU prosecutor is absent. Just as likely, the defense attorneys don't wish to negotiate with the substitute prosecutor because of the unpredictability it brings.

In an interview with a supervising prosecuting attorney, I raised these issues with him. He responded that the prosecutor's office has limited resources to work with and that the defense attorneys "all follow a cattle trail. They need to be more inventive about their practice. Change the way they spend their time." This interview offers the first hint of organizational tension that exists between defense attorneys and prosecutors.

Content and Sequence of Bargaining Discourse

Similar to Maynard's (1984) observations, the attorneys in this study engaged in a bargaining sequence that involved a "proposal" and "position report." In these negotiations, most defense attorneys enter the bargaining session silently waiting to see what the prosecutor will propose. The offer will reveal some level of information about the prosecutor's view of the case, or as Mather (1979) and Eisenstein and Jacob (1976) pointed out, the prosecutor's assessed "value" of the case. The defense attorney views it as an important strategy, similar to Maynard's (1984) "framing strategy," particularly in cases where they believe no

18. An interview with the EPU prosecutor indicated that consultation with the victim during the EPU negotiations is paramount. According to the prosecutor, it is vital to keep communication open with the victim so that they can consent to the plea being offered. It is essential at this stage because a victim's concerns can be sacrificed at the trial stage, especially if the case falls apart.

factual or legal points exist to argue on behalf of the defendant. Furthermore, the reply techniques Maynard (1984) identified in his analysis are used by these attorneys too, specifically, the uses of utterances to delay a position report.

- Defense Attorney: "Last time we talked I think it was about scoring."
[Defendant's offender score.]
- Prosecutor: "Yes. We were looking at a 7 or an 8."
- Defense Attorney: "Um."
- Prosecutor: "We need check on these felonies in California.... To see if the crimes are comparable felonies here."
- Defense Attorney: " Huh?"
- Prosecutor: "We need to check the California code on the conspiracy to commit a crime."
- Defense Attorney: "What crime?"
- Prosecutor: "Theft. I don't think the theft is comparable, but the conspiracy is."
- Defense Attorney: "What happens when the DOC [department of corrections] doesn't agree with our scoring?"
- Prosecutor: "We would be willing to drop the theft, but not the conspiracy. Why don't we get a continuance and you bring me a copy of the California code next time you come in?"
- Defense Attorney: "If we go to trial, they'll split into two trials as one will be a misdemeanor."
- Prosecutor: "If you set for trial, it will give us more time to figure out the circumstances of the California crimes and increase the offender score."

In this exchange, the defense attorney uses a number of indirect utterances to get the prosecutor to define her proposal without giving a clear position report until the end of the conversation. When the defense attorney does give a position report that threatens to reject the offer, the prosecutor reminds him to whose advantage a trial would be. As Maynard (1984) observed, the attorneys will move to explicit bargaining and use formal justice if "convergence" does not occur between counsel. In addition, the defense attorney strategically uses the phrase "our scoring," suggesting the teamwork that should be involved in solving this issue.

Maynard (1984) also observed that facts and characteristics were not essential to case disposition, but rather charging and sentencing were the key to case disposition. Indeed, much of the content in the negotiations revolved around those ideas. However, both prosecutor and defense attorneys acknowledged that character could be an important part of the content. As Mather (1979) observed, defense attorneys use character to add "value" to a case when other factors cannot be argued. The defense attorneys and the prosecutor both agreed it could be used effectively, only if done strategically. In this exchange, I asked the EPU prosecutor under what circumstances she would consider character.

- Prosecutor: "Mental Health issues. Juveniles. Overall, I can't think about character because where is the dividing line? I let them say their piece, but I don't care. Is that awful?"

Interviewer: "Can they make their case in the sentencing hearing?"

Prosecutor: "Well, yes. Exactly. They can argue it there."

From the defense attorneys' perspective, this was unfair. A key component in meting out justice was allowing for second chances. Character was a key determinant of that. According to defense counsel, the sentencing hearing seemed to be an ineffective, if not unpredictable, place to argue character because judges are so prone to follow the prosecutor's sentencing recommendation. However, the defense attorneys did use character strategically in their negotiating and effectively added "value" to their case.

For example, on one occasion the EPU Prosecutor did allow herself to be swayed by character. In this case, the defendant appeared to be afflicted with mental health issues. The defendant was arrested and charged with theft after exiting a store with pants wrapped around his arm. He had not paid for them. With the intention of cooperating, the defendant had gone back to the store and photographed himself re-creating the crime. He sent a copy of the pictures to the prosecutor. When the defense attorney explained his client had mental health issues and was on medication, the prosecutor agreed to dismiss the case. The key was to use these characteristics in the context of the crime to support his "position report" to the prosecutor. Maynard (1984) also observed this strategy in his work.

A significant theme observed in Maynard's (1984) discourse analysis, as well as in Feeley's (1979) and Mather's (1979) work is that most of the negotiating involves implicit bargaining. The parties quickly come to an alignment of the shared value of the case. In this exchange the attorneys view the offense as a "normal crime" and agree on the "going rate."

Defense Attorney: Do you have an offer for me on this?"

Prosecutor: "A misdemeanor with restitution. Criminal Trespass?"

Defense Attorney: "This mother is driving me nuts. I'd never make it in Juvy [Juvenile Court] because of all the whiney mothers. I'd tell them it's their fault and get fired. So are we thinking along the same lines? Deferred Sentence? 12 month rec?

Prosecutor: Okay, but 20 days in custody and credit for time served. He'll be out at sentencing.

Defense Attorney: But you're not doing it out of the goodness of your heart. Hey, we're going to the game on Friday?

Prosecutor: Yeah, but he is still getting the benefit of it.

There is no discussion about the facts of the case. Instead, the end result is agreed upon in the midst of non-legal discussion. What's also being communicated here is an acknowledgment by the prosecutor that some incarceration period is included in the offer to justify the time the defendant has already spent in pretrial detention. When asked about this type of exchange the prosecutor said, "A lot of times, when I know the attorney well, we just look at each other and agree on what needs to happen here. I feel like we work together on it. They know I'm reasonable and going for broke is not a good idea" (EPU Prosecutor).

This implicit bargaining was consistent with Feeley's (1979) and Mather's (1979) observations that in these less serious cases substantive justice was more appealing than formal justice. The challenge was balancing the costs of pretrial detention. On the one hand, the sentencing range is so small for less serious felonies that it would have been low risk to go to trial, or at least investigate potential issues, but the time it would take to investigate and/or get to trial would mean the defendant often spent more time in detention waiting through continuances than his sentence would be. Therefore, pretrial detention became a strong motivator to plea bargain in less serious felony cases. In those cases where the defendant had spent more time in detention than the sentence agreed to in the plea bargain, the prosecutor made adjustments to the sentence offer, as noted in the previous negotiation exchange.

Cooperation Within the Workgroup

Despite the increasing tension around the organizational structure of the EPU, evidence of cooperation within the workgroup revealed itself in a number of ways. Overwhelmingly, attorneys took the view that they should work together to settle on the appropriate charge and punishment. When they did not agree, they respected each other's position to go to trial, but it often belied defense attorney resentment at "wasting time with the EPU." Overall though, the attorneys' approaches in interacting with each other suggested a sense of familiarity and ease that comes from working together regularly over a long period of time.

Cooperation in the workgroup originates from an understanding of what the two parties are trying to achieve. Both sides know that the court and prosecutor's office endorse plea negotiations to increase the efficiency of case processing. The defense attorneys acknowledged the seemingly objective approach the EPU prosecutor takes. If the case has problems, it should be investigated. The EPU prosecutor explained her philosophy this way:

It's a credibility issue. We tend to agree because I see my job as being objective. I advocate for the state, but I must make sure we can make our case. At the same time, I'm not going to tell them all the issues or hide them all either because that would mean ineffective assistance of counsel. (EPU Prosecutor)

When defense attorneys questioned the facts, the charge, evidentiary or scoring issues, the EPU prosecutor always agreed to a continuance to investigate the case further. She willingly shared resources with the defense counsel and went so far as to point out potential issues that the defense counsel appeared to have not picked up on. In addition, when the defense attorney determined that trying the case was a better strategy, or that a request denied by the prosecutor would be raised at the sentencing hearing, the EPU prosecutor respected that position. This example illustrates this behavior.

A defense attorney began negotiations on an assault case questioning whether the charge of Assault in the third degree was appropriate given the

facts of the case. The victim was the landlord who shared a house with the defendant. The victim confronted the defendant about not paying rent as well as his messy room. A fight ensued in which both parties were arrested, but only the defendant was charged. When the defense attorney did not elaborate on why Assault in the fourth degree would have been more appropriate, the EPU prosecutor handed him the charging standards to review. The defense attorney asked for help in looking them up. The prosecutor read them aloud. Together, they listened to the 911 tape and examined the pictures of the injuries in light of the charging standards. The prosecutor then conceded:

Prosecutor: "It's an assault 4 (then jokes) with the stipulation that the defendant keep his room clean!"
 Defense Attorney: "Agreed! I do have to check with my client though."
 Prosecutor: "If the defendant won't agree, just set it for trial."

In this exchange, the parties clearly worked together in the dispassionate manner Uviller (2000) recommends to find the appropriate charge. The prosecutor agrees to reduce the charge and wants a guilty plea in exchange for the low end of the sentence range recommendation. All of this is implicit bargaining. However, the defense attorney does not readily agree because there is an unspoken character issue of which both parties are aware. The defense attorney knows, however, it would be bad strategy to articulate it explicitly. The victim is gay and the defendant is straight. The attorneys know socially sensitive characteristics can be problematic for a jury. The defense attorney is testing to see if there is room for further negotiation by leaving himself room to check with his client. The prosecutor makes her position clear with the last statement. The tone of the exchange is pleasant and even includes a joke, but ultimately the prosecutor has made clear she will not negotiate further.

Reasonableness seemed to have its limits, and similar to Heumann's (1979) observations about "ungentlemanly" behavior, attorneys who raise frivolous legal issues that they cannot support are perceived as wasting the prosecutor's time. In one case, the defense attorney came in for the initial negotiations and asked for a misdemeanor on an eluding police case. The defense attorney suggested there was an identification issue, but did not elaborate. The prosecutor disagreed and offered that perhaps there is a search issue instead. She advised the defense attorney to read the case law, and then they'd ask for a continuance. The prosecutor even read him the cite to the case. When he returns with the case law in hand, but does not actually argue the case, defense counsel's request for a misdemeanor is met with silence. The prosecutor explained her reaction: "I think we'll lose on the search issue, but it doesn't kill the case. Yeah, sure, I could have given him reckless endangerment, but I did not want to do it. Sometimes I'm surprised how unprepared they are. Why not argue why the case applies?" (EPU Prosecutor).

On the other hand, some defense attorneys asserted that the prosecutor was not always prepared either, but the defense attorneys claimed that this could be to their advantage. The defense attorneys entered these types of negotiations

simply waiting for an offer, rather than arguing the case. On occasion, the prosecutor would underestimate the value of the case, and the defense counsel perceived that the EPU prosecutor gave a better offer than the “going rate.” Defense counsel particularly relished these moments because they could go back to their clients and legitimately argue that the defendant got a discount off their “theoretical exposure.” In other situations, when the offer was too good, defense counsel took it as a signal that something was wrong with the case and a better offer could be had if they waited and set it for trial.

Overall, defense attorneys felt that they operated in a subculture of cooperation, in which most cases were readily negotiated because of the shared knowledge and easy alignment in terms of “normal crimes” and “going rates.” Most defense attorneys thought that the EPU had a place in the judicial system and that certain types of “no brainer”¹⁹ cases belonged there—victimless crimes in particular. The defense attorneys found they could work with the EPU prosecutor in a cooperative manner, but certainly under tense circumstances. They believed that the lack of resources made available suggested that the prosecutor’s office did not care about efficiency and fairness. Consistently, the defense attorneys voiced concern about the time it took to negotiate cases in EPU because only one prosecutor was assigned to the Unit. Every request to investigate a case further meant a delay in resolving the case.

Decision Making and Adaptation to the Institutional Rules and Process

Despite the perceived impediments of the EPU’s organizational system, the actors within the workgroup almost approached a sense of camaraderie as they completed their daily tasks. While the defense attorneys tolerated the structural arrangement of the EPU (less so as the study wore on) eighty percent expressed deep frustration about two institutional rules of the bargaining process. The first rule stated that once negotiations failed at the EPU, no negotiations *should* occur at the trial level, and if the case absolutely required them, the trial team could not offer a deal better than what was offered at the EPU. The second rule declared that negotiations were *not* available at all if a case bypassed EPU and immediately set for trial. These rules were viewed as another form of a trial penalty.

With regard to the first rule, every defense attorney had a story to tell about the deputy trial team offering a better deal than EPU, only to have it withdrawn

19. When asked to clarify “no brainer” cases, defense attorneys repeatedly mentioned cases where the facts are straightforward, no evidentiary problems exist, and the offense is not overcharged. Despite King County’s policy of charging conservatively, many defense attorneys felt the least experienced prosecutors who filed the charges were not properly trained. In fact, one deputy trial prosecutor acknowledged that cases sometimes were overcharged. The overall description of “no brainer” cases seemed to meet the definition of Mather’s (1979) “dead bangers” or Sudnow’s (1965) “normal crimes.”

when the trial team discovered that the EPU had made a less attractive offer. One defense attorney explained it this way:

There's almost an incentive not to submit the case to EPU and set it for trial. Because sometimes a deal is offered by the trial team and they can't make the offer because the EPU set a tougher deal. I had a defendant where three cases were involved. I said, "My guy will plead if two are dismissed." EPU said one" and the trial deputy said "two" and then looked in the file and said, "I can't because of the policy on EPU offers. It's almost better not to open the can of worms [at EPU]." (Public Defender)

The defense attorney's comment suggests that he is more confident in the second rule being broken: the trial team's willingness to negotiate even if the defense attorneys bypass EPU because the trial prosecutor is facing the pressure of whether they can win at trial.

The rule that the trial team cannot offer a deal better than the EPU causes additional angst particularly when the defendant has been in pretrial detention. While the attorneys negotiate the case at EPU, the defendant spends weeks or even months in jail only to have the process start all over again with the trial team. The additional time incarcerated may afford the defendant a better deal on paper only; overcoming the risks of trial and a more severe sentence could, in the end lead to a better offer, but the amount of time he spends in jail waiting for two different prosecutors and his defense attorney to resolve the case may surpass his actual sentence.

A defense attorney described the problem of the EPU in the following manner:

The problem is that this is a traffic jam. You have to have continuances. I average three or four a case because you need the time to determine if there's a good defense. You're just shooting from the hip; both of us [prosecutor and defense attorney] need to get up to speed. Maybe one out of 30-40 cases do I get a deal on the first try. (Public Defender)

Defense attorneys chose one of two ways to adapt to this situation. Typically, if the deputy trial attorney refused to negotiate or revised an offer to remain consistent with the EPU's offer, the defense attorneys approached the supervising trial attorneys.

The defense attorneys who tried this method were usually more senior than the deputy trial attorneys with whom they were negotiating. Public defenders, in particular, perceived that they had more success with the supervising prosecutors because of one key factor—history. According to one defense attorney:

I go to the supervisor because I usually have a history with the supervisor. There is no substitute for history with a person. I'd love to work with someone I've bonded with in trial. We've bonded through the stress and we know how the disagreements will fall out. (Public Defender)

The other adaptation employed by about twenty percent of the defense attorneys was to bypass the EPU and set the case for trial. Although the defense

attorneys ran the risk of having the trial prosecutor enforce the second rule— no negotiating, they knew that if the case fell apart or the trial attorney had a full calendar, a deal could be made. The majority of defense attorneys informed me that they monitor the deputy trial attorneys' calendars. They deemed it good strategy to set the case for trial and have a "highly stressed prosecutor call for a deal."

Over ninety percent of the trial team prosecutors interviewed said that they would initially enforce the no negotiation rule unless it was a private attorney unfamiliar with the process. However, every trial team prosecutor thought that each case should be negotiated, if possible, but some noted that defense attorneys who bypassed EPU should not receive as good a deal as those that followed the process. This prosecutor's opinion summarizes most of the trial team's view:

Even if it's gone through EPU, I basically think the negotiating has to happen. Every case needs the opportunity to be resolved. I'm not trying to jumpstart a case, but every case can unravel, witnesses go missing or evidentiary issues come up. It's a mistake not to listen to the defense attorney. In my last eight or nine cases, I've given better deals in two or three cases [than EPU.] (Deputy Trial Attorney)

The defense attorney's engaged in a two-part decision-making analysis, similar to the approach taken by the attorneys in Emmelman's (1996) work. First, the defense attorneys assess the value of the case based on the seriousness of the case, the strength of the evidence, and the background characteristics. The more serious the case, the more inclined defense counsel was to take it directly to the trial team and try negotiations there; particularly after engaging in part two of the analysis—the potential costs of delay by setting the case for trial after going to EPU. The defense attorneys felt that the possibility of lost witnesses, better defense evidence emerging, and a clogged prosecutor calendar could all be used in their favor regardless of the risk of a trial penalty. In the end, the defense attorneys know that these rules are flexible. A plea bargain is possible with either the EPU or the trial team. Thus, the defense attorneys felt that they used this knowledge to create a balance of power.

Organizational Challenges of Having Separate Units Process the Same Case

Notwithstanding, the defense attorneys found the negotiating process challenging whether it was with the EPU prosecutor or the trial team deputy prosecutors. They felt a truly effective negotiation could not occur if both parties were not approaching the bargaining with the same level of investment in the case. The defense attorneys thought that EPU prosecutor was too removed from the case because she would not actually be trying the case. She was not

really eyeing the case for trial in the same way a defense attorney was because the EPU prosecutor was not facing the same consequences of *trying* the case if the plea fell through. Consequently, she had less at stake than the trial attorney.

The following example illustrates this point. In two burglary cases, the defendants had substantial offender scores that significantly increased the lengths of their sentences. The EPU offers in both of these cases were at the higher end of the sentencing range because:

There is nothing to lose by going to trial. I offered midrange because I was appalled by the offender scores. They're off the charts. Sure I could have gone lower, but I didn't want to. Let trial team deal with it, if they have too. (EPU Prosecutor)

In this case, there was a shared understanding as to the crime, but no convergence around the sentence length. The defense attorney was frustrated because he had to begin the negotiation process again with the trial team, under the guise that the trial team could not offer anything better; yet EPU knew the defense counsel would try to get a better deal.

In fact, the trial prosecutor offered the minimum range in one of the cases, as he was unable to get any response from the victim. In the other case, the trial prosecutor kept the EPU offer open. The defense attorney advised her client to plead guilty. Ultimately, defense counsel obtained a significantly lower punishment at the sentencing hearing after describing in detail that the defendant had mental health issues for which he desperately wished to seek treatment. This shows how the defense attorney used the manipulation of his knowledge of the rules to his advantage at every stage. The trial attorney, having greater investment in the case, saw the need to plead out the cases. While discussing characteristics would not influence the EPU prosecutor, or perhaps even the trial prosecutor, it did impact the judge's sentencing. Only if both the prosecutor and the defense attorney sign an "agreed" plea, will the defense attorney not attempt to get a lower sentence at the sentencing hearing.²⁰ Regardless, the defense attorney felt the case could have been processed more efficiently if the EPU prosecutor actually had an investment in the case going to trial.

While Bibas (2004c) advocated greater supervision of plea agreements, defense attorneys thought there was too much supervision. Defense counsel felt that deputy trial prosecutors did not have adequate ownership over their cases. In comparing the organization of trial prosecutors in another county, one defense attorney observed: "In Thurston [county], the attorney has ownership

20. Both prosecutors and defense attorneys noted that systematic pressures can influence judges. For example, if judges were deviating too much from the prosecutors' recommended sentences, prosecutors would threaten to send more cases to trial. Similarly, if the jail complained of overcrowding, judges would give less pretrial detentions or more diversion sentences, thus reducing the jail population.

over the case and they'll review it as if going to trial. They feel better about the job because they're independent thinkers. Deputy prosecutors here need approval for everything" (Private Defense Counsel).

In fact, the single biggest improvement that the defense attorneys wanted was for the deputy prosecutors to have more power over their cases. While the trial prosecutors examined the case as if going to trial, they did not have the ultimate say in whether a deal could be accepted. Again, the final decision went to a supervisor who would not be trying the case.

Furthermore, seventy five percent of defense attorneys bitterly expressed resentment towards the Prosecutor's Office in general. They could not understand why the institution was so unwilling to devote resources to increase the efficiency of both defense and prosecutorial tasks in the pursuit for justice. They felt that too much time was wasted on continuances because the EPU prosecutor was overwhelmed with cases that needed further investigation. The defense attorneys in this study were continually under pressure to avoid delays not only for themselves, but also for their clients in pretrial detention. While the EPU prosecutor certainly wanted to process cases, she was not facing a trial calendar pressure point like defense counsel.²¹ In that sense, for non-"no brainer" cases, the defense attorneys felt that there was always an unequal balance of power at the EPU that could not be overcome without bypassing it, which came with risks.

At the end of the study, one defense attorney was so frustrated by this situation that he was conducting an experiment of his own. He was immediately setting all of his cases for trial to see if he could obtain better outcomes faster than in the EPU alone or in an EPU/Trial Team combination because of his confidence in manipulating the rules to his advantage.

Discussion

This article has examined the internal machinations of a highly rationalized model of plea bargaining from the legal actors' perspectives. It has sought to answer three questions under this so-called reform model: (1) Do the behaviors, norms, and language of the attorneys differ from the more traditional models studied? (2) Does this institutionally separate model of case processing lead to the balance of power sought by Bibas (2004c) and Uviller (2000)? (3) If not, what adaptations, if any, are made by defense counsel to achieve some balance of power?

On one level, this model demonstrates an efficient and cooperative model of plea bargaining for those cases that fit Sudnow's (1965) "normal crimes" definition. While the structural organization and resource allocation of the EPU led to tension, the legal actors were able to come to an agreed upon plea

21. Although, it should be noted no defense counsel mentioned their own caseload pressure as a reason to plea bargain.

in over 70 percent of the cases that were processed through the EPU. Essentially, both defenders and prosecutors engage in routinization to efficiently process these cases. While cooperation abounds in the "no brainer" cases, the adversarial nature of the trial emerges in the EPU when cases don't fit this model.

Norms, Language, and Behavior

The behaviors and perceptions described here demonstrate that even under this more rationalized model, the defense attorneys and prosecutors act fundamentally quite similarly to the attorneys studied by Emmelman (1996), Feeley (1979), Heumann (1978), Mather (1979), and Maynard (1984). The attorneys sort cases in the same way, relying on shared understandings of "normal crimes" and "going rates." While the name of the "normal" crimes has changed to "no-brainers," these attorneys work under a largely congenial workgroup setting, where a shared history appears to assist in the bargaining process. The bargaining sequence and content is remarkably similar to Maynard's (1984) descriptions. The attorneys engage in the same proposal and position report, with strategic uses of utterances and silences to delay responses. They use implicit bargaining for "no brainer" cases and explicit bargaining for more complex cases. The attorneys also engaged in information control. They discuss mostly offender scores and sentencing more so than charging, but strategically mention character to add value to their cases when possible to do so. Finally, as Emmelman (1996) and others before her noted, case pressure does not appear to be a key motivator for defense attorneys in negotiating their pleas.

Balance of Power

While the norms, behavior, and discourse can appear to be significantly analogous, some key distinctions do emerge in this new setting and serve to decrease the balance of power in the prosecutor's favor. The EPU model appears to follow Bibas' (2004c) and Uviller's (2000) recommendations: separate charging, negotiating and trial units with differing levels of advocacy and investment in the case; high level prosecutorial review of charges and pleas; charges conservatively filed and readily provable, with less charge bargaining; and all plea offers written down. However, this structural model does not create the general power balance Bibas (2004c) supports. Moreover, despite this structural organization, the EPU does not follow the ideological framework of neutrality as advocated by Uviller (2000). It engages in institutional retaliation through its threat of trial penalties, its no trial team negotiation if the EPU is bypassed rule, and its no better offer than the EPU offer rule.

For the majority of cases, defined as no-brainer cases that can be easily aligned, this model seems to be highly effective, according to prosecutors and

defense attorneys alike.²² For the remaining 30 percent of more complex cases, this model can be troubling. It appears to create even less efficiency, more strain, and less power for defense attorneys for a number of reasons.

First, the institutional rules around trial penalties and limited negotiation opportunities with the trial team are quite different from traditional models, and thus, significantly impact prosecutorial power. Mather (1979) noted that the defense attorneys in her work may have engaged in conservation of resources when they pled out the "dead bang" cases. Because the sentencing range was so narrow, the defense attorneys would have incurred relatively little risk in taking the case to trial, but chose to negotiate anyway. However, the attorneys' behavior in this study more closely mirrored the attorneys' motivations in Feeley's (1979) work. The attorneys in this study felt compelled to plea bargain cases not because of resource conservation, but because of the threat of a trial penalty. While Feeley (1979) emphasized the present, yet unspoken nature of the trial penalty in his work, in this study, the trial penalty was a clearly articulated rule that significantly influenced and frustrated the defense attorneys. Feeley (1979) wrote of a "theoretical exposure" most defendants in reality would not encounter. However, the attorneys here knew that the combination of extra charges, enhancements, and a recommended high end of the sentencing range, along with the length of time required to negotiate with the EPU followed by the trial attorney, created a real risk in adequately resolving the case as time wore on.

Second, while delay was a significant tactic employed by defense attorneys in earlier studies, it seemed to benefit the EPU in this study. Emmelman (1996) found delay particularly important in the plea bargain decision-making that attorneys in her work engaged in. The organizational structure and limited EPU resources in this study, however, meant that defense attorneys could not use delay as effectively. Because the EPU attorney was not taking the case to trial, she was not as concerned about a case going stale. Furthermore, the EPU prosecutor knew that even if the case did go to trial and get stale, the trial prosecutor was under significant pressure to offer no better deal than what she had offered. Defense counsel had to continually weigh the amount of time their clients were spending in pretrial detention against the delays of continuances, the trial penalty, and the opportunity to negotiate a better deal with the trial team in spite of the rules prohibiting it.

Furthermore, the lack of resources to actively investigate cases for legal issues in a timely manner also creates a power disequilibrium. While the supervising prosecutor who preassigns these cases feels that those cases assigned to

22. Perhaps the most troubling observation is the unquestioned emergence of Ritzer's (1993) McDonaldization into the process of justice production. Neither prosecutors nor defenders seemed particularly troubled with the idea of increased efficiency in case processing through the use of this rationalized system of plea bargaining. In fact, as discussed, both parties felt that this type of model of plea bargaining had a place in the criminal justice system, but only for those cases they identified as "no brainers" or as Sudnow (1965) defines them, normal crimes. The question remains whether their judgments in sorting these cases as "no brainers" was, in fact, correct. As a plea inherently means waiving the right to trial, it is impossible to find out the answer to this question.

EPU don't have triable issues, it is incumbent on defense counsel to also make that assessment. The limited resources at EPU result in multiple continuances and discourage this investigation for all but the most serious cases. The defense attorneys are put in a less powerful position when they have to consider the EPU prosecutor's case pressure against their client's pretrial detention. Defense counsel worried about the ability to properly examine the legal issues in the case at EPU, frustration from the EPU prosecutor if she felt the continuances and investigation were unwarranted, and then further delays if they felt the case needed to be set for trial.

Third, differences in negotiation content also restrict defense counsel's bargaining power. Mather (1979) found that overcharging played a significant role in negotiation conversations. This was not the case here, as the policy in this office was to charge conservatively. Instead, more conversations were around sentencing or offender scores, which directly impact the sentencing range, rather than charges. In addition, character seemed to be used much more sparingly in this setting than in prior studies, where it was a key negotiating tactic. Under this organization structure, defense counsel experienced significant pressure to delay any character discussion until the sentencing hearing. However, defense attorneys often felt that arguing character at the sentencing hearing was futile because the judges deferred overwhelmingly to the prosecutors' recommendations. They asserted that the judge's deference to the prosecutors' recommendations meant that prosecutors held too much power in the system. Unlike in Mather's (1979) work prosecutors in this study were not passive about sentencing.

Finally, an exchange relationship is essential to any negotiation. Both parties must feel that they are gaining from the bargain. As Maynard (1984) observed, exchange relationships occur within the constraints of organizational process. However, in the EPU structural model, it did not feel like an exchange was taking place. The defense attorneys could negotiate with only one EPU attorney who may have been too dispassionate in that she had little at stake if the deal fell through. Either way, the case would leave her desk without her taking it to trial. The defense attorneys had more at stake and more to gain from the deal. In that sense, the EPU prosecutor was particularly effective at calling defense counsels' bluff. This uneven investment in the case led to tension and suspicion.

Defense attorneys exhibited an undercurrent of distrust towards the EPU prosecutor. When the prosecutor offered a deal lower than expected, the defense attorneys were just as likely to take the case to the trial team as when the deal offered was too high. They suspected that the prosecutor had reduced the case value because it was a weak case. Again, the perceived uneven investment in the case actually increased the adversarial tone at the EPU. The defense attorneys did not trust that the EPU prosecutor could be acting in a reasonable manner for non "no brainer" cases. Thus, by taking the case to the trial team, the defense attorneys were decreasing efficiency and increasing risks for their client.

Feeley (1979) emphasized the exchange process in plea bargaining, in which personalities and relationships become an essential part of the negotiations. The attorneys in this study did not find that central to their work at the EPU. As Weber (1968) predicted, with increased rationalization, the rules take over and actors become alienated. Under the EPU model, the rules and penalties on plea bargaining attempted to remove the human element to increase predictability, efficiency, and fairness. Instead, they appeared to alienate the prosecutor and disempower the defense community. However, as will be seen in the next section, defense counsel used relationships and personalities to subvert these rules and achieve some modicum of justice.

Adaptations

Despite the frustrations articulated about EPU, and in fact, most attorneys lamented not being able to go straight to trial counsel in the non- "no brainer" cases, the defense attorneys knew that the rules could be breached. Meaning, some defense attorneys could equalize the power in the bargain. Specifically, the use of supervisors cut both ways for the attorneys. On the one hand, the supervisor may have appeared too dispassionate, even a hindrance, in disallowing the subordinate trial prosecutor's offer, while experienced defense attorneys used supervisors to their advantage. If they had a trial history with the supervisor, they could often get a better deal than what the less experienced trial prosecutor was offering them. Relationships, personality, and reputation were seen as key to their success in this maneuver.

The defense attorneys were also quite adept at acquiring bargaining power by sidestepping the EPU entirely. They were confident that in certain more serious, complex cases, the closer one got to trial, evidence and loss of witnesses could be turned to their advantage. In fact, defense counsel and prosecutors both agreed that they gave better "going rates" the closer the case came to trial in spite of rules to the contrary. In addition, defense counsel used trial prosecutors' case pressure to their benefit in exacting deals that weren't available at EPU or supposed to be available from the trial team. Ultimately, defense counsel also found highly effective ways to call the prosecutor office's bluff. However, much of this power was achieved because of the trial experience, history and relationships that existed between defense counsel and trial prosecutors.

Conclusion

Despite the presence of structural changes advocated for by Bibas (2004c), the neutrality Uviller (2000) suggests did not materialize in this reformed model of plea bargaining. Under the current organization of "reformed" plea bargaining in this study, efficiency was achieved at the EPU in seventy percent of the

cases, but it's unclear whether justice was. The structure, resources, and rules lent considerable more power to the prosecutors than under the traditional model. While the attorneys in this study behaved remarkably similar to the attorneys in traditional models when it came to processing "normal crimes," this imbalance in power led to tension and distrust in resolving more complex cases.

The defense attorneys were under significant pressure to screen cases in the midst of negotiating and minimizing continuances, particularly for clients in pretrial detention. In some cases, this may have caused them to treat certain cases as "no brainer" cases that might have deserved further legal attention. Under these circumstances, the defense attorneys tended towards substantive justice over formal justice. In addition, working under the threat of the trial penalty, no trial team negotiation rules, and further time delays, defense counsel experienced significant pressure to accept the EPU plea offers.

While those defense attorneys who had relationships and trial history with supervising prosecutors successfully adapted to the system and achieved some balance of power with the trial team on more complex cases, this study suggests that Bibas's (2004c) and Uviller's (2000) recommendations are not enough. Wright and Miller (2002) demonstrate that better screening is the first step in fairly and efficiently processing cases. However, more should be done.

First, more resources, should be allocated to Early Plea Units so that both prosecutor and defense counsel can carefully examine the case for triable issues without the burden of excessive time delays.

Second, neutrality is more likely to emerge if both parties have the same level of dispassion around the case. Defense counsel should be assigned to EPU cases in a similar model to the prosecutor's office. Certain defense counsel should work only on EPU cases. When both dispassionate parties agree that the case has a triable issue that can't be pled out, then the case should be assigned to a new trial team, including a new trial defense counsel and a new trial prosecutor.

Third, the trial penalty should be removed. While there may be a sentence discount to provide an incentive in taking a plea, the state should act in good faith and charge only what it intends to prove at trial and remain consistent with that charge. If a triable issue emerges, defendants should not be punished for asserting their Constitutional rights to trial.

The rules prohibiting plea bargaining between trial counsel should be eliminated. As has been shown, these rules can be subverted if a case starts to fall apart for either party. Furthermore, defense counsel will not bypass the EPU, nor have the incentive to do so, if they have confidence that counsel on both sides is dispassionately and efficiently reviewing the case.

Finally, the judges should take an active role in reviewing the sentence. If character is not an appropriate subject for the plea bargain, it is appropriate at the sentencing hearing. Judges should take careful note of the recommendation, but also review the presentence report and the evidence presented at the hearing to ensure the defendant is receiving a fair sentence given all aspects of

the case. At this stage in this process, the judge is in the best position to ensure a balance of power in the disposition of the case.

At a minimum, the prosecutor's office should examine its screening procedures for the thirty percent of cases that do not get resolved in the EPU. Perhaps those types of cases should be immediately assigned to the trial team, where a more traditional model can be followed. As it stands now, this study suggests that we have not yet found a reform model of plea bargaining that addresses the concerns of legal scholars, social scientists, or practitioners.

References

- Acevedo, R. (1995). Is a ban on plea bargaining an abuse of discretion? A Bronx NY case study. *Fordham Law Review*, 64, 987.
- Alschuler, A. (1968). The prosecutor's role in plea bargaining. *University of Chicago Law Review*, 36, 50.
- Alschuler, A. (1975). The defense attorney's role in plea bargaining. *Yale Law Journal*, 84, 1179.
- Bar-Gill, O. (2006). Plea bargains only for the guilty. *Journal of Law and Economics*, 49, 353-368.
- Barkow, R.E. (2006). Separation of powers and the criminal law. *Stanford Law Review*, 58, 989.
- Bibas, S. (2001). Judicial fact-finding and sentence enhancements in a world of guilty pleas. *Yale Law Journal*, 110, 1097.
- Bibas, S. (2004a). The Feeney amendment and the continuing rise of prosecutorial power to plea bargain. *Journal of Criminal Law & Criminology*, 94, 295-309.
- Bibas, S. (2004b). Pleas' progress. *Michigan Law Review*, 6, 1024.
- Bibas, S. (2004c). Plea bargaining outside the shadow of trial. *Harvard Law Review*, 117, 2463.
- Blumberg, A. (1967). The practice of law as a confidence game. *Law and Society*, 2, 2-34.
- Bohm, R.M. (2006). "McJustice": the McDonaldization of criminal justice. *Justice Quarterly*, 123, 27-146.
- Bordens, K. S. & Bassett, J. (1985). The plea bargaining process from the defendant's perspective: A field investigation. *Basic and Applied Social Psychology*, 6 (2), 93-110.
- Brereton, L., & Casper, J. (1981). Does it pay to plead guilty? Differential sentencing and the function of the criminal courts. *Law and Society Review*, 16, 45.
- Brown, D.K. (2005). The decline of defense counsel and the rise of accuracy in criminal adjudication. *California Law Review*, 93, 1585.
- Colquitt, J. (2001). Ad hoc plea bargaining. *Tulane Law Review*, 75, 695.
- Dubber, M. D. (1997). American plea bargains, German lay judges & the crisis of criminal procedure. *Stanford Law Review*, 49, 547.
- Easterbrook, F. (1992). Plea Bargaining as Compromise. *Yale Law Journal*, 101.
- Eisenstein, J., & Jacob, J. (1976). *Felony justice: an organizational analysis of criminal courts*. Boston: Little Brown.
- Emmelman, D. (1996). Trial by plea bargain: case settlement as a product of recursive decisionmaking. *Law and Society Review*, 30, 335-360.
- Feeley, M. (1979). Perspectives on plea bargaining. *Law and Society Review*, 13, 199-249.
- Gorr. (2000). The morality of plea bargaining. *Theory & Practice*, 26, 129-151.
- Fisher, G. (2003). *Pleas' progress pleas bargaining triumph: a history of plea bargaining in America*. Palo Alto, CA: Stanford University Press.

- Goodman, J., & Porter, P. (2002). Is the criminal justice system Just? *International Review of Law and Economics*, 22, 25-39
- Guidorizzi, D. D. (1998). Should We Really "Ban" Plea Bargaining? The Core Concerns of Plea Bargaining Critics. *Emory Law Journal*, 47, 753-783.
- Heumann, M. (1978). *Plea bargaining: the experience of prosecutors, judges, and defense attorneys*. Chicago: University of Chicago Press.
- Heumann, M. (1979). A note on plea bargaining and case pressure. 9 *Law and Society*, 9, 515-554.
- Jacob, H. (1978). *Justice in America: courts, lawyers and the judicial process* (3rd ed.). Boston: Little, Brown.
- Jones, D. A. (1979). *Crime without Punishment*. Lexington, Mass: Lexington Books.
- Langbein, J. H. (1992). On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial. *Harvard Journal of Law & Public Policy*, 15, 119.
- Lee, S-H. (2005). The scales of justice: balancing neutrality and efficiency in plea-bargaining encounters. *Discourse & Society*, 16, 33-44
- Lynch, T. (2003). The Case Against Plea Bargaining. *Regulation*, 26 (3), 24. Retrieved December 18, 2008, from <http://www.cato.org/pubs/regulation/regv26n3/v26n3-7.pdf>.
- Ma, Y. (2002). Prosecutorial discretion and plea bargaining in the United States, France, Germany, and Italy: A comparative perspective. *International Criminal Justice Review*, 12, 22-52.
- Mather, L. (1979). *Plea bargaining or trial? The process of criminal case disposition*. Lexington, MA: Lexington Books.
- Maynard, D. (1983). Social Order and Plea Bargaining in the Court. *Sociological Quarterly* 24, 233-245.
- Maynard, D. (1984). *Inside plea bargaining: the language of negotiation*. New York: Plenum Press.
- McDonald, W. F. & Cramer, J. A. (Eds.) (1980). *Plea Bargaining*. Lexington, Mass: D.C. Heath.
- Miller, H., & McDonald W. (1978). *Plea bargaining in the United States*. Washington, DC: National Institute of Law Enforcement and Criminal Justice.
- Nardulli, P. F. (1978). *The Courtroom Elite: An Organizational Perspective on Criminal Justice*. Pensacola, FL: Ballinger.
- Perschbacher, R. R., & Bassett, D.L. (2004). The end of law. *Boston University Law Review*, 84, 1.
- Ritzer, G. (1993). *The McDonaldization of society*. Newbury Park, CA: Pine Forge.
- Rosett, A., & Cressey, D. (1978). *Justice by consent: plea bargains in the American courthouse*. New York: J. B. Lippincott.
- Rubinstein, M., & White, T. (1979). Alaska's ban on plea bargaining. *Law and Society Review*, 13, 367.
- Schulhofer, S. (1984). Is plea bargaining inevitable? *Harvard Law Review*, 97, 1037.
- Schulhofer, S.J. (1992). Plea bargaining as disaster. *Yale Law Journal*, 101, 1979.
- Shichor, D. (1997). Penal policies at the threshold of the twenty-first century. *Criminal Justice Review*, 25, 1.
- Stunts, W. J. (2004). Plea bargaining and criminal law's disappearing shadow. *Harvard Law Review*, 117, 2548.
- Sudnow, D. (1965). Normal crimes: sociological features of the penal code in the public defender's office. *Social Problems*, 12, 255-276.
- Utz, P. (1978). *Settling the facts*. Lexington, MA: Lexington Books
- Uviller, R. (2000). The neutral prosecutor: the obligation of dispassion in a passion pursuit. *Fordham Law Review*, 68, 1695.
- Weber, M. (1968). *Max Weber on law in economy and society*. Cambridge: Harvard University Press.

- Wright, R. (2005). Trial distortion and the end of innocence in federal criminal justice. *University of Pennsylvania Law Review*, 154, 79.
- Wright, R., & Miller, M. (2002). The screening/bargaining tradeoff. *Stanford Law Review*, 55, 29.
- Zacharias, M. (1998). Suggested reforms for plea bargaining. *Law and Society Review*, 25, 24.

Cases Cited

Bordenkircher v. Hayes 434 US 357 (1978).