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Factors Affecting the Plea-Bargaining Process in Erie County: Some Tentative Findings

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FACTORS AFFECTING THE PLEA-BARGAINING PROCESS IN ERIE COUNTY: SOME TENTATIVE FINDINGS*

I. INTRODUCTION

Although the legitimacy and necessity of plea bargaining rest on a variety of philosophical and practical considerations,[1] the basic rationale is that plea bargaining not only saves time and expense for the state and the accused, but also eliminates the uncertainty both would experience at trial.[2] The conventional tradeoff is a plea of guilty in return for a charge reduction, perhaps accompanied by a recommendation of sentence leniency by the prosecutor.[3] Despite existing differences of opinion concerning the adequacy of various rationales for the plea process, the literature is replete with demands for the formulation of standards to be applied in the plea bargaining process. The hope is that the product of well-defined standards will be a reduction in inconsistent determinations. If the process were more visible and subject to more control, it is argued, then a minimization of corruption and unfairness would result.[4] The literature also evidences a countervailing desire for the flexibility that prosecutorial decisionmaking (in the form of plea bargaining) affords.[5] Judge Breitel has summarized the

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1. The United States Supreme Court has at various times enunciated its attitude with regard to the plea bargaining process. In *Santobello v. New York*, for example, the Supreme Court spoke of plea bargains as a desirable means to the ends of prompt and final disposition of criminal cases, protection of the public from accused individuals who have been released on bail, and enhancement of the rehabilitative process by means of rapid disposition and sentencing. 404 U.S. 257, 261 (1971). Since, however, all these noble aspirations presuppose an element of fairness in the bargaining process, the court may, in the exercise of its discretion, reject the bargained plea if the prosecutor does not fulfill his promises. *Id.* at 261–62.

2. Newman, *Reshape the Deal*, 9 TRIAL 11 (May-June 1973).

3. *Id.* at 11. The American Bar Association has sanctioned sentence concessions as well as charge reductions. ABA STANDARDS RELATING TO PLEAS OF GUILTY 2 (1967) [hereinafter cited as ABA STANDARDS].

4. ABA STANDARDS, *supra* note 3, at 62–63.

5. Abrams, *Internal Policy: Guiding the Exercise of Prosecutorial Discretion*, 19 U.C.L.A. L. REV. 1, 3 (1971).

general concerns: "The question then is not how to eliminate or reduce discretion, but how to control it so as to avoid the unequal, the arbitrary, the discriminatory, and the oppressive."[6]

Traditionally, the duty of every district attorney has been to "conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he shall have been elected or appointed."[7] By necessary implication, the district attorney's authority to prosecute crimes has been deemed to include the authority to recommend acceptance of a plea of guilty to a lesser included offense.[8] The court is then empowered to accept or reject the recommended plea.[9]

Legislative and judicial attempts have been made to define the prosecutor's power to plea bargain, and to insure that the bargaining process takes place with due regard for constitutional mandates of due process. However, the delicate balance between system-oriented efficiency and standards to ensure that defendants are dealt with justly is not easily achieved.

The concept of standardization is an admirable goal if two criteria are met. First, the standards must be logically related to the elimination of what is deemed to be a possible, or actual, abuse of the system, and second, the standards must be implemented in the actual processing of cases. Satisfaction of the first criterion is a task best left to policymakers, and is not examined here. What this article does examine is the extent to which articulated standards are translated into behavior.

In order to determine the relationship between what "should be" and "what is," and thus to indicate to policymakers the need for increased accountability in the plea bargaining process, field research was conducted in the Erie County District Attorney's Office. The fundamental question was: what relation do the criteria proposed for the operation of the system[10] have to the way plea bargaining is *actually* conducted?

The field study indicated that some surprising factors affect the plea bargaining process (e.g., whether a public or private defense attorney handles the case), that district attorneys with "plea

6. Breitel, *Controls in Criminal Law Enforcement*, 27 U. CHI. L. REV. 427 (1960).

7. NEW YORK COUNTY LAW § 700-01 (McKinney 1972).

8. McDonald v. Sobel, 272 App. Div. 455, 72 N.Y.S.2d 4, *aff'd*, 297 N.Y. 679, 77 N.E.2d 3 (1947).

9. N.Y. CRIM. PROC. LAW § 220.10 (3) (McKinney 1976).

10. The Erie County Bar Association's position and the Buffalo Police Department rules represent the way the plea bargaining process should operate in Erie County.

authority" operate on the basis of rudimentary knowledge of a case, and that pleas are approved subsequent to informal, undocumented conversations with opposing counsel. Thus, it appears that the mere articulation of local standards for plea bargaining procedures does not insure implementation of the standards. What is needed, it is argued, is a set of procedural safeguards for documentation and review of the plea negotiation process.

II. STANDARDS IN ERIE COUNTY

The Erie County Bar Association has formally endorsed the practice of plea bargaining.[11] In justifying this stance, it has characterized the plea bargain as an expeditor of rehabilitation as well as an historically accepted means of obtaining "individualized" justice. Relief from unnecessary expense and uncertainty was also cited as an advantage of plea bargaining.[12]

It should also be noted that while the Association generally approved of plea bargaining, it did attempt to correct what it perceived to be "misunderstandings" surrounding the process. For example, the term "plea *bargaining*" is rather commercial in tone. Therefore, the Association's formal statement suggested adoption of the term "plea agreement."[13] This suggestion seems anomalous, however, in a locality in which the participants and observers refer to the process as "Let's Make a Deal."[14]

The Erie County Bar Association also provides guidelines for judicial and police participation in the process. In the Association's view, justice is best served when the judiciary and the district attor-

11. H. Brand, V. Doyle & J. McCarthy, *The Plea Agreement: A Position Paper of the Erie County Bar Association* (April 7, 1975). Joseph McCarthy is First Assistant to the District Attorney of Erie County. This paper was represented to me as generally indicative of that office's policy concerning plea agreements. The first assistant also informed me of a "plea authorization slip" formulated by him, for use by his assistants. After obtaining a copy of this (with some difficulty) I questioned various assistants about the meaning of the listed concerns of a district attorney in making a plea agreement. They were unable to explain many of the terms, however, and admitted failure to use the slip, although they stated that they applied some of the same considerations in various cases. Interview with Joseph McCarthy, Buffalo, New York (June 25, 1975); discussion with assistants (July 8, 10, and 29, 1975).

12. H. Brand, V. Doyle, & J. McCarthy, *supra* note 11, at 2. These justifications for plea agreements are similar to those articulated by the Supreme Court in Santobello v. New York, 404 U.S. at 261.

13. H. Brand, V. Doyle, & J. McCarthy, *supra* note 11, at 1.

14. Police officers and attorneys involved in the plea bargaining process used this phrase to describe plea bargaining several times during the period of this study.

neys "act independently" of each other. The judge, therefore, should refrain from encouraging or discouraging the plea, and the prosecutor should refrain from intruding on the judicial function of sentencing except in "extraordinary situations."[15] The police officer, in some cases, may be both the victim and the arresting officer. Thus, the Association maintains, his position, or that of any victim of a crime, should be heard by the district attorney before any plea is approved, but his "desires in the matter should not control." Rather, the officer's opinion should be "one factor to be considered by the prosecutor in either consenting or refusing to consent to a plea."[16] Furthermore, the Buffalo Police Department regulations mandate that an officer shall not "recommend, approve, nor actively consent to, the reduction or changing of a charge against a prisoner."[17] When asked his opinion of a reduced plea, the officer's response must be that "he cannot participate in a 'plea bargaining' and to do so would be a violation of departmental rules."[18]

III. Research Methodology

Data was collected two ways: (1) direct observation of the plea negotiation process, and (2) interviews. Background interviews were conducted with policymakers in the Erie County District Attorney's Office, the Buffalo Police Department, the Erie County

15. H. Brand, V. Doyle & J. McCarthy, *supra* note 11, at 3-4. This is contrary to the view of the Administrative Board of the Judicial Conference of the State of New York that judges should encourage discussions between an informed prosecuting attorney and an informed defense counsel. Memorandum from the Administrative Board to all trial judges (Jan. 10, 1973), *cited in* H. Brand, V. Doyle & J. McCarthy, *supra* note 11, at 4.

16. H. Brand, V. Doyle & J. McCarthy, *supra* note 11, at 8.

17. Buffalo Police Department, Police Academy Training Bulletin, Rule 4.7.9 (Feb., 1973).

18. *Id.* Such articulation of standards for prosecuting attorneys, judges and police officers is apparently aimed at maintaining the consistent and uniform objectivity exercised by courts and prosecutors as opposed to the contamination which would result were influence to be exerted by subjective individual victims. Certainly, the standards advocating separation of prosecutorial, judicial, and police functons do not seek to cure all the possible ills of the plea bargaining process, but they are nevertheless valuable if they do indeed relate to elimination of abuse or unfairness. The philosophical foundation of the rules is that the prosecutor, rather than the judge or the police officer, is best equipped to assess the legal, factual, and practical aspects of the case, and to "fit" the "crime" to the defendant through plea bargaining, free from emotional interference of the experiences of the victim or police officer; the judge is the appropriate party to determine the defendant's specific rehabilitative needs by means of a pre-sentence report and a knowledge of the resources available to the court.

Sheriff's Department, and the Public Defender's Office.[19] Interviews were conducted with open-ended questions, specifically designed not to suggest any expected answers.[20]

After obtaining adequate consent,[21] 88 plea-negotiation sessions were observed over a three week period.[22] No cases were systematically excluded, but if several cases were being discussed simultaneously, only one was recorded.[23] The data gathered consisted of a record of the conversation that took place among the district attorney, the defense attorney, and other individuals present,[24] and any other information which could be obtained in a very brief, unstructured, post-negotiation discussion with the district attorney.

IV. General Findings and Observations

A. *The Plea Negotiation Process*

The City Court Bureau disposes of thousands of cases each year through plea bargaining.[25] A typical bargaining session lasts between five and ten minutes,[26] and consists of the district attorney and the defense attorney exchanging offers. If the parties are not mutually satisfied with the initial offer, they may either make counter-offers or suggest practical reasons for accepting a particular plea agreement. For example, the defense attorney may mention the inadequacy of proof or the fact that the defendant will prob-

19. These interviewees were chosen because their roles provide them with authority to set up policy standards for the operation of their departments, and with the authority to allow the researcher to interview the assistant district attorneys and police officers who implement the standards.

20. The questions are reprinted in the addenda on pages 710 to 711, *infra.*

21. Permission was obtained from the defense attorney in each case observed.

22. The observation period was July 14, 1975 through August 1, 1975. This period coincided with the typical summer vacation period, perhaps making the sample of cases and participants in the plea negotiation sessions not entirely typical of the rest of the year.

23. The researcher attempted to document the discussions, but this was not always possible given the informal, unscheduled, and often simultaneous nature of the discussions.

24. These may include the defendant, the victim, the police officer, or the victim's family.

25. In 1974, for example, approximately 8,000 of 17,000 case dispositions were arrived at through plea bargaining. City Court of Buffalo, Annual Report 2 (1974).

26. The District Attorney has been quoted as saying that every case is "subjected to close scrutiny" and that the assistant district attorneys "look very closely before an agreement is made." Healy, *DA's Differ on Plea Bargaining as Criminal Justice Tool,* Buffalo Courier Express, June 18, 1976, at 27, col. 2. Such "close scrutiny" hardly seems possible in ten minutes.

ably get only probation even if he is convicted as charged.[27] If all else fails, one party resorts to threatening the other with going to trial.[28] On one occasion, the district attorney did not acquiesce to an eventual plea simply because he felt that he had to present a stern "front" or risk the loss of his reputation as a tough negotiator.[29]

Other active parties in the discussion typically include the police officer and/or the victim. The dynamic between the prosecutor and the police officer represents one primary area of interpretation by the researcher. In 75% of the instances in which the police officer or victim was present at the negotiation either he was addressed directly by the district attorney or else his "voluntary" statements were acknowledged. If the district attorney's question resembled a request for an approval or disapproval of a particular plea bargain, the police officer would reply that he could not offer his opinion. The district attorney, however, had various methods of eliciting an opinion about the case from the officer. In some instances the district attorney would rephrase his question so as to request the officer's "professional opinion" as to whether this defendant had "learned his lesson."[30] Other times the district attorney gave the officer an opportunity to describe the defendant's activities at the time of the arrest more "fully" than he had in the information,[31] or asked the officer if the defendant had given him a "bad time."[32]

The district attorney's elicitation of approval or disapproval from the victim was much less vague. This more direct approach probably results from the fact that while the victim's view cannot be "controlling,"[33] there are no rules which specifically prohibit consulting the victim in this regard. There was no case in which the result of the plea bargain was contrary to either the view of the police officer or that of the victim (as inferred by the researcher), unless the district attorney lacked the power to implement the re-

27. Plea negotiations observed: July 22, 23, 31, 1975 and Aug. 1, 1975 (five occasions).
28. Plea negotiations observed: July 24 and 28, 1975 (three occasions).
29. Plea negotiation observed: July 24, 1975.
30. Plea negotiations observed: July 18 and 24, 1975 (five occasions).
31. Plea negotiations observed: July 15 and 31, 1975 and Aug. 1, 1975 (six occasions).
32. Plea negotiations observed: July 23, 24, 28 and 31, 1975 and Aug. 1, 1975 (ten occasions).
33. H. Brand, V. Doyle & J. McCarthy, *supra* note 11, at 8.

quest.[34] While such a result may be coincidental, it does suggest that the opinions of the officer and the victim are factors which are considered by the district attorney. To buttress this conclusion, there were cases in which police officers walked into the office, *prepared* the plea agreement slips, and placed them in front of the district attorney for his signature.[35] Also, in certain instances, the district attorney asked a detective from a particular squad to suggest a plea. Because of this officer's position, his suggestion was routinely controlling.[36]

B. *Interviews*

Seven law enforcement officers were interviewed. When asked to express their thoughts on the considerations of the prosecutor, they uniformly stated that the prosecutor himself should be asked this question. The reasons given for this response were that only the district attorney has the authority to negotiate pleas and that policemen are not qualified to answer "legal" questions. The researcher was referred to the police regulations which apparently were supposed to represent current practices; if they did not, no one was going to acknowledge the discrepancy. Thus, the interview phase revealed that police officers and members of the district attorney's staff, when asked about the plea bargaining process, would make reference to the articulated standards as the source of all behavior.

V. Statistical Analyses

Because research was limited to the City Court Bureau of the Erie County District Attorney's Office, the only plea bargains under consideration are charge reductions from felony level to misdemeanor level, or reductions within the misdemeanor range or to

34. For example, the district attorney cannot revoke a defendant's taxi registration simply because the police officer suspects that the taxi was used in bank robberies, and a district attorney in city court bureau cannot accept a guilty plea to a felony. Plea negotiations observed: July 16 and 23, 1975 (two occasions).

35. Plea negotiations observed: July 22 and 28, 1975 (four occasions).

36. Plea negotiations observed: July 24 and 28, 1975. This officer's opinion was controlling when a particular crime was involved. The reason for this officer's special authority could be because of his reputation in the law enforcement community, or because of his insistence on being consulted on plea negotiations arising out of this particular charge.

violation level. An overview of the charge reduction data illustrates that 48% of the cases were disposed of by a reduction to two "steps" below the original charge. (Table A.) (All computations have been rounded to whole numbers.) That is, a reduction from a D felony to an E felony would be one step, as would a reduction from E felony to A misdemeanor. No distinction has been made between the degree of severity between the E felony/A misdemeanor step and the A misdemeanor/B misdemeanor step. Rather, the steps are presumed to constitute a form of ordinal measurement.

TABLE A

Overview of Case Dispositions

Guilty plea	Percent of cases observed
To charge	1%
1 step charge reduction	24%
2 step charge reduction	48%
3 step charge reduction	9%
4 step charge reduction	2%
trial	10%
adjournment	6%

Statistical analyses were performed to measure the relationship between each of the following four variables and the resulting plea bargain: (1) the particular district attorney authorizing the plea, (2) the presence of the police officer at the plea discussion, (3) the presence of the victim of the crime at the plea discussion, and (4) whether or not the defense attorney handling the case was a public defender. The following description of findings focuses on the potential source of influence, its actual effect on the plea, and the degree of that effect.

A. *The Identity of the District Attorney*[37]

In only 10 of the 88 cases did the two district attorneys express independent opinions concerning the plea recommendations. In

37. One district attorney handled 82% of the plea negotiations observed. The other district attorneys (in city court bureau) with "plea authority" handled 18% of the cases observed. There is no specific assignment of plea negotiations to the district attorneys. The process is random, except that one district attorney spends a greater proportion of his time on plea negotiations than the other district attorneys. In Table B, *supra* page 701, this individual is identified as the "primary plea negotiator." The two other district attorneys are referred to as the "secondary plea negotiators."

three such cases the district attorneys formulated inconsistent decisions concerning the same set of facts. (Table B.) Although ten cases is a very small sample, the large proportion (30%) of inconsistent decisions strongly suggests that the results are affected by subjective factors.

TABLE B

General Findings

	Number of cases (out of 88 observed)	Percent of cases (out of 88 observed)
District attorney with plea authority:		
primary negotiator	72	82%
secondary negotiators	16	18%
Parties present at plea discussion:		
defendant	6	7%
victim (non-police)	28	32%
police officer	52	59%
Defense attorney:		
none present	10	11%
public defender	59	67%
private attorney	19	22%

Disposition of case coincides with view of victim: 24 out of the 28 cases at which the victim was present (86%).

Disposition of case coincides with view of police officer: 48 out of the 52 cases at which the officer was present (92%).

District attorney makes sentence recommendation on plea authorization slip: 4 out of 88 cases observed (5%).

Judge makes recommendation concerning plea: 2 out of 88 cases observed (2%).

District attorney asks private defense attorney if he has been paid yet: 2 out of 19 privately defended cases (11%).

District attorneys' conflicting opinions exhibited concerning plea in the same case: 3 out of 10 cases in which two opinions were rendered (30%).

A comparison was made between plea decisions of the primary negotiator, so named because he handled 82% of the negotiations observed, and those of the two other district attorneys with plea authority (secondary negotiators.) Viewing the overall distribution

of cases over the categories of disposition, it appears that the two secondary negotiators were much more lenient than the primary negotiator as evidenced by their authorization of a greater proportion of 2, 3, and 4 step charge reductions. (Table C-1.) When "plea strength" was measured, however, that is, when trials and adjournments were disregarded, guilty pleas considered, and t-scores[38] computed, the apparent differences were found to be statistically not significant.[39] (Table C-2.)

Despite the lack of statistical significance, the percentages remain as indicators of possible sources of inconsistency in the plea process. The possibility of different district attorneys within the same office arriving at contradictory plea decisions should be further examined with a larger sample—this would allow a more confident statement of the results.

TABLE C-1

Number of steps by which charge reduced	Primary Negotiator Number/Percent of cases		Secondary Negotiators Number/Percent of cases	
0	1	1%	0	0%
1	19	26%	2	13%
2	32	44%	8	50%
3	4	5%	2	13%
4	2	3%	1	6%
trial	11	15%	1	6%
adjournment	3	4%	2	13%
	N = 72		N = 16	

TABLE C-2

Plea Strength

Number of steps by which charge reduced	Primary Negotiator Number/Percent of cases		Secondary Negotiators Number/Percent of cases	
0	1	2%	0	0%
1	19	33%	2	16%
2	32	57%	8	62%
3	4	7%	2	15%
4	2	4%	1	8%
	N = 58		N = 13	
	$\times = 1.81$		$\times = 2.15$	
	$\sigma = .706055$		$\sigma = .769231$	
	$t = -1.229358$ (not significant)			

38. T-scores were computed on the basis of $\sigma_1 = \sigma_2$. For an explanation of statistical methodology see H. BLALOCK, SOCIAL STATISTICS at 226 (1972).

39. The fact that the secondary negotiators were observed so seldom might account for the lack of any finding of statistical significance.

B. *Presence of Police Officer*

The arresting officer[40] was often present either to act as a witness when the defendant was scheduled for trial on that day, or to provide the district attorney with information concerning the case on the day of arraignment. The officer was classified as "present" at the plea discussion regardless of whether he voluntarily gave the district attorney information, answered the district attorney's questions, or merely stood mute. Under this system, the police officer was present at 59% of the plea discussions, and his view of the case coincided with the final disposition of the case in 92% of those discussions. (Table B.) The officer's view was exhibited in numerous ways: his eagerness to dispose of the case in whatever manner so that he could go home as quickly as was possible, his willingness to testify at trial that day, his apathy, or his desire to dispose of the case with a specific plea because that is what he felt the defendant deserved. Therefore, this analysis presupposes matching interpretations of the officer's attitude by the prosecutor and the researcher. In spite of the subjective nature of the process, however, the district attorney's solicitation of attitudinal responses from the officers was relatively obvious and represents a factor which must have affected his decisionmaking process to some extent.

A comparison was made of case dispositions with the officer present and the officer absent. (Table D-1.) The percentage distribution over the categories of disposition is not noteworthy, except that when the police officer was absent, there were more cases scheduled for trial. A possible explanation for this is the district attorney's reluctance to accept a plea without first speaking to the arresting officer. If the case is scheduled for trial, there will be time to contact the officer to obtain further information from him, and a plea can still be authorized prior to trial. A statistical analysis of "plea strength"[41] indicates that the reductions to the charges against the defendants were not significantly affected by the presence or absence of the arresting officer. (Table D-2.)

40. The arresting officer may have been a member of a public police force, such as the city or county patrol or investigative units, or a private or specialized police force, such as store detectives or campus police.

41. *See* text accompanying note 37 *supra*.

TABLE D-1

Number of steps by which charge reduced	Police present Number/Percent of cases		Police absent Number/Percent of cases	
0	0	0%	1	3%
1	14	27%	7	19%
2	26	50%	17	47%
3	4	8%	2	6%
4	1	2%	1	3%
trial	3	6%	6	17%
adjournment	4	8%	2	6%
	N = 52		N = 36	

TABLE D-2

Plea Strength

Number of steps by which charge reduced	Police present Number/Percent of cases		Police absent Number/Percent of cases	
0	0	0%	1	4%
1	14	31%	7	25%
2	26	58%	17	61%
3	4	9%	2	7%
4	1	2%	1	4%
	N = 45		N = 28	
	$\times$ = 1.8222222		$\times$ = 1.8214288	
	σ = .6762277		σ = .7584557	
	t = .0038058 (not significant)			

C. *Presence of Victim*

The victim was present at 32% of the plea discussions observed, and his view coincided with the final disposition of the case in 86% of those discussions. (Table B.) The case more often went to trial when the victim was present at the plea bargaining discussion (Table E-1), probably because the victim was prepared to go

TABLE E-1

Number of steps by which charge reduced	Victim present Number/Percent of cases		Victim absent Number/Percent of cases	
0	0	0%	1	2%
1	5	18%	15	25%
2	14	50%	31	52%
3	4	14%	3	5%
4	0	0%	2	3%
trial	5	18%	3	5%
adjournment	0	0%	5	8%
	N = 28		N = 60	

to court that day and did not object to spending more time if justice would be served by the sacrifice. However, the t-test comparing differences between the frequencies of various pleas with the victim present or absent yielded no significant results. (Table E-2.)

TABLE E-2

Plea Strength

Number of steps by which charge reduced	Victim present Number	Victim present Percent of cases	Victim absent Number	Victim absent Percent of cases
0	0	0%	1	2%
1	5	22%	15	29%
2	14	61%	31	60%
3	4	17%	3	6%
4	0	0%	2	4%
	N = 23		N = 52	
	$\times$ = 1.9565217		$\times$ = 1.8076923	
	σ = .6240304		σ = .7348066	

t = .7196219 (not significant)

D. *Private Defense Attorney Compared with Public Defender*

Private defense attorneys handled only 22% of the cases observed. (Table B.) The distribution of private defender/public defender case dispositions indicates noticeable percentage differences. Private defense attorneys obtained considerably "better" plea bargains than did public defenders. Twenty-seven percent of the private attorneys' cases resulted in a plea to a charge reduced 3 or 4 steps below the original charge, as compared with only 5% of the public defender's cases in the same category. (Table F-1.)

TABLE F-1

Number of steps by which charge reduced	Private attorney Number	Private attorney Percent of cases	Public defender Number	Public defender Percent of cases
0	0	0%	1	2%
1	3	16%	16	27%
2	8	42%	25	42%
3	3	16%	3	5%
4	2	11%	0	0%
trial	0	0%	11	19%
adjournment	3	16%	3	5%
	N = 19		N = 59	

The distribution of pleas over the five categories of charge reduction varied enough between the private and public defenders to justify a conclusion that, in general, private attorneys are more

successful than public defenders in obtaining more "desirable" bargains for their clients.[42]

In addition, private attorneys in the sample never went to trial, and frequently had their cases adjourned, whereas the opposite situation existed for public defenders. This seems anomalous since it is only the private attorney who is compensated commensurate with the time he spends in court. The public defender works on a salary rather than for a fee contingent on the number of hours he devotes to a case.[43] The high percentage of publicly defended cases going to trial might, however, be attributable to the fact that many of the observed plea discussions took place on the day of arraignment. Therefore, cases subsequently set down for trial could still have been disposed of by guilty plea between the arraignment and the trial date if the public defender persuaded his client to accept the district attorney's offer, or if the district attorney revised his offer, making it more acceptable to the public defender.

TABLE F-2

Plea Strength

Number of steps by which charge reduced	Private attorney Number/Percent of cases		Public defender Number/Percent of cases	
0	0	0%	1	2%
1	3	19%	16	36%
2	8	50%	25	56%
3	3	19%	3	7%
4	2	13%	0	0%
	$N = 16$		$N = 45$	
	$\times = 2.25$		$\times = 1.66666$	
	$\sigma = .9013878$		$\sigma = .6324555$	

$t = 2.1376746$ (significant at .05 level)

The inability of the public defender to strike a bargain roughly equivalent to what a private attorney would obtain may be the result of several factors: (1) public defenders may not have the resources, in the form of time and personnel, to investigate their cases adequately and to identify enough legal and factual "weaknesses" to persuade the prosecutor to authorize a particular plea, (2) the sense of "adversariness" necessary for competitive bargain-

42. The t-score was 2.1376746, indicating that there is a 95% probability that the difference in distributions was caused by the variable measured rather than by chance.

43. Interview with Richard Boccio, Director of Legal Aid Bureau of Buffalo, Criminal Division, in Buffalo, New York (May 19, 1976).

ing may be lacking between the district attorney and public defender, because of their very frequent dealings with each other and the close proximity of their offices in the city court building, (3) the public defenders' caseload may be so large that the pressure to dispose of cases quickly outweighs the desire to obtain a drastic reduction for a client, and (4) the "class" of defendants represented by the public defender's office may consist of the more frequent offenders who might be "presumed" guilty, thus placing the public defender in an unfavorable bargaining position.[44]

RECOMMENDATIONS

Various desirable objectives concerning the operation of the plea bargaining system include: formulation of standards that are rationally related to the goals of informed plea bargaining and humanization of the plea bargaining process; authorization of pleas with assurance that similarly situated defendants receive consistently fair and equal treatment; and reallocation of personnel and financial resources with a recognition of the significance of the plea bargaining process.[45] The perplexing problem is the order and interrelationship of these priorities.

Even if rational standards are delineated by a bar association, the police department, or the prosecutor's office, given the apparent influence of the district attorneys' subjective impressions,[46] it might be necessary to translate such standards into specific office procedures designed to cull from the decisionmaking process a written, reviewable record. The "plea authorization slip" recommended by the First Assistant to the District Attorney of Erie County, but seldom used in practice,[47] might well be sufficient to provide adequate documentation to serve as the basis for a review procedure to be undertaken by the district attorney's staff.

In addition, review of the factors which determine a district attorney's decision to authorize a plea bargain by the judiciary, the police force, and the community at large would facilitate constant

44. *Id.* The fact that the public defender's office serves a large proportion of repeated offenders was documented by Mr. Boccio.

45. *See generally* ABA STANDARDS, *supra* note 3; Abrams, *supra* note 5; Breitel, *supra* note 6.

46. *See* text accompanying notes 37–39 *supra.*

47. The plea authorization slip is discussed in note 11 *supra.*

scrutiny of the plea bargaining process by all groups that have an interest in it. A random sample of all cases disposed of by guilty plea should be reviewed. This investigation should include an analysis of the uniformity of criteria that affect each prosecutor's decisions. An examination of the various relationships which were the subject of this study might provide a current check on all parties interacting in the bargaining system. Since the public is directly affected by any disposition of a criminal case, the role of the "community" component should be more than that of observer. Rather, the lay members of the review board should provide an active representation of all citizens.

Locally prescribed standards for plea negotiation can be applied only if the attorneys involved are completely familiar with the case at hand. In other words, an intelligent bargain, suited to the needs of a particular defendant, can be struck only if the defendant's background, and the facts and law involved, have been thoroughly examined and considered. Perhaps a less costly manner of obtaining this extensive information is through the use of investigators, such as law students or paralegals who could gather data and compile it in systematic fashion to be interpreted by the prosecutor or public defender. Such a compilation, similar to the pre-sentence report used by judges, would make possible an assessment of the needs of a particular defendant. An appropriate class of sanctions could then be imposed through a plea of guilty to a reduced charge.

The familiarity of the attorney with a defendant and his case could be furthered by assignment of attorneys to follow a case from arraignment through to acquittal or sentencing. In this way, the defendant would become more than a series of files passing over desks, and an attorney could more easily develop a sense of responsibility for the individual's fate. Because only the prosecutor who has investigated and studied a case has a full appreciation of its legal status and the position of the defendant, each district attorney should be given authority to negotiate pleas. This procedure would reduce the assembly line quality of the plea bargaining process which results when the few district attorneys with plea authority dispose of ten or fifteen cases in an hour. One possible reason for delegating plea authority to a few selected assistants is that it insures the uniformity of the process. This purpose might be equally served by a requirement of a written delineation of the reasons for

a plea bargain and an articulated standard review of these reasons.

Above all, the defendant must be recognized and acknowledged as a human being and a member of society. Such recognition requires dealing with the characteristics and needs of the accused in a way not possible with the assembly line approach now taken toward the plea bargaining process.

KAREN GORBACH REBROVICH

ADDENDUM I

Questions asked of law enforcement officers during interview phase:

1. After making an arrest, what information do you put in the formal written police report? What is this report called?
2. How do you make the first contact with the prosecutor's office regarding an arrest you have made? Who makes the contact? When is it made?
3. Who prepares the accusatory instrument which is given to the court and the accused at arraignment? How does it differ from the police report?
4. Who received copies of the police report? Is the report sent to the prosecutor's office?
5. When a police file is sent to the prosecutor's office, who makes the decision whether or not to prosecute, and what charge to make?
6. What factors do you think, in practice, go into the decision whether or not to prosecute, and what charge to make?
7. What set of circumstances might result in a decision not to prosecute?
8. What sources of information do you know of that the prosecutor uses in making his decision whether or not to prosecute?
9. How are follow-up contacts made between the police and the prosecutor's office? What is discussed?
10. Do you make known to the prosecutor your opinions and recommendations regarding a particular case? Do you think your recommendation affects the prosecutor's decision making process?
11. In arrests initiated by citizen complaints, what do you think is the influence of the citizen's wishes on the prosecutor's decision?
12. Do you think there is consistency between the plea decisions of various district attorneys with plea authority?
13. If you were a prosecutor, what would be some of your goals in the plea bargaining process?

ADDENDUM II

Questions asked of assistant district attorneys during interview phase:

1. After an arrest, how is contact made between the police and the prosecutor's office? When is it made?
2. Which assistant district attorneys are authorized to make plea bargains? Does each assistant make all decisions for all cases assigned to him?
3. What factors go into the decision whether or not to prosecute?
4. What factors go into the decision to authorize a particular plea bargain? Are these factors recorded? Is this decision reviewed by another member of the district attorney's staff?
5. What sources of information are used in making the decision to authorize a plea bargain?
6. Do you receive police opinion or recommendation about a particular plea bargain?
7. In arrests initiated by citizen complaint, what is the influence of the citizen's wishes on your decision regarding a plea bargain?
8. Is there consistency between the decisions of all district attorneys with plea authority? Do they all apply the same criteria?
9. Does your office have a policy advocating plea bargaining in as many cases as possible?
10. Can a defense attorney influence your decision whether or not to authorize a plea bargain?
11. What is the role of the judge in the plea bargaining process?