2 Harv. Negotiation L. Rev. 115

Harvard Negotiation Law Review
Spring 1997

Note

GETTING TO "GUILTY": PLEA BARGAINING AS NEGOTIATION

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I. Introduction

Plea bargaining is the process in a criminal case by which prosecutors and defense counsel reach an agreement providing that a defendant will plead guilty to a specified offense in exchange for leniency in sentencing or in the charge itself. [1] As the mechanism by ***116** which most criminal cases are resolved, plea bargaining [2] unsurprisingly has been the focus of much debate and discord. Scholars and citizens alike argue about whether the system is inevitable, fair, or just. Some hold that the plea agreement process yields results that discount crime and are too soft on criminals. [3] Others argue, conversely, that prosecutors wield too much power over criminal defendants, especially those who are indigent. Specifically, some posit that plea agreements are unduly coercive and penalize defendants who do not accept agreements for exercising their right to trial. [4] In contrast, practitioners [5] generally believe that plea bargaining produces fair results. [6]

Critics and supporters alike agree that the plea bargain is central to our current criminal system. By most accounts, plea bargaining disposes of approximately ninety percent of all criminal cases in ***117** the United States. [7] Many plea agreements would undoubtedly be reached even without the explicit process of plea bargaining. [8] The structure of the law provides certain inherent incentives to admit guilt, such as reduced sentences [9] or downward departures from established guidelines for those who accept responsibility for their crimes. [10] This Note focuses on the remainder of cases in which a plea is reached--cases involving negotiations over sentence length, charge, sentence recommendation, or other important aspects that influence the ultimate outcome. [11]

Many scholars have scrutinized the plea bargaining process, focusing on the roles of prosecutor, defense counsel, and judge; [12] the protection of constitutional rights of defendants; [13] the market aspects ***118** of the process; [14] the impact of external factors; [15] and proposals to reform the system. [16]

At the same time, much academic literature has critically analyzed the concept of a bargain--both the agreement and the process by which it is achieved. [17] This Note examines plea bargaining through the lens of dispute resolution, exploring how practitioners approach and carry out plea negotiations and gauging whether and to what extent plea "bargaining" may be analyzed as "negotiation." [18] Specifically, this Note explores how plea bargaining intersects with negotiation and dispute resolution models, drawing on the academic literature of both plea bargaining and negotiation theory as well as anecdotal data provided by interviews with prosecutors and defense counsel.

It may seem counterintuitive to link negotiation theory and criminal procedure. One of the basic provisions of the Constitution provides that a jury in a court of law determines the guilt or innocence of the accused. [19] Yet empirically, the criminal

justice system relies on less formal resolution of disputes. Accordingly, scholars have implied ***119** that plea agreements are susceptible to analysis as simply another negotiated form of dispute resolution. [20]

The identity of the parties distinguishes plea bargaining from other types of negotiation. Unlike many other negotiations in the legal setting, plea bargaining involves a citizen negotiating with the government for her liberty; additionally, the government, through the judge, ultimately governs the legal parameters of plea negotiations. The strength and dual role of the government can create an imbalance of power between the negotiating parties. Furthermore, government regulations, sentencing guidelines, and legal precedent restrict plea negotiations more than civil negotiations. [21] Legal entitlements affect plea negotiations by both constraining the government as a negotiator and mandating specific consequences for a defendant who is found guilty. [22] These limitations call into question whether the plea agreement is a real bargain between two freely acting parties.

Despite these distinctions, the notion of the plea as a bargain struck by two independent parties is well-acknowledged. Courts treat the plea agreement as a contract and the bargaining that induces it as simply another type of contractual transaction. [23] Economic analysis of the criminal justice system also indicates that the ***120** plea agreement may be a mutually desirable outcome between prosecution and defense. [24] Such analysis presumes the existence of rational actors. [25] Yet it is unlikely that most defendants possess the knowledge of the criminal system necessary to perform an economic analysis; rather, they are likely to depend on their defense attorneys to offer such analysis. Moreover, an economic analysis may be belied by unquantifiable factors such as the stigma of a felony record, the uncertain benefits of marginal decreases in prison time, and the unpredictability of juries.

***121** Although negotiation in the criminal context is fraught with legal constraints and power imbalances, case law and legal scholarship support the notion that plea agreements represent mutually beneficial negotiated outcomes. Keeping a watchful eye on these constraints and imbalances, this Note explores how the practice of plea bargaining intersects with three concepts central to current negotiation theory. Part II analyzes how practitioners evaluate their options and alternatives with respect to plea negotiations. Part III explores how attorneys' incentives and motivations influence plea negotiations, and Part IV examines how relationships affect plea negotiation dynamics and outcome.

II. Options and Alternatives

Parties in the criminal context, like those in the civil context, are endowed with certain “bargaining chips” that are derived from “the outcome that the law will impose if no agreement is reached.” [26] In criminal law, these chips are dependent on at least three factors: (1) legal rules pertaining to evidentiary issues; (2) the strength or weakness of the state's case and the defendant's case; and (3) jury attitudes or tendencies in a given location. Both prosecution and defense explicitly evaluate these and other criteria when performing their ex ante analysis of how to approach a negotiation. Criminal attorneys on both sides regularly perform an evaluation of their best alternative to a negotiated agreement (BATNA) [27] in order to determine whether to reach a plea agreement and what the terms of that plea agreement should be.

A trial on the merits of the case is the most obvious alternative to a guilty plea. Unlike parties in a commercial transaction, the accused and the prosecutor in a criminal case are not free merely to opt out or to look elsewhere if they cannot reach a mutually agreeable plea. An indicted defendant may not simply step away from the negotiation; a prosecutor, who has somewhat more leeway, may be reluctant to use her prosecutorial discretion to dismiss charges without adequate legal or factual basis. As with disputants in a civil litigation, then, parties must assess their BATNA in terms of anticipated lawsuit outcome. How well a party is likely to fare in court is a critical factor in determining whether to negotiate a plea agreement and what terms one should offer or accept.

***122** Issues that will be decided in court range from procedural entitlements and evidentiary issues to guilt or innocence and type of punishment. Each side must assess the range of possible outcomes and attempt to formulate an opinion as to what

would constitute a favorable or acceptable plea offer. In examining what plea, if any, to offer and accept, defense counsel and prosecutors alike ask the question of whether a given case is "triable." [28] It is thus useful to examine how the defense and prosecution may employ similar and differing criteria for determining the "triability" of a case and to explore how other factors may influence calculation of the BATNA.

A. Defense

In determining whether a plea agreement is the best course of action in a particular case, defense counsel must assess the risk of going to trial. One defense counsel defines that assessment simply: "the minimum penalty [if convicted] at trial, and the strength of the government's case." [29] This attorney would also compare a plea offer on the table with his "overall core sense of what similar cases are worth." [30] One scholar highlights determining a case's worth as an essential element of plea negotiation:

> Once an attorney has a feel for cases, he knows whether to try or plea bargain a case; if he chooses plea bargaining, he knows how to weigh factors as diverse as the defendant's record, the facts of the case, the prosecutor's personality, the prosecutor's willingness to go to trial, the judge's reactions to specific types of crimes, the precedents in terms of prior dispositions for this type of offense, and so on. He is confident that he can predict early what disposition is obtainable. [31]

Of course, such confidence may be misplaced; [32] nonetheless, most defense attorneys perform this mental calculus to determine whether to advise a defendant to accept a plea agreement. As a complicating ***123** factor, defense counsel must consider the defendant's risk preferences and circumstances in order to assess the BATNA accurately. [33]

The BATNA calculation may depend, to a large extent, on the rules and traits of particular jurisdictions; legal precedent and adherence to sentencing guidelines may necessitate further readjustment of one's risk assessment equation. [34] When a case is slated to be heard before a particular judge, the identity and past actions of the judge further influence the determination of the litigation BATNA. As one attorney explains, "You sometimes know what a judge will do . . . [You have to assess] the likelihood of the judge figuring things your way." [35] Information about or past experience with a judge helps to make such an assessment more accurate.

Defense counsel also note, surprisingly, that there is a less obvious alternative to an offered plea agreement than going to trial. Simply dragging a case out and making it somewhat stale for prosecutors may create additional opportunities for several reasons. Prosecutors may want to get older cases out of their office quickly; they simply may not know such cases as well as their newer ones. In addition, they may no longer feel the same pressure from supervisors or law enforcement agencies to attain a particular outcome. [36] Finally, other experiences in the interim may enable prosecutors to judge the worth of a case more accurately. As one defense counsel explains, "My feeling is that the older a case gets, the less interest [prosecutors] have in it. It moves to another assistant [U.S. attorney], or [that assistant] has gained perspective, which results in a better offer." [37]

***124** B. Prosecution

Prosecutors, like defense attorneys, look at the triability of the case as a key determinant of whether to plea bargain in given cases. Explains one state prosecutor, "Would I want to try this case?" is the crucial question that guides the plea bargaining process. [38] Prosecutors weigh factors including the strength of the evidence against the defendant, the relative strength of the government and defense cases, legal precedent, and the qualities of the court, judge, and opposing counsel to decide whether and how to plea bargain in a particular case. [39] One prosecutor notes that "the stronger [the] evidence, the more likely [there will be] a plea." [40] Another notes, "There's room to be more brazen and arrogant, depending on how strong your evidence is." [41]

In addition, prosecutors may consider criteria such as the nature of the crime and the history of the defendant in determining what, if any, plea to offer.

Plea bargaining scholar Albert Alschuler posits that prosecutors have the greatest incentive to offer highly favorable plea deals when evidence against the defendant is very weak. [42] This seems consistent with the notion of a BATNA--prosecutors should agree to any deal that is better than their best alternative, which, in a weak case, is a losing trial. Pleas also are advantageous because they represent a certain conviction, which precludes prosecutors' exposure to what one prosecuting attorney calls “the vagaries of the jury system.” [43]

However, empirical studies have limited Alschuler's holding somewhat; research shows that prosecutors do sometimes “bluff” when evidence against a defendant is weak or deficient, but not to an unethical or deceitful extent. [44] Indeed, anecdotal evidence undercuts ***125** Alschuler's conclusion. [45] For example, one prosecutor who defines “triable” somewhat counterintuitively--as a case in which there may be issues in doubt on which the defendant might prevail--explains that triable cases “are more difficult to plead out, and they should be.” [46] She notes that the less “triable” a case is, the more pressure she will bring to bear on defendants to plead--she “will try very hard to get a plea if the proof [in a given case] is overwhelming.” [47] In other words, on an open-and-shut case, she is more likely to press for a plea disposition, while in a weaker case she “will understand” the defense's reluctance to take a guilty plea, and thus “won't try so hard to get a plea.” [48] Conversely, she notes, the more triable a case is, the more likely it will be that defense counsel has less interest in accepting a plea. [49]

Prosecutors do, of course, have the final option of dismissing charges. While it is unlikely that this is a prosecutor's BATNA in many cases, it may be a option in a case in which certain key witnesses fall through or the judge decides a crucial evidentiary issue--such as a motion to suppress important evidence--in the defense's favor. When such legal entitlements seriously influence the outcome at trial, the BATNA may well be dismissal rather than trial of a losing case.

While it may be uncommon for attorneys to perform the detailed expected value calculations so often utilized by economic theorists, each party in the criminal context roughly determines its chances of success and failure at trial using a complex array of factors based in large part upon experiential knowledge. This broad assessment then informs both prosecutors' and defense counsel's decisions about how to view plea agreements compared to trial outcome or other possible alternatives.

III. Incentives and Motivations

An objective observer might find that plea agreement outcomes diverge from what one expects of rational individuals acting in their own best interests. Terms of agreements can differ among similar cases despite comparable legal entitlements; sometimes, parties do ***126** not reach agreements even when there is a zone of possible agreement. [50] Structural or institutional motivations may cause such unexpected outcomes, especially when the incentives of principals and agents are misaligned. [51] In the criminal context, agency issues have a significant effect on attorney incentives and case outcome. [52] This Part of the Note highlights the shared and divergent interests between the various principals and agents in the plea bargaining process and examines how personal and institutional factors may alter negotiation incentives.

A. Defense

On the defense side, the defendant is clearly the principal; the defense attorney, whether private or public, is the agent. [53] Even defense counsel who also feel motivated by a larger sense of societal justice claim to act exclusively as agents for their clients. [54] As one defense counsel muses, “Who am I in this case? I'm just an agent, and if a client insists that these are the options and they'd rather ***127** take this plea, I have to allow them to do it.” [55] The attorney notes, however, that acting in a

purely agentic manner may be different than acting as a good lawyer, and comments that a lawyer's role as a counselor makes her role as an agent somewhat more nuanced. [56] The client almost certainly will wish to achieve the minimum possible penalty for a crime. Defendants' wishes may depend on the type of crime involved and personal circumstances such as age, family, or health. If defense counsel has a good understanding of a defendant's wishes and can perform a reasonably accurate assessment of the defendant's BATNA, she may be able to suggest a course of action in line with the defendant's wishes.

Notwithstanding such professions of pure agentic behavior, other factors affect the motives and behavior of defense counsel. First, personal motives related to attorneys' career goals or quality of life issues can influence the acceptance of plea offers. These motives can include the wish to get trial experience, fear of going to trial, desire not to work excessively, and establishment of a particular reputation. Second, institutional and structural factors--especially financial arrangements--likely have some effect on defense counsel's incentives; these factors may pull defense counsel in an opposite direction from the wishes of their principals. [57] An examination of the motives of ***128** several types of criminal defense counsel reveals the effect of these factors.

Public defenders are salaried employees who represent indigent defendants. It is unlikely that public defenders, who receive a fixed salary regardless of outcome, perform a complicated economic calculus to determine what course of action is in their best interests. Because they are not motivated by financial concerns, public defenders have a certain freedom to ignore monetary considerations that might be vital for an attorney in private practice, and to assess BATNA based purely on the defendant's wishes and the facts at hand. [58] However, public defenders have other institutional considerations, like a backlog of cases, [59] that may produce pressure to reach plea agreements. [60] Furthermore, the public defender is a repeat player in a particular jurisdiction; she may seek agreements in many cases to appease the prosecutor and to secure continuing cooperation from the District or United States Attorney's office. In addition, she may fear that refusing a “reasonable” plea offer in one case may make such an offer less forthcoming in future cases. [61]

Private attorneys also may represent indigent clients; these attorneys receive hourly fees for their services from the government and therefore face somewhat different economic incentives than public defenders. [62] These financial incentives pull in two directions. First, these lawyers may want a high turnover of cases so that they ***129** can earn money through, for example, a volume practice of pleas at the arraignment stage, with minimal investment of time or money. [63] Conversely, these lawyers might have an incentive to drag a case out, even going to trial when a plea would offer a better outcome, because they receive hourly payment. In addition, these attorneys, operating as repeat players within a particular jurisdiction, have reputational concerns akin to those of public defenders. [64] Also, these attorneys may be interested in maintaining a credible reputation so that they will continue to receive appointments and attract paying clients through word of mouth. [65]

A practitioner in either a small firm or in a solo practice may have economic motivations similar to the private attorney paid by the government. Such attorneys may charge either a flat or hourly fee; [66] both fee arrangements can create divergent incentives between attorney and client. With a flat fee arrangement, attorneys have an incentive to plead cases out as quickly as possible so that they reap the greatest profit for the least amount of work, effort, and time. [67] With an hourly fee schedule, attorneys have an incentive to drag a case on, even when a good outcome may be achieved through a plea bargain. [68] ***130** Even then, however, some attorneys may rely less on drawing a case out and more on maintaining a large portfolio of cases that are turned over quickly by pleading them out. Finally, reputational concerns of the solo practitioner who wants to establish a reputation for aggressive advocacy, good trial skills, or the ability to obtain favorable plea agreements may variously push away from or toward a defendant's interest.

In the case of highly-paid defense counsel representing a large corporate actor or a rich defendant, the immediate economic incentives point against pleas because most firms bill by the hour. However, the fact that these defendants are likely to be repeat

clients who will use the firm for other matters may help to align agent incentives with those of the principal. The firm likely will desire the best outcome for the client so that the client continues to rely on the firm and contributes further business.

B. Prosecution

On the prosecution side, principal-agent tensions are less intuitively apparent. Prosecutors are likely to be a more homogeneous community in terms of motivation and incentives than the defense bar. Although prosecutors have no direct equivalent of the “client,” they nonetheless answer to a host of principals. These principals provide prosecutors with numerous and often competing allegiances and motivations, which in turn yield conflicting incentives for and against plea bargaining.

In a democratic government, governmental officials are agents of the people. Prosecutorial offices are set up to further the societal necessities of crime prevention, rehabilitation, and deterrence. A prosecutor, therefore, is the agent of the people whom the office purports to protect. As one federal prosecutor explains, “I'm working for the public, the people that live in the district we're serving”; she says that her motivation stems in part from her concern with the quality of life in that community. [69]

***131** Pressures from the community constituency may pull in opposite directions. First, demands on an already strained tax dollar may indicate that plea agreements are the most efficient resolution of criminal disputes. As one scholar notes, the “goal of a prosecutor, defined in the most basic terms, is to increase societal welfare by maximizing the reduction of crime.” [70] Plea dispositions may be the most efficient way to accomplish this goal. [71]

Conversely, communities are also likely to apply pressure to prosecutors to avoid plea bargaining in a particularly egregious or high profile case. [72] Newspaper articles reporting the crime of a repeat offender may point to an earlier plea bargain as the cause of the current crime. [73] The pervasive public perception that pleas are softer on defendants than conviction at trial, or that they represent a corruption of criminal justice, may force prosecutors to step away from negotiated settlement in certain cases. [74]

In addition, prosecutors may feel some responsibility to act on behalf of the law enforcement officials with whom they work closely in developing a case. [75] Because these organizations invest tremendous time and resources in the investigation of a particular case, prosecutors may feel that they owe allegiance and deference to these parties' wishes. As an attorney responsible for environmental crimes prosecution explains, “[We] try to keep them all [[[United States Attorney, Washington, the regulatory administration, the criminal investigation division] happy. We're a service organization, and if we don't provide the service, they don't call anymore.” [76] “To some extent,” says another prosecutor, “[law enforcement agencies] are clients and we need to be responsive to their needs.” [77] Because law enforcement groups and prosecutors are repeat players, there is a strong incentive for prosecutors to be responsive to the desires of such groups.

***132** Allegiance to such groups produces incentives both for and against plea bargaining. Law enforcement officials or agency members may want the certainty of a plea agreement rather than the risk of acquittal at trial. The efficiency of pleas--a greater number of pleas may be entered in a given time than the number of cases that could be fully tried [78] --may also induce law enforcement officials to pressure prosecutors to come to a plea agreement. There may even be other, more complex motives behind the pressure to reach a plea. [79] But law enforcement groups also may serve as a check on pleas that are too lenient. As partners in the development of a case, they may protect it from being compromised by a prosecutor with little stake in the outcome, especially in the horizontal case management system. [80]

Finally, prosecutors in cases that involve harm to individual victims may feel that they serve as agents of the victims or of the victims' families. [81] Even prosecutors who work on cases with large corporate “victims” feel a sense of responsibility to these parties. One prosecutor, discussing such cases, notes that those crimes don't have “the same immediacy as rape or murder. . . .

[Nonetheless, as members of] the community that we serve, institutional victims . . . deserve to have law enforcement available and to be treated with respect." [82]

Victims' concerns may provide disincentives for plea bargaining. The press, victims, and families often point out the glaring defects of ***133** plea agreements. Victims have a tremendous emotional stake in seeing that perpetrators of crimes against them receive appropriate punishment. [83] Other victims' interests, however, may point toward settlement by plea. Victims and their families may be reluctant to proceed to trial for a host of reasons. Some may want to dispose of the case as quickly as possible and move on with their lives. For others, recounting the facts of the crime may be too painful. It seems clear that the wishes of the victim will not always coincide with other prosecutorial incentives to settle; therefore, the extent to which victims' concerns motivate a particular prosecutor may well dictate the outcome, at least in part, of a criminal case.

In addition, some prosecutors feel that they are agents of abstract notions of justice and moral virtue. Notes one prosecutor, "Every prosecutor brings a sense of right and wrong and justice to the process." [84] Another prosecutor explains that it is "one of the great joys of [his] job" that he works for "the cause of truth and doing the right thing." [85] Such moral principles are likely to act as a disincentive to reach a plea agreement in a situation in which the prosecutor feels that the crime deserves a punishment to which the defendant will not agree. As one prosecutor explains, "As a real matter, the more time a prosecutor invests in a case, the less inclined he or she is going to be to be generous in a plea agreement. You become convinced of [the fact that the] defendant is [one of the] worst people." [86]

***134** Along with the desires of a prosecutor's many potential principals, institutional factors affect the motives and interests of prosecutors. The hierarchical structure of prosecutors' offices [87] affects the motives of prosecutors in two respects. First, prosecutors have an incentive to please their supervisors so that they will advance within a particular office. Supervisors, in turn, whether appointed or elected, may have goals relating to political ambition or personal achievement. [88] These goals may impede settlement, particularly in high profile cases in which political constituents view pleas with disfavor. [89] Second, prosecutors may have institutional incentives related to the particular office in which they work--for instance, as an agent of the District Attorney's office, a prosecutor might have an incentive to increase the conviction rate for that office [90] or to ensure that the office has a good reputation for a particular type of case prosecution. These incentives could work both toward and against plea negotiation. Because plea dispositions are more efficient in terms of time and resources and because there is no uncertainty as to conviction outcome, those who want to increase institutional conviction statistics favor pleas. However, a reputation for expertise in a particular area of prosecution may necessitate both the development and the demonstration of that expertise in jury trials.

Internally generated institutional pressures also create incentives toward settlement for the individual prosecutor. One such institutional pressure is the pressure to cut costs. Plea agreements are far less monetarily demanding than trials, and pleas consume fewer human resources and less time. Prosecutors may want to arrive at plea agreements in every situation because "[e]ven small reductions in the number of criminal-case settlements pose big problems for the ***135** federal courts." [91] If federal guilty pleas were to drop by 5 percent, the resulting increase in trials would be at least 33 percent. [92]

An additional institutional factor that affects plea negotiations is how cases are managed in a particular office. While defense counsel often manage their cases on a "vertical" basis, meaning that they represent a client from start to finish, prosecutorial offices are more likely to operate by "horizontal" or "zone" representation, in which different attorneys handle different stages of a case. [93] Vertical management may point in favor of plea outcomes because a particular attorney may feel more urgently the impact of the alternatives to a plea. She will try the case if she does not reach a plea and thus has a better sense of the calculation of success or failure at trial. Conversely, horizontal management may discourage parties from reaching agreement because an attorney does not personally face the consequences of her bargaining behavior. [94]

Lastly, personal motives also may push toward or against plea resolutions. Some prosecutors might want to establish a reputation for zealousness, whether for career ambition or personal desire, and therefore would offer only harsh pleas. Others may want to gain trial experience and thus would offer less palatable plea agreements in order to force defense counsel to proceed to trial. Still others may offer very lenient pleas because they fear trial or simply want to minimize their workload. And finally, others may strive to act reasonably in the interests of developing ongoing and credible relationships with defense counsel.

IV. Relationship

Criminal justice is premised upon an adversary system; one might therefore imagine that, even in a system of negotiated justice, an adversary system in which defense counsel and prosecutor argue vehemently on each side would produce the best results. Yet much negotiation theory presumes the opportunity for joint gain through cooperation, [95] and negotiation theorists insist that there are clear benefits to separating the adversarial nature of a problem from the ***136** relationship. [96] Ronald J. Gilson and Robert H. Mnookin have examined the plea bargaining process as a prisoner's dilemma and have hypothesized that their model of lawyers as insurers of cooperative behavior has useful implications in the criminal law context. [97] Both prosecutors and defense counsel agree that cooperative attorneys create significant benefits in the plea bargaining context. This Part examines how cooperative relationships yield two tangible benefits: First, such relationships can make plea negotiation more efficient and foster the exchange of information; second, and perhaps more strikingly, they can affect the actual outcome of plea negotiations. This Part concludes with an examination of the factors that practitioners identify as key elements in establishing positive reputations and relationships.

Cooperative relationships based on a reputation for trustworthiness and credibility may simply grease the wheels of a plea negotiation, making it faster and more efficient. For example, an attorney negotiating with someone she perceives as an unpleasant or untrustworthy opposing counsel might be unwilling to agree to anything, no matter how minor, rather than regularly accepting oral agreements and generally agreeing to stipulations. [98] A positive working relationship, however, can facilitate what another attorney deems "process," including "agreements on bail, restrictions on bail, how accommodating [you are] to scheduling." [99] As one prosecutor notes, "Opposing counsel can make each others' lives miserable or can work together to make each others' lives easier." [100]

Cooperative relationships can also foster the exchange of information useful to both the prosecution and the defense in reaching agreement. As in any negotiation, a better understanding of the strengths and weaknesses of each side's case allows for a more realistic assessment of one's own BATNA. Yet the realities of an adversary system indicate that attorneys will not want to reveal the full strength of their own information before trial, because such a revelation will give opposing counsel additional time to prepare for, to undermine, and to attack specific witnesses, evidence, or theories. One ***137** defense counsel describes how information asymmetries hamper pre-trial outcome assessment and how information exchange can help foster more productive plea negotiations:

> It makes it very difficult to talk to [prosecutors], to negotiate with them, to figure out what . . . a good disposition would be. It makes it very hard for you to talk to your clients in a meaningful way. It is very hard to advise a client if they ask, "What should I do?" if you don't know what the prosecutor's case looks like. It actually is much more expeditious . . . if prosecutors are more open about what their evidence is. [101]

An exchange of information can also benefit the prosecutor by pointing out the strengths and weaknesses of the government's case and allowing her to determine more effectively her BATNA. A positive relationship between lawyers helps to facilitate the exchange of information. Explains one defense counsel:

> I think that if you have an adverse relationship or a hostile relationship or a non-existent relationship with [prosecutors], they're more likely to play their cards closer to their vest and just give you what they're legally compelled to give you. . . . [I]f you develop a good rapport with the prosecutor[s] you can, through

> conversation, flesh out more about where they're coming from, . . . why they think they have a good case, how they view the evidence, and what evidence they have. I've done that many times. [102]

One state prosecutor notes that the beneficial exchange of information is easier when attorneys trust one another: “It helps to have a defense attorney who's willing to exchange facts. A defense attorney who I couldn't trust--I couldn't go to them and ask, “What happened? My guy says x. What does your guy say?”' [103] Similarly, a federal prosecutor states, “I would be more forthcoming when [a defense attorney known for candor and honesty] says [that his client] did x, or x and not y; I would take that much more seriously than [[[the same thing from] a lawyer who has been [dishonest].” [104]

While trusting and cooperative relationships between attorneys can smooth out the process of information exchange, such relationships may have an even more profound effect on the outcome of plea negotiations. Research indicates that variance among plea agreements depends on the identity of the attorneys involved, irrespective ***138** of evidence in the case, type of crime, or other circumstances. [105] Most prosecutors and defense counsel interviewed for this Note agreed that the behavior and relationship between lawyers may affect not just the tone of their interaction but the ultimate disposition of a case. As one defense counsel explains, a positive relationship between negotiating attorneys has great impact on the negotiation's outcome, “because a lot of what you're talking about when you are negotiating is credibility.” She continues:
[I]f I have a good relationship with the D.A., and I say, “This kid is a good kid. He is a kid that shouldn't go to jail.” . . . If you had a good relationship over the years, I think that carries much more weight . . . . You have some credibility built up, you have some trust. . . . I think that you can carry the day more often that way. [106]

Similarly, a private defense counsel notes:

> The most important thing is that you're a person who can be trusted and whose word can be trusted. . . . If you're a person whose word they trust and take, it can significantly affect the outcome. And I also think that just by having . . . a good relationship, it's harder for them to stick it to you and play hardball with you than if you're really adversarial with them. I try to make [the relationship] matter. [107]

A good relationship allows attorneys who trust one another to craft mutually beneficial plea agreements.

In contrast, a poor relationship can stymie possibility for successful plea negotiation altogether. Notes one prosecutor, “I don't like to reward [poor] behavior [by defense counsel]. . . . I'm less willing to give [an unpleasant attorney] a break [if she exhibits unprofessional or unpleasant traits].” [108] Another prosecutor explains how poor attorney relationships can rule out pleas in a horizontal case management setting. [109] In describing a defense counsel whose behavior he finds inappropriate, he explains that she “is so annoying that it's counterproductive to her client. She wants to lecture you, to show how smart she is, establishing the wrong relationship for plea bargaining. You want to indict [her client] and get rid of her.” [110] In this ***139** situation, poor relationship skills effectively forfeit this attorney's opportunity to reach a favorable agreement for her client at this stage. [111]

Despite the general agreement that relationships expressly affect plea outcomes, prosecutors seem more reluctant to acknowledge the role that relationships play. One prosecutor cautions that although the relationship between attorneys influences both negotiation outcome and process, relationships do not affect ultimate dispositions dramatically, but rather “at the margins.” [112] Some prosecutors deny that relationship has any impact on outcome. One federal prosecutor says, “A client shouldn't suffer from [who they have as a] lawyer. . . . [It] would be unfair not to offer a plea because of an attorney.” [113] Another federal prosecutor concurs, insisting that relationship between attorneys does not influence agreements: “It's not fair

to punish a defendant for [his] lawyer. . . . Whether or not you trust a lawyer is of little relevance. The identity of the lawyer generally is of no consequence.” [114]

A good relationship between attorneys negotiating a plea yields a striking benefit in a tricky situation--a case in which the defendant may be innocent. Some scholars of plea bargaining have concluded that the practice acts coercively on innocent defendants, making them more likely to plead guilty to a crime they did not commit than to seek trial. [115] However, a good relationship can sometimes produce a better outcome for innocent defendants by promoting the candid exchange of information. When defense attorneys interviewed for this Note were asked whether they would ever counsel a defendant to ***140** accept a plea offer--even when they believed their client was innocent--if the plea offer represented a better outcome than their assessment of the likelihood of prevailing at trial, several responded by focusing on the relationship between the negotiating attorneys. When these defense counsel genuinely feel that the prosecution has erred in accusing their clients, they sometimes present prosecutors with sensitive information about their defense case prior to trial, although that information could, if revealed too early, help the prosecution build a stronger case against the defendant. The prosecutor's reputation and any relationship between attorneys are important factors in determining when attorneys can achieve such potentially efficient solutions.

One defense attorney explains that in rare circumstances he divulges evidence that exculpates his client before trial even if it could prove damaging to his case if revealed too early. When he is convinced that a defendant is innocent, he considers discussing directly with the prosecutor the exculpatory evidence. This attorney considers such a negotiation a plea negotiation much like others:

There are certain cases, and they're very rare, where I've been persuaded that my client's innocent. You might say, “Well, fine, don't you go to trial?” And I'd say, “Well, no, because innocent defendants get convicted every day in this country.” I should still be trying to avoid a trial and persuade the government. It's a judgment call whether a prosecutor's more easily persuaded than a jury. And you have to make that tactical and strategic decision. I find that type of negotiation to be the most difficult--you have to be extremely deft, have a very light touch, and you have to absolutely 100% trust your prosecutor. [116]

He describes a particular case several years ago in which he was convinced that his client had not committed the crime in question. After spending eighteen months negotiating with the prosecution, he was finally able to come to a point where he could persuasively discuss his client's innocence candidly with the prosecutor. As he explains,

The reason that it happened was--[a particular person] was the Assistant [[[United States Attorney handling the case]--I trusted [him] implicitly. If [[he] said to me, “I'm not doing this to get an advantage with your client,” I believed him. If I said to [him], “Would you entertain the possibility that my client is innocent or not guilty or that you can't prove the case, can we talk?” . . . . [T]his is someone who knew what I was saying, understood what I was saying, trusted me, because I don't go around saying, ***141** “I think you got an innocent guy,” every time. If I say it, they know I mean it. [117]

This defense counsel relies on both his own reputation for credibility and the prosecutor's reputation for trustworthiness when he attempts to disclose value-creating information about his client. Another defense counsel offers a similar scenario: “If you are marching your witnesses into [the office of a prosecutor] who knows you and trusts you and likes you and has had good experience with you and a good relationship with you,” she notes, “[she is] going to listen more seriously than if you had a very bad time with [her].” [118]

Another defense attorney tells a similar story. Her client was charged with seriously abusing a child, a felony which would require a mandatory sentence of five years in jail. [119] The client, a single mother of two young children, was offered a “very tempting” plea deal of probation. [120] Although she protested her innocence, the mother wanted to plead guilty to the offense so that she would not be separated from her children, even though a guilty plea would result in her ineligibility to hold any job involving the caretaking or supervision of children, her primary skills. The defense counsel's independent investigation corroborated the woman's innocence. In this situation, the client's risk aversion made trial an untenable option, but the terms of

the plea deal were not realistically suited to the defendant's best interests. [121] The defense counsel explains how she used her relationship with the prosecutor, as well as the prosecutor's reputation for honesty, to achieve a better outcome for her client:
I went to the chief prosecutor . . . who was somebody with whom I got along and who I think of as an honorable prosecutor and was able to have a much more candid conversation. . . . I obviously talked about my client and the reasons that I thought there was more than a reasonable doubt about her being the perpetrator of this crime. But I said, “Don't you understand that I'm going to have to win this case--that basically the choices are either that she takes the safe way out, or I have to tell her that she has to go to trial? I can't tell this client that she should plead guilty to something she didn't do. . . .” I was hoping actually to reach the prosecutor by talking one lawyer to another . . . . She would get that. And then I said, “. . . I think you've been really reasonable; I think you get it. I think you ***142** know there are some questions in this case. I think that it's troubling for you. What I'm saying to you basically is that this [offer is] incredibly coercive, and even cowardly on your part . . . . [I]f you're saying you think there's a question here and you're translating that question into a lesser sentence, then I think that's irresponsible as a prosecutor, because I think you're expressing the doubts that you have about the guilt of my client in [the] sentence and not in your decision to prosecute, and I think you ought to not prosecute this case and conduct more investigation.” [122]

Likely based in part on the fact that the defense attorney herself had a reputation as a fair and trustworthy counsel, the prosecutor did investigate further and ultimately dropped all charges against the client. [123]

Prosecutors seem to agree that a positive relationship with a defense counsel can foster potentially exculpating conversations. Discussing cases in which the defense counsel tries to convince him that an element of a case is not provable, one prosecutor says that there are “times when we'll listen.” [124] That prosecutor explains that those times occur when he is dealing with someone in whom he “has developed some sense of trust.” [125] He notes that he would ignore the same thing coming from someone with a reputation as a con artist. [126]

Clearly, this type of exchange between attorneys promotes a better and more efficient outcome: If evidence exists that tends to indicate that prosecutors have accused an innocent party, it is in the interests of all involved to end the case before the investment of further time, energy, and money. [127] Furthermore, society presumably benefits from being spared the external costs of prosecuting innocent parties, and an innocent accused clearly gains by not being wrongfully prosecuted or convicted. Yet the adversary process is a barrier to exchanges like these, because the effectiveness of the revelation of a defendant's private exculpatory information at trial decreases as ***143** the time and energy spent discrediting that information by the prosecution increases. Trusting relationships between attorneys can overcome the adversary process and facilitate the exchange of information between reluctant defense attorneys and skeptical prosecutors.

Because trusting and cooperative attorney relationships can have such a great impact on the plea negotiation process and outcome, it is useful to examine what practitioners identify as key factors in building good, and bad, reputations. Practitioners interviewed for this Note uniformly agree that both attitude and personality are key factors in developing a positive reputation and in building a cooperative relationship. Honesty and empathy are crucial elements in developing a professional persona that will foster a cooperative outcome. A federal public defender notes that the key to successful negotiation is finding someone “who knows how to transact business.” [128] This same attorney explains that it is difficult to deal with prosecutors who lack empathy for defense counsel or who cannot communicate their understanding of the role of the defense counsel adequately:
There are many prosecutors who have no idea what my job is--none. They don't respect it, they've given it no thought, they have no idea--let alone believe it. But just from a business standpoint, to negotiate anything you have to step into your adversary's shoes. You have to say, “What is it that this person wants to do, and where can I find a middle ground?” . . . You have to understand a prosecutor and the way that they think. [129]

Similarly, a prosecutor notes that it helps negotiation when a defense attorney is "knowledgeable about the way this office works. It's better to have a lawyer who knows the parameters of what's possible." [130] Understanding and respecting another person's motives--a critical factor in negotiation theory-- [131] clearly affects negotiation in the criminal context.

Both prosecutors and defense counsel pinpoint untrustworthiness, going back on one's word, unpreparedness, and personal rudeness as disliked traits. Defense counsel specifically add that self-importance, rigidity, and a lack of sense of humor are problematic for them in dealing with prosecutors: A difficult prosecutor is one "who ***144** believes that only they [sic] are on the side of angels, [and that defense lawyers] represent the evil side." [132] Another defense attorney uses remarkably similar language to describe prosecutors with whom he dislikes dealing: They are "overzealous [and] believe they are doing God's work . . . [and that] defense work is devil's work." [133] Defense counsel thus dislike the rigid morality of a prosecutor who cannot--or chooses not to--fathom the reasonable motives and objectives of defense work.

Lack of empathy, not only for the defense counsel's role but also for the defendant, likewise hinders the successful negotiation of a plea, at least from the defense perspective. Defense counsel regularly appeal to empathy to achieve what they believe are reasonable outcomes. From the defense perspective, negotiation is more productive when a prosecutor is willing to listen and to attempt to understand a particular defendant's situation. One attorney notes that she appreciates dealing with prosecutors who "see the clients as human beings" and describes how difficult negotiations with an unempathic prosecutor can be:

> Those prosecutors are very hard to deal with because they don't want . . . to hear about what you have to say about your client. There are prosecutors who only see your client as that period of time during which they committed the offense. . . . From their perspective the client is that twenty minute period that they did the robbery. . . . They are unwilling to hear about the other nineteen years and eleven months and twenty-nine days and eleven hours that the client had a life. [134]

Another defense counsel criticizes the bulk of prosecutors for being "threatened by an appeal to compassion." [135] The ability to demonstrate empathy for the defendant is a crucial factor in establishing a good reputation for prosecutors.

Prosecutors, too, may feel that empathy is a positive factor in plea negotiation. One prosecutor notes that "[t]he system within which we work doesn't mean [we] can't be human beings." [136] She encourages defense attorneys to provide her with as much information about a defendant and her situation as possible, explaining her empathy on two levels: "[First,] I care because I care. Second, [I care] because the judge will care. It's better to know and evaluate the ***145** sympathies [in a particular case]." [137] Here, empathy helps her to better assess her BATNA in court.

Because positive relationships built on trust and mutual understanding clearly create value for both defense counsel and prosecutors, many attorneys may attempt explicitly to develop and maintain credible reputations that can serve as shorthand "signals" to alert opposing counsel to the likelihood of cooperative relationships. Reputation is likely to have a significant effect on the development of cooperative relationships between prosecutors and defense counsel because criminal law is a specialty, and repeat players are frequent, despite high turnover in some prosecutorial offices. [138] Unsurprisingly, firms specializing in criminal law may serve, as Gilson and Mnookin hypothesize, as repositories of reputation type. [139] Attorneys pay careful attention to reputation, even investigating opposing counsel prior to a negotiation. [140]

***146** Because reputations may facilitate relationships that allow for better and more efficient case dispositions, some prosecutors and defense attorneys treat the development of a cordial or trust-based relationship between attorneys as a key element in their case disposition "tool bag." Says one prosecutor, "What you don't want to do is bluff falsely. Then every other defense attorney will know that when you say x you mean y. You want to have a [[[good] reputation." [141] However, non-cooperative reputations are also deliberately cultivated. For instance, because the strength of opposing counsel is a key factor

in BATNA calculation, a reputation as a skillful trial attorney may be useful. And a non-cooperative reputation may be helpful in achieving certain negotiation goals; as one public defender explains,

[Y]ou might have a reputation for being particularly litigious and a D.A. knows that you are just going to be a pain in the ass. That “they want six months, I am asking for a year. You know, if I don't give them this they are going to motion me to death. I am going to have to answer fifty-seven motions over the next year and thirty-three subpoenas and they are going torture me with this case. It's not worth it; I'll give them the six months.” I don't know if you would ever get a D.A. who would admit they make decisions that way. But those kinds of reputations and personal relationships carry a lot of weight . . . . [142]

Because of the close-knit nature of the criminal law community, [143] an attorney who develops a reputation, whether credible or dishonest, gladiator or conciliator, is likely to find that her behavior affects her ***147** relationships with opposing counsel and directly affects her plea negotiation.

V. Conclusion

This Note suggests, by its examination of plea bargaining in the context of three areas of negotiation theory, that such theory is applicable in the context of criminal law. Attorneys engaged in plea bargaining regularly consider their alternatives and options when evaluating the terms of a particular plea. Conflicting motives and incentives from a host of sources influence the actions of both defense counsel and prosecutors. And relationships between attorneys can stymie or ameliorate plea negotiations. Surely, other negotiation principles apply in the plea bargaining context.

This Note's preliminary exploration of the intersection between plea bargaining and negotiation principles indicates that an examination of how negotiation theory fits within the framework of criminal law will benefit both practitioners and academics. Practitioners may gain from expressly treating plea bargaining as negotiation. Principles of effective negotiation, including thorough research into alternatives and options, analysis of one's own and an adversary's motivations and incentives, and consideration of relationship issues, can help practitioners foster more effective plea negotiations and more productive plea agreements. [144] Further inquiry into how negotiation theory applies in the context of plea bargaining may inform academic discussion of issues including the viability of negotiation ***148** theories, the nature and effectiveness of the adversary system, and the desirability of a system of negotiated justice.

Footnotes

d1 The author is currently a law clerk to the Honorable Kimba M. Wood of the United States District Court for the Southern District of New York. The author originally submitted this Note to fulfill the Third Year Written Work Requirement at Harvard Law School. The author would like to thank, first, the eleven practitioners who gave so freely of their time and who made this Note possible. Additional thanks are due to Professor Robert H. Mnookin and the members of the 19951996 Negotiation and Dispute Resolution Interdisciplinary Research Seminar at Harvard Law School, for their efforts and guidance during this Note's formative stages. Credit is also due to Professor Roger Fisher, for the inspiration behind this Note (and its title). The author is also grateful to Ben Sokoly and Ashok Ramani for their editorial assistance; special thanks must go to Neil Steiner for his editorial endurance. Finally, the author notes with appreciation the constant support of Dory Hollander, Jerry Blumoff, Sam Blumoff, and Matt Bodie.

1 Black's Law Dictionary 1152 (6th ed. 1993). There are two readily identifiable types of plea bargaining exchanges--bargaining over sentence reduction (prosecution and defense agree to some presumably reduced sentence recommendation) and bargaining over charge reduction (prosecution agrees to waive certain charges in exchange for a defendant's guilty plea to other charges). In addition, some plea agreements allow the defense counsel to argue for a downward departure from guidelines at sentencing or ensure that the prosecutor will not argue for any specified sentence. For an overview of the federal plea bargaining system, see David H. Cramer, Guilty Pleas, 80 Geo. L.J. 1261, 1261-62 (1992). See also Dawn Reddy, Guilty Pleas and Practice, 30 Am. Crim. L. Rev. 1117, 1133-35 (1993); William L. Gardner & David S. Rifkind, A Basic Guide to Plea Bargaining Under the Sentencing Guidelines, 7-SUM Crim. Just. 14 (1992).

This Note focuses on the elements of the negotiation process rather than differences between the types of plea agreements or differences in plea bargaining practices and rules across jurisdictions. Similarly, although this Note includes empirical information about negotiating cooperation agreements (arrangements in which a defendant turns state's witness against a co-defendant), the special implications and intricacies of cooperation agreements are outside of its scope. For a comprehensive overview of cooperation agreements, see Graham Hughes, Agreements for Cooperation in Criminal Cases, 45 Vand. L. Rev. 1 (1992).

2 For clarity, this Note refers to the process by which a plea disposition is reached as “plea bargaining,” and to the actual outcome as a “plea agreement.”

3 See, e.g., Keep Known Child Sex Abusers Out of Society, in Appropriate Facility, Sun-Sentinel (Fort Lauderdale), May 5, 1995, at 18A (“[The accused] should have been serving a 24 to 40-month state prison term for molesting an 11-year-old girl.... Instead, he was free to go on an armed rampage due to one of the biggest, most-abused loopholes in a Swiss-cheese criminal justice system--the plea-bargain. Even though [the accused] admitted fondling the 11-year-old, her parents felt she was emotionally unable to testify. So to get a guilty plea and avoid a trial, they, the judge and prosecutors agreed to a too-lenient plea-bargain.”); Richard Perez-Pena, Mentally Ill Man Held Fit for Murder Trial, N.Y. Times, Aug. 16, 1993, at B3 (noting that murder of young woman in 1991 “spurred a chorus of criticism of the mental-health and criminal justice systems, which has let [defendant] slip through its fingers more than once: in 1990, he was accused of attacking a former neighbor with an ice pick but served only 34 days under a plea bargain”).

4 See generally Albert W. Alschuler, The Prosecutor's Role in Plea Bargaining, 36 U. Chi. L. Rev. 50 (1968); Stephen J. Schulhofer, Plea Bargaining as Disaster, 101 Yale L.J. 1979 (1992).

5 This Note uses data gathered by the author from personal interviews with prosecutors and defense attorneys, primarily in the New York City area. To maintain interview subjects' anonymity so that they could speak freely, the Note identifies subjects as Prosecutor A, Prosecutor B, Prosecutor C, Prosecutor D, Prosecutor E, Prosecutor F, Defense Counsel A, Defense Counsel B, Defense Counsel C, Defense Counsel D, and Defense Counsel E. Although the sample size is too small to offer anything other than anecdotal data, such data offers a useful starting point for this Note's exploration of plea bargaining in the negotiation context.

6 Plea bargaining yields a “rough justice,” notes one defense attorney. Interview with Defense Attorney C, supra note 5. Says one prosecutor, “The results of plea bargaining are fair, often more so than what happens at trial.” Interview with Prosecutor A, supra note 5. “In a plea agreement,” notes another prosecutor, “everyone's got to be happy. No one's going to be taken advantage of. It's got to be a fair result.” Interview with Prosecutor D, supra note 5. Others qualify this enthusiasm for pleas: one defense attorney states, “In many cases [plea agreements] are fair, but in a not insignificant minority they're not fair.” Interview with Defense Attorney E, supra note 5.

7 Although the scholarly articles that use this figure are too numerous to cite, some statistics indicate that the number may be slightly lower. In the federal system in 1995, approximately 78% of all criminal defendants entered guilty pleas; if one considers only cases in which charges were not dismissed, guilty pleas account for the disposition of 90% of those cases. See Bureau Of Justice Statistics, U. S. Dep't of Justice, Sourcebook of Criminal Justice Statistics (Kathleen Maguire & Ann L. Pastore eds., 1996). In a 1990 study of 1800 randomly selected felony cases in Los Angeles, however, 98% were settled with guilty pleas rather than trials. Says Los Angeles County Superior Court Judge Richard P. Byrne, “It's a settlement system. It is not a trial system.” Crime Overloads L.A. Justice System; Many Suspects Are Never Prosecuted and Small Crimes are Often Ignored, L.A. Times, Dec. 16, 1990, at A1. Practitioners generally concur, estimating that approximately ten percent or less of their criminal cases go to trial. Interview with Defense Counsel A, C, D & E, supra note 5; Interview with Prosecutors A, B & D, supra note 5.

8 In jurisdictions in which attorneys do not engage in “plea bargaining,” pleas continue to account for a sizable share of the case dispositions. For example, in his study of the Philadelphia court system, Schulhofer found that despite the fact that prosecutors were not able to offer much in the way of concessions, guilty pleas still accounted for a substantial number of case dispositions. See Stephen J. Schulhofer, Is Plea Bargaining Inevitable?, 97 Harv. L. Rev. 1037, 1061 (1984).

9 Interview with Prosecutor C, supra note 5; Interview with Defense Counsel B, supra note 5.

10 In the federal system, Sentencing Guidelines are based on a point system; a guilty plea indicates acceptance of responsibility, which the law automatically rewards with several “points off.”

11 Other factors might include, for instance, determining a monetary figure for a financial crime. An agreement over such a figure might significantly affect the sentencing outcome in a system governed by guidelines. Interview with Defense Attorney B, supra note 5.

Federal prosecutors are limited in their ability to bargain over charges and sentence length by Justice Department policy. See Dick Thornburgh memo, reprinted in 1 Fed. Sent. Rep. 421.

12 See, e.g., Alschuler, supra note 4; Albert W. Alschuler, The Defense Attorney's Role in Plea Bargaining, 84 Yale L.J. 1179 (1975) [hereinafter Alschuler, Defense Attorney]; Albert W. Alschuler, The Trial Judge's Role in Plea Bargaining, Part I, 76 Colo. L. Rev. 1059 (1976).

13 See, e.g., Albert W. Alschuler, Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System, 50 U. Chi. L. Rev. 931 (1983); Schulhofer, supra note 4.

14 See, e.g., Frank Easterbrook, Criminal Procedure as a Market System, 12 J. Legal Stud. 289 (1983) (expressly examining the plea agreement as merely another type of bargained-for transaction).

15 See, e.g., Stephen J. Schulhofer & Ilene H. Nagel, Negotiated Pleas Under the Federal Sentencing Guidelines: The First Fifteen Months, 27 Am. Crim. L. Rev. 231 (1989); Ilene H. Nagel & Stephen J. Schulhofer, A Tale of Three Cities: An Empirical Study of Charging and Bargaining Practices Under the Federal Sentencing Guidelines, 66 S. Cal. L. Rev. 501 (1992); Jeffrey Standen, Plea Bargaining in the Shadow of the Guidelines, 81 Calif. L. Rev. 1471 (1993).

16 See, e.g., Alschuler, supra note 13; Schulhofer, supra note 8 (proposing a system of bench trials based on a model developed in the Philadelphia court system).

17 For example, legal academics have examined bargaining through the doctrinal framework of contract law. For a recent example see, Blake D. Morant, Contract Rules and Terms and The Maintenance of Bargain--The Case of the Fledgling Writer, 18 Hastings Comm. & Ent. L.J. 453, 457464 (1996). More recently, scholars have analyzed bargaining through the burgeoning interdisciplinary field of negotiation and dispute resolution. See, e.g., Robert Axelrod, The Evolution of Cooperation, 241 (1984).

18 Although no legal scholar has yet to explicitly apply bargaining analysis to the field of criminal law, one author has taken a well-reasoned step in this direction. Rodney Uphoff offers defense attorneys a practical guide to plea negotiation that relies on negotiation principles as well as the empirical reality of the criminal system. See Rodney J. Uphoff, The Criminal Defense Lawyer as Effective Negotiator: A Systemic Approach, 2 Clinical L. Rev. 73 (1995). Uphoff demonstrates the benefits that a careful examination of the applicability of negotiation principles to the criminal context can yield for practitioners.

19 U.S. Const. amend. VI.

20 “[N]egotiated dispute resolution,” says one author, ‘privatizes' the [criminal] dispute by empowering the parties themselves to resolve it without any significant involvement by either the public or the courts.” Peter Arenella, Rethinking the Functions of Criminal Procedure: The Warren and Burger Courts' Competing Ideologies, 72 Geo. L.J. 185, 219 (1983). Other works explicitly have labelled plea bargaining as negotiation. See, e.g., Pamela Utz, Settling the Facts: Discretion and Negotiation in Criminal Court (1978); Douglas W. Maynard, Inside Plea Bargaining: The Language of Negotiation (1984).

21 Cf. Robert H. Mnookin & Lewis Kornhauser, Bargaining in the Shadow of the Law: The Case of Divorce, 88 Yale L.J. 950, 968 (1979) (analyzing how legal entitlements influence negotiation in the civil context).

22 Once charges are filed, for example, a prosecutor cannot simply decline to prosecute the case; similarly, a prosecutor cannot offer and guarantee a defendant a lesser punishment totally unwarranted by existing law.

23 See United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1997) (“The interpretation of plea agreements is guided by contract law, and parties to the agreement should receive the benefit of their bargain.”); United States v. Podde, 105 F.3d 813 (2d Cir. 1997) (construing plea agreements according to contract law principles and interpreting such agreements strictly against the government); see also, Ricketts v. Adamson, 483 U.S. 1 (1987) (holding the defendant to negotiated terms of a plea agreement); Mabry v. Johnson, 467 U.S. 504 (1984) (holding that contractual law governs the formation of plea agreements); Brady v. United States, 397 U.S. 742 (1972) (holding that the standard for reviewing pleas to ensure that due process violations have not occurred is whether pleas offered by defendants fully aware of the consequences were induced by improper threats, misrepresentations, or promises having no proper relationship to the prosecutor's business); Santobello v. United States, 404 U.S. 257 (1971) (holding that when a guilty plea rests in any significant degree upon a prosecutorial promise, such a promise must be fulfilled); Brooks v. United States, 708 F.2d 1280 (7th Cir. 1983) (treating a plea agreement as a contract entered into by free and uncoerced parties).

24 See, e.g., William M. Landes, An Economic Analysis of the Courts, 14 J. Law & Econ. 61 (1971) (arguing that both prosecutor and defendant seek to maximize utility); Brian Forst & Kathleen R. Brosi, A Theoretical and Empirical Analysis of the Prosecutor, 6 J. Legal Stud. 177 (1977) (finding that prosecutors allocate scarce resources in such a way as to maximize convictions); Richard P. Adelstein, The Negotiated Guilty Plea: A Framework for Analysis, 53 N.Y.U. L. Rev. 783 (1978) (analyzing how plea bargaining forces criminals to internalize both the economic and "moral" costs of a crime); Easterbrook, supra note 14, at 30809; Brian Ostrom, An Economic Analysis of the Plea Bargaining Process (1988) (unpublished Ph.D. dissertation, Harvard University, on file with the Langdell Library at Harvard Law School) (noting that a broad-based incentive and monitoring structure constrains prosecutors in plea bargaining); cf. Ronald H. Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960) (positing that parties will come to the most efficient result by mutual agreement through bargaining); Richard A. Posner, Economic Analysis of Law § 21.7, at 56164 (4th ed. 1992) (concluding that plea bargaining compensates both prosecutors and defendants, and is determined in part by the relative costs of negotiation to litigation and the amount of uncertainty over litigation outcome).
According to economic analysis, plea bargaining is simply an efficient alternative to litigation. See Albert W. Alschuler, The Changing Plea Bargaining Debate, 69 Cal. L. Rev. 652, 683 (1981) (discussing the implications of plea bargaining as a sentencing tool and as a dispute resolution mechanism). As two authors explain,
For a large number of plea bargains, probably the great majority, ... there is no mystery about what drives the bargain. Criminal trials are costly for defendants, and even more so for prosecutors. These costs can be saved, and the gains split between the parties, by reaching a bargain early in the criminal process. Consequently, in cases where both parties understand that conviction at trial is virtually certain--a description that fits many, many cases--the incentive to bargain is simple. Savings in adjudication costs represent the gains from trade.
Robert E. Scott & William J. Stuntz, Plea Bargaining as Contract, 101 Yale L.J. 1909, 1935 (1992).

25 See Daniel Frome Kaplan, Where Promises End: Prosecutorial Adherence to Sentence Recommendation Commitments in Plea Bargains, 52 U. Chi. L. Rev. 751, 768 (1985) ("[For] a plea to be intelligent, the defendant must know the scope of, and limitations upon, any promises made by the government.... Plea bargaining entails a rational calculation of risks and benefits. In responding to a prosecutor's plea proposal, the defendant will compare the expected period of incarceration following a trial with the expected period of incarceration following a negotiated guilty plea.").

26 Mnookin & Kornhauser, supra note 21, at 968.

27 See Roger Fisher, et al., Getting to Yes 99100 (1991). Although practitioners do not explicitly use the BATNA label, their descriptions of the analyses and calculations they perform reveal that it is an accurate characterization of the process.

28 "Triable" is a term used by both defense counsel and prosecutors to mean that sufficient legal and factual basis exists for an attorney to make reasonable arguments at trial.

29 Interview with Defense Counsel A, supra note 5.

30 Id.

31 Milton Heumann, Plea Bargaining 76 (1978).

32 Little research has been conducted regarding the accuracy of assessing case outcome at trial. One study indicated, however, that inexperienced prosecutors could predict with significant accuracy the likelihood of success at trial. William F. McDonald, Plea Bargaining: Critical Issues and Common Practices, 66 (1985) (citing William M. Rhodes, Plea Bargaining: Who Gains? Who Loses? (1978)).

33 One defense counsel described the situation of a defendant in a federal case who had built a completely new life for himself and was being prosecuted for a five-year old crime. This particular defendant's life would be ruined whether he went to prison for four months or a year and a half; the defense counsel's primary goal was to keep the defendant out of prison and to craft a plea which would allow for some alternative form of punishment. Interview with Defense Counsel B, supra note 5.

34 Says one defense attorney of his jurisdiction, "[W]e have ... an extremely liberal circuit with respect to downward departures." Id.

35 Id.

36 See Part II.B, infra.

37 Interview with Defense Counsel A, supra note 5. Another possible BATNA may be a deferred prosecution, in which the prosecutor's office agrees to hold off on prosecution for one year; if the defendant is not arrested within that year, charges are dropped. See Interview with Defense Counsel E, supra note 5. In addition, a BATNA might be dismissal of charges, if there are circumstances which might influence the prosecution to dismiss them. Of course, both of these BATNAs represent types of negotiated agreement in and of themselves.

38 See Interview with Prosecutor B, supra note 5.

39 See Interview with Prosecutor D, supra note 5. The strength of the evidence against the defendant is often the most important factor. See id.; see also William F. McDonald, Plea Bargaining: Critical Issues and Common Practices, supra note 33, at 6370 (identifying caseload, seriousness of the criminal and the crime, strength of the case, personal attributes of attorneys, the victim, the police, and mitigating and aggravating attributes and circumstances as determinants of the plea bargaining decision).

40 See Interview with Prosecutor D, supra note 5.

41 See Interview with Prosecutor E, supra note 5.

42 Alschuler also notes that such highly favorable deals can often coerce defendants into accepting a light sentence rather than risking a higher sentence if they are convicted at trial. See Alschuler, supra note 4, at 5961.

43 Interview with Prosecutor D, supra note 5. Another prosecutor also highlights the general inability to assess a jury's outcome: “What juries decide isn't necessarily based on evidence. You can do a spectacular job at trial and just not win.” Interview with Prosecutor C, supra note 5.

44 McDonald, supra note 33, at 4960.

45 However, one prosecutor notes that when a serious defect “appears” in his case, such as a missing or dead witness, he may offer a lower plea bargain, using his workload as an excuse. See Interview with Prosecutor B, supra note 5.

46 Interview with Prosecutor C, supra note 5.

47 Id.

48 Id.

49 See id.

50 See Howard Raiffa, The Art and Science of Negotiation (1960).

51 See Ronald J. Gilson & Robert H. Mnookin, Cooperation and Competition in Litigation: Can Lawyers Dampen Conflict?, in Barriers to Conflict Resolution 185, 19293 (Kenneth Arrow et al. eds., 1995).
When acting in their professional roles on behalf of client-principals, lawyers are exclusively agents. Principals gain substantial benefits from obtaining the services of the agent--the agent presumably brings specialized skills, expertise, and time that the principal does not possess or cannot utilize. But agency relationships also impose substantial costs; agents are individuals with their own set of incentives, motivations, and interests. The difficulty in bringing the agent's and principal's incentives in line with each other has been detailed by a number of scholars and has been called the “principal-agent tension.” See, e.g., Robert H. Mnookin et al., Bargaining in the Shadow of the Law: The Lawyer as Negotiator at 4663 (August 22, 1995) (unpublished manuscript, on file with the author) (discussing the costs and benefits that arise from the principal-agent relationship, the pervasiveness of the principal-agent tension, and various techniques to manage this tension).

52 See generally Schulhofer, supra note 4, at 1987 (noting the various ways in which incentives in the principal/agent relationship may be misaligned in the criminal context).

53 Each defense attorney who replied to the question, “To whom/what do you owe your allegiance in a given case?” stated that the answer was the client. Interview with Defense Counsel A, B, C & D, supra note 5.

54 Says one defense attorney, “Representing my client is, for me, in the interests of justice. We have an adversarial system: there are enormous resources that are brought to bear against my client, and I think it is justice for an impoverished person accused of crime to

be very well represented.” Interview with Defense Counsel B, supra note 5. Another notes, “I feel like I have some responsibilities to [the justice system] .... [E]ven if I can't get somebody off completely or avoid jail completely, I feel proud when through my efforts I educate the prosecutor and/or the judge to the point that the case is less serious for my client.” Interview with Defense Counsel A, supra note 5.

55 Interview with Defense Counsel C, supra note 5.

56 See Interview with Defense Counsel C, supra note 5. That defense attorney further explains:
My view of the counseling role of the criminal lawyer entails more than merely accepting a client's initial instinct. Whether the client says that he or she wants a trial or a plea, that is the beginning of a conversation. Client decision-making in a criminal context is very complex. Many factors influence a client aside from a narrow cost-benefit analysis. Whether or not the client is currently incarcerated is chief among them. It's the criminal defense lawyer's job to assist the client in making a good decision under all the facts and circumstances. Sometimes this process is far more grueling than just going to trial--or grabbing the first plea offer.
Id. For a more amplified discussion of the tensions between client autonomy, attorney agency, and attorney responsibility, see Abbe Smith, Rosie O'Neill Goes to Law School: The Clinical Education of the Sensitive New Age Public Defender, 28 Harv. C.R.-C.L. L. Rev. 1, 27-37 (1993).

57 Much focus has been put on legal fee structures as a mechanism for incentive alignment or conversely as a mechanism that exacerbates incentive differences. For example, an attorney working on a contingency fee basis may have an incentive to settle a case quickly, for far less than it might be worth to the client, because her own interest in a percentage of the settlement changes much less dramatically with respect to the total. For a minimal investment of time, she will be able to earn a reasonable fee; earning the much larger fee that might result from trial will be counter-productive, because the time for trial is so great that she will actually earn less per hour overall. This scenario also fits the example of the real estate agent, whose “primary interest is to maximize his earnings for a given amount of effort.” Mnookin et al., supra note 51, at 50.
Although a defense counsel may not be retained on a contingency basis in a criminal case, see ABA Code DR 2-106(c); ABA Model Rule 1.5(d)(2), the differing fee structures used by defense counsel can significantly alter their financial incentives and motivations.

58 Many public defenders are likely to be personally dedicated to the cause of providing adequate representation to poor criminal defendants; this personal moral motivation may further help to ensure alignment between principal/agent incentives.

59 Public defenders normally have a fairly heavy caseload. See Alschuler, Defense Attorney, supra note 12, at 1248; Interview with Defense Counsel B, supra note 5.

60 Notes one public defender, “The point of making agreements is to resolve cases, to resolve litigation forever in the case--and to eliminate work. In a volume business that's part of what you [defense counsel] try to do, what they [prosecutors] try to do.” Interview with Defense Counsel B, supra note 5.

61 But see Alschuler, Defense Attorney, supra note 12, at 1248-49 (noting that the public defenders' large portfolio of cases creates a bargaining chip; public defenders may threaten a general strike on plea bargaining, gaining leverage through their power to tie up the court system and prosecutors in countless trials).

62 In New York, these lawyers are called 18B lawyers on the state level, and CJA (Criminal Justice Act) panel lawyers on the federal level.

63 See Alschuler, Defense Attorney, supra note 12, at 127374.

64 As one such attorney notes:
I am always aware of the fact that there are more clients down the road and I feel tension in occasional cases that I can't pound the table as hard as I might if this was the only person I would represent in my life ... because I am going to be going before that same prosecutor in the same office in a month or two with another case that may have more merit. And if I sit there and do a scorched earth policy on this case that had no merit I would have less credibility for the next person that comes down the road.
Interview with Defense Counsel A, supra note 5.

65 At least one CJA attorney receives a good number of his private criminal cases through the word of mouth that goes on between prisoners in jail. See id.

66 As noted earlier, contingency fees are generally prohibited in criminal cases. See supra note 58.

67 Says one defense counsel:
The sleazy lawyer way to approach a new client is to tell them how difficult the case is and [that the] odds [are] highly against them, but “I am a good lawyer and I am going to work very very hard to overcome these odds.” Somebody like that can say to the client, “Since it is such a tough case, pay me a lot of money.” Then, after they have the money, once you have your retainer and it is in your pocket and you know that the person is really sort of stuck with you, you can be more forthcoming about the prospect of a plea ... because with sleazy lawyers ... there is a motivation to do a plea; there is less work.
Interview with Defense Counsel A, supra note 5; see also Alschuler, Defense Attorney, supra note 12, at 120102.

68 “For the lawyer working hourly,” notes one defense counsel, “there is a motivation not to do the plea--to continue to work the case and get paid hourly wages.” Interview with Defense Counsel A, supra note 5. Prosecutors were not hesitant to mention this as a possible incentive: “I hate to say it,” says one prosecutor, “but I've heard enough jokes about defense lawyers saying, “I'm not pleading this out; I need to pay for my summer vacation.”' Interview with Prosecutor E, supra note 5. Similarly, another prosecutor highlights “defense attorneys wanting to make their money” as one factor that might hinder reaching a plea agreement. Interview with Prosecutor F, supra note 5.

69 Interview with Prosecutor C, supra note 5.

70 Tung Yin, Not a Rotten Carrot: Using Charges Dismissed Pursuant to a Plea Agreement in Sentencing Under the Federal Guidelines, 83 Cal. L. Rev. 419, 457 (1995) (examining how the use of dismissed charges in sentencing proceedings alters the incentives of both prosecutors and defendants to plead guilty).

71 See, e.g., Easterbrook, supra note 14.

72 Editorial, Getting Away With Murder, S.F. Chron., Jan. 17, 1994.

73 See, e.g., Keep Known Child Sex Abusers Out of Society, in Appropriate Facility, supra note 3.

74 See, e.g., Linnet Myers, Pressure Kills a Plea Bargain Offer Dropped in Rape Case After Women Stage Protest, Chi. Trib., Dec. 14, 1986, at 3C.

75 See McDonald, supra note 33, at 69.

76 Interview with Prosecutor F, supra note 5.

77 Interview with Prosecutor A, supra note 5.

78 Most literature on plea bargaining makes the assumption that plea dispositions take up less time and resources than trials, and practitioners concur. Interview with Prosecutor C, supra note 5. But see Schulhofer, supra note 7, at 1085 (finding that pleas take longer, but not significantly longer, than bench trials).

79 For example, pleas may serve as a cover for incompetent, or even corrupt, police activity; once a plea is reached, the underlying arrest is never examined closely by a court. “The vast majority of charges for narcotics or weapons possession crimes result in pleas without the necessity of grand jury or trial testimony, thus obviating officers' concerns about the risk of detection and possible exposure to criminal charges of perjury.” City of New York Commission to Investigate Allegations of Police Corruption and the Anti-Corruption Procedures of the Police Department (Milton Mollen, Chair), Commission Report at 37.

80 Under “horizontal” or “zone” representation, different attorneys handle different stages of a case, whereas under “vertical” representation, an attorney represents a client from the case's inception to termination. Interview with Prosecutor B, supra note 5. For further discussion, see infra text accompanying note 94.

81 See, e.g., Christopher Darden, In Contempt 310-11 (1996).

82 Interview with Prosecutor C, supra note 5. In contrast, another prosecutor who handled mostly white-collar work noted that he did not handle a lot of cases “with real live human victims,” and said he found it “hard to get excited about [a large bank].” Interview with Prosecutor A, supra note 5.

83 Recently, such concerns have grown into a more unified movement that is providing victims with a concrete influence in the criminal disposition process:
Despite the potential impact of the plea bargaining process on the victim, statutes permitting the victim's participation in the process were virtually nonexistent until the early 1980s. By 1988, however, at least twenty-one states had enacted laws requiring the prosecutor to consult with or to notify the victim regarding the plea bargaining negotiations. Thus, although the victim's opinion is never binding on the prosecutor, the victim is effectively allowed to contribute to the negotiating process.
David L. Roland, Progress in the Victim Reform Movement: No Longer the “Forgotten Victim, 17 Pepp. L. Rev. 35 (1989).
A criticism of this plan is that it does not truly integrate the victim and her needs into the negotiating process. One study demonstrated that victims who attended pre-trial settlement conferences in which plea agreements were reached regularly agreed with the outcomes proposed by prosecutors and implied that such agreement was due to intimidation by prosecutors. See Karen L. Kennard, The Victim's Veto: A Way to Increase Victim Impact on Criminal Case Dispositions, 77 Cal. L. Rev. 417, 435 (1989).

84 Interview with Prosecutor E, supra note 5.

85 Interview with Prosecutor A, supra note 5.

86 Id. However, a prosecutor's sense of right and wrong may include the notion that innocent taxpayers should not pay to try a case in which a plea results in just as appropriate an outcome as would a trial.

87 On the federal level, presidentially appointed United States Attorneys serve as chief prosecutors in their respective jurisdictions. Under each United States Attorney are numerous Assistant United States Attorneys with varying levels of seniority and experience. Offices are divided up into units--major crimes, narcotics, organized crime, for example--with supervisory division heads for each unit. On the state level, the structure is similar; elected or appointed District Attorneys head regional offices composed of numbers of Deputy or Assistant District Attorneys divided into supervised units. The day-to-day management of cases is generally handled by Assistant/Deputy District Attorneys or Assistant United States Attorneys.

88 See Schulhofer, supra note 4, at 1987.

89 See id.

90 See Alschuler, supra note 4, at 52. No prosecutor with whom I spoke acknowledged any pressure to achieve a high conviction rate; indeed, one prosecutor noted that her office was extremely supportive of attorneys who lost at trial. Interview with Prosecutor C, supra note 5.

91 W. John Moore, Courting Disaster, Nat. J., Mar. 3, 1990, at 502.

92 See id.

93 Interview with Prosecutor B, supra note 5.

94 But see, Gary Mendelson, Lawyers as Negotiators, 1 Harv. Negotiation L. Rev. 139, 14866 (arguing that separation of the litigation and negotiation functions for specific types of cases will often result in more creative and cost-effective settlements).

95 See, e.g., Fisher et al., supra note 27, at 70-75.

96 One key tenet of “principled negotiation” is that one must “separate the person from the problem.” Such a separation enables a negotiator to view the substance of the negotiation as distinct from the relationship with the other negotiator and can prevent a negative or positive relationship from skewing negotiation outcome. See id. at 18-21.

97 See Gilson & Mnookin, supra note 51, at 207-08.

98 See Interview with Prosecutor A, supra note 5.

99 Interview with Prosecutor D, supra note 5.

100 Interview with Prosecutor A, supra note 5.

101 Interview with Defense Counsel D, supra note 5.

102 Interview with Defense Counsel E, supra note 5.

103 Interview with Prosecutor B, supra note 5.

104 Interview with Prosecutor A, supra note 5.

105 See McDonald, supra note 33, at 68.

106 Interview with Defense Counsel D, supra note 5.

107 Interview with Defense Counsel E, supra note 5.

108 Interview with Prosecutor E, supra note 5.

109 See supra text accompanying note 94.

110 Interview with Prosecutor B, supra note 5.

111 The time of an agreement might be of significance because many criminal defendants cannot make bail. If an early deal is struck that involves probation or other sentences that do not involve prison, the defendant would benefit. In addition, in white-collar cases, early pleas are much desired by defendants, because by pleading early, one may be able to preclude an investigation. As one prosecutor who specializes in white-collar crime notes, “You know the guy's going to be found guilty eventually. Do you want the hassle of having your company turned upside down when at the end of the day you're going to be indicted anyway?” Interview with Prosecutor A, supra note 5.

112 Id.

113 Interview with Prosecutor C, supra note 5.

114 Interview with Prosecutor D, supra note 5.

115 See, e.g., Kenneth Kipnis, Criminal Justice and the Negotiated Plea, 86 Ethics 93, 105-06 (1976) (analogizing a defendant's choice in plea bargaining to threat at gunpoint); John H. Langbein, Torture and Plea Bargaining, 46 U. Chi. L. Rev. 3 (1978) (likening plea bargaining to medieval torture). But see Yin, supra note 71, at 442-44. For a concise summary of the coercion argument and relevant citations, seeScott & Stuntz, supra note 24, at 1919-21.

116 Interview with Defense Counsel B, supra note 5.

117 Id.

118 Interview with Defense Counsel D, supra note 5.

119 See Interview with Defense Counsel C, supra note 5.

120 Id.

121 See id.

122 Id.

123 See Interview with Defense Counsel C, supra note 5. Alschuler posits that the type of exoneration discussed here depends not on relationship but on institutional role; he notes that some prosecutors will listen more carefully when the public defender, rather than a private attorney, asks them to reassess their case. See Alschuler, Defense Attorney, supra note 12, at 1219.

124 Interview with Prosecutor A, supra note 5.

125 Id.

126 See id.

127 As one prosecutor notes, “[We] are just as much in the business of vindicating someone who's innocent as prosecuting someone who's guilty.” Interview with Prosecutor C, supra note 5.

128 Interview with Defense Counsel B, supra note 5.

129 Id.

130 Interview with Prosecutor E, supra note 5.

131 See, e.g., Roger Fisher & Scott Brown, Getting Together: Building Relationships as We Negotiate 70 (1988).

132 Interview with Defense Counsel D, supra note 5.

133 Interview with Defense Counsel A, supra note 5.

134 Interview with Defense Counsel D, supra note 5.

135 Interview with Defense Counsel C, supra note 5.

136 Interview with Prosecutor C, supra note 5.

137 Id.

138 Attorneys in the criminal context are likely to be repeat players because prosecutors and defense counsel (to a lesser degree) are tied to a particular jurisdiction. One federal prosecutor in New York notes that he knows 75% of opposing counsel personally or through prior experience, see Interview with Prosecutor D, supra note 5; another estimates that the figure is 70%, seeInterview with Prosecutor A, supra note 5; still another guesses that the number hovers around 50%, see Interview with Prosecutor E, supra note 5. One prosecutor in the New England area says that opposing counsel is “more likely than not someone you've dealt with before.” Interview with Prosecutor F, supra note 5. Defense counsel offer varying estimates: One notes that he knows about 40% of the prosecutors he deals with, see Interview with Defense Counsel A, supra note 5; another explains that after a certain amount of time practicing in a given jurisdiction, “You would know most of the District Attorneys by name and reputation.” Interview with Defense Counsel D, supra note 5.

139 Gilson & Mnookin, supra note 51, at 198. “Someone coming out of a [[[positively] well-known firm [is likely to be] a person of ability and integrity,” notes one prosecutor. Interview with Prosecutor A, supra note 5. He also notes that members of his office tend to view legal aid attorneys very positively, as prosecutors have developed good relationships with them through repeated encounters. In contrast, he says, members of other organizations are immediately suspect; certain firms are known for a “firm culture” that fosters “hard-line, somewhat sleazy, not totally trustworthy [attorneys].” Id. A defendant who wants to achieve the most efficient disposition in a case would be wise to hire an attorney from a “cooperative” firm; the terms of the plea agreement ultimately reached by defense counsel and prosecution would likely benefit from this choice.

140 One public defender notes that such investigation is “absolutely essential.” Interview with Defense Counsel B, supra note 5. A prosecutor concurs:

I'll ask, “What do you know about [a defense attorney]?”... [You] always want to know who you're dealing with. You always want to find out about your adversary--who the hell is the other guy? What's his reputation? Is he a hard bargainer, an easy bargainer? Does he lie? Could I bulldoze if I needed to? ... A smart Assistant District Attorney will always find out who the hell they're dealing with. Interview with Prosecutor B, supra note 5. Another prosecutor says, “I make it my business to know who I'm dealing with.” Interview with Prosecutor F, supra note 5.

Networks for information about other attorneys are informal, but reputational data is easily obtainable. For example, to determine what sort of person his opposing counsel is, one experienced public defender working in the federal system routinely uses his office mates as a resource. He also makes calls to and receives calls from fellow members of professional organizations asking for information on prosecutors. Interview with Defense Counsel B, supra note 5. Attorneys may also routinely send around e-mails asking for information about opposing counsel. Interview with Prosecutor C, supra note 5; Interview with Prosecutor F, supra note 5; Interview with Defense Counsel D, supra note 5. Others rely on the assessments of close colleagues. Interview with Prosecutor D, supra note 5.

141 Interview with Prosecutor B, supra note 5.

142 Interview with Defense Counsel D, supra note 5.

143 The relationships between prosecutors and defense counsel often run even deeper in some circles where numerous former prosecutors leave government service to join the private bar. A prosecutor at one United States Attorney's office estimates that half of the cases in the office have former Assistant United States Attorneys on the other side. Furthermore, he estimates that eighty percent of the people who leave the office do criminal work of some type; prominent examples of such “cross-overs” include Robert Fiske, Johnnie Cochran, and Arthur Liman.

144 As discussed above, at least one scholar has already begun to apply negotiation principles to practical plea bargaining techniques. See Uphoff, supra note 18. Such explicit practical advice using negotiation theory is particularly useful to attorneys in the field of criminal law because plea bargaining is often conducted on an ad hoc basis, in hallways, in brief phone calls, or outside of the courthouse. The casual nature of this type of negotiation may make careful attorney preparation less likely.
For example, one study determined that defense attorneys' knowledge and investigation of the legal and factual issues in the case prior to plea negotiations was woefully inadequate. In 47.3% of felonies and 69.2% of misdemeanors, defense attorneys failed to interview any witness for the prosecution and failed to interview any defense witnesses 33% of the time. One half of the attorneys studied “did not conduct a thorough investigation, do legal research, or develop a theory of defense before plea negotiations.” Robert L. Doyel, The National College--Mercer Criminal Defense Survey: Preliminary Observations about Interviewing, Counseling, and Plea Negotiations, 37 Mercer L. Rev. 1019, 102627 (1986). One federal prosecutor states, “Eighty to ninety percent [of defense attorneys] don't look at evidence hard until trial.” Interview with Prosecutor C, supra note 5. Anecdotal evidence indicates that federal prosecutors, who put more resources into case investigation, may be better prepared than state prosecutors, who receive cases on their desks shortly before they must appear for an arraignment. See Interview with Prosecutor B, supra note 5.

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