BARGAINING FOR JUSTICE: PLEA BARGAINING AS REFORM IN THE CRIMINAL COURTS

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ABSTRACT

Title of the Thesis: Bargaining for Justice: Plea Bargaining as Reform in the Criminal Courts

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The dissertation develops an empirical basis for evaluating plea bargaining as both a behavioral phenomenon and as a formal model of operation for the courts. It rejects the assumption that bargaining occurs primarily at the plea stage, and instead, argues that bargaining is the dominant mode of decision making from arrest through appeal of a criminal case. The model of bargaining that it develops suggests that proposals which concentrate on either the elimination or the regulation of plea bargaining will be unsuccessful due to their lack of recognition of the pervasiveness of bargaining in the courts and their lack of understanding of the dynamics of the process by which criminal cases are bargained.

The research questions are drawn from an analysis of proposals for reform of the courts and from arguments commonly made about the dynamics of plea bargaining. Proposals for eliminating plea bargaining through procedural and administrative change are examined critically and then compared with more recent proposals for "negotiated justice," which seek to regulate rather than abolish plea bargaining. In each case an attempt is made to isolate the assumptions which the proposal makes about the process of plea bargaining and especially to emphasize the assumptions that would be critical to the success or failure of reform through "negotiated justice."

A second source of research questions is the debate which has arisen over the existence of plea bargaining in the courts -- both as reflected in the decision of the appellate courts, and in the few attempts to build a theory of plea bargaining. The debate over the desirability of plea bargaining is traced through four major arguments: that plea bargaining is unconstitutional; that it is necessary to the efficient operation of the courts; that it is a logical outgrowth of the discretionary power of court personnel; and finally that it is an effective mode of sentencing. The theoretical debate is organized around a series of propositions concerned with the dynamics of the bargaining process itself. Is bargaining based on a cooperative or a conflict model of behavior" Is it a process

resembling economic exchange or is it more closely related to the negotiation of reality? Finally, is the defendant an active participant or merely a vehicle for bargaining?

The research questions attempt to explore the variables that shape plea bargaining at two levels. First, they are intended to lead to a positive analysis of plea bargaining which would suggest who the actors are, what their interests are, and the factors which determine when and how they bargain. A more normative set of questions asks whether plea bargaining is indeed a necessary adaptation of the courts and what, in fact, its impacts are on the goals of the criminal court.

Case studies of criminal cases from arrest through appeal provide the empirical basis for understanding plea bargaining. At each stage of the criminal process, the factors which seem to be influencing the outcomes of cases are discussed and specific reference is made to conversations and events in cases which provide illustrations of bargaining. In presenting the empirical material, special attention is given to the mechanisms used by defense attorneys to prepare a case, to the relationships between the defendant and the defender, to the interchanges between the defender and the prosecutor, and to the diverse roles of the police, probation officers, and judges in their relations with each other and with other actors.

The case study data describes a process by which each stage of a case is comprised of a series of bargains which build characteristically toward the outcome of the case. A model is built which indicates that the specific course of this process is determined by the purpose of each bargain, the currency being exchanged among actors, and the interests of the actors involved. The strongest influence on each bargain, moreover, is found to be the type of crime with which the defendant is being charged. The model also indicates that each stage of the criminal process tends to produce a predictable configuration of purposes, currencies, actors, and interests.

The findings indicate that proposals which focus on the elimination or the regulation of plea bargaining will have little impact on the courts. Their focus on the plea stage ignores the dynamics of the larger bargaining process. Even the assumptions they make about the plea stage itself ignore the number of actors involved, their interests, and their tendency to bargain for many more purposes than obtaining sentence concessions. Finally, the normative analysis indicates strongly that bargaining is not a response to an overcrowded docket but rather a necessary mechanism for resolving the conflicting goals and pressures on the courts. It is argued, moreover, that the process of bargaining is guided by its own normative system which appears to constrain actors to work for a bargained "due process" for the defendant.

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Chapter I

Court Reform and the Genesis of Negotiated Justice

The realization that justice in our criminal courts is dispensed through bargaining rather than through trial has met with considerable alarm. The concern is less for the fact that bargaining may not serve the goals of the criminal process than that it departs from the courtroom procedures that have been traditionally associated with fairness -- particularly those dictated by the powerful models of due process and the adversarial system. For many reformers, then, the issue of what to do about 'plea' bargaining is stated as a problem of making the court's decisions about defendants "return" to these standards. One approach has been to work through procedural reform -- regulating the decisions of the court so that they must be made equitably. A complementary proposal is to eliminate the need for bargaining by relieving whatever administrative pressures have made the court abandon its traditional procedures.

This dissertation is concerned with yet a third type of reform, which we have chosen to call negotiated justice. Rather than trying to eliminate bargaining, this approach accepts bargaining as the dominant mode of operation for the courts. Proposals for negotiated justice define their task as the regulation and formulation of the bargaining process, to create a due process of bargaining.

Negotiated justice is not an articulated reform, but rather a trend we have observed in a number of proposals for change in the decision making practices of police and courts. Because of their fragmentation, little attempt has been made to judge the accuracy of the claims these proposals make for negotiated justice. What impacts would formalization of bargaining have on the courts? Is it a potentially feasible or effective mechanism

for reform? There is even less information available with which to judge the assumptions these proposals make about the process which is usually labeled plea bargaining. Are these assumptions accurate? What interests determine the nature of bargaining? Can the process, in fact, be regulated?

Evaluating proposals for negotiated justice is made even more difficult by the lack of empirical basis for judgment. At this point no major proposals for negotiated justice have been implemented, and there is no known analogy in the reform of social service organizations. In this respect, the conclusions of this dissertation must be predictive and normative -- asking how the implementation of negotiated justice might affect the quality of decisions made by the court. In part, those conclusions will be drawn by comparing the assumptions which negotiated justice makes about plea bargaining with an empirical examination of bargaining in the criminal courts. The results of that analysis will be reported in Chapter IV.

The focus of this section will be to develop some criteria for evaluating negotiated justice as a reform. In particular, we will compare the contentions and assumptions of negotiated justice with the traditional goals of the courts and with other approaches to reform. What are the requirements which the due process and adversary models impose on the courts? How have other proposals for reform responded to these goals? What assumptions are made in proposals for negotiated justice and how do they differ from other types of reform? How effective are procedural and administrative reforms likely to be in eliminating bargaining? This discussion indicates the issues to which court reformers have generally

responded, the assumptions which they have made about decision making in the courts and the model of plea bargaining from which they have drawn. Negotiated justice can then be examined as a response to these issues and assumptions.

Though this dissertation will be limited to an analysis of bargaining as a model for court reform, the issues raised lie as well at the roots of dilemmas in other social services. It is clearly true that most decisions to dispense or withhold services involve negotiation between clients and service agencies. Understanding the dynamics of plea bargaining may provide a basis for knowing what variables shape the bargains which social service agencies make with their clients. Reforms which stress the formalization and regularization of the discretionary decisions of agency personnel, moreover, are as common to welfare, health, and other public organizations as they are to the courts. This dissertation should suggest criteria by which this kind of reform can be evaluated and the variables which may be critical in determining its potential success or failure.

Models of the Criminal Court

The goals of the court and the bargaining model

Perhaps more than any other social service agency the criminal courts may be victims of the high hopes society has for them. Not only are they part of a complex system which identifies, apprehends, and processes criminals, but, as an institution with strong symbolic significance, they are often described as possessing special responsibilities for the protection of civil rights, and indeed, of criminal defendants themselves. As they structure the ways in which they process defendants, the courts implicitly select from among this diverse set of functions. This has lent to each individual court -- or judge -- an aura of being hard on criminals, being progressive about treatment, or processing cases very quickly.

If any single agency attempted to perform all the duties that are at one time or another ascribed to the criminal courts, it would most likely demonstrate that the tasks were inherently conflicting. Can an institution, for example, both deter criminal defendants from committing subsequent crimes and act as the protectors of their civil rights? Can a court process criminals efficiently while still pursuing the complex questions that must be answered before treatment is prescribed?

These same kinds of concerns have plagued those who have wondered how to make the criminal courts work. Most of the attempts to reform the courts, in fact, have been fostered by a desire to redirect the court's attentions from what is seen as an over-emphasis on administrative convenience to a focus on the court's special role as a dispenser of justice. In

particular, the charge is very often made that the need to fulfill its role as a processor of criminal defendants through a system interferes with its ability to protect the rights of the criminals being processed. The focus of several major reforms in the courts has been to try to make it possible for the courts to give more attention to the procedures by which defendants are processed -- either by decreasing the pressure on the courts to make decisions rapidly or by imposing strong sanctions where procedures are not strictly followed.

The interest of court reformers, then, has been primarily concerned with those functions of the courts which relate to decisions made directly about defendants or which are directed toward efficiency of operation -- and how these are interrelated. Lloyd Ohlin provides a useful categorization of these functions by suggesting that the courts must convict or acquit offenders; they must pass sentence at least with reference to the goals of deterrence, rehabilitation, and community protection; and they must accomplish their objectives within a relatively limited time and with restricted personnel and budgets.[1] This list is, of course, a minimal statement of what courts often attempt, but it highlights those goals on which reform has focused. As we will see, reform has turned to asking not how well these functions are filled by the courts, but rather to how they are fulfilled.

As a kind of gatekeeper agency, the courts sort out defendants by the question of innocence and guilt. In this regard, they are not only determining whether a defendant will be subject to their own sentencing processes, but also whether the decisions of the police to arrest the defendant were in some sense justified. This function, then, apparently

requires two roles of the courts -- the determination of a defendant's innocence or guilt and the review of decisions made by the police.

In addition to the evident difficulty of deciding innocence and guilt, this function presents a number of other problems to the court. First, the two problems of sorting and review are organizationally quite closely linked. It is at each stage -- not merely in the court -- that the criminal justice system is intended to filter out those who are law violators, at the same time that it provides an avenue of freedom to those who are innocent or who are casual law breakers.[2] Thus, there is already an organizational presumption of guilt when the police arrest someone and refer him to the courts. In this sense, the court is not considering the question of guilt on the basis of courtroom evidence alone.

As subsystems, too, the police and the courts are mutually interdependent, with the caseload of the courts supplied primarily by the police and the conviction rate of the police determined by the action of the courts. In a sense, the very ability of the court to decide innocence and guilt is most often based on evidence available from the police -- and for this, too, they must encourage working relationships.

The interest of reformers has not settled so much on whether those the court finds guilty are guilty, but rather how the court made that decision. In the absence of any reliable ways to assess whether courts are doing a good job of sentencing, reformers have turned to watching the process by which sentencing decisions are made. The unavailability -- and therefore the absence -- of complete presentencing information is evident in most courts. Even more important, it is clear that sentences are

affected by many considerations other than their probable impacts on the defendant and society. The skill of the defense counsel, the anger of the arresting officer, the appearance, prior record, and economic condition of the defendant are only a sample of the observed influences on sentencing. The critical question, therefore, has become whether -- and how -- courts can design a sentencing process that will limit what reformers see as illegitimate considerations in sentencing.

The possible organizational presumption of guilt, combined with the friendliness between the police and the courts has aroused the suspicion of would-be reformers. The high incidence of findings of guilty (between 75% and 90%) has clinched the case for those investigating the procedures by which the court decides guilt. It is, then, on the procedures by which the court reviews and employs the evidence which police submit that reformers have concentrated their efforts to reform the courts' approach to finding guilt or innocence.

While in the narrowest sense sentencing is the strict application of a specified penalty appropriate to an offense, sentencing may, in fact, be an even more ambitious task for the courts than the determination of innocence and guilt. In the contemporary court the judge has nearly unlimited sentencing discretion, even where minimum and maximum sentences are specified.[3] This is the case in part because of the growth of rehabilitation and deterrence as proper goals for sentencing. Sentencing is no longer even officially a simple meting out of punishment, but rather a juggling of the goals of punishment, deterrence, rehabilitation, and community protection. Hogarth goes so far as to say that "it is the burden

of the courts alone to reconcile conflicting goals, through the offices of the sentencing judge."[4]

Little progress has been made in deciding either how it is that judges make these sentencing decisions or, more important, in understanding the relationship between the sentence and the goals it might fulfill.[5] There is no convincing evidence, for example, that the severity of the sentence is related to deterrence of crime -- either (to borrow Packer's terms) as the general deterrence of criminals by the threat of punishment or as the specific deterrence of an individual from further crime after he is punished.[6] Even more problematic is the question of rehabilitation, which requires that a court be able to look "forward to the likely impact of the sentence on future behavior of the offender and on potential offenders."[7] Even if it were known what kind of information would support a forecast like this, and it were collected by the criminal justice system, the variety of correctional alternatives necessary to individualize treatment would not exist.

What observers see, then, is a criminal court system which may be fulfilling its tasks of making findings and passing sentence, but in ways which seem to compromise traditional notions of justice. In particular, they charge that the courts are not extending to defendants their right to be judged under a system which gives them due process or which makes its decisions as a result of adversarial contests. The model by which the courts do operate is variously labeled plea bargaining, bargained justice, or crime control.

What is this alternate model, and how did it come to take control of the courts? Critics of the present modes of operation in the courts believe that under the pressure of an overload of cases, the courts had to displace other objectives to concentrate on only one of their goals -- the efficient processing of cases. Because the courts were being evaluated primarily on the extent of their delay in processing cases, there were almost overwhelming pressures to clear cases as fast as possible. The overriding objective then became to increase the speed with which the courts could screen subjects, determine guilt, and secure dispositions.

When courts streamline their procedures, the trappings associated with the elements of due process and the adversarial ceremony may be the first to be sacrificed. The trial, for example, is an especially expensive procedure, and pressures to find other means of disposing of cases are great. Instead of depending on the trial to reveal evidence, the focus is shifted to pre-trial processes, and particularly to administrative fact-finding. In theory a defendant reviewed in this manner can then be exonerated or encouraged to enter a guilty plea, but as Packer points out, the likelihood of exoneration is decreased by the fact that a presumption of guilt is the most efficient theory to adopt for processing defendants. As Packer suggests, the court under this model becomes a mechanism for routinely screening out those cases for which it looks as if conviction is unlikely and assuring as rapidly as possible the conviction of the rest.[8]

This model describes what critics see as a real shift in the ways in which courts process defendants, brought on by a rapid change in the demands of the courts. Most admit, however, that rather than a

literal representation of the operations of the court, the model is a pole on a continuum of choices available to the courts. The actual work of the courts is a constant series of adjustments between this model and a second pole represented by the ideal of due process and adversarial justice.[9] Thus, court reforms have tended to focus on the tensions between the due process and bargaining models, and to advocate the need to move closer to the due process ideal.

Three themes dominate this critique of the bargaining model of justice -- and the advocacy of due process and the adversary model -- as we will see in the section that follows. First there is assumed to be a necessary conflict between the procedures the court uses to facilitate its administrative duties and the procedures it must follow to dispense justice. In short, reformers claim that only an adversarial process, not administrative procedures, can guarantee justice. A closely related contention is that the bargaining model fails to attend to the ways in which defendants are processed, in its haste to see that they are processed. An emphasis on procedure, then, dominates most current reform efforts in the courts.

Finally, decisions which are not public and formalized are open to suspicion. The greatest fears are that such decisions will not be subjected to appellate review and that there will be no mechanism for assuring that a defendant receives any bargains he is promised. Under the due process adversarial model, the assumption is that everything that is relevant to the defendant's case takes place within the confines of the courtroom and can be watched and regulated by the court.

The concept of due process

Due process is a concept which is invoked more freely and more often than any other standard applied to the decisions of the criminal courts. While it refers formally to a phrase in the Fourteenth Amendment to the Constitution,[10] it is employed with much more abandon than even very free interpretation of the Constitution might allow. Nearly every observer of the courts has strong conceptions of the court's obligation to its defendants and that this obligation is discharged by adhering to standards of due process.

Though their implications may be quite different, for instance, due process is often used interchangeably with legality, to mean that the actions of the court must be constrained by the legal definitions of criminal conduct and criminal sanctions; the court must make sentencing decisions by using legal guidelines only. The term due process is also used to refer to the right of an accused to have his "day in court." This focus asserts the obligation of the courts to apply standards of procedural regularity to the individual defendant, by allowing him to confront his accusers and prepare a case.

What all these interpretations of due process appear to have in common is the belief that it is the manner in which courts make decisions which will determine whether the decisions are fair. It is the fact that the defendant is given the opportunity to confront accusers, for example, that is his due process. Given this emphasis on the procedures by which the court makes its decisions, what is being constrained by due process standards is the behavior of individual actors in the court. Interpretations of what it means to give due process may limit judicial sentencing

discretion, the clerk's freedom to schedule a case, or the policeman's power to gather information. In this sense, due process is linked with the belief that official power must be restricted when it interferes with the rights of an individual defendant.

It is this concept of due process which has probably had the most influence on reformers in the criminal courts. This is true in part because the concept of balancing public and private rights is a powerful inheritance from the Common Law, which recognized that the powers of a government had to be restrained when it began to deprive a citizen of life, liberty, or property. Thus, due process has a strong symbolic significance, in that it appears to embody the right of citizens to call government into account for unlawful acts.

The view that due process is the regulation of public decisions in the court has also been important because it has called into question the relationship between due process and the efficient processing of cases. The argument is that following due process standards slows down the operation of the court by imposing technically unnecessary processes on court personnel. Writers like Packer, then, have seen due process and efficiency as trade-offs. As Packer concludes, it is "precisely because of its potency in subjecting the individual to the coercive power of the state [that] the criminal process must, in this model, be subjected to controls that prevent it from operating with maximum efficiency."[11]

This view of due process, then, has served as a theme for reformers who deplored the interest of the courts in efficiency and who saw "due process" and efficiency as polar concerns. The meaning of due process as it is grounded in the Fourteenth Amendment, however, has remained

uncertain,and the Supreme Court's efforts to interpret it have been fragmented at best. This situation, of course, has left few specific provisions for the evaluation of procedure in local courts. Despite their lack of coherence, the attempts of the appellate courts to apply the due process clause to the operation of local trial courts are interesting in themselves because they provide a sense of the diverse meanings it has developed as a model for reform, if not a standard for the operation of local courts.

The direct consequences of the appellate rulings which have relied on the due process clause were, for many reasons, fragmented and slow to reach the trial courts. This could have been due in part to the general reluctance of the Supreme Court to apply the Bill of Rights to the States[12] and in part, to specific problems in the interpretation of the due process clause itself. Before the turn of the century procedures in local trial courts were developed without interference from the appellate courts. According to the practice of the day, as long as the particular rules of criminal procedure in a state did not violate "those fundamental principles of liberty and justice which lie at the base of our civil and political institutions...they will be permitted to stand."[13]

When the appellate courts did begin to rule on procedure in the trial courts which appeared to differ from practice in the federal courts, the debate had to shift to the meaning of the due process clause itself. The crux of the Supreme Court's attempts to decide what it meant for a court to conform to due process was the question of how much specific procedural reform must be included. The question became defined as the extent to which the Fourteenth Amendment might, in fact, incorporate the provisions

of all the other amendments. Palko v. Connecticut makes the argument for "incorporation":

> The argument for the appellant is that whatever is forbidden by the 5th amendment is forbidden by the 14th...in the appellant's view the 14th amendment is to be taken as embodying the prohibitions of the 5th. 'Whatever would be a violation of the original Bill of Rights if done by the federal government is now equally unlawful by force of the 14th amendment if done by a state.'[14]

A consistent decision that the Fourteenth Amendment incorporated the substance of even the Fifth Amendment alone might have had critical implications for procedure in local trial courts. The right to avoid compulsory self-incrimination, for instance, might have been ruled applicable to the States more than fifty years earlier. Appellate decisions, however, waivered from arguing that the Fourteenth Amendment was an omnibus statement of other amendments defining basic rights to arguing that the due process clause only selectively incorporated other amendments.

For the local courts, then, what procedural requirements might be implied by due process standard remained inconsistent and elusive. If anything, the decisions of the Supreme Court reflected a growing tendency to posit that the due process guarantee had a meaning apart from any other amendments it might include. Perhaps the most ambitious attempt to define due process without reference to other amendments was Adamson v. California which argued that judicial review of the guarantee of due process requires the court to judge whether criminal proceedings have "offended those canons of decency and fairness which express the notion of justice."[15] Thus, the Court argued that, in fact, it was possible to determine what principles "were so rooted in the traditions or conscience of our people as to be

ranked as fundamental"[16] and whatever rights were implicit in these principles could then be applied to the States through the due process clause.

What has emerged from these attempts to define and apply due process standards is a piecemeal application of procedural requirements to State criminal cases and a powerful, but ill-defined ideal. During the past ten years, for example, the due process clause has been the vehicle for establishing the right against unreasonable search and seizure (through the Fourth Amendment)[17] and the right to counsel in all criminal cases (through the Sixth Amendment).[18] While other provisions of these amendments and provisions of the Fifth and Eighth Amendments have also been applied in the same fashion, coherent standards for the conduct of criminal trials are still absent. Provisions relating to the right to a speedy trial (Sixth Amendment) and to the prohibition against excessive bail (Eighth Amendment) have still not been ruled applicable to the states. Even amendments which have been applied to local courts provide only sketchy guidelines for evaluation of local practice. Does Gideon v. Wainwright[19] require that counsel be supplied to the indigent during the bail hearing? What standards of indigency satisfy the spirit of the right to counsel?

Though specific provisions for evaluating the procedures used in a trial have yet to be applied to the State level courts, due process is still employed as if it were a standard with a precise meaning. The argument is frequently made, for instance, that the courts should be able to conform to the spirit of due process regardless of the extent of its application to the States or the specificity of its requirements. Abraham contends that even where there are not specific standards, court procedures should "amount

to due process." "In other words, the concept of a fair trial demands safeguards which may not fall below a certain minimum even if it be that vague minimum of due process."[20]

An even greater leap of faith is made by those who speak of procedural due process as a reform. Procedure -- the manner in which a law or practice is carried out -- is more often the object of reform than is the substantive law itself. This emphasis on procedure can be attributed primarily to the fact that challenge on due process grounds is most likely to occur in the execution or administration of statutes, and thus, in reference to court procedures.[21] When reformers call for procedural due process, then, they invoke a standard for judging the decisions of a court by the manner in which it makes its decisions, but one which the appellate courts, at least, have yet to define.

The adversary model

While due process remains a strong, but ambiguous standard for judging the equity of individual defendants' treatment in the criminal courts, the adversarial model is equally powerful, and clearly, if not operationally, drawn. In fact, the assumption that ours is an adversarial system of criminal justice has undergirded most of the recent applications of the due process clause to the criminal courts. Some of our understanding of what constitutes an adversarial process is shaped by these decisions. The cases which have established the right of indigents to be supplied with legal counsel, for example, have portrayed a counsel who advocates the rights of the accused as an adversary to the prosecutor.

A model of the adversary process has been even more dutifully defined by the legal profession, through its guidelines for the role and

ethics of the criminal lawyer. Traditionally, the American Bar Association (ABA) has viewed the lawyer's obligations to the public interest as being met by the vigorous advccacy of the rights of a single client. If the interests on both sides of the adversary contest are represented single-mindedly, the Bar Association view assumes that the results would reveal the truth in the case and the lawyer would have done his duty.

From both Supreme Court decisions and the professional statements of the ABA emerges a fairly consistent conception of what might be meant by an adversarial model of the court. The major feature is, of course, that disputes are two sided and that by airing the views of each side the truth will emerge. For this model to be credible a number of assumptions have to be accepted -- that truth is discoverable, that this process can discover it, that each side wants to win, and that each can muster the resources that will make a contest. Finally, the model demands the faith that it is possible for the adversaries to discern the difference between innocence and guilt and to recognize fact when it is presented.

Even the most thorny of these assumptions have found their way into most models of decision making in the courts. The single most influential has probably been the underlying notion that there are two sides in the court -- the prosecution and the defense -- and these two sides are in conflict with each other. Evidence of cooperation among prosecution and defense must in this view be taken to mean that the defendant is not being fairly represented, since his case is not "fought." Thus, fairness under an adversarial model requires the maintenance of conflict within the court structure and implies some strict guidelines for procedure. These guidelines have, in turn, become critical to proposals for reform: the

defendant must openly "confront" his accusers, equal resources must be given to the defendant and the prosecution, and the roles played by court personnel must support the "battle" between the two sides.

A minimum requirement for an adversarial process, then, is that the defendant has a right to be personally confronted with the evidence against him and then to respond in his own defense. Less attention has been given to defining what constitutes this kind of accusatorial system than has been devoted to depicting its opposite -- the inquisitional system -- as inequitable by comparison. Lawyers point with pride to what they see as the differences between the manner in which defendants are treated by the police and by the courts. Yale Kamisar's vivid -- though ungrounded -- analysis of the courts contrasts the fact finding methods of the police to the truth finding focus of the courts by reference to the police as the "gatehouse" and the courts as the "mansion."[22] Kamisar argues that while the police tend to gather evidence through inquisition, it is in the safety of the criminal court, that "the enemy of the state is repersonalized, even dignified, the public invited, and a stirring ceremony in honor of individual freedom from law enforcement is celebrated."[23]

However exaggerated, Kamisar's description conveys what appears to be central to most conceptions of an accusatorial system -- that it is public and that it is a trial, with all of its attendant ceremony. Court reformers have argued, in fact, that the trial is the only mechanism which can allow the defendant to review the evidence against him, and that the practice of plea bargaining as an alternative to trial is a form of the inquisitorial not the accusatorial system.[24]

Just as the roots of the adversary model may lie in the need to provide mechanisms by which citizens can challenge the actions of government in open court, it requires that the citizen is given sufficient resources to bring about his challenge. In this sense, the adversarial model requires that the interests of the State and the accused are somehow "balanced." Balance has always been an issue for the criminal process because of the strong sanctions the State has available in comparison to the weak position of the defendant. Equity under an adversary model lies in matching the resources of the State with a lawyer for the defense -- and thus, in theory, reducing the power of the State.

Under the assumption of an adversary process, provision of counsel to indigent defendants has been argued to be a way of restoring balance. A second mechanism presented as insurance that the interests of the defendant are adequately represented is traditionally the use of the jury system. The jury in this sense is seen as a community judgment of the accused that can act as a buffer between the State and the defendant and help balance the defendant's resources.[25]

A critical point for debate is whether balance can be achieved in the absence of a defense counsel, a jury, or more important, a trial. Recently adopted rules of criminal procedure have argued that balance might be assured somewhat if the defendant is given enough information with which to judge his own situation. He should not be allowed to plead guilty without being informed of the consequences of a guilty plea, for example. Procedures which allow the defense the privilege of discovery of the State's case also constitute an attempt to balance the resources available to the accused.

In the adversary model as it is most often used by court reformers, however, balance between the two sides can only be restored through trial and representation by counsel. The emphasis of the adversary model is fundamentally the process by which defendants are adjudicated and not whether the outcome is equitable. In this view the public interest is better served each time both sides square off, than if the same result could be achieved without trial. According to one observer, creating a balance of interest and conducting a trial is critical even if the outcome of the process is to permit errors in favor of guilty defendants.[26]

Since the prosecutor and the defense counsel represent the "sides" in the adversary model their roles are more clearly implied by the notion of conflict than are those of other court personnel. Because he represents the State's side, the prosecutor is usually seen as a kind of junior judge, with the discretion to determine what charges are in the public interest:

> He must approve the evidence on which the indictment may be demanded and the accused defendant tried, if he be indicted, and in that service must judge of its availability, competency, and probative significance. He must on occasion consider the public impact of criminal proceedings or again, balance the admonitory value of invariable and inflexible punishment against the greater impulse of the 'quality of mercy.' He must determine what offenses and whom to prosecute.[27]

While the prosecutor has the clear discretion not to charge the defendant, it seems true that in the best adversarial tradition his decision is to be guided by some conception of the good of the State. Prosecutorial decisions are viewed as being made on the basis of the possible public image the case might present, and on an assessment of the strength of the State's case.

In the face of the power of the prosecutor, the defense counsel has been at least recently assumed to be critical to the balance of the adversary model. His role is usually defined by reference to the role of his opponent -- the prosecutor. Since the adversary model assumes that the prosecutor is "skilled," the counsel becomes a person who can provide the defendant with a comparable set of skills. The appellate decisions relating to the right to counsel have articulated a number of skills which lawyers can provide for their clients during the course of a trial. Since the prosecution is trying to minimize the chances that the defense will win, Williams v. Kaiser, for example, admitted that the prosecutor was likely to become "overzealous" in his prosecution and violate the rights of the defendant.[28] In this definition of his role the lawyer is seen as a protection against a prosecutor with unbounded desires to win.

The trial itself is also viewed as a threat to the defendant, since its tensions "make him unfit to give his explanation properly and completely."[29] Thus, by another interpretation the role of the lawyer is to become a kind of coach who prepares the defendant to deliver his "lines" during the trial.

Because of the view that the criminal process is a contest between the resources of the prosecution and the skills of the defense, the parts played by the judge and the defendant have been less well defined. The adversary model asks only that the judge act as a guarantor of fair procedure and that his sentencing decision be based primarily on his assessment of the facts which emerge from the cases presented by the prosecutor and the defense counsel. The degree to which the judge may become involved in the work of the prosecutor or to which he may provide assistance to the

defendant who is not receiving adequate counsel is not ordinarily treated in discussions of the adversarial process. There is clearly a tension, however, between traditional judicial theory, which argues that the judge must be free of any associations which might affect the objectivity of his decisions, and the adversarial model which dictates the necessity of balancing the sides of the conflict.

The defendant is mentioned less often as an actor in the adversarial process then is the judge, perhaps since it is assumed that he will be represented by counsel. Most court cases which assume an adversarial model have depicted the defendant as incapable of acting in his own defense, frightened, and inarticulate. One case, for example, argues:

> When the average defendant is placed in the witness chair and told that nobody can ask him questions and that he may make such a statement to the jury as he sees proper in his own defense, he has been set adrift in an unchartered sea with nothing to guide him; he may be overwhelmed by the situation and embarrassed; it will not be surprising if his explanation is incoherent or if it overlooks important circumstances.[30]

This view of the defendant appears to be in conflict with the basic tenet of the adversary system that a defendant has a right to confront his accusers and to act in his own defense.

Within the strictest limits of the adversary process, these images of the defendant are not in conflict. While the defendant as an individual may be confused and helpless, in court he can become part of a well-prepared "side" in case. An argument for aid to indigent defendants, for example, explains that the Court's attempt to subsidize transcripts for indigent defendants "does not presuppose a general commitment on the

part of the federal government to relieve impoverished persons of the consequences of limited means," but that it acts to rid the criminal process of all problems that might tend to defeat the ends of the adversarial system.[31] Thus, from this perspective, the court may believe the defendant incapable of understanding the criminal process and still assure that he is informed of his rights, if that information is necessary to build a balanced adversarial contest.

Especially in light of such bold assumptions as its view of the defendant, the survival of the adversary model may seem surprising. In fact, its resistance to challenge has been unusually strong. As it has become clearer that many decisions in the criminal courts are the product of bargains, not contests between the prosecution and the defense, it should have been difficult to retain the assumption that the courts operate -- or ought to operate -- on an adversarial model. While the existence of plea bargaining has been acknowledged since at least the turn of the century, however, there has been reluctance to accept it as an alternative to the adversary system. Even when it has been argued that plea bargaining is a more efficient mechanism for processing cases than the more time consuming trial system, new grounds have been found to explain the desirability of retaining an adversary system.

One argument, for example, has been that while the adversary system is not efficient, it is at least more equitable, since it does not depend on the defendant's skill in striking a good bargain. Thus, when the adversary model is attacked as infeasible or inequitable, the response is often similar to that of Abraham Blumberg. "No known scientific procedures

have demonstrated in scientific rigorous terms that they can, in fact, more readily sort out the innocent from the guilty than the adversary combative system of due process."[32]

It is just this kind of dogged faith in the adversary model -- however it might be questioned on empirical grounds -- that has spurred major reform movements in the courts. Reforms have most often been directed at trying to recover the due process standards of the courts, even though they do not always agree on precisely what due process means. Similarly, adversarial assumptions undergird most of the proposals for reform of the courts, though it is widely acknowledged that the courts have never actually achieved an adversary system of justice.

In the sections that follow we will review the ways in which reformers have tried to snatch the courts away from the grips of bargaining and "crime control" and assert due process, adversarial standards. The procedural reformers face this task head on, proposing rules and procedures to enforce these standards. Administrative reformers posit a more indirect model of change, resting on the belief that relieving administrative pressures will make it possible for court personnel to pay attention to the rules the procedural reformers have tried to levy. We will try to examine these claims critically, showing what assumptions underly each approach to reform and whether they seem justified. Our purpose is, of course, to provide a backdrop with which to look at negoitated justice -- the reform which has reacted to the procedural and administrative reforms by rejecting the adversarial, due process model as an operating basis for the courts.

Proposals for Reform

The procedural revolution

The hope of lawyers, judges and law reform groups has long been the reform of the courts through modification of procedure. During the past twenty years the pace of procedural reform has quickened, culminating most recently in the efforts of the Supreme Court to define the rights of the criminal defendant to counsel and to limit the ability of the courts to use evidence. Even with this flurry of activity, attempts to return to the adversary model are slow. Successful efforts at defining the process of assigning counsel and limiting access to evidence must be balanced by the myriad of procedural decisions the court has yet to consider. In fact, all the arrangements by which the court exercises official power are fair game for procedural reformers: "the information which must be secured, the people whose views must be listened to, the findings and justifications of the decisions which must be made, and the formal requisites of action which must be observed."[33]

The advocates of procedural reform argue that, however slow, procedural strategies can change the criminal courts on at least two levels. While the immediate goal is to help assure a just disposition for an individual defendant, the imposition of new procedures is also directed at shaping the court as an institution.[34] To argue that a procedural change will affect the disposition of any individual case requires a great deal of faith in the court's system of review. It assumes that if court personnel do not follow procedural guidelines, some mechanism in the court will inform

defendants of their right to appeal. The court itself has yet to deal with the question of whether informing defendants of a right is enough to assure either that they understand its meaning or that they will assert it.

The argument that procedure also shapes institutions is not clearly drawn. It appears to be based less on the assumption that procedure will alter the objectives of the institution as much as that it will reinforce the adversarial model, even at the expense of individual cases. In this sense, procedural reform seems based on a kind of social utilitarianism. While procedures may sometimes allow a "guilty" defendant to escape punishment, reformers argue,"if the criminal goes free in order to serve a larger and more important end, then social justice is done even if individual justice is not."[35] This "larger and more important end" appears to be the need to assert the adversary model. New procedures are likely to be judged successful in shaping the court so long as they "[give] each of the participants in a dispute the opportunity to sustain his position" and "[do] not create conditions which add to the inequality of position between the parties."[36] The hope of procedural reformers is that the actions of court personnel can be regulated to produce a criminal process closely resembling the adversary ideal through revisions in procedure, but without interfering with the basic goals of the court.

The long history of procedural reform raises several questions about the efficacy of procedural reform -- at the level of both individual cases and the court itself.[37] Before the 18th century there were very few procedural safeguards in criminal courts, and the assumption was that since the defendant was guilty, the only role of the State was to prove it.

As concern for balancing the power of the State grew up in other sectors, juries in criminal courts began to exert pressures for reform by refusing to indict defendants or to convict them. The result was a modest attempt to develop minimal procedural safeguards for the defendant, focusing especially on establishing a presumption of innocence and requiring proof beyond a reasonable doubt.

During the 19th century under the banner of humanitarianism, court rules and procedures underwent a massive reformulation. The very enthusiastic procedural reformers of this period hoped that if rights could be defined in enough detail the courts would be constrained to deal justly with defendants. The result was an exhaustive specification of procedures, and by the beginning of the 20th century the courts possessed a tangle of highly formalistic rules, which, according to many observers of the period, nearly clogged the courts into inaction. It was at this point that procedural reformers began to wonder whether courts could indeed be procedurally correct and handle the volume of cases that was flooding the courts.

The period that followed this deluge of procedure was characterized by skepticism about what procedural reform could accomplish. Was it protecting defendants or, in fact, coddling them and interfering with the goals of punishment? In which direction was the balance of advantage shifting? How sensitive was procedure to the administrative needs of the courts or was it a burden? Did procedural reform merely alter the symbols of the court or did it actually impact the structure of the courts? These questions are worth considering in some detail since they have remained at the center of the debate over procedural reform.

The first hard look at the interests being served by procedural changes came immediately on the heels of the procedural revolution at the turn of the century. The debate that followed is at best still a stalemate. The charge that procedural modifications had given undue advantage to the defense stemmed from the observation that a large number of criminal defendants who admitted guilt were released on the grounds of "technicalities." Because of its evident interest in securing convictions, the prosecution viewed this situation as evidence of an altered balance of interests. The most quoted spokesman for this point of view was the judge in U.S. v. Garson who argued that "our dangers do not lie in too little tenderness to the accused. What we need to fear is the archaic formalism and the watery sentiment that obstructs, clogs and defeats the prosecution of crime."[38]

Those who see the weight of procedural advantage as lying with the prosecutor, of course, do not recognize punishment as the goal of the criminal process. Abraham Goldstein has argued in an often quoted article[39] that procedure has always favored the prosecutor and that recent procedural reforms have aggravated this situation by "loosening standards of pleading and proof, without introducing compensatory safeguards earlier in the process."[40] What concerns Goldstein is that the new rules have lessened judicial scrutiny of the level of proof which a prosecutor must present for conviction, at the same time that no corresponding change has occurred in ability of the defense to request pre-trial disclosure of evidence. In Goldstein's view the result is that the prosecutor's power to convict is increased while the ability of the defense counsel to prepare a case is not.

Goldstein's concern over the equity of procedural reform could also have been expressed as an indictment of the reformers for not considering how one procedural change would affect the rest of the system. A strong attempt to take the impacts of procedure into consideration followed closely on the heels of the procedural revolution at the turn of the century.

Borrowing heavily from the lessons of a successfully reformed civil procedure, a group of "legal realists"[41] argued that court procedure should avoid becoming overly complex. Especially in the face of the urbanization of the court system and the resulting rise in caseload, a new kind of procedure, more sensitive to the administrative demands on the courts, would be required. The vision of this kind of procedure was that it would be simple enough that its meaning would be as visible to defendants as to court personnel, and that it would be flexible enough to change as the organization of the courts changed.[42]

Certainly the rash of Constitutional decisions which characterized the past twenty years is testimony to the failure of the legal realists to reduce either the fragmentation or the volume of procedural changes. Critics of procedural reform also add that even if procedure could be streamlined, its structure runs counter to the reality of the criminal process. The means emphasis of procedure and its assumption that the criminal process is -- or should be -- adversarial leaves procedural reform vulnerable to charges of being insensitive to the nature of the criminal process.

Since procedural reform tries to impose an adversarial model on the courts, it logically deals only with those problems which are characteristic of an adversarial system. An example of this problem is the

procedural revision made in Mallory v. United States[43] -- that criminal suspects should be brought promptly before the court, to allow the decisions of the police to be reviewed. This change is based on the assumption that the court will review police decisions, because it operates on a presumption of innocence, and thus, questions whether arrests and charges were made on valid grounds. Mallory may be successful in changing the arrest practices of the police, only if the court structure in fact provides incentives to review -- or to threaten to review -- their decisions. Those who believe the criminal process is a series of bargains -- rather than a formal contest -- argue that the court personnel cannot formally question the police, and that Mallory provides no incentive to change.

The means emphasis implied by procedural reform also leaves it open to charges of being blind to the nature of the criminal process. The cases which have established the right of counsel illustrate this problem. Though thorough in other respects, these cases never articulate the specific role that would be played by a counsel to the indigent. Instead there was a strong indication that it was the presence of counsel -- whatever his specific duties and skills -- that was to help insure that the defendant's rights would be upheld.

In fact, it is reasonable to think that it is the presence of the lawyer that prevents some unjust practices by making the defendant's treatment more open to scrutiny, and thus, discouraging the court from taking advantage of the defendant. In addition, because the lawyer is also in a position to make the defendant aware of his own rights, the defendant himself becomes less vulnerable. But here, too, the emphasis on means is evident,

since the intent is less making certain that the defendant asserts his rights and more to assure he has been informed of them. This distinction is well-articulated by Yale Kamisar in an argument for procedural reform:

> I do not claim that the state has an obligation to prevent a suspect from incriminating himself. I do contend that it must ensure that the suspect is aware that he need not and cannot be made to incriminate himself. I do not claim that the state should or even that it can eliminate all the subtle and personal 'inequalities' which 'disadvantage' some subjects of police interrogation more than others. I do contend that so far as it is reasonably possible that the state can and should ensure that the choice of the weak and the ignorant and poor to speak or not to speak is as free and informed as their more fortunately informed bretheren.[44]

Thus, in this view the success of the procedures like the assignment of counsel is to be assessed not so much on its impact on the outcomes of cases, but for its success in changing the mode by which conclusions are drawn.

A critical question, then, is how effective procedural reform can be in bringing about change in the court, if it is indeed not addressed to its operating structure. Certainly, there is little empirical evidence to support or dispute the claims made by the critics of procedural reform. We do know, however, that since procedural reform, many more criminal defendants have been acquitted because they were illegally searched or interrogated, and that, increasingly, courts are instituting procedures for informing defendants of their rights. Are any of these uses of procedures likely to be more than symbolic -- providing routes of appeal only in cases where the court structure would already have supported them?

Thurman Arnold argues that it is in the nature of courts to perform acts which are purely symbolic -- but that the strength of that symbolism is critical to the image of the court as a dispenser of justice.[45] He suggests that since symbolic institutions lose prestige unless they appear to be firmly founded on reason, their principles must be flexible enough to allow for conflicting perspectives and goals: "A people will never accept an institution which does not symbolize for them the simultaneously inconsistent notions to which they are at various times emotionally responsive."[46] By this interpretation, procedure is a way of maintaining the conflicting goals of the court -- of visibly demonstrating that the rights of individual defendants are being protected, at the same time that the court ceremony and its sanctions can demonstrate the role of the court in correcting criminals. As an advocate for the rights of even the indigent defendant, for example, the court-assigned lawyer is an eloquent public symbol of the court's intent to be fair, and to conduct an adversary contest.

While it does establish the importance of procedures at one level, this argument begs the question of whether procedures can alter the fundamental structure of the courts. Its harshest critics suggest that it cannot, since court personnel employ procedures selectively at the same time that they often do have strong interests in not altering the ways in which things are done. In this sense, there is evidence that procedures are viewed by court personnel as the "rules of the game," which will be strongly valued by those they benefit. In the case of new rules of discovery which might favor the defendant, for example, Goldstein points out that they have been publically resisted by court personnel on the grounds

that a defendant who knows the case against him can then fabricate evidence or intimidate witnesses.[47] In fact, Goldstein suggests, it was more likely that court personnel opposed the changes because they worked out informal relationships under the "old rules," which satisfied all the conflicting interests in the court.

This view of procedures as strongly held values is also supported by Lemert's case study of change in the organization of juvenile courts in California.[48] Like Goldstein he found that changes in procedures were often resisted because each member of the court was able to view the old procedure as meeting his own interests. The sheriff likes a procedure because he thinks it allows him to increase his salary, the prosecutor, because it enables him to get convictions,and the judge,because it clears his dockets. In this respect procedure in courts may be even more resistant to change than rules in other kinds of organizations.

Court procedure is highly specialized, bound by concepts of precedent, and the province of a profession, not merely an individual court. A specific procedure may be strongly valued not only because it serves the informal structure of the court, but also because it is rooted in the authority and tradition of the court.

Administrative reform

Though both argue from a concern for the prevalence of bargaining in the courts, proposals for reform through administrative strategies articulate a model for change markedly different from that implicit in procedural reform. Where the procedural reformers are hopeful that regulations will constrain the behavior of court personnel, those advocating administrative measures express skepticism that the behavior of court officials will

change until the organizational pressures on them are eased. While procedural reform sees plea bargaining somewhat as an invention of court personnel, administrative reformers focus more on its genesis as a systemic response to massive changes in caseload. In each instance, the model advocated by proposals we have categorized as primarily administrative stresses the need to begin with measures that will increase the efficiency of the courts so that eventually the pressures which are believed to cause the departure from due process can be reduced. Typically, the tools of management and systems analysis are called upon to achieve these ends.

The acceptance of this kind of reform in the criminal courts has been difficult, especially in contrast to the history of procedural reform. Though procedure is the natural tool of the legal system, the technology of other fields has been long and stubbornly resisted by the courts.

Certainly, there has been a traditional reluctance to subject the courts to external influences of any kind. Until quite recently the concept of judicial isolation prevented the acceptance of any administrative assistance in the judiciary for fear that the judge might be subjected to pressures which could affect his objectivity. Most judges, as a result, even now have not surrendered their dual roles of adjudicating cases and acting as chief administrators of their own courts. The control of court policy by the legal profession has undoubtably further strenghtened this reluctance of the courts to focus on their administrative problems. Since court related problems have traditionally been expressed as specialized legal issues, the legal profession has most often emerged as the source of expertise on court administration.

Had there not been a close association between the development of procedural reform and the identification of the administrative needs of the court, administrative reform might have occurred even more slowly. Since the procedural tangle which engulfed the courts in the late 19th century pointed up the need to rationalize procedure, proposals for altering the administration of the courts emerged as a response to the courts' procedural overload. Borrowing from the experience of reformers who had reorganized civil procedure in the same period, administrative reformers were able to argue that elaborate procedural systems had to be counterbalanced by efficiency in the organizations charged with implementing them.

Early in this century the report of the Wickersham Commission, for example, argued for this position, suggesting that proper administration could indeed mitigate the ill-effects of an over-elaborate procedural system. "Good organization, equipment, methods, and principles of administration on the part of the police, prosecution, and the courts would largely nullify the power of so-called 'technicalities' to do harm.[49]" While many of the early arguments for administrative reform did appear -- like the Wickersham Commission -- to take the form of attacks on the inefficiency of procedural reform, most of them did hasten to add that it was important to protect the rights of defendants through procedure. Their avowed intent was to provide an efficient enough organization that court personnel would have the opportunity of giving time to procedural safeguards.

Riding on the heels of procedural reform, administrative reformers could argue that they provided a complementary strategy. The factor which clinched the case for administrative reform was its currency in other parts

of the criminal justice system. By the turn of the century police departments had begun to adopt increasing numbers of investigative tools, including,even at this period, ballistic and fingerprinting devices.[50] The courts were interested in the technology available to the police,and this interest was heightened by the recognition that court administration in Europe was the province of technologists and "experts" in management, not lawyers and judges. As experts from other fields -- especially social work and medicine -- gradually began to play roles in American courts, it became more feasible to argue that, like the police, courts could accomplish their work more efficiently if they were supplied with technical assistance from outside the legal profession.

Recent proposals have broadened the range of technology to be applied to the courts from court management and investigative devices to personnel programs, information systems and case scheduling. With the initial attempts to introduce new technology into the courts they share a belief that the departure of the courts from due process is a result of inefficient organization -- forcing the courts to compromise justice in order to process cases. They have responded to this problem by recommending a large number of piecemeal modifications in the methods by which cases are handled.

The very diversity of these proposals makes it difficult to analyze administrative reform as a single coherent effort. Instead, we have chosen to isolate one of the issues on which these proposals have focused and to ask how they have responded to it. The most common theme in administrative reforms -- especially those which advocate changes in scheduling and information gathering -- is the elimination of delay in the

processing of cases. How have administrative reformers defined the problem of delay? What justifications have they offered for its elimination? What kinds of strategies have they proposed?

The speed at which cases are processed has been one of the most frequently used criteria for evaluating courts. How much delay courts allow is of particular interest to administrative reformers, because delay is a primary measure of administrative inefficiency. Delay is usually defined as the time between the arrest of an offender and his first appearance in court or as the total time between the arrest and the trial and disposition. In some courts, delays as long as a year and a half from arrest to disposition and as long as one year between arrest and trial have been recorded.

Administrative reforms have offered at least two explanations for the existence of delays of this magnitude: the resources of the court cannot accommodate the demand generated by urban caseloads, and scheduling techniques cannot make adequate use of the resources which do exist. Both views of delay treat the problem as an anomaly, not an outgrowth of the courts' structure. These proposals suggest, for example, that the court is prevented from absorbing large caseloads because it has a fixed budget and labor force. In fact, courts cannot easily respond to their caseloads by increasing their resources, since their budgets are controlled legislatively. The result is that, in courts like the District of Columbia Court of General Sessions, four judges in one court process nearly 1,500 felonies, 7,500 misdemeanors, 38,000 petty offenses, and an equal number of traffic cases in a year.[51] Even when a court is allowed to increase its personnel, adding judicial and prosecutorial resources is often difficult. Within a

profession whose numbers are somewhat restricted by its specialized training, the practice of criminal law has been an increasingly unpopular choice, and the result is only a small pool of criminal lawyers from which to draw.

Drawing on the earliest arguments made for administrative reform, these proposals also invoke procedural overload as a reason for the prevalence of delay. In this view the court is even now clogged by elaborate procedures, including "archaic" methods for scheduling cases. In its policy statement on crime, for instance, the Committee on Economic Development commented that "certain otherwise commendable Supreme Court decisions, such as those assuring legal counsel for defendants at all stages, have slowed court processes."[52] This argument reiterates the belief that the procedural reformers failed to consider the impacts of their proposals on the courts, but that, in fact, being procedurally correct should not cost the court in time or efficiency of operation. It now costs dearly, the argument goes, because courts have not introduced effective systems for allocating time to cases. In some jurisdictions, the judge and the clerk manage all cases, and in most, complex records are kept by hand.

The one explanation for delay not possible within these arguments is that courts intentionally delay the disposition of their cases. Other sources make strong arguments for delay as a functional tool in the court's handling of cases.[53] Delay may be employed by both judges and lawyers to provide time for gathering evidence, locating dispositions or putting pressure on defendants and witnesses to cooperate. The model implicit in proposals for administrative reform would not tolerate this view of delay. Unlike procedural reform which attempts to control the decisions of court personnel directly -- through regulation -- administrative measures depend

on the theory that changes in the organization of the court will result in predictable, but indirect changes in the behavior of court personnel. To fit this model, then, delay must be a problem which will be sensitive to organizational changes -- an intentional use of delay by court personnel would not be predictably affected by changes in the court's resources, or perhaps, not even in its scheduling devices.

The justification for decreasing delays in case processing is most often expressed in terms of the costs of delay. Indeed, the investment of resources in speeding the disposition of cases could be justified in these terms alone. The time incurred in waiting for trial is clearly costly to lawyers and witnesses. The lost opportunities suffered by defendants and their families, especially while defendants await trial in jail, lose wages, and incur costs for child support, cannot even be calculated. It is evident that both the economic and human costs of waiting for trial can be high.

Proposals for administrative reform appear to feel that they must also justify their actions in the same terms as procedural reformers. Their arguments try to link the impacts of delay with the bargaining process. According to the model which administrative reformers build,[54] the courts attempt to reduce delay by emphasizing the settlement of cases. Because courts are monitored on the basis of their average delay in processing cases, court personnel become preoccupied with moving cases and clearing the docket. Thus, wherever a bargain can be struck which speeds the progress of a case, in this model, court personnel are likely to sacrifice the rights of the defendant to trial or to other basic procedural safeguards. The sentencing decision may then not be based either on penal

or correctional considerations, but rather on the success of court personnel in suggesting a good bargain to the judge.

In this model, delay, clearly, is seen as a direct cause of bargaining. In effect, then, administrative reformers are allowing their justification for intervening in the courts to rest heavily on the nature of bargaining. They argue that delay in the processing of cases ought to be reduced because delay produces pressures for bargaining. Like procedural reformers, they make only an ex post facto case for the evils of bargaining. In fact, their case rests on a very specific set of assumptions about bargaining. They depict it as a process which has efficiency of case processing as its goal and which succeeds well enough in speeding up cases that court personnel employ it intentionally when they are pressured. They imply, in addition, that bargaining is not in the interests of the defendant, because it gives his case only short shrift, though they also argue that speedy justice is to the benefit of the defendant.

Though their justifications speak of eliminating bargaining, the strategies proposed by administrative reformers all attempt to increase the resources of the court for dealing with its caseloads -- with a decrease in bargaining as only an indirect result. Adding to the personnel of the courts is, of course, the most direct means for meeting the increased demands on the court. Indeed, manpower strategies are commonly proposed by administrative reformers, but as a response to the problems of delay, they are often rejected as infeasible. It is estimated, for example, that under present conditions four times the current level of personnel would be required to meet current caseloads, were bargaining to disappear.[55]

The costs of added personnel have tended to concentrate the attention of administrative reformers on less direct strategies. Particularly common are proposals for improving the scheduling of cases and the flow of information within the court. Models for scheduling cases are usually simple listings of ideal intervals between each stage of the criminal process. The President's Crime Commission, for example, suggested a goal of no more than four months from arrest to disposition and no more than five additional months if elaborate appeals are made.[56] This would mean, for example, that the period from arrest to first court appearance should be no more than 24 hours. Though this approach tries to provide rather precise guidelines which courts can use to monitor cases, the expectation is clearly that cases cannot be scheduled precisely. Strict adherence to guidelines is seen as impossible, not because court personnel are not willing, but because it is assumed that contingencies like failure of witnesses to show up or the discovery of new evidence in a case would make only approximate scheduling likely.

The necessity of keeping track of how long cases have been in the system, if scheduling procedures are to succeed, often couples scheduling and information system strategies. Proposals for systems of this type stress that information is necessary for setting priorities among cases (deciding which are "routine" and which must be allowed a longer processing time), for locating witnesses, attorneys and other principles in a case, and for making certain that no case exceeds the recommended guidelines. Courts could be asked to create files of information, for example, relating to the schedule a case follows and its history, the projected loads on judges and court facilities, and management statistics on the overall

workload of the court.[57] The assumption is that given adequate information, court personnel will have no reason not to maintain a more efficient flow of cases, and that this increased efficiency in scheduling will result in a reduction in delay.

These strategies place a great deal of faith in the power of information to change the behavior of court personnel. Because they do not assume that the court intentionally causes delays in cases, they can also assume that given enough guidelines for timing and information for monitoring cases court personnel will have no reason not to move them quickly. As a model for change, though, this argument remains undirected, especially compared to that offered by procedural reformers. Procedural strategies posit that decisions about criminal defendants must be regulated directly. If the rules for processing defendants are made explicit enough, then decisions can be reviewed and court personnel censured for violations of procedures. Administrative strategies, on the other hand, posit that there are general pressures on court personnel which make them bargain. Strategies are aimed at creating a more generally efficient court organization, but without any specification of the pressures at which they are aimed. The model depends very heavily on the theory that the overall efficiency of the court has direct impacts on the decisions of individual personnel and that administrative changes will "filter down."

Negotiated justice

Most proposals for reform reflect a stubborn faith in the ability of the courts to operate on an adversarial model. Very few question the model -- whether it is a realistic description of the kinds of relationships that might happen in the criminal courts or whether it is still appropriate

at all in the face of the changing goals of the criminal justice system. A handful of advocates for reform of the courts through negotiated justice have asked these questions. Though fragmented and tentative, their answers do point to a growing acceptance of plea bargaining -- not the adversary system -- as an operating model for the courts and a feeling that the adversary system can no longer respond to the changing demands on the courts.

Despite what seems like a radical departure from other proposals for court reform, advocates of negotiated justice do share much with administrative and procedural reformers. Rather than abandoning the possibility of due process, they argue that it can be maintained even while bargaining is taking place. What is required is a set of rules, standards, and goals -- much like those envisioned by procedural reformers -- which could regulate bargaining to give defendants due process. In this sense, due process serves less as a model for organization of the courts and more as a general guideline which can be upheld during bargaining.

Employing bargaining as an operating model appears to represent a complete shift in the formal structure of the court. The flavor of proposals for negotiated justice very much contradicts this assumption. They deny quite strongly that what they are proposing is essentially a civil, not a criminal system.[58] It is true that like the civil courts, negotiated justice would allow for the settlement of the majority of cases without a full trial of issues, and would encourage an emphasis on "fact" finding rather than "truth" finding. The critical difference between the civil and the criminal systems, however, is that criminal cases are initiated by the state and the state is a formal party to the case. Civil cases, on the

other hand, involve disputes between two private parties who are, at least in the eyes of the law,"equals." If the state and the defendant are inherently in conflict, even though they bargain with each other, some provision has to be made for safeguarding the defendant against the power of the state. Unlike the civil system, then, proposals for negotiated justice have accepted this idea that there is conflict between the state and the accused, and on this premise they justify the regulation of the bargaining process.

Advocates of negotiated justice, then, do not argue that they are transforming the criminal court to a civil model, nor do they all admit that they are shifting the structure or goals of the courts at all. Instead, they suggest that they are merely formalizing and regulating the decision making process that has been the dominant model in the courts for decades. Even the most recent do not enthusiastically embrace plea bargaining as a mode of operation, and instead, almost grudingly admit that since bargaining cannot be dispelled, it should at least be regulated.

The roots of negotiated justice

The assumptions of the few, fragmented proposals we have identified as negotiated justice are easily traced. The earliest merely call for recognition of the discretionary nature of decisions made by criminal justice personnel. A second set make some suggestions for how this discretion might be retained and still be regulated. In either case, it would be pretentious to label these proposals "reforms," since they are merely isolated attempts to make sense out of informal methods for processing criminal defendants.

The first proposals we have labeled negotiated justice are found in the traditions of police administration, and very modestly attempt to fathom the problem of police discretion. The public recognition of the discretionary powers of the police necessarily spawned interest in mechanisms for limiting the scope of police discretion. Control through strict legislative definition of police powers had often been proposed but the police resisted actively, arguing that legislative involvement in law enforcement would weaken the force of the criminal law and the judiciary.

An option designed to be more acceptable to the police was to establish a board that would divide the ex post facto evaluation of police decisions among police representatives and personnel from other agencies. The purpose of this board was to devise a means "whereby abusive judgments [could] be minimized or neutralized and conscientious judgments guided to ensure consistency with the totality of goals of a criminal law system."[59] The assumption, then, was that the discretionary powers of individual policemen could be balanced if enough interests were represented in a reviewing committee.

It was evident that ex post facto review only very indirectly -- and slowly -- affected the decisions of the individual policeman. The next obvious step was to encourage him to exercise judgment, but within a set of guidelines.[60] A number of ambitious attempts have been made to see that the policeman is provided with rules for making an arrest decision -- who to arrest, on what grounds, and what alternatives to use when arrest is not indicated. Wilson suggests that this approach represents the attempt of the legal profession to "judicialize" the police:

> The remedy, therefore, is to bureaucratize or judicialize the police: make them subject to more and more explicit rules, have these rules reviewed by the courts or other non-police agencies and reduce their discretion whenever possible. Lawyers for whom "clear standards" is always a favorite remedy for administrative discretion are especially inclined to take this approach.[61]

In the sense that they do work for change through the imposition of rules, these proposals appear to be similar to procedural reforms. If enough explicit guidelines can be provided, decisions made by individual policemen are likely to be consistent with official goals. Where these proposals depart from procedural reform in the courts is that they admit that regardless of rules some police decisions will still be discretionary, and in fact, that the policeman should have the ability to individualize decisions on a case by case basis. Because of the nature of the policeman's job, they argue, it is only possible to define the conditions sufficient to arrest a suspect for a crime, not to predict the actions to be taken when the job is one of "maintaining order."[62] Order maintenance, especially, is still left to be defined and executed by the individual policeman with whatever means he chooses.

For many reasons, the courts have been much slower to admit that their personnel in fact make equally discretionary decisions. The prevalence of plea bargaining, in particular, forced attention to the ways in which court personnel make decisions. A handful of proposals has attempted to give recognition to the informal decision-making practices of the court and to suggest that they could make a workable basis for decision-making if they were properly regulated. Unlike attempts to define guidelines for regulating police decisions, however, all but the most recent attempts to

regulate plea bargaining still assume that bargaining is an aberration of a still preferable trial system.

These few proposals share a common approach to plea bargaining and point to the critical elements of negotiated justice. Though they deplore the practice, they implicitly agree that bargaining is a legitimate method for processing some kinds of cases. Their efforts are directed toward making bargaining "public" enough that inequities can be reviewed. A proposal to require written explanations of bargains illustrates one option for opening up bargaining to scrutiny, and two others articulate guidelines which might be used to detect inequitable bargains.

An early, modest approach tried to expose prosecutorial bargains, with the hope of discouraging bargaining, or at least of exposing abuses. What would constitute an abuse of bargaining was at this stage left to the imagination. With this approach in mind a number of States created statutes requiring that prosecutors file a description of their reasons for granting a plea to a lesser charge.[63] These statutes constituted a grudging acceptance that prosecutors were offering reduced charges in exchange for guilty pleas, but their intent was that blatant cases of abuse could be reviewed by a higher court.

It was evident from the experience in these States that bargaining could not be successfully evaluated after the fact. Prosecutors rarely made explicit that bargains had occurred, and even where review was possible, criteria for judgment were difficult to develop.[64] An obvious next step was to develop guidelines for the bargaining process itself, checkpoints which would help decide whether the emerging bargain was equitable for the defendant. The two examples offered here try to develop these guidelines and create a kind of "due process" for bargaining.

Abraham Blumberg, for example, elaborates a set of checkpoints to be used in protecting a defendant whose case is being bargained. He suggests such steps as publicly probing a defendant's reasons for agreeing to a guilty plea, assessing what factors might have made the defendant tractable to plea bargains, and determining whether any "secret" arrangements have been made which might unduly influence the defendant.[65] Blumberg's criterion for judging the equity of a bargain is clearly whether the defendant is voluntarily engaging in the bargain or whether he is being coerced by the prosecution. Because he sees coercion as the critical danger in bargaining, Blumberg does not trust court personnel to implement these procedures fairly. He supplements his proposal by suggesting that an "ombudsman" who is not enmeshed in the organization of the court should conduct this review of the guilty plea.

A smiliar but more complex process of review was suggested by Judge Bazelon in Scott v. U. S. In this case Bazelon attempts to extend Blumberg's criterion of coercion to a more elaborate test for the equity of bargains. His intent was to compare the proposed bargain with the probable outcome of the case if trial had occurred. This comparison required an ambitious calculus. A bargain would be considered equitable for the defendant if his motive were "to acknowlege his guilt of the lesser charge rather than risk conviction on the more serious, or to accept the promise of a lighter sentence to escape the possibility of conviction after trial and a heavier sentence."[66] If these motivations could indeed be evaluated, a bargain which violated the defendant's rights to due process would be one which was motivated only by the prosecutor's need to deter people from exercising their rights to trial and not by an assessment of

the defendant's probable outcome with a trial. Like many other attempts to guide and evaluate bargaining, Bazelon's formula requires a very complex set of judgments about the motivations of both the prosecutor and the defendant. At the same time, the process by which these judgments are to be made remains sketchy.

Recent proposals by the American Bar Association[67] and the President's Crime Commission[68] provide by far the most comprehensive attempts to define negotiated justice. Like earlier proposals they try to transform bargaining into a more open, formalized process. What they add to proposals like those made by Blumberg and Bazelon is a sense of how a court might conduct a due process of bargaining. In particular, they delineate some of the roles which court personnel might play and the judgments that might be made at each stage. The assumptions the two proposals make about the desirability of bargaining and its relationship to the adversary process are quite different, and provide a good sense of the scope of negotiated justice -- as an outgrowth of both procedural and administrative reform.

The ABA proposal

The reports of the ABA Project on Minimum Standards for Criminal Justice are the most ambitious statement on court procedure to come from any group other than the appellate courts. Its report is a very successful attempt to systematize the work of the procedural reformers. Of particular interest are the sections of the project which focus on the plea of guilty and argue for its regulation. Taken together the recommendations in these sections describe a formalized plea bargaining process, try to justify the disposition of cases by this mechanism, and even design safeguards for making it fair.

Despite its relative comprehensiveness, the ABA proposal's acceptance of plea bargaining is no more enthusiastic than Blumberg's or Bazelon's. Its perspective is that of an organization which would like to make even bargaining conform as closely to the adversary process as possible. Indeed, its proposals for negotiated justice are concentrated on those aspects of the process which have been of greatest concern to the appellate courts in their attempts to enforce due process requirements: determining that a plea of guilty is made voluntarily by the defendant; defining the role of the prosecutor and the defense counsel; and delimiting the judge's involvement in the bargaining process. Reviewing each of these elements in turn provides a nearly complete statement of the ABA proposal.

In the standards proposed for evaluating the defendant's guilty plea, the ABA tries to blend traditional conceptions of the plea with the recognition that it is an efficient administrative device. The criteria which emerge are both ambitious and perhaps, conflicting. Not surprisingly, as a minimal standard for the acceptance of guilty pleas, the ABA suggests the traditional standard of "voluntariness."[69] If the defendant has not been coerced or otherwise forced to cede his right to trial, then the plea can be assumed to have been a voluntary act on the part of the defendant, and thus sufficient for maintaining due process.

A logical -- and traditional legal -- corequisite to the test of voluntariness is that the defendant understand the significance of his plea. In the ABA proposal this standard is translated into the requirement that the court determine from the prosecutor and the defense attorney whether the prosecutor has offered the defendant any bargains. When a bargain is discovered the court can then inform the defendant that the

bargain is not necessarily binding and that there is a risk that it may not be kept. Like the test for voluntariness, this method of deciding whether a bargain is equitable requires considerable ability to communicate with the defendant and to judge whether he understands the risks he runs.

While these are standards dictated by the appellate courts as much as by the ABA, a second set is a real departure from appellate tradition. Voluntariness and understanding are standards which emerge when the plea is seen as a confession; if the defendant is entering a plea, he should understand its seriousness, and not be forced into taking the associated risks. When the plea is seen as a tool for providing more flexibility to the criminal process, however, the standards can be inherently administrative rather than legal. The least daring of these is the suggestion that the guilty plea can be seen as a mechanism for providing more correctional options. In this view a bargain is valid if the "concessions will make possible alternative correctional measures which are better adapted to achieving rehabilitation, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant from the form of conviction."[70]

A final standard openly recognizes the role of bargaining as an efficient method for processing cases. Because of its concentration on the protection of the defendant -- and its suspicion about bargaining -- the ABA links even this standard with the well-being of the defendant. A bargain can be justified if "the defendant by his plea has aided in avoiding delay (including delay due to crowded dockets) in the disposition of other cases and thereby has increased the probability of prompt and certain application of correctional measures to other defendants."[71]

This last requirement, especially, leaves the ABA without a clear, unambiguous position on the guilty plea. The plea is at the same time the means to an end and a critical decision for the individual defendant. The Standards seems to suggest that the guilty plea is not merely an ameliorative device to provide the defendant with better correctional programs, but that the plea must also be a sincere admission of responsibility for a criminal act. By maintaining this kind of tension they may succeed in fulfilling the requirement established under the Federal Rules of Criminal Procedure -- that there be a factual basis for the guilty plea -- at the same time that the efficiency of bargaining can be tapped.

The efforts of the ABA virtually stopped with the designation of standards for judging the plea. It left few clues as to the way in which these judgments might be made or what roles should be played by the prosecutor and the defense. What attention is directed to this process leans heavily on the adversary model and clearly conflicts with some of the attitudes toward bargaining conveyed in the standards for judging the guilty plea. While the assumption is made that a bargain must be worked out between the two sides, for example, the prosecutor may confer only with the defendant's attorney, not with the defendant himself. Similarly, though the court must ascertain precisely what kind of a bargain has been made, no official record is kept of the bargain or the process by which it was reached, and thus, it is not an official element of the decision making process. Finally, the Standards explicitly recognize that the prosecutor does have the discretion to engage in bargains, at the same time that they require that the court as far as possible limit the grounds for accepting guilty pleas -- thus, severely limiting the prosecutor's discretion.

Ironically, given the centrality of prosecutor-attorney relationships during bargaining, only the judge's role is clearly drawn. This emphasis is perhaps expectable if the position of the ABA is that bargaining should be constrained and certainly not accepted by the court to the jeopardy of the adversary process. The thrust of their discussion of the judge is to help prevent the judge from stepping out of his proper adversarial role and becoming a party to the plea agreement. Instead his function is only to review the plea agreement after the bargain has been made, and to indicate to the defense counsel and the prosecutor whether he agrees with the proposed disposition of the case. In this respect the judge may be able to increase the probability that the bargain will be kept, while at the same time not abdicating his role as an objective truth finder, aligned with neither side in the case. By this definition it is the judge who retains the most formally recognized power in the bargaining process, since he can at any time withdraw his concurrence with the bargain, with only the requirement that he notify the defendant.

The President's Crime Commission Proposal

Unlike the ABA Standards Project's focus on procedural reform, the President's Crime Commission report on the courts[72] focuses on the need to improve the efficiency of the courts through the development of new techniques for scheduling and monitoring cases. It also begins with the premise that ours is a system of justice without trial and develops an extensive analysis of the nature of plea bargaining:

> Many overburdened courts have come to rely upon these informal procedures to deal with the overpowering caseloads, and some cases that are dropped might have been prosecuted had sufficient resources been available. But it would be an

> oversimplification to tie the use of early disposition solely to the problem of volume... the flexibility and informality of these discretionary procedures make them more readily adaptable to efforts to individualize the treatment of offenders than the relatively rigid procedures that now typify trial, conviction, and sentence... Moreover, by placing less emphasis on the issue of culpability, discretionary procedures enable the prosecutor to give greater attention to what disposition is most likely to fit the needs of those whose cases he considers.[73]

The process of plea bargaining, then, is seen primarily in administrative terms -- as a necessary result of both prosecutorial discretion and the burdens on the courts. Unlike the ABA Standards, this proposal does not consistently view plea bargaining as an aberration of the adversary process, but rather as a system of justice which has virtually replaced the traditional trial system. As a result, the Crime Commission report assumes that using bargaining as a system for processing criminal cases must also lead to altered roles for court personnel and to changed goals for the process itself. On this basis, the report also tries to develop a new set of goals and ideologies for the criminal process, avoiding an uncritical dependence on the adversary model.

The result of the Crime Commission's attempts to define negotiated justice is a proposal for ordering, evaluating, and reviewing the plea bargaining process, and for structuring the roles of those involved in bargaining. Though the report still suggests a process which is closely tied to the adversary model, it does maintain the premise that it is trying to formalize -- not eliminate -- bargaining. In this respect it is moderately successful in designing a process focused on fact finding, not on determining truth -- and thus, guilt and innocence.

Even this shift of emphasis profoundly affects the kind of assumptions that can be made about the behavior of court personnel, about the uses of information in the criminal process, and about the sentencing decision. In particular, three elements of the Crime Commission proposal depart somewhat from the adversary model and from the recommendations of the ABA report: the process by which the prosecution, defense, and the judge negotiate a bargain; the role of the judge in the bargaining process; and the correctional goals of bargained pleas.

Under the Crime Commission model the negotiations between the prosecution and the defense are legitimate, open functions of the criminal process. Like procedural reform, this report assumes that bargaining decisions should occur with procedural regularity -- that even during plea bargaining the means by which decisions are reached are as important as the end result. Also like the advocates of procedural reform the authors of the Crime Commission report posit that, given an adequate store of information, equitable bargains between the prosecution and the defense can be better assured. Thus, the Crime Commission suggests that two major changes be made in the procedures by which bargaining takes place; that provision be made for adequate discovery and that records be kept at each stage of the negotiation.

The concept of discovery is both closely related to the adversary model and is a critical feature of bargaining. Under the assumptions of an adversary model, it is necessary for the sides in the contest to be balanced, and to create a balance of information the defense may need to "discover" the prosecutor's case. By nature, bargaining, too, involves

exchange of information about a case before trial, but this exchange is voluntary -- motivated by a mutual need to arrive at an acceptable bargain.

Retaining some of the notions of adversarial conflict, the Crime Commission does not leave the cooperation of the prosecutor and defense to chance. The Crime Commission report stipulates early and complete disclosure of attitudes and facts relevant to a criminal case.[74] Because little information is now systematically collected by courts, to make complete discovery work, the Crime Commission must propose changes in the way in which information is gathered. The Commission envisions an extensive presentence report detailing the defendant's history and whatever information is available about the facts surrounding the offense itself. This ambitious task might fall to the probation office or to some other specially created fact-finding body. Armed with such a presentence report the prosecution and defense could presumably engage in free discovery early in the case, at least unhampered by the burdens of inadequate information.

Beginning with this preplea discovery, the Commission suggests that records be kept of the negotiations at each stage. The purpose is, of course, to make plea bargaining as much a matter of record as the criminal trial process and as open to scrutiny. Since the bargaining process still does not take place "in public," it is even more critical for all the terms of the bargain to be put into writing. The Commission identifies at least five types of information about the bargaining process that ought to be recorded:[75] statements of the facts of the offense from each side; opening positions of the parties; the terms of the agreement,

as it evolves; background information, both on the offense and on the defendant; a statement from each side explaining why the negotiated disposition is appropriate; and the judge's evaluation of the bargain.

The assumption that this kind of information is feasibly recorded draws directly from a belief in the value of trial transcripts. Just as the transcript is expected to make courtroom proceedings amenable to after-the-fact review -- and the actors more procedurally careful during the process -- this record is expected to open up the bargaining process. If bargaining is indeed a meeting in which prosecutor and defense decide what kinds of benefits the defendant might receive if he pleads guilty, then the kinds of information specified here might be easily recorded. If bargaining occurs before or after this stage, involves more actors than merely the two sides, or in effect alters the facts of the case, then the kind of record described will be difficult to maintain. Even more important, the success of the record clearly depends heavily on the willingness of the actors to provide information, since they are not in an open courtroom, where their interactions can be observed. If their "agreement" involves currency or interests not likely to find sympathy with the judge, they will undoubtedly choose not to record them.

Even if no other directions were offered by the Commission for the roles to be played during bargaining, the prosecutor and defense might be constrained greatly by the necessity of engaging in discovery and especially of coming to terms suitable for the record. What the Commission does reveal about its expectations for the prosecutor indicates some further deviation from his adversarial role. Most significant is its proposal that

the prosecutor not only engage in friendly discovery with the defense counsel, but also that he freely advertise his bargaining procedures. According to the Commission he should "publish procedures and standards, making clear his availability to confer with counsel and listing the factors which are relevant."[76] Interpreted literally, this requirement certainly departs from the traditional role of the prosecutor as challenger to the defense counsel and as champion of the State's case.

The roles specified for the defense and the judge are much more conservatively drawn. Here again, the Commission is skeptical that the relationship between prosecutor and defense can be open and cooperative -- even where provision is made for discovery and review. To minimize the chances that the prosecutor will take advantage of the defendant, the defense counsel is asked to take on his adversarial role of protecting the defendant, at the same time that he is bargaining freely and openly with the prosecutor. The Commission suggests that the counsel helps ensure that the plea is reliable, that the risks of litigation are considered, and that no unfair advantage is taken of the defendant.[77] In this respect, the duties of counsel as envisioned by the Commission vary almost not at all from those described by the ABA.

While its strict adversarial assumptions made the ABA wary of judicial involvement in bargaining, the Crime Commission allows the judge much closer contact with the bargaining process -- on the grounds that he ought to determine the equity of the bargain. Some of the criteria the Commission specifies for identifying an equitable bargain are the same as the judge might use to assess a sentence levied after trial. In particular, the bargain should be evaluated against the defendant's need for correctional

treatment, the circumstances of the case, the defendant's willingness to cooperate with rehabilitative programs, and the requirements of law enforcement.[78] In addition, the Crime Commission asks the judge to apply the more traditional standards dictated by the ABA standards and by the requirements of due process. Is the plea an understanding choice on the part of the defendant? Was the plea a result of inducements by court personnel?

Some supporters of the Crime Commission's approach have greeted these criteria with enthusiasm, suggesting that they will foster a real shift in the sentencing process to focus on correctional goals. Arthur Rossett tries to make this case in a comparison of the ABA and Crime Commission proposals.[79] Rossett believes, for example, that the ABA proposal leaves the substance of the negotiations unchanged. "Parties will continue to bargain about how many counts of what crime the defendant will plead guilty and how many years the offense is worth ..."[80] In contrast, he argues that the Commission created guidelines that will shift the negotiating process to a focus on correction. "A plea [bargain] is fundamentally a negotiation about the correctional disposition of a case and is, therefore, a matter of moment to both the defendant and the community."[81]

At least on the face of the two proposals, neither these differences or the shifts in goals attributed to the Crime Commission are evident. In fact, the standards proposed by the ABA and the Crime Commission seem to raise very similar issues. They both seem to mix assumptions about the bargaining process. At the same time that it is a positive attempt to provide correctional alternatives, it is still viewed as an effort to cheat the defendant out of a trial (and thus, care must be taken to see that the defendant has not been coerced.) Because both

conceptions of bargaining remain in tension, the judge's task is essentially the same as it is in sentencing, to balance these potentially conflicting standards for judgment. In this respect, it is difficult to see that the Crime Commission proposal has created any incentives for the judge to emphasize correction more than other goals, or to view bargaining as a "positive" process.

In addition to the potential difficulties in applying these standards, the judge in the Crime Commission proposal must play a very delicate role. While he is not seen as a party to the negotiations he must maintain careful scrutiny over the process. One observer points out that in viewing him in this way, the Crime Commission is actually depicting a judge much more like that in civil cases "involving minors or representatives of a class of litigants." Under these circumstances the judge must audit the disposition to assure that it is fair and advise the defendants accordingly, but he does not actively participate in fashioning the disposition.[82]

In order to fill this role, the judge must observe the negotiating process closely enough to be able to advise the defendant of the issues. This may mean, for example, that the judge attends some of the preplea conferences. It always requires that the judge question the defendant and the prosecutor about the plea and the bargain. If the judge is then not satisfied that the criteria for a fair disposition have been met, he must inform the defendant and give him an opportunity to withdraw his plea. At any of these stages, the judge's attempts to watch the bargaining process and advise the defendant could direct -- and in fact determine -- the course of bargaining. Even the Crime Commission proposal is not ready to allow the

judge to be an active participant in the bargaining process, but in the judge's case the line between participation and observation is obviously shaky.

In the Crime Commision's attempts to describe the judges' roles -- and indeed in the rest of its proposal -- the heritage of the procedural and administrative approaches to reform is very evident. Both the ABA and the Crime Commission have tried to combine the critical elements of administrative and procedural reform; they aim for a process which will increase the efficiency of the courts at the same time that it more reliably regulates the activities of court personnel. Implicitly the proposals suggest that these two goals are not incompatible, and that a highly regularized kind of bargaining can indeed accomodate both. In the same way, proposals for negotiated justice also hold the due process, adversarial model in tension with the reality of bargaining. Both try to retain the major components of the adversary process -- the objective judge, the careful scrutiny of the guilty plea, and the "two sides" in the case -- while still making decisions through bargaining.

Whether either proposal could in fact succeed in establishing a "due process of bargaining" depends to a great extent on the assumptions they make about bargaining. The impact of the ABA proposal, for example, may be critically dependent on whether decisions which shape a particular bargain can be constrained within the narrow context of the guilty plea review. The regulations proposed by the Crime Commission are much broader, in the sense that they try to trace a process of bargaining from discovery to plea review. Even at that, the effectiveness of their procedures may

hinge on aspects of the bargaining process which their model does not address. What criteria guide the decision to bargain and the choice of particular bargains? Are court personnel in conflict when they bargain (as these proposals assume)? Is it at all possible to regulate a latent process like bargaining?

What emerges from both the ABA and the Crime Commission proposals is a model of bargaining which is incomplete, but which does make some definite assumptions about the process. For both, bargaining appears to be a single decision point, focusing on the guilty plea, in which prosecutor and defense counsel vie for the better deal. During this process they are inherently in conflict, while the judge remains detached and protective of the defendant. In the sections that follow we try to examine these assumptions in light of other conceptions of bargaining -- both as they have emerged from the appellate courts and from empirical studies of the trial courts. Our intent is to develop a framework for evaluating proposals like these made by the Crime Commission and the ABA, by at least initially testing the assumptions they make about the bargaining process.

Notes

1. Lloyd Ohlin and Frank Remington, "Sentencing Structure: Its Effect Upon Systems for the Administration of Criminal Justice," Law and Contemporary Problems, XXIII (Summer, 1958), p. 499.

2. Abraham Blumberg, Criminal Justice (Chicago: 1970), p. 21.

3. Ohlin and Remington, pp. 499-507.

4. John Hogarth, Sentencing as a Human Process (Toronto: 1971), p. 5.

5. See the U.S. Task Force on the Courts, Task Force Report: The Courts (Washington: 1967), pp. 14-25.

6. Herbert Packer, The Limits of the Criminal Sanction (Stanford, California: 1968), p. 39.

7. Hogarth, p. 5.

8. p. 160.

9. Packer, p. 153. Also see John Griffiths, "Ideology in Criminal Procedure or a Third Model of the Criminal Process," The Yale Law Journal, v. 79, No. 3 (January, 1970).

10. U.S. Constitution, Amend. XIV, Sec. 1, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law ...".

11. p. 166.

12. For discussion of the applications of the due process clause, see Henry Abraham, The Judicial Process: An Introductory Analysis of the Courts of the United States, England, and France (New York: 1968); Livingston Hall, et al, Basic Criminal Procedure, 3rd ed. (St. Paul, Minnesota: 1969), pp. 13-61; and Charles Fairman and Stanley Morrison, "Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding," Stanford Law Review, II (December, 1949). See also Blumberg, pp. 15-25.

13. Hurtado v. California 110 U.S. 516 at 535 (1884).

14. 320 U.S. 319 at 325 (1937).

15. 332 U.S. 46 at 67 (1947).

16. Palko v. Connecticut. Palko was overruled in Benton v. Maryland 395 U.S. 748, which argued that basic constitutional rights cannot be denied by the States even if they do not seem to be a denial of "fundamental fairness."

17. Mapp v. Ohio 367 U.S. 643 (1961).

18. Gideon v. Wainwright 372 U.S. 335 (1963).

19. For discussions of the issues in assigning counsel to the indigent, see U.S. Attorney General's Commission on Poverty and the Administration of Federal Criminal Justice, Report (Washington, D.C.: 1963); Leon Mayhew and Albert Reiss, "The Social Organization of Legal Contacts," American Sociological Review, v. 34, No. 3 (June, 1969), pp. 309-318; Dallin Oaks and Warren Lehman, "Lawyers for the Poor," The Scales of Justice, ed. Abraham Blumberg (Aldine: 1970), pp. 91-104; Lee Silverstein, Defense of the Poor in Criminal Cases in American State Courts (Chicago: 1965).

20. Abraham, p. 102.

21. Abraham, p. 90. Here Abraham echoes the opinion of Mr. Justice Frankfurter in McNabb v. U.S. 318 U.S. 332 at 347 (1943). "... It is in the execution, administration, and interpretation of the meaning of statutes and executive ordinances that actions of the agents of the governmental process are likely to be challenged on due process grounds."

22. Yale Kamisar, Fred E. Imbau, and Thurman Arnold, Criminal Justice in our Time (Charlottesville, Virginia: 1965), p. 20.

23. p. 20.

24. See Blumberg, p. xiii. Here "inquisitorial" appears to refer to police practices which elicit confessions and secure evidence using coercive methods and without protection of defendants' civil rights. See, for example, Albert Reiss and Donald Black, "Interrogation and the Criminal Process," Annals, v. 374 (November, 1967); "Interrogations in New Haven: The Impact of Miranda," Yale Law Journal, (July, 1967), pp. 1521-1648.

25. "The Unconstitutionality of Plea Bargaining," Essays Selected from the Harvard Law Review (Cambridge, Massachusetts: 1972), p. 503. Here the authors quote Duncan v. Louisiana 391 U.S. 145 at 154, pp. 157-158 (1968), which states that a "jury trial is granted to criminal defendants in order to prevent oppression by the Government" and that "jury trial for serious offenses is a fundamental right, essential for preventing miscarriages of Justice ...".

26. "The Unconstitutionality of Plea Bargaining," p. 504.

27. Howell v. Brown 85 F. Supp. 537 at 540 (D. Neb., 1949).

28. 323 U.S. 471 at 476 (1945).

29. Ferguson v. Georgia 365 U.S. 570 at 594 (19610).

30. Ferguson v. Georgia at 593-596.

31. U.S. Attorney General's Commission on Poverty and the Administration of Federal Criminal Justice, p. 9.

32. p. 181.

33. Henry Hart and Albert Sacks, The Legal Process: Basic Problems in the Making and Application of Law (1958), p. 173.

34. Abraham Goldstein, "The State and the Accused: Balance of Advantage in Criminal Procedure," Yale Law Journal, v. 69 (1960), 1149.

35. Goldstein, p. 1149.

36. Goldstein, p. 1192.

37. This section borrows heavily from Goldstein. See also Edwin Lemert, Social Action and Legal Change: Revolution Within the Juvenile Court (Chicago: 1970) p. 3 ff.

38. 291 Fed. Supp. 646 at 641 (S.D. N.Y., 1923).

39. "The State and the Accused: Balance of Advantage in Criminal Procedure," Yale Law Journal, v. 69 (1960), 1149.

40. Goldstein, p. 1152.

41. Goldstein, p. 1198.

42. Goldstein, pp. 1198-9.

43. 354 U.S. 449 (1957).

44. Kamisar, et al, p. 10.

45. See Thurman Arnold, The Symbols of Government (New Haven: 1935), or Thurman Arnold, "The Criminal Trial as a Symbol of Public Morality," in Kamisar et al.

46. The Symbols of Government, p. 9.

47. p. 1158.

48. Lemert, see especially p. 19.

49. U.S. National Commission on Law Observance and Enforcement, Report on Prosecution, No. 4: The Wickersham Commission Reports, "Reissue" (New Jersey: Patterson, Smith, 1968), p. 154.

50. Geoffrey Hazard, "Rationing Justice," Journal of Law and Economics Vol. 8 (October, 1965), p. 5.

51. U.S. President's Commission on Crime and the District of Columbia, Report (Washington: 1966), p. 272, table 23.

52. Reducing Crime and Assuring Justice: A Statement on National Policy (Washington: 1972), p. 19.

53. See, for example, Advisory Commission on Intergovernmental Relations, State - Local Relations in the Criminal Justice System (Washington: 1970), p. 182.

54. U.S. Task Force on the Courts, p. 80 ff.; Lawrence Friedman, "Judicial Rules and the Volume of Business," Society and the Legal Order, eds. Richard Schwartz and Jerome Skolnick, (New York: 1970); Hans Zeisel, et. al, "Justice Delayed ..." in Schwartz and Skolnick; U.S. Advisory Commission on Intergovernmental Relations, esp. p. 180 ff.

55. Comment, "Official Inducements to Plead Guilty, Suggested Morals for a Marketplace," University of Chicago Law Review, Vol. 32 (1964), p. 167. Here the estimate is made on the basis of the caseload of the federal courts.

56. pp. 84-88.

57. U.S. Task Force on Science and Technology, Task Force Report: Science and Technology (Washington: 1967), pp. 37-44. See also U.S. Task Force on the Courts, pp. 88-9; 162-171.

58. Arthur Rossett, "The Negotiated Guilty Plea," The Annals, Vol. 374 (November, 1967), p. 72, outlines the differences between the assumptions of the civil and criminal systems.

59. Sanford Kadish, "Legal and Norm Discretion in the Police and Sentencing Process," Harvard Law Review, Vol. 75, No. 5 (March, 1962), p. 914.

60. See U.S. Task Force on the Police, Task Force Report: Police (Washington, D.C.: 1967), pp. 21-27; Wayne La Fave, Arrest: The Decision to Take a Suspect into Custody (Boston: 1965), p. 492 ff; Herman Goldstein, "Police Discretion: The Ideal v. Real," Public Administration Review, (September, 1963), pp. 140-145.

61. James Q. Wilson, Varieties of Police Behavior (Cambridge, Massachusetts: 1968), p. 281. Wilson cites Packer as a source for his concept of "judicializing" the police, cf. Herbert L. Packer, "Two Models of the Criminal Process," University of Pennsylvania Law Review, Vol. 113 (November, 1964), pp. 1-68.

62. "Order maintenance" is used by Wilson to refer to the police objective involving the "handling of disputes or behavior which threatens to produce disputes .... a family quarrel, a noisy drunk, a tavern brawl ...." cf. James Q. Wilson, "Dilemmas of Police Administration," Public Administration Review, Vol. 28, No. 5 (Sept.-Oct., 1968), p. 407.

63. The Task Force Report: The Courts, p. 108.

64. Weintraub and Tough, "Lesser Pleas Considered," Journal of Criminal Law and Criminology, Vol. 32 (1939), as cited by the U.S. Task Force on the Courts, p. 108.

65. pp. 182,3.

66. Scott v. U.S. 419 F. 2nd (D.C. Circuit, 1969).

67. The American Bar Association, Standards Relating to Pleas of Guilty (Approved Draft) (New York: 1968).

68. Task Force Report: The Courts, pp. 9-13; 108-119.

69. Section 1.5 at pp. 7-8, 29.

70. Section 1.8 at pp. 8-9.

71. Section 1.8 at pp. 36-7.

72. U.S. Task Force on the Courts, hereafter in this chapter referred to as the "Crime Commission Proposal."

73. p. 4.

74. p. 12; p. 117.

75. p. 12.

76. p. 12.

77. p. 12.

78. p. 13.

79. pp. 70-81.

80. p. 80.

81. The Crime Commission Proposal, p. 12.

82. Rossett, p. 77.

Chapter II

Bargaining: the Development of a Model

Conceptions of Bargaining

The incidence of bargaining

The observation that criminal defendants are usually processed without trial has become commonplace. The defendants who enter pleas of guilty are thought to make up as much as 90% of the total caseload of the courts. The suspicion runs high that these defendants plead guilty and forgo trial in exchange for special considerations from the court. As early as 1929 the high incidence of guilty pleas was noted and thought to indicate just this kind of bargain between the defendant and the court. According to a survey of Cook County courts made in that year:

> When the plea of guilty is found in records it is almost certain to have in the background, particularly in Cook County, a session of bargaining with the State's attorney. If the prisoner is charged with a severe crime which for some reason or other he does not care to fight he frequently makes overtures to the State's attorney to the effect that he will plead guilty to a lesser crime than the one charged... These approaches particularly in Cook County often are made through another person called a fixer. We found many cases in which the plea accepted and the punishment inflicted seemed trivial in comparison to the magnitude of the crime committed.[1]

Conceptions of bargaining in the courts have changed little since 1929. Identified variously as plea bargaining, plea negotiation, or bargained justice, the process by which cases are decided without trial is still assumed to be a conscious exchange between the State and the accused. The defendant offers to plead guilty and the prosecutor -- who needs to maintain his conviction rate efficiently -- offers a reduction in the defendant's penalty. Like the Cook County fixer, the prosecutor who makes

a bargain of this type is seen as acting outside the law, and the practice is hidden in most courts.

In part because bargaining has remained clandestine, little is known about the process, or even whether it resembles the model described in the Cook County survey. Indeed, what is the evidence that bargaining exists at all or that it is actually "plea" bargaining? What we do know about bargaining is confined almost entirely to statistics which measure the incidence of guilty pleas and to one ambitious survey of prosecutors and judges.

Statistical views of bargaining provide evidence of the high incidence of guilty pleas, but do not convincingly link pleas to a bargaining process. As a nationwide average it is estimated that nearly 90% of all defendants plead guilty. Many analysts imply that the very frequency of guilty pleas indicates that pleas are used for bargaining devices. Realizing that this claim is unsubstantiated, other studies have looked for evidence that these pleas were related to pressures from the court. One found that at least one-third of those who plead guilty had originally plead not guilty and then chosen to change their pleas.[2] The study reasoned that defendants would not have changed their pleas to guilty unless they had been offered inducements. A third attempt to make this same argument looked at the rates of dismissed charges, which in some courts is as high as one-half of all cases entered.[3] While no further evidence was available, it was contended that this rate is too high to be attributable to anything but bargains which trade guilty pleas for the dismissal of charges.

The inferences drawn from these studies fail to establish the existence of bargaining. Even as measures of guilty plea rates they are of

questionable validity. The estimated incidence of guilty pleas, for example, is based on the aggregate of both felonies and misdemeanors. If the figure is calculated for felonies alone, it is reduced from a spectacular 90% to as low as 70%, indicating that perhaps the meaning of guilty pleas may be different in more serious cases. There may even be some evidence that the use of the guilty plea is declining. In 1967, guilty pleas were entered in 73% of cases in the United States Courts; since then the rate has dropped to nearly 60% in some courts.[4] This declining rate could indicate a new fervor for trial or, perhaps, efforts to limit guilty pleas. In either case it weakens further the credibility of the guilty plea rate as evidence of bargaining.

Types of bargains

To measure bargaining by focusing on the guilty plea clearly requires substantial leaps of faith. The fact of bargaining must be inferred from the indications that large numbers of defendants are pleading guilty. The need for more convincing measures of bargaining prompted the American Bar Foundation to sponsor a study of the processes involved in the conviction of criminal defendants.[5] The results of the study -- especially as reported by Donald Newman[6] -- and those which followed it have produced a second kind of data for establishing the existence and the nature of the bargaining process. The study focused not on the plea, but rather on the kinds of inducements available to the prosecutor and the judge and estimated how often each was used to urge a plea of guilty. It observed that the prosecutor through the discretionary powers given him by the court can, for instance, reduce or even drop the charges against a defendant. The prosecutor

with the judge's cooperation can also promise to secure a lighter sentence for the defendant, in trade for his guilty plea.

The results of Newman's study provide not an empirical observation of bargaining but a comprehensive statement of the kinds of bargains that might be offered by a prosecutor. By focusing on inducements to bargaining it avoids the fallacy of inferring inducements from the incidence of guilty pleas, but it still fails to give insight into the dynamics of bargaining. What we do learn from Newman is that there are four types of bargains which might be offered to a defendant in direct exchange for a plea of guilty: bargains over the charge, bargains over the sentence, bargains over concurrent charges, and bargains involving dropped charges. Newman also speculates on the interests a defendant might have in accepting each type of bargain and on the differing roles of the prosecutor and judge in the process.

Newman found that the power of the prosecutor to reduce or modify the defendant's charge gives him a powerful set of inducements to offer. While in theory the judge reviews the decision of the prosecutor, it is clear that he takes little active part in controlling the charge.[7] Before the charges have been filed the determination of the offense category is strictly the province of the prosecutor. After the charges have been determined, there is usually too little information available about the crime or about the defendant to enable the judge to evaluate the charges. Even after sentencing there may be little indication in the record that the charge has been modified as a result of the defendant's plea of guilty, and therefore, scant basis for judicial review on appeal.

Newman believes that the prosecutor makes use of this power to offer defendants the chance to change their charges in about 20% of the bargains which take place. To the defendant he attributes several motivations for accepting the prosecutor's offer. The most evident is, of course, to reduce the seriousness of the change -- and thus, the penalty. By charging the defendant with a less serious offense the prosecutor can, in effect, confine the upper limits of the judge's sentencing power. Especially in courts in which there are maximum penalties set through the penal code, the reduction of a charge to a lesser offense is tantamount to a less serious penalty.

In courts in which mandatory minimum sentences have been set, the pressures on the defendant to enter into this kind of agreement with the prosecutor may be even stronger. The goal in this kind of agreement is to see that the defendant's charge is changed to a category for which there is no minimum sentence. In many courts, this process of charge reduction appears to have been routinized. Prosecutors are suspected of routinely overcharging defendants in order to increase the chances that they will bargain for a charge reduction. Sudnow found that in public defenders' offices, prosecution and defense may even possess a common set of formulas which they use as routine mechanisms for reducing one charge to another.[8]

While the motivations Newman assigns to defendants are primarily associated with "getting off" lightly, he also acknowledges that some might be concerned with the ways in which they could be labeled by association with some kinds of crime. Especially in the case of "victimless" crimes like prostitution, homosexuality, and drug abuse, the defendant may

seize the opportunity to be charged with a related but less stigmatizing crime in exchange for agreeing to plead guilty.

The judge replaces the prosecutor as the central figure in bargains which promise light sentences rather than reduced charges. In 50% of the cases observed by Newman the judge -- or sometimes the prosecutor -- promised the defendant a more lenient sentence in trade for his waiver of trial. Both in its initiation and its consequences, this kind of bargain is different from bargains over the charge. In charge-related bargains, the prosecutor has the power to control the offense category and counts heavily on receiving no interference from the judge. In bargains over sentences, however, Newman found that, though the prosecutor recommended a bargain to the judge, he had no guarantee that the bargain would be kept. For this reason it was often the defense attorney, the judge, or even the defendant himself rather than the prosecutor who initiated the proposal for a sentence-related bargain.

The basis for bargains which lead to dropping or consolidating charges is quite different from the pattern of bargaining over the sentence or the charge. Newman found that the court most often offered the defendant a reduced sentence or charge when it lacked evidence to establish his guilt. Even when the State's case is strong enough to support a conviction, however, the prosecutor may want to bribe the defendant anyway, in exchange for information or merely for the ability to process the case rapidly. If the defendant is cooperative, the prosecutor may agree to forget some of the defendant's charges, or at least, make it possible for him to receive concurrent, rather than sequential, sentences for his crime. Often bargaining involving concurrent or dropped charges takes

place when the defendant is a first time offender who needs to minimize his record or where the victim is a relative or friend of the offender, and thus,is not eager for conviction.

As ideal types, Newman's categories are a fair statement of current conceptions of the bargaining process. He provides a comprehensive list of disposition-related inducements to bargaining and a good sense of the motivations of the judge and the prosecutor for agreeing to compromise the disposition of a case. The typology which organizes Newman's findings, however, may in fact describe only a limited portion of the bargaining process and only a single set of roles and motivations. Because Newman has concentrated on those inducements to bargain which relate to the outcome of the case, he can identify only one kind of bargaining currency which might be offered by the prosecutor and the judge. His concentration on the guilty plea as the defendant's vehicle for bargaining similarly ignores other possible inducements the defendant himself might offer to the court and fixes bargaining only at one stage of the criminal process -- the entering of the plea.

Other studies also indicate that the behavior Newman attributes to the actors during bargaining may be more complex than he has described. His prosecutors and defendants share knowledge of bargaining possibilities and make bargains calculated to affect the disposition in predictable ways. The President's Crime Commission, however, describes a completely different set of bargaining relationships which create "tacit" not overt bargains.[9] In this kind of bargain, the defendant pleads guilty only because he senses that guilty pleas do "better" in court. Without prompting from court personnel or any negotiations, the defendant enters his plea and hopes for

favorable treatment. While the defendant has no stable expectation that he will be given a concession for his plea, the attitude of many judges that a guilty plea indicates the defendant's commitment to correction, combined with the court's preference for processing defendants without trial probably assures that the defendant will indeed get his "tacit bargain."

As will be argued in the next section, however, the debate over bargaining has not recognized the possibility that bargaining might be tacit, or even that it might be broader than Newman's categorization. Essentially, the debaters have usually seized on the high incidence of guilty pleas as evidence of "plea" bargains. Like Newman, participants in these discussions of bargaining have rarely strayed from notions of bargains between prosecution and defense over the sentence or the charge. As we will show, the motivations attributed to the bargainers do not often differ significantly from those Newman found: a prosecutor who wants information, speedy cases, or protection from losing a case; and a defense which wants to minimize penal time or avoid a damaging criminal label.

The Debate Over Bargaining

A major source of definition of the bargaining process has been the debate which has arisen over its domination of the courts. Regardless of their lack of empirical base, the studies which called attention to the frequency with which cases were processed by bargaining sparked enthusiasm for evaluating bargaining. Is bargaining inherently coercive to the defendant? How is the defendant affected by the process? How well does bargaining serve the diverse goals of the court?

The rush to address these issues has involved the appellate courts, professional court administrators, lawyers, and sociologists. The thrust of appellate court activity has been primarily -- though not consistently -- to establish the unconstitutionality of bargaining. Much of the rest of the debate has been directed toward seeking a justification for bargaining, especially on the grounds that it is necessary to the operation of the court. Each position in the debate has been based on an implicit model of the bargaining process -- suggesting why bargaining exists, how it is conducted, and what roles it requires.

This section will present four major questions which have dominated the debate over plea bargaining: Is bargaining Constitutional? Can it be justified on the grounds of its necessity for the efficient operation of the courts? Is it a necessary extension of discretion given to court personnel? Or can bargaining be justified by its role in furthering rehabilitative goals? Since each of these questions has been addressed by a number of groups with differing roles in the criminal justice system and conflicting interests in bargaining, we cannot provide a complete

chronicle of the debate. Instead, our focus will be on identifying the assumptions and on evaluating the arguments of each general stand on bargaining.

Constitutionality

The issue of whether bargaining is equitable is most often translated into questions about its Constitutionality. Certainly the preponderance of lawyers and judges among the critics of bargaining have encouraged the debate to be framed as a legal, as much as a philosophical or moral argument. What the appellate courts have asked about bargaining is the same question they would ask about any practice which involves giving up a right: is the citizen giving up his right freely? Because this is the proper legal issue, the appellate courts' considerations have taken place on very narrow grounds and centered entirely on deciding what it means to bargain "freely." The results are ambiguous and present conflicting views of bargaining.

The most direct reason why the courts can consider bargaining on Constitutional grounds is that it requires the sacrifice of a right. In agreeing to plead guilty and waive the right to trial a defendant invokes one of the most time-honored principles of law:

> When an individual forgoes the exercise of a Constitutional right in order to obtain or retain a benefit from the State, established doctrine requires that the courts examine such an exchange to determine if it places an undue burden on the exercise of the right and hence, is unconstitutional.[10]

By its nature as the exchange of a right for a benefit, then, bargaining is subject to suspicion as potentially unconstitutional.

Because of the particular right which bargaining trades away, the attention to the Constitutionality of the process has been unusually vigorous. For the appellate courts the Fifth Amendment right to trial has been the critical element of the adversary system, differentiating it from the inquisitorial model of justice. The appellate courts have long emphasized the importance of trial. Trial is fundamental, for example, because it prevents the State from overwhelming the defendant and thus preserves the balance of interests in the court.[11] It is only during a public trial, these opinions argue, that the defendant can be assured the right to remain silent, to offer evidence in his behalf and to compel witnesses to appear. Duncan v. Louisiana insists so vigorously on the importance of the trial that it appears to argue that a trial must be held even in cases in which the defendant himself would be satisfied with a waiver of his trial rights.[12]

While the liveliness of the appellate courts' activity can probably be attributed to these strong opinions about the importance of trial, its focus has been determined by legal tradition. The role of the courts is not to consider whether a citizen can sacrifice a right, but rather the manner in which that right is relinquished. From practice in the appellate courts, from the requirement of due process of law, and as specified by the Rules of Criminal Procedure the standard for judging the sacrifice of a right is whether it is made "voluntarily and knowingly."

In the case of bargaining, this means that the practice might be said to be Constitutional if the defendant is not coerced into pleading guilty and if he understands the significance of the guilty plea. The history of appellate decisions regarding bargaining has been a series

of attempts to decide what it means for a defendant to understand a plea and how to determine whether he has been coerced. The question has been defined as determining the characteristics of a "knowing" and a "voluntary" plea.

The knowing plea

The courts' attempts to define what it might mean for a defendant to "understand" a guilty plea reflect conflicting assumptions about criminal defendants, their abilities to use information, and their role in the bargaining process. At one extreme, cases have determined that a defendant can be said to understand the act of pleading guilty if he is merely told what the charges are to which he is responding. A 1941 Supreme Court decision argued that the "first and most universally recognized requirement of due process" was to give the defendant "real notice of the true nature of the charge."[13] In many jurisdictions this standard is interpreted merely as requiring the reading of the charging papers and,thus, bringing to the defendant's attention the seriousness of the charge. Where the defendant is also represented by counsel even this minimum standard is often not followed.

In contrast, however, more recent cases have implied that the defendant cannot understand the significance of pleading guilty unless he is given accurate information about all the implications of the plea. In Pilkington v. U.S.,[14] for example, the trial court had explained to a defendant that the maximum sentence he might be given was five years. When the defendant agreed to plead guilty under this assumption and was then given a six year term, he appealed the case. The appellate courts held that when the court advises the defendant that he will receive a

specific sentence and a different sentence is imposed after he pleads guilty, the plea should be voided on the grounds that it was based on inaccurate information and, therefore, "not knowing." Other cases can be interpreted similarly as arguing that,whenever a defendant is influenced by inaccurate information, the plea should be declared not knowing, regardless of whether the information was the result of deceit or of oversight on the part of the court.[15]

What has emerged as a standard, then, is that a defendant understands the significance of accepting a bargain (and has a "knowing" plea) if he has been advised of the nature of the charges against him and given an accurate statement of the consequences of entering a guilty plea. The courts make no attempt to take into account whether the defendant absorbs this information or whether he can, in fact, employ it to make a decision. Rather, possibly because courts must review cases via their transcripts, they have developed standards that can be applied to the recorded statements of actors in the court. Thus, the focus becomes whether the court actually told the defendant about his charge, whether the charging papers were read, or whether the judge remembered to explain the pleading process -- not how the defendant reacted.

The deliberations of the courts, then, have been limited to trying to refine the requirements for what information the court must give the defendant. The courts have grappled continuously and unsuccessfully with what it might mean to inform someone of the "consequences" of accepting a bargain. Their decisions do reflect some understanding of the complexity of the bargaining process -- that it might not be possible to assist a defendant in predicting all the variables which might determine

whether a bargain is kept. "Consequences" have been interpreted variously by the courts as entailing a knowledge of what grounds might establish guilt in a trial, how a court might view a particular crime, and what the theory is that guides the choice of penalty for a crime. Just as the influences on a bargain are limitless, then, there is no limit to the consequences of a guilty plea -- and to what a defendant might need to be told in order to "understand" a plea. Must he understand the possible correctional alternatives open to him? Does understanding entail knowing about the effects of a guilty finding on future criminal cases with which the defendant might be involved? Should the defendant be informed of the loss of rights that can be associated with criminal conviction?

Because the courts failed to establish a consistent, operational standard for judging a knowing plea, they have often fallen back on secondary indicators. Having not decided how much a defendant should be told to assure that he understands the implications of bargaining, the courts have tended to rule that the presence of a defense counsel is assurance enough that the defendant's plea is knowing. Here their assumption of the adversarial model is strong, even with reference to the bargaining process. Though the counsel for the defense is acknowledged to be bargaining with the prosecutor, he is assumed to be able to represent the interests of the defendant fairly -- by telling him the benefits and limitations of the bargain the prosecutor is proposing.

This is not to suggest that the courts have always considered the presence of counsel to be a sufficient condition for establishing understanding. Cases like U.S. v. Davis, in fact,[16] argue that a defendant can charge that he did not understand the meaning of his plea,

even if he was represented by counsel at the time. Instead, the Court seems to have viewed counsel as a means of helping the court communicate with the defendant by providing a more informal means of contact and a "check" on the court's information. In U.S. ex rel Wissenfeld v. Wilkins,[17] for instance, the Court implied that counsel provided a link to the informal decision making structure in the courts and could interpret the consequences of the defendant's plea in light of that structure. In this case, the Court felt that the defendant should have been told that a particular prosecutor usually failed to honor his bargains. It is this kind of intelligence that the appellate courts have envisioned the defense as supplying.

The voluntary plea

The question of how to determine whether a plea is made voluntarily has been more alluring to the courts than the issue of a knowing plea. The role of the prosecutor and his power to set charges have created more than the suspicion that defendants might be routinely forced into pleading guilty through the threat of a prejudiced trial or a severe penalty. Evaluating the degree of pressure which might have been applied to a defendant to elicit a guilty plea has proven to be much more difficult than deciding whether a defendant was properly informed. Measuring the defendant's understanding of his plea might at least be accomplished by an indirect measure -- the level of information the court communicated to him. There is no analogous measure for the degree of coercion the defendant might have suffered, since either implicit or explicit threats are not recordable.

The strategy of the courts, then, has generally been to turn from looking for evidence of coercion in specific bargains, to arguing that bargains are inherently coercive. If the courts could establish grounds for this contention, any offer from the prosecution in exchange for trial rights could be seen as placing undue burdens on the defendant and rendering his plea involuntary. One article which supports this position argues that, in fact, any plea "taken to avoid the risk of being convicted of a more serious crime...is truly no more voluntary than is the choice of the rock to avoid the whirlpool."[18]

The courts' search for Constitutional grounds on which to base a denunciation of bargaining as necessarily coercive has been largely unsuccessful. A long series of cases has appealed to both the provisions regarding self-incrimination and those specifying the nature of voluntary confession in the hopes that these standards could be applied to bargaining. In each case, however, bold assumptions about the nature of bargaining were required. To argue that bargaining is a form of self-incrimination, for example, is to suggest that a defendant has a right <u>not</u> to plead guilty. In other words, the question becomes not whether bargaining coerces the defendant merely to enter a plea, but rather whether it forces him to admit guilt and thus to incriminate himself.

Similarly, to make the case that bargains and confessions are analogous, the courts had to assert not only that they involved like admissions of guilt but that they used similar methods to force "confessions." In this respect, then, bargaining and confessions were viewed by the courts as alike in their reliance on inquisitorial methods, allowing the State to work through coercion to prove its charges against an accused "out of his own mouth."[19]

The analogies between bargaining and other "confessions of guilt" fail to hold for a number of reasons. Even the courts have been forced to acknowledge that the processes by which bargains are made and confessions are given might be critically different. Since the confession is secured in the context of police interrogation, and the plea, in the context of sentencing in open court, the pressures on defendants may not be comparable. If it is also true that counsel is more often present during the plea than the confession, there is presumably a greater check on the court's ability to be coercive.

Because of its belief in the power of the courtroom to "open up" the criminal process, the Supreme Court itself has had to acknowledge differences in the environments of confessions and bargains. In a number of decisions the Court has conceded that given the proper conditions (counsel present, open court, etc.) there could be "honorable" plea bargains that are not inherently coercive.[20] In a remarkable decision, the Court, in Cortez v. U.S.,[21] can even be interpreted to have argued that despite the danger that his pregnant wife might be convicted if he went to trial, the defendant's guilty plea was "honorable." The Court held that the circumstances under which the plea was offered made the plea itself honorable regardless of other pressures on the defendant.

An even more critical assumption made by the courts in their attempts to establish that bargaining was coercive concerns the nature of the guilty plea. A confession which is suspected of having been coerced is overthrown because the circumstances under which it was induced cast doubt as to whether the facts expressed ever actually occurred. A similar argument made about the guilty plea would have to suggest that

any bargained plea is inadmissable because the circumstances under which it was secured make it doubtful that the defendant is actually guilty.

Requiring that a guilty plea be allowed only under conditions of factual guilt, however, would represent a significant shift in the attitude of the appellate courts toward the guilty plea. Even the most conservative interpretation of the guilty plea acknowledges that it is an admission of facts sufficient to find guilt, not necessarily of actual guilt:

> The guilty plea is not necessarily an admission that the defendant engaged in a criminal incident but is a conclusion that there is sufficient evidence for a judge or jury to find that he did so...The court is no longer concerned with whether given facts occured, but only with whether the defendant has made an informed determination that a judge or jury could find such facts on the prosecution's evidence.[22]

The President's Crime Commission extends this argument one step further to suggest that a guilty plea offered in exchange for a bargain must be judged on even more flexible standards than a guilty plea entered for other reasons and -- certainly -- on more flexible bases than a confession. According to the Commission, the plea should be evaluted on ethical gounds, not on factual grounds. The question becomes one of deciding what the defendant's motivation is for pleading guilty. In the Commission's words the task becomes to "distinguish the psychological experience of the defendant who is induced to plead guilty by a prosecutor or judge's promise of sentencing leniency from that of a defendant who is induced to plead guilty by his desire to begin service of his sentence so that he will be released soon."[23]

The judge and voluntary pleas

Just as the courts turned to the defense counsel to be a guarantor that the defendant understood the significance of pleading guilty, they turned to the judge to assure voluntariness. Defining the judge's role, however, has proven to be more difficult. The decisions of the courts reflect a great deal of uncertainty about the ability of the judge to protect the defendant from coercion without getting too close to the bargaining process. Their intent is to maintain a judge who is neutral, in the best adversarial tradition, while still responding to the special roles the bargaining process imposes. The cases which try to resolve this dilemma largely fail again to produce an operational standard for recognizing a voluntary plea.

The decisions of the courts regarding voluntary pleas most often cast the judge in the role of the disinterested observer. The courts count heavily, for example, on the image of the judge to help discourage coercion. The presence of a procedurally correct judge is expected to prevent prosecutorial excesses, including overcharging. In addition, the judge can play a more active role in seeing that procedures are followed. If the defense counsel fails to make the defendant aware of the significance of the guilty plea, the judge can step in and provide the defendant with the proper information. Finally, the judge also evaluates the plea itself. He is expected to gauge the acceptability of the plea by determining that it was voluntary and by deciding whether it is "factual." ("Factuality" in this instance is usually measured by the substantiality of the prosecutor's case; if the prosecutor can sustain a

strong case then the plea is probably factual and the defendant probably "guilty" for the purposes of the court.)

The possible tensions, even among these roles, are clear. Presenting a neutral image to the prosecutors may require that the judge retain his observer's stance. Evaluating the plea, of course, may necessitate information that can only be gained by involvement in the bargaining process. The courts have acknowledged these possible contradictions by trying to create a judge who can remain neutral while occasionally stepping close enough to the negotiations to gather information or advise the defendant.

The court's reasons for stubbornly trying to exclude the judge from bargaining are clearly articulated. They fear that judicial involvement will prejudice a bargain and compromise the symbolic stature of the judge. Because of the power of the judge, his participation in the early stages of the bargaining process could place undue pressure on the defendant and therefore coerce him into entering a plea. The argument is that if the judge appears to concur with the bargain, the defendant will have no choice but to accept the arrangement since he knows that the judge will determine the outcome of the case. As Euziere v. U.S.[24] argues, there is also danger that judicial involvement in bargaining will actually prejudice the results of the case. "A judge who has already started thinking about the defendant's sentence before the trial begins...may have negated the presumption of innocence."[25]

The assumption that it is the judge who will determine the outcome of the case and who has sufficient power in the court to coerce the defendants, is, of course, strongly adversarial. In the adversarial model

the judge -- not the prosecutor or the defense counsel -- is the central actor in the court. When the judge participates in a bargaining process, the appellate courts argue, he compromises his judicial stature and becomes only a kind of quasi-prosecutor. In each of the cases that argue for the separation of the judge from the bargaining process the logic hinges on the symbolic role of the judge in the adversary process. The judge should appear as a "symbol of even-handed justice"[26] and thus, not engage in compromises with either side in the case.

Appellate decisions have not been able to hold consistently to this position in the face of evidence that new roles might be required of the judge if the defendant is to be given due process. In particular, recent procedural reforms, relating to assigned counsel, focused the courts' attention on the fact that despite adversarial assumptions to the contrary, counsel is not always present during the bargaining process. An unrepresented defendant may not have the benefit of advice about the merits of a bargain. A number of appellate cases have also recognized that even represented defendants may receive inaccurate or incomplete information. Without any guarantee that the defendant will be given guidance in evaluating a bargain, the courts have had to re-evaluate the dangers of judicial coercion.

In light of these considerations, it has been difficult for the courts to ignore the potential value of the judge's advice to the defendant and the possible inequity in denying it. As a result, a number of cases have suggested that the judge can offer advise to a defendant evaluating a bargain, as long as he is being "fatherly" (and thus, not coercive). An indication of what might be meant by fatherly judicial

advice is illustrated in U.S. ex rel McGrath v. La Vallee. The trial judge is quoted as offering the defendant an assessment of his case, with and without a bargain. "...If the District Attorney proves the case as he has outlined the likelihood of your being acquitted is not good. Or do you want to take a plea to robbery in the second degree and have some opportunity of receiving a shorter sentence?"[27] The resulting appellate decision held that the judge's remarks did not constitute a denial of due process since they were "not an enticement or threat by means of a prior commitment, [but]...merely a fair description of the consequences attendant on the defendant's choice of plea."[28] The distinction being drawn is evidently that a fatherly judge gives the defendant a fair evaluation of a bargain, without in any way shaping the bargain.

Despite the courts' efforts to maintain an adversarial model of the judge, while still serving the needs created by bargaining, the distinction between the coercive and the fatherly judges remains elusive. It is certainly hard to believe that a judge can advise a defendant on the value of a bargain, without in fact shaping the defendant's responses -- and thus, the bargain. Even if the distinction drawn by the courts seems operational, it is not clear whether bargaining actually subjects the defendant to the levels of coercion implied. The argument of the appellate courts suggests a bargaining process which does not involve the defendant until a final plea decision must be made. Even at that stage the defendant is seen as vulnerable and passive, waiting for advice from either the defense counsel or the judge.

Depicting the judge as the objective evaluator of bargains also has implications for the social structure of the courts. Even staunch

defenders of the adversary model acknowledge that the judge must maintain friendly relationships among his court personnel.[29] Is the judge likely to override consistently bargains made at the discretion of the prosecutor? Is he, in fact, likely to be divorced from the negotiations of people whose interests and bargaining patterns are well known to him?

Administrative necessity

Underlying the courts' deliberations about the equity of the bargaining process is a reluctant admission that the process might indeed be administratively efficient. To a limited extent, the courts have also had to address this issue head on. As a device which may facilitate the speed with which a case is processed, bargaining raises the issue of the defendant's right to swift, efficient justice. Facing this question of whether bargaining actually facilitates the exercise of individual rights has forced the courts to consider what the tradeoffs are between administrative efficiency and procedural safeguards.

The debate over the administrative benefits of plea bargaining has centered on two kinds of arguments. The appellate courts defined the problem as an issue of necessity. Under what circumstances can it be argued that it is necessary to the general welfare of defendants that bargaining exist in the courts? Though the weight of appellate cases falls on the side of denying that bargaining is necessary, some cases have recognized its value as an administrative device. Since the acknowledgment that bargaining might be efficient is not tantamount to admitting that it is necessary to the operation of trial courts, the debate also adopted a second line of argument. For some purposes the proper question is not whether bargaining is efficient, but whether, in fact, the same

ends might not be achieved through less drastic means. Court administrators have, of course, joined the discussion from the position that bargaining is necessary to the courts precisely because no other means are available for assuring an efficient court system.

Appellate court decisions which have tried to weigh the benefits of bargaining have reached conflicting conclusions. Cases can be uncovered which appear to say that the general welfare of defendants is served by the efficiency of bargaining. Barber v. Gladden, for instance, views the bargaining process as a justifiable -- if not desirable -- accommodation to the burdens of the courts.[30] "We do it in the Federal district court. On multiple count indictments, we often accept pleas of guilty to one or two counts...It is an integral part of the administration of justice in the U.S."[31] An even more direct endorsement is found in People v. Guiden which argues that "the acceptance of pleas of guilty to lesser offenses with consequent lighter sentences is perfectly appropriate where the proper and efficient administration of justice will be best served thereby."[32]

In general, it is difficult to find appellate court decisions which give unambiguous support to bargaining. While many cases discuss its efficiency, most imply that the need for efficiency is somehow outweighed by the need for maintaining procedural correctness. The delicacy of this relationship between efficiency and due process, as viewed by the courts, is undoubtedly best illustrated by the debate which arose over United States v. Jackson. In arguing that the death penalty clause of the Federal Kidnapping Act ought to be struck down Justice Stewart stated that "...the evil in the federal statute is not that it necessarily

coerces guilty pleas and jury waivers but simply that it needlessly encourages them'.[33] Would-be interpreters of the case seized on the term "needlessly" suggesting that it implied an acceptance of the fact that some circumstances might necessitate the encouragement of guilty pleas and jury waivers.

By other readers, Jackson has been interpreted to have the opposite implication. In particular, the case is made that pursuing the goal of efficiency is a "needless" sacrifice of trial rights. Justification for this position comes primarily from precedent. It is argued that the history of procedural reform is a history of continual sacrifice of efficiency to the protections of the individual; to do otherwise would be a violation of the purposes of the Bill of Rights. The majority opinion in Bruton v. U.S. is often cited as support for this argument.[34] The court ruled that two co-defendants cannot be tried together if one has already confessed, but will not take the stand. The accompanying opinion read,

> Joint trials do conserve state funds, diminish inconvenience to witnesses and public authorities and avoid delays in bringing those accused of crime to trial...[But to] secure greater speed, economy and convenience in the administration of the law at the price of fundamental principles of constitutional liberty" was to pay too high a price.[35]

A number of other cases do appear to place the same value on "fundamental principles of Constitutional liberty" as Bruton: Miranda v. Arizona[36] requires that involuntary confessions be inadmissible despite the courts' needs for information; and the right to counsel decisions provide counsel to indigent defendants, regardless of the costs. The

applicability of this line of argument to bargaining, however, is not convincing. While joint trials, involuntary confessions, and unrepresented defendants may indeed be more efficient for the courts than are their opposites, they are not necessarily analogous to bargaining. While a case can be processed without confessions, it is not clear that many cases can now be disposed without bargaining and on the assumption of an adversarial system.

The argument has been made, for instance, that bargained pleas are the necessary embodiment of the new roles to be played by the courts. The President's Crime Commission report argues that the courts are no longer actually "truth finders" in every case but, instead, they must focus on "settling" most cases.[37] Trial under this view becomes a luxury, an elaborate mechanism to be used when the facts of the case are not in dispute, but settlement cannot be easily reached. In this view bargaining is the necessary mechanism for the routine settlement of cases.

This stance taken by the Crime Commission and others may appear to be an unenthusiastic acceptance of bargaining, viewed merely as a substitute for an outmoded trial system. Instead, the Crime Commission report argues vigorously that the increased use of bargaining may actually increase the effectiveness of the trial system for those few cases in which it is still the appropriate mechanism.[38] If trials were to continue to be used routinely, the Report suggests, they would lose their role as an accurate mechanism for truth finding, compromise the presumption of innocence, and violate the requirements of proof beyond a reasonable doubt. If, on the other hand, trials are restricted solely to those cases

which allow thorough preparation on both sides, principles of innocence and proof might remain meaningful to the court. In this sense, then the report argues that bargaining is necessary not only to fill new fact finding roles demanded of the court, but also to preserve some elements of the trial system.

The courts have sometimes conceded even this point -- that most cases might be more efficiently processed by bargaining than by trial. What they have been unwilling to concede is that bargaining is the best -- or the only -- means for realizing this efficiency. Instead, the principle of "less drastic means" becomes a second grounds for argument. One critic, who begins with the premise that the primacy of the individual in the criminal process should be protected regardless of administrative concerns, uses the principle of less drastic means to argue that other strategies could just as effectively replace plea bargaining.[39] Alternative strategies include allocating additional court personnel in order to provide more resources for handling cases and decriminalizing some forms of behavior to reduce the total number of cases the courts must handle. Even if bargaining is justified on grounds other than its efficiency, the principle of less drastic means is still used as an argument. The contention that bargaining makes possible alternative correctional measures, for example, can be countered by suggesting that a less drastic proposal would be for the legislature to lower or eliminate harsh mandatory minimum sentences and give judges more sentencing discretion.

The crux of this debate becomes whether these other mechanisms can indeed make possible the same level of efficiency as bargaining. In fact, there is no empirical evidence that measures the efficiency of

bargaining itself. There is reason to believe, however, that the mechanisms offered as alternatives to bargaining would result in considerable increases in expenditure and time to the court. One analysis predicts that if the number of judges and prosecutors were increased to respond to the current demand for trials, an increase of nearly four times the present level of personnel would be required.[40] If, on the other hand, bargaining were eliminated and personnel not increased to this level, the result undoubtably would be an overwhelming backlog of cases, and an increased need for facilities and defense counsel. Evidence suggests, too, that decriminalization might actually increase the demand on the courts' resources. Where some types of "victimless" crimes have been decriminalized, the result has been an increase in the number of cases requiring trial, since the same defendants are then arrested on more "serious" charges.[41]

The debate over the impacts of bargaining on the operation of the courts may suffer more than anything else from a lack of empirical base. Little is known about the efficiency of bargaining, and certainly, there is only sparse evidence as to the effects of increasing the number of cases processed by trial. In this respect, the tendency of both sides to link the efficiency of bargaining with an argument for its necessity to the courts is particularly interesting. Most of the supporters of bargaining assume that it is necessary to the courts because the courts could not manage their caseloads in any other way. The search for "less drastic means" also implies a belief that bargaining would be necessary only if it were the most efficient device for processing defendants.

The premises on which both sides argue seem as similar as their willingness to believe that bargaining is efficient. Both the appellate courts and court administrators apparently view bargaining and the protection of individual rights as direct tradeoffs.[42] Both imply that if the efficiency of the court process is to be maintained, then some element of due process must be compromised. Even the strongest supporters of bargaining most often fall back on the utilitarian argument that while bargaining may not honor the rights of any individual defendant, it does aid the general welfare by making the system more efficient. Just as the contention that bargaining is efficient cannot be supported, however, the argument that it compromises individual rights bears empirical examination. It is true that bargaining and the adversary process are inherently contradictory, but there is no evidence that bargaining does not strictly maintain the "rights" of defendants through its own processes.

Bargaining as discretion

A third issue which has dominated the discussion of plea bargaining is whether bargaining can actually be justified as an extension of the discretionary powers of court personnel. In a sense, it, too, becomes an argument for the necessity of bargaining since it suggests that court personnel use bargaining as a way of correcting problems in the court. What bargaining accomplishes in this view is meeting what one observer has called the inevitable need for mediation between laws and human values.[43] It may be that through bargaining the prosecutor is able to juggle his needs to maintain a conviction rate and an efficient case schedule with the individual needs and rights of defendants.

Most of the basis for discussing bargaining as a form of discretion comes from experience in other parts of the criminal justice system, and what does derive from a consideration of the courts focuses strictly on the prosecutor. Traditionally, it is prior to accusation and after conviction that notions of due process are most often subordinated to the power of personnel to exercise discretion.[44] Before accusation there is extensive police and prosecutorial discretion to determine what laws to enforce, against what people, and under what situations. After guilt is ascertained there is de jure discretion of sentencing, parole, and correctional dispositions.

The stage at which this exercise of discretion is most fully recognized is prior to accusation, when the police must make decisions about arrest. This is true despite decisions of the appellate courts which have insisted on a goal of full enforcement of the law by the police[45] and despite formal goals articulated in police manuals. Instead, the dominant argument has been that strict interpretations of the law cannot guide the operating decisions of the police, and thus, full enforcement of the law is not possible.

The basis for supporting the exercise of de facto discretion in the decisions of the police is the argument that no guidelines provided by statutes and manuals can predictably guide the decision to initiate the criminal process.[46] The initial decision about whether to deploy equipment or investigatory forces is dictated to a great extent by availability of resources and thus, is at the discretion of the police leadership. Once the individual policeman is placed on duty, he is faced with the decision to arrest, and he can take at least four different courses of action:

arrest and initiate proceedings; arrest and then release the suspect; provide an on-the-scene solution to the problem; or ignore the incident and take no action at all. The standards for choosing among these options are certainly not statutorially dictated, and even informal guidelines for action are nonexistent for those cases which appear to require immediate action.

The closest analogy to the kinds of decisions made by the prosecutor during bargaining are those cases in which the police may potentially make the decision not to institute the criminal process. In arrest decisions, the most commonly cited example of this type are those offenses which are considered to be "overcriminalized." With typically unenforced crimes like gambling, prostitution, and other "victimless" offenses it falls to the police to decide when, if at all, this kind of conduct should be defined as criminal. In the case of those offenses which have a clear social objective, but relate to private sexual conduct, strict enforcement could require an understanding of the legislative intent. Even where statutes may provide a clear description of other offenses, it still falls to the police patrolman to reinterpret the statute in light of the particular circumstances involved in the incident.

The case for de facto police discretion rests on a belief that the policeman's decision to arrest -- especially in these "overcriminalized offenses" -- cannot be strictly regulated or even guided. A similar case is made for the necessity of prosecutorial discretion. It falls to the prosecutor to decide whether to bring charges and which charges to bring. Like the policeman's decision to arrest, this decision is not regulated by

any clearcut set of guidelines. Among the factors which may play a role are the evidence that an offense took place and that the defendant was probably involved, the likelihood of conviction, the strength of the sanctions against the offense, and the costs of conviction. In a sense, the prosecutor is being asked to decide whether bringing a charge would be in the societal interest, as viewed by the court; the threat to the community represented by the defendant is to be weighed against the probability that the case can be inexpensively and successfully prosecuted.

The primarily link between the role of the prosecutor and bargaining exists because the prosecutor has the discretion to engage in this kind of calculus. In this respect the power of the prosecutor to bargain may be merely an extension of the prosecutor's discretion to control a case before trial. If the prosecutor can refuse to prosecute or to prosecute only in certain cases, then he can also select and alter charges when he chooses. Appellate court cases can be generally interpreted as upholding the prosecutor's right to exercise this level of discretion.[47] For the observer eager to support the practice of bargaining this can be said to constitute an a fortiori case for bargaining as an extension of prosecutorial discretion.

By a liberal interpretation, then, the prosecutor has the discretionary power to bargain -- or at least to control the charges against the defendant. But why must he bargain, so that bargaining actually becomes viewed as "necessary?" The response offered by many observers of bargaining is related to the responsibilities of the prosecutor. In addition to bringing charges against defendants, he must also maintain a satisfactory conviction rate and see that the criminal process "works." Bargaining

may be one mechanism for filling these roles -- and in this sense may be necessary.

The relationship which is believed to exist between bargaining and conviction rates is by now almost trite. The prosecutor must demonstrate that he has won enough cases, or more often, that he has not lost many cases. His problem is that he must predict the chances that a given case can be successfully prosecuted, though at the time the decision to charge must be made he has little information with which to make a judgment. Bargaining, then, may be a way to resolve the uncertainty about conviction in a case. In this sense the argument can be made that bargaining is necessary to allow the prosecutor to control the number of convictions, without wasting his resources on any but the most contested cases. Lloyd Ohlin, in fact, observes that the job of the prosecutor is designed on just this assumption -- that few of the prosecutor's cases will have to come to trial.[48] Since the prosecutor is given resources on that basis, he must assure that there are either real or apparent sentencing concessions to urge defendants not to elect trial.

As the State's representative in criminal cases, in theory the prosecutor has a broader responsibility than conviction. He must also see that the criminal process "works" to punish, deter, or rehabilitate defendants. Just as the ad hoc decisions of the police may make it possible for law enforcement to be flexible enough to apply to operating situations, prosecutorial discretion is seen as necessary means for ameliorating the problems of the court. If trial is an imprecise method of finding the truth, for example, it is of benefit to both sides if the prosecutor can exercise his discretion to bargain a case where the facts

are in doubt. Thus, by this kind of logic, it can be said that one of the inadequacies of the trial process is being corrected when the prosecutor chooses to bargain rather than chance the uncertainties of the trial. In a discussion of the Responsibility of the Defense Lawyer, Steinberg takes the position that bargaining can also be a means of humanizing the criminal process.[49] In those cases in which trial might be especially stigmatizing the attorneys can exercise the option to bargain.

Whether bargaining can fill this ambitious role is unclear. As a creature of the court, there is certainly no evident reason why bargaining should be more "humane" or less risky than trial. Arguing that a policeman should make flexible interpretations of statutes to fit individual arrest situations may be a realistic case for the exercise of discretion in law enforcement. Does the analogy in fact hold for the exercise of bargaining in the courts? If bargaining centers on the decision to reduce or drop charges and, thus, necessitates the prosecutor's ability to intrepret charges liberally, then it is necessary on the same grounds as police discretion. If, on the other hand, it is a process which goes beyond this decision or which is controlled by personnel other than the prosecutor, the case for bargaining as discretion may be weak.

Bargaining as sentencing

In a real sense bargaining is a form of sentencing. Just as it can be argued that the bargaining process is an extension of the discretionary power of the prosecutor it is also an outgrowth of the judge's responsibilities for pleading, adjudication, and disposition, combined into one process. The debate over bargaining has frequently settled on this view of the process to ask how bargained sentences differ from those made

after trial. Because criteria for evaluating even sentences levied at trial are sparse, the arguments have most often fallen back on less direct comparisons. The appellate courts have concentrated on the opportunity structure provided to the defendant whose case is being bargained, charging that bargaining is not offered to all defendants equally. A vocal rebuttal has been that it is this very ability to treat defendants differently and individualize sentencing that makes bargaining a successful device for meeting rehabilitative goals.

"Differential sentencing" is an issue to the courts because it violates traditional notions of how sentencing decisions are made. Among the factors which have been held up as equitable guidelines for sentences are the gravity of the offense, the social history of the defendant, and the kinds of correctional alternatives available. Any other grounds for sentencing are seen as evidence of "differential" treatment of defendants. This would include personal characteristics of the defendant, pressures from the court, or in the case of bargaining, the fact that the defendant has made an agreement with the prosecutor.

The case that bargaining is a kind of differential sentencing, however, has not been clearly made by the courts. By some interpretations bargaining is differential sentencing because it bases the sentence on factors other than those traditionally accepted as "valid" correctional considerations. In particular, one intent of bargaining is, of course, to circumscribe the grounds the judge may use for sentencing and his ability to give a severe penalty to the defendant. The effect, then, is to limit the range of punishment the judge can impose and to make it impossible for

him to sentence the defendant with only the offense, the defendant's record and correctional alternatives in mind.

Perhaps because no one is confident that considering only the offense, the record and correction produces equitable sentences, bargaining is also attacked as differential sentencing on other grounds. The argument is made that not all defendants have an equal opportunity to bargain. The evidence for the "equality" of bargaining opportunity is ambiguous. Though the court requires that the plea be entered only if the defendant understands his situation, it is certainly not evident that all defendants have equal access to information about their circumstances. Also unknown is the extent to which court personnel extend the offer to bargain to all defendants or how they decide what bargain each defendant "deserves."

The few appellate court decisions which have considered the equity of bargained sentences have accepted the theory that not all defendants are treated equally during bargaining and that this constitutes differential sentencing. They have become involved primarily in those cases where defendants were supposedly "punished" for not cooperating with a trial court in its efforts to bargain. The well-known case, North Carolina v. Pearce, for example, is often used to justify this critique of bargained pleas.[50] The court held that it is a violation of due process when a state punishes defendants who appeal lower court convictions, by imposing harsher sentences on those who insist on appealing. The court argued that a defendant's sentence can be increased on retrial only if there have been events subsequent to the original trial that cast new light on the defendant's "life, health, habits, conduct, and mental and

moral propensities,"[51] and certainly not because the defendant appealed his case. Implicit, then, is an analogy to bargaining. In this view bargaining may impose a harsher, or at least disparate, sentence on defendants who choose to exercise their trial rights, just as in Pearce harsher sentences were imposed on those who exercised their rights of appeal. This indictment of bargaining has been evident in a limited number of cases in which different penalties appeared to be given to defendants who admitted to charges than to those who chose to defend their case through trial.

It is possible to respond to these charges against bargaining only with partial success. No evidence exists with which to deny that bargaining produces sentences which are based on factors other than the defendant's record, his offense, and his correctional potential. Certainly, if nothing else, the sentence may be influenced by the bargained agreement itself. There is also no data to support or dispute the claim that bargaining rewards some kinds of defendants more than others and in this sense does not provide equal opportunities to bargain. Probably because of the lack of data on these aspects of bargaining, the supporters of bargaining have avoided the temptation to argue that bargaining is not differential sentencing, and instead, they have attacked the grounds on which the appellate courts and others have argued. They reject the underlying premise of the courts that bargaining necessarily affects the sentence at all, and they charge that in those instances when a sentence is actually bargained the results are no more differential then are sentences after trial. Finally, they suggest that differential sentencing actually supports the goals of the courts.

The evidence that bargaining is not a consistent factor in determining sentences comes primarily from sentencing institutes held for trial judges and, in particular, a 1959 Pilot Institute on Sentencing.[52] Each judge in attendance was asked what he thought would be the difference in sentences given to defendants who had pleaded guilty as compared to those who were found guilty following trial. Only one group of judges felt that a defendant would be penalized for taking his case to trial, since an admission of guilt is the first step toward rehabilitation and ought to be encouraged. A second group expressed the opinion that the defendant who elects trial deserves a harsher penalty only if his defense seems contrived, and thus, he appears not to have demonstrated his interest in rehabilitation. The rest, however, felt either that the admission of guilt should be rewarded only in consideration of the particular crime charged or that the willingness of the defendant to plead guilty should have no independent significance in sentencing. In each case, the judges' perception of proper sentencing policy apparently rested less on the fact that the case was bargained than on the significance of the guilty plea as an indicator of rehabilitative potential.

The validity of this data is clearly dependent on the degree to which a judge would admit that he was influenced by the "latent" process of bargaining. The problem of discovering what factors actually influence a judge's sentencing decision also haunts efforts to prove that all sentencing, whether bargained or not, is "differential." If nothing else, studies which attempt to prove that sentences are based on non-correctional factors are more extensive than those which have looked at the relationship of bargaining to sentence

These studies have most often tried to measure the outcomes of a large number of cases and to show that disparate sentences have been imposed in cases in which neither the offense nor the defendant appeared to be different.[53] The basis for these disparities is usually sought in judicial prejudice against particular types of defendant. Most commonly cited as factors which prejudice sentencing are the defendant's age, sex, and race, though none of the studies which have attempted statistical correlation of these variables to case outcome can be said to be conclusive.

More recently it has been fashionable to reject the idea that judges base sentences on their own attitudes toward defendants. Instead, disparities are thought to be a product of the judge's interpretations of local policy. The most comprehensive statement of this position is supplied by John Hogarth, who argues that the logic used in most analyses of sentencing is to infer judicial attitudes from the already inadequate data on the outcomes of cases.[54] As support, he argues that if factors such as the type and severity of the crime, the number of criminal acts charged, and the offender's past record are taken into account in analyzing sentences, much of the apparent variation by age, sex, and race disappears. Hogarth believes that if the sentencing behavior of judges were studied directly and not merely inferred from case outcomes, variation in sentences would be explained less by the attitudes of individual judges and more by the context in which they work. "Apparently unequal sentences for similar offenses may also result from difference in the social contexts in which the courts operate, such as differences in crime rate, or in public opinion, or in the resources to deal with offenders available locally."[55]

Whether Hogarth's analysis of influences on sentencing is credible is, of course, dependent on how accurately the behavior of judges can be observed. Hogarth put his faith in questionnaires on which judges were asked to record the factors behind each sentencing decision. If sentences are indeed the result of a single decision by a judge, if judges are aware of the decision processes they use, and if they would record their perceptions honestly, then Hogarth's conclusions are probably valid. All that is documented is that different sentences are given to defendants with what appear to be the same offense, record, and correctional possibilities. Whether the differences are due to defendant characteristics, differences in local courts, or some other factors, is yet to be determined.

A final line of argument turns this issue around, by saying that sentencing ought to be "individualized." If the court is indeed to be enforcer of local mores, then it must be able to take local expectations and definitions of crime into account, along with the more traditional factors.[56] Accepting this view of sentencing, Hogarth suggests that we might alter our attitude toward sentencing disparities. "The best that can be hoped for is equality of consideration...in roughly similar situations courts ought to consider similar factors and have similar reasons for selecting particular forms of sentencing."[57]

A stronger motivation for condoning "disparities" is the need to consider treatment goals in the sentencing process. While sentencing theories have traditionally stressed the need for uniformity, such innovations as the indeterminate sentence, parole, and the juvenile court have been based on the belief that the particular personality of the offender and the circumstances of his offense should be taken into account if the

defendant is to be "treated" for his problem. Thus, individualized sentencing is closely linked with the concept of treatment as the goal of the criminal process. This implies further that sentencing which looks to treatment should emphasize "fact finding" over "truth finding." In the penology of individualization "...the judgments called for are professional and diagnostic in character, rendering legal controls inappropriate and destructive, and unnecessary to afford safeguards against abuse."[58]

The perceived relationship between bargaining and this theory of sentencing is clear. Bargaining is viewed as a mechanism which allows court personnel to engage in a process of fact finding, leading to a recommendation unique to the circumstances of the case. Whether the recommendations which result from bargaining actually are guided by any conscious goal of treatment is yet undemonstrated. To those who argue for bargaining as a means of achieving rehabilitative goals, the belief is less that bargaining does emphasize treatment and more that it is potentially a better mechanism than trial for enabling individualized sentencing.

Sanford Kadish suggests that there are a number of reasons why individualized sentencing cannot be implemented through the criminal trial process.[59] According to Kadish, the half-hearted efforts to implement individualized sentencing have been plagued by doubts about the ability of a treatment oriented court to accomplish deterrence. There is a strong suspicion among courts that the goals of rehabilitation and deterrence are mutually exclusive and a court which is visibly treatment oriented will lack the image of authority necessary to deterrence. A second factor may have been the fear that gathering the information necessary for

individualization of sentencing will cost the courts in time and resources. This becomes an especially strong fear, since the ideology of treatment is often so ill-defined as to provide no substantial basis for decision making.

Sentencing as part of the bargaining process is thought to be free of these constraints. If bargaining maximizes efficiency, it is not bound by the formal goals of the criminal justice system. Because it is also not an overt process, it is not burdened by formalized procedures or requirements for information. In this sense, then, it may permit a convergence of the bureaucratic goals of the court with the ideology of individualized sentencing and treatment.

Blumberg suggests, in fact, that there is a symbiotic relationship between treatment and bargaining.[60] Just as bargaining is thought to facilitate individualized sentencing, Blumberg assumes that ideology of treatment has fostered the growth of bargaining. Rather than being limited to the offense and the defendant's record as an indicator of the sentence, by borrowing the theory of individualized sentencing, the court can turn to the defendant himself, his behavior, personality, and social circumstances. This shift in the concerns of the court allows flexible and rapid disposition of each case through bargaining. In particular, it has the effect of eliminating the need for proof beyond a reasonable doubt and, instead, allows a decision making standard of a "fair preponderance of evidence,"[61] based more on the characteristics of the defendant than on the facts of the offense.

Blumberg's attitude toward bargaining here is hardly sympathetic. In fact, he is deploring the degree to which the treatment ideology has

provided a favorable climate for bargaining: "The deflection of due process goals to those of efficiency and production has been aided and abetted by the emergence of 'socialized' courts, which have furnished the means for achieving the new goals."[62] Ironically, the same argument is used by supporters of bargaining to justify the process as a means of treatment. They contend that bargaining is the only sentencing process which can take into account the particular needs of individual defendants.

The case for bargaining as a necessary part of the treatment process is still weak. It assumes that since bargaining is not regularized it can and does take into account the unique attributes of each case. The factors on which bargains are based, however, are as unknown as those on which sentences are based. Bargains may, in fact, be struck on grounds which are even less compatible with "individualized" sentences than are the premises of traditional sentencing. Even if they do tend to reinforce treatment goals -- whether intentionally or not -- bargains may be less predictable in their outcomes than are sentences after trial. In fact, as we have seen, there is evidence that bargains may not even consistently determine subsequent sentences, if the judge elects not to be influenced by a bargained recommendation.

Toward a Model of Bargaining

The debates over bargaining have generally combined very ambitious proposals for its evaluation with very insufficient evidence about the nature of the process itself. The case for its Constitutionality, for example, rests on whether adequate information and the good offices of the judge can, in fact, protect the defendant from coercion, self-incrimination, or any of the other suspected evils of bargaining. In turn, this answer hinges on the ability of the defendant to use the services offered to him or the judge to be "fatherly." In very similar ways, the validity of the other arguments over the proper evaluation of bargaining is dependent on critical features of the bargaining process: bargaining might be justified as administratively necessary if it does not require complete sacrifice of due process; it might be seen as a legitimate extension of prosecutorial discretion if, indeed, it is only a decision made by the prosecutor over the charges; and it could probably be looked upon with more favor if it is capable of making responsive "rehabilitative" decisions.

What is missing from these arguments is any strong empirical basis for deciding exactly what it is that is being bargained, who it is who participates and on what basis, and how the defendant fares throughout the process. As a way of organizing our own empirical study of bargaining we have made use of the very few studies which have suggested even tentative answers to these questions. They provided us less with hypotheses to be tested than with a sense of the directions in which our questions might be focused and our research organized.

The work from which we have drawn to suggest alternative models of bargaining comes primarily from the efforts of a very few sociologists,

though from two distinct traditions. The first emphasizes organizational theory and sees the courts as a bureaucracy whose focus is the processing of criminal cases; logically, this view depicts bargaining as an exchange of goods within this organization and views the bargainers as bureaucrats responding to organizational pressures. In contrast, the tradition that begins with an interest in how deviants are labeled by society identifies a different kind of bargaining in the courts; court personnel bargain over the way in which a defendant is to be defined and exchange perceptions rather than goods or services.

While these two perspectives hardly capture the range of approaches which might be made to the study of bargaining or even perhaps, the extent of the work that has been done, they allow us to test the major propositions that have emerged from the debate over the proper mode of reform in the courts. Using this work we examine the arguments that bargaining is an exchange of services and that it is an exchange of perception of reality. Similarly we can look at the case for bargaining as a process which happens in an atmosphere of cooperativeness among the bargainers and that which contends that it operates on a conflict model. Finally, these observers provide conflicting testimony as to the status of the defendant during this process -- whether he is indeed the passive victim, the active bargainer, or perhaps merely a willing participant. Since these possible interpretations of the bargaining process seem to us the most consequenceful for a study of reform through negotiated justice, we are perhaps less apologetic than we might be for the sparseness of the work we review as a first step toward modeling bargaining.

Bargaining as exchange

Probably the most expectable connotation of "bargaining" is economic exchange -- an agreement is made to give up one kind of commodity for another. The transactions between prosecutor and defense in the criminal courts have not escaped this interpretation of bargaining and, in fact, there is a modest set of analyses which appear to view bargaining in just this way. What they have in common is an emphasis on the currencies that are used in bargaining, especially the guilty plea and the ability to process cases rapidly. They also share a common perspective, that the court should be viewed as a formal organization. While the metaphor of exchange and the theory of formal organizations are useful for examining bargaining, they have yielded only a partial model of the bargaining process.

Studies which have concentrated on the court as a formal organization tend to be bound by a number of assumptions borrowed from classic organizational theory.[63] Viewing the courts as formal organizations focuses attention on their activities as a "business" and not primarily as a sanctioning agency. This perspective assumes that the starting points for analysis of the court are the tasks it must perform and the organizational structure it uses to accomplish them. Even more important for a consideration of bargaining is the assumption of organizational theorists that the legal outputs of the court are a product of the personal interactions of court personnel and the defendant.

Focusing on the tasks of the court has prompted these analysts to devote their attentions to the courts' increasing caseloads, in particular their effects on the behavior of court personnel. It is in addressing

this issue that bargaining is most often "discovered." Abraham Blumberg, for example, contends that urbanization caused shifts in expectations about the court's tasks and increased society's reverence for administrative efficiency.[64] Instead of being evaluated by their adherence to courtroom procedure or by the outcomes of cases, courts were then pressured to keep their budgets up and to decrease delay in processing cases. In this way, Blumberg argues that a shift occurred in the operating goals of the court, from due process to maximization of production:

> The official goals of the crimial court based on ancient values: due process, justice, and the rule of law are necessary ideologies. But concerns of secularism and rationality, based on modern values of efficiency, maximum production and career enhancement have deflected and perhaps displaced those goals. So there is a new angle of vision more harmoniously in accord with the rationalization of justice. These perspectives are organizationally geared through bureaucratic discipline to mesh with the new goals.[65]

What Blumberg sees then, is an organization which has had to adopt as its latent goals "efficiency, maximum production, and career enhancement," but which must still appear to maintain an ideology of due process. He contends that the court is able to maintain this dual personality because it is organized according to a bureaucratic model. Here Blumberg borrows heavily from the notions of the ideal bureaucracy developed by Weber, who depicted bureaucracies as organizations held together by a high degree of specialization, hierarchical organization, impersonality of relationships between organizational personnel, and finally, recruitment on the basis of technical knowledge.[66] By this view, then, Blumberg must see

the court as an organization maintained by these same kinds of hierarchical impersonal relationships among professionals and by the routines they dictate.

Bargaining emerges, then, as one of the efficient routines developed in the context of the bureaucratic authority of the court. Because of its heavy emphasis on organizational and bureaucratic theory, Blumberg's analysis is only interested in considering how the organizational needs of the court lead personnel to bargain, and what ideology is used to justify bargaining in the face of due process requirements. In fact, Blumberg focuses almost no attention on what bargaining is. All that can be learned from Blumberg about the bargaining process itself must be inferred from his discussions of bureaucratic relationships during bargaining.

In particular, his portraits of the prosecutor depict bureaucrats who are helpless in the face of pressures to bargain. Thus, since they are constrained to bargain they must minimize their losses in each case, by establishing rules of trade with each other. In this view, bargaining is an administrative routine which allows them to trade away the right to trial for potential change in charges or in sentences. It appears, then, that the significant element is the guilty plea, which is the currency by which the defense is thought to make bargains.

In this regard it is valid to suggest that what the model may be describing is a process much like the concept of economic exchange, which is often borrowed to provide a descriptor of social interaction. As it is used in economics, exchange merely implies that the value of a good for a buyer and a supplier is mutually agreed upon and the "exchangibility" of the good is variable by the traditional laws of supply and demand.[67]

As used by Homans and others to explain social behavior the concept of exchange is modified from its purely economic meaning.[68] The most critical difference is that in a social exchange services, not goods, are being traded. Since service is not a good with a clear value, the expectation of return is less clear in terms of both its nature and its timing than is true in an economic exchange. Peter Blau, who makes use of the concept of exchange in the Dynamics of Bureaucracy argues that " social exchange...entails services that create unspecified obligations in the future and, therefore, exert a pervasive influence on social relations."[69] Thus, since there is not necessarily any advance agreement on the precise nature of the return, both parties have to believe that they will gain from the exchange.

It seems fair to assume that bargaining as a bureaucratic routine could be an exchange of this kind. Both the defense and the prosecutor are bound to "efficiency" and recognize the value of the guilty plea as a mechanism for getting cases rapidly disposed. The defense can then offer the prosecutor a chance to avoid trial in trade for either future favors or for a sentence concession in the case at hand. Except for this basic outline, however, this model implies little else about the dynamics of the bargaining process -- how the prosecutor and defense negotiate, what determines the decision to bargain, how often each kind of currency can be spent, whether other personnel are involved in the exchange, or in fact, why the process must be an "exchange" at all and not merely a unilateral act of the prosecutor.

Because he is primarily interested in the relationship of bargaining to the formal tasks of the court, what Blumberg does flesh out is the

process by which the exchanges between prosecutor and defense are concealed. The exchange made between defense and prosecution is conducted consciously, but in violation of the formal goals of the court, especially due process. Blumberg believes that the prosecutor and defense -- and the rest of the court -- see the need to deliberately conceal bargaining. To this end they have developed at least two justifications for the ways in which defendants are processed -- that the court deals with defendants who are already "beaten" and that treatment is the goal of the criminal process.

In particular, Blumberg points out that court personnel often portray defendants as defeated not by the court but by their social backgrounds:

> A defendant in [court] is really beaten by the deprivation and limitations imposed by his social class, race, and ethnicity. These in turn preclude such services as bail, legal counsel, psychiatric services, expert witnesses, and investigatory assistance. In essence, the concommitants of poverty are responsible for the fact that due process sometimes produces greatly disparate results in an illmatched struggle.[70]

A related justification is that the courts must focus on the defendant's treatment, not on his offense, if the defendant is to be rescued. Thus, the court can explain why it spends more time on the disposition of the cases than on the formal process of determining guilt.

Blumberg's hypothesis that court personnel would develop justifications for their use of exchanges rather than trials is largely consistent with what other organizational theorists have found in institutions which process people. In his analysis of total institutions Erving Goffman contends that, when an organization is driven to process its human products

efficiently, its personnel must "depersonalize" them and treat them like "inanimate things," or fail to maximize production.[71] At the same time, to fend off hostility from clients and observers of the process, the staff must have available a rational perspective to be espoused as the philosophy of the institution. The resulting "theory" about what the institution is doing, according to Goffman, is technically unnecessary, but it "rationalizes activity, provides a subtle means of maintaining social distance from inmates, and a stereotyped view of them, and justifies the treatment accorded them."[72]

In the case of bargaining in the courts it is clear that notions of the clients' backgrounds and their need for treatment could indeed supply a "rational perspective" with which to justify the process. What is not evident is the degree to which court personnel are aware that they are making "exchanges," deliberately conceal bargains, or even knowingly justify bargaining on grounds such as these.

Bargaining as negotiated reality

While it has been fairly common to recognize that the courts bargain about the outcome of a case by exchanging favors, it is less often acknowledged that the reality of a case might also become the focus of bargaining. A few studies have posited that court personnel jockey with each other to present the defendant to the court in ways that are calculated to encourage a favorable disposition. This focus on the way in which the court defines the defendant comes less from classic organizational theory than from the theories of deviance and labeling that call attention to the importance of the way in which a criminal is perceived and "labeled." Applying this tradition to the problem of bargaining suggests a second

model of bargaining which ties the issue of disposition to the presentation of the defendant's moral character. As Emerson has portrayed it, however, this kind of bargaining is limited to a brief encounter at the point of dispositional decision and is limited in its perception of the interests court officials and defendants pursue.

While the exchange view of bargaining has its genesis in the traditions of bureaucratic theory, this model has its roots in the literature of social policy and particularly social work. It takes as its unit of analysis the decision points at which a client's problem is defined and service is offered. These decisions become particularly important to understand, since the standards by which services are actually dispensed often remain implicit -- even to the agency itself -- and thus, often different from its stated standards. According to Martin Rein, organizations like the courts may distribute services on the basis of criteria of which even they are not aware.[73] This perception is significant, since, as Rein argues, agencies do not merely respond to a problem presented to them by a client, but instead they define the problem, the service required, and the appropriate moral attitude that should be taken toward the client.[74]

In the literature of criminal justice, this perspective on organizations is transformed into theories of deviance and labeling. This tradition posits that deviance and crime, at least in part, are the products of the way in which agents of social control define and respond to people who come into contact with the criminal justice system. Particularly evident in observations of the juvenile justice system, for example, this perspective asks how it is that juveniles are identified by the system and how "labels" are applied to them.[75] The assumption is that the way in which

these youth are classified by criminal agencies is important not only for understanding the agencies themselves, but also for understanding the "causes" of juvenile delinquency.

Applied to the courts, then, this tradition leads to a focus not on the tasks of the courts or the relationships among court personnel, but on the processes by which the courts define a defendant's problem and, implicitly, decide what "service" he will receive. The best illustration of this approach is in Robert Emerson's study of the juvenile courts.[76] Emerson describes the ways in which a court classifies a defendant's character, behavior, and potential. Because these classifications will determine how the juvenile's case will be disposed, court personnel may each try to influence the way in which the court sees him. It is from this process, then, that bargaining can be said to emerge. Court personnel present competing views of the defendant and bargain over the "reality" of the case.

Bargaining in this instance is clearly different from that described by Blumberg, though neither model exists in enough detail to make a full comparison possible. Emerson focuses on stages in the process of defining a defendant, omitting any explanation of why this kind of negotiation occurs, or precisely how court personnel participate in it. Unlike the view that bargains are conscious exchanges of currency, this perspective sees bargains as conscious -- and tacit -- attempts to shape the court's perceptions of a defendant. What the prosecution and defense negotiate is the way in which the court will view a case. They apparently accomplish this not by direct contact with each other but by "pitches" and "denunciations" made about the defendant in court and designed to "negotiate" what the court believes.

Bargaining as it occurs in this model focuses only on defining two aspects of the defendant: his potential for "trouble" and his moral character. The court's attempts to perceive "trouble" in a defendant illustrate how the way in which the defendant is to be viewed becomes a matter for negotiation. Emerson believes that the court must identify "trouble" because it costs the court time. A defendant who presents an active or potential threat, as measured by his charges and record, will require more complex disposition by the court. Anticipating this problem by labeling some defendants as "trouble," "establishes a sifting process to allocate time, efforts, and resources among delinquency cases. Untroubled cases require little effort."[77]

This becomes more than a process of definition, though,because at the same time that the court is making this independent assessment of trouble and,therefore,of the kind of action that needs to be taken, the victim, the complainant, and other actors involved in the case may have arrived at their own evaluation of the seriousness of the case. It is likely that depending on his interest in the case each observer will see the defendant as representing a different degree of trouble. Most fortuitous for the court, of course, is for the assessments of court personnel and complainants to coincide. When there is a discrepancy between the views held by the complainant and the court, however, the complainant must be "cooled out" and convinced that the court's assessment of trouble is accurate and the action proposed is appropriate. If the complainant proves to be difficult to convince, then the court must often change its conception of the action to be taken, and thus, of the defendant's moral character.

If the case is to be disposed, then, all the personnel in the court and the complainant must at least agree to a common view of the defendant. Emerson believes that court personnel not only perceive the importance of the defendant's image, but intentionally direct their presentations of the defendant to convince each other that a particular conception of the defendant is valid. When they cannot agree on "trouble," then, they must escalate to a negotiation over moral character -- the social circumstances of the defendant and his family, his criminal history, his motivations for committing crimes, the kind of criminal behavior he exhibits, and his personality in court.

It is at this point that Emerson's model of negotiated reality becomes especially ambitious in its assumptions about court personnel. Not only do they calculate their presentations of defendants, but their knowledge of how to affect the disposition of a case extends to an elaborate set of defendant stereotypes which they believe lead to predictable case outcomes. If the person making the presentation is sympathetic to the defendant he may make a "pitch," an effort designed to obtain a disposition which is more lenient than might seem appropriate, by creating an image of the defendant as "normal" or "ill." If the goal, on the other hand, is to work toward a severe disposition, a member of the court may make-a presentation which is a "denunciation," serving to depict a defendant as a hardened criminal. In the case of assault, for example, Emerson suggests that the denunciator would want to demonstrate that the offense was in reality a mugging, and therefore, the act of a hard-core criminal.[78] The pitchmaker, on the other hand, might choose to depict the assault as a simple fight between two people, not the defendant attacking a victim.

Emerson believes, then, that in the eyes of court personnel, these stereotypes of defendants are important not only because they evoke images of moral character but also because they have direct consequences for the disposition of the case. There is motivation for court personnel to make pitches or denunciations because they believe that control over the reality of a case leads to control over its disposition. A defendant who can be shown to have a "normal" moral character will predictably get a different "break" than one who appears to have a "hard core" or "disturbed" character, and these categories carry precise meanings in the perceptions of court personnel. A "normal" moral character is one which is like the majority of the population except for a few isolated acts. In contrast, the "hard core" character consciously and maliciously pursues illegal acts. Finally, the "disturbed" personality is "driven to acting in senseless and irrational ways by obscure motives or inner compulsions."[79]

The actions of personnel in the court Emerson observed appeared to be premised on the assumption that a defendant established to be "normal" would have the best chance of being handled routinely by the court and, perhaps, receiving probation or a suspended sentence. The defendant who is successfully depicted as "hard core" is a strong candidate for incarceration or other kinds of institutionalized treatment. A court which has been encouraged to see a defendant as "disturbed" can justify circumventing the usual correctional facilities, in favor of programs which stress rehabilitation through psychiatric care or other forms of therapy.

Emerson's pitchmakers and denunciators, then, count on their abilities to predict the court's dispositional behavior and gauge their performances to depict normal, hard core, or disturbed defendants. Their

opportunities to shape the defendant's image occur during the deliberations over the defendant's offense and his history. They can establish that the defendant has a hard core criminal character if his offense can be shown to have been professionally planned, if it contained a high degree of risk, or if it appeared to involve "vicious" behavior. A normal motivation for committing a crime, on the other hand, is personal gratification, whereas a "disturbed" character is shown by acts which appear "bizarre" to the court.[80]

Since the court is apt to wonder what the defendant's "potential" is, his criminal history is the second important reality to be investigated. The defendant's prior offenses, attitudes, school and employment records, family background, friends, or sponsors, are all assumed to point to his potential for change. A denunciator hoping to establish that the defendant has a criminal character would use these indicators to show that the defendant has had a consistent criminal career which has become progressively more serious, now reaching a hopeless stage. The pitch, on the other hand, might attempt to depict a defendant who was at a turning point and, therefore, a strong candidate for rehabilitation or, a defendant whose social history displays a strong potential for a "normal" life.

What Emerson may have provided is a narrow and interesting slice of the criminal process. While other parts of his book do deal with the rest of the juvenile court proceedings, they do not trace the genesis or the conclusion of negotiations over the reality of a case. Instead, they treat this stage as an isolated process of definition and labeling. While it is possible that the court engages in this kind of negotiation at a single stage, Emerson's presentation of the negotiated reality still raises

a number of questions. What are the influences of arrest and extra-court-room conversations on the court's perceptions of the defendant? What determines whether a lawyer plays the pitchmaker or the denunciator? What determines whether a member of the court accepts a pitch or denunciation? While these questions may be unfair to Emerson's purpose in depicting a labeling process, they are critical to rounding out this view into a model of bargaining.

The conflict model

While bargaining might appear to take place only where there is a meeting of the minds between members of the court, there is actually strong disagreement as to the relationship among the bargainers. Even studies which essentially accept Blumberg's organizational focus cannot concur that the prosecutor and defense attorney enjoy a cooperative relationship -- or that they are in conflict. The primary case for a conflict model of bargaining is made by Blumberg and his colleagues who see bargaining as a bureaucratic routine enforced on its participants by the coercive power of the social organization of the court.

The argument that the court operates on a conflict model is probably an inevitable result of viewing the courts as a bureaucracy. Weber believed that the nature of the bureaucrat is that "in the great majority of cases he is only a simple cog in an ever moving mechanism which prescribes to him an essentially fixed route of march."[81] Echoing this view Blumberg takes as a premise that court personnel are controlled by the court to keep them in line with its goals and needs, and thus, that their personal judgment and initiative are, indeed, limited. In particular, according to Blumberg they must be regulated by a system of discipline and

a set of uniform perspectives because otherwise they will fall prey to doubts about the "validity, purpose, and rectitude" of the operation of the court.[82] Elements of Weber's rational-legal authority serve to provide these controls and perspectives. In particular, three major kinds of bureaucratic authority were observed by Blumberg to exist in the courts: manipulation as a supervisory device, authority by complicity, and the "panopticon effect."

Far from being seen as free agents, then, this view depicts a group of people who are tightly controlled by the structure of the court. This structure is built on an assumption of conflict between each actor and the rest of the court. At the same time that they are told that they work in a democratic environment, the "free professionals" who work in the court are controlled by manipulation through sanctions for questioning the goals or values of the court. In this way the image of the court as a place where professionals represent clients and where the only guidelines are justice and codes of professional ethics is perpetuated. In practice, Blumberg believes, lawyers especially are heavily censured when they fail to honor the needs of the court for bargains. Punishment may take the form of denial of favors from prosecutors, limitation of access to judges, or lack of cooperation from police witnesses.

When these personnel do bow to the authority of the court, the result is that they bargain and they are bound into the court bureaucracy. Emerson found that the pressures to search for shortcuts and to increase the number of guilty pleas entered universally pointed the way to bargaining. Once the practice is adopted by a member of the court, he is ironically caught by his complicity and in theory, then, amenable to more control from

the court. This process is especially vividly described by Blumberg in reference to the treatment of new employees, who are initially threatening to the court because they are unsocialized to the norms of the court. By slowly introducing the new member to the convert practices of the court and urging him to participate in them, the court can bind him, too, by his complicity in illegal practices.

A final aspect of the court which Blumberg thinks is critical to the control of personnel is what he calls the "panopticon effect." This is a term borrowed from Jeremy Bentham's proposal for a circular prison with a central watch tower from which inmates could be observed at all times. Blumberg argues that the uniquely public character of the court's activities is analogous to Bentham's panopticon:

> Everyone in the criminal court like the panopticon inmate genuninely feels he is being observed at all times -- and at the same time is observing others...[Court personnel] arrange their official behavior to suit the expectations of those who will be 'watching'.[83]

The implication is that bargaining remains covert in part because court personnel must make it appear to observers that they are acting in accordance with the formal goals of the court. Thus, they are controlled by the openness of the court.

The model of bargaining that Blumberg presents is that of behavior which is imposed on personnel by their participation in the life of the court. Court personnel bargain because they are manipulated to do so, and bargaining is, in turn, a manipulation of the defendant and of other personnel. Bargains then become exchanges among personnel who relate to each other on a "conflict" model. Lawyers and prosecutors exchange favors with

each other, but according to Blumberg only because there are sanctions for failure to bargain. Because the lawyer and prosecutor are in conflict, the lawyer must trade his right to bring a case to trial for any future assurance that he can get the schedules, information, and predictability of sentence that he needs to defend a case. The prosecutor, on the other hand, may exchange the possibility of conviction for protection against the defense, which may demand too many trials.

The cooperative model

A counter-hypothesis concerning the relationships among court personnel is offered by Skolnick and others.[84] It begins with essentially the same premise as Blumberg's model, that the large case loads in the court are responsible for creating the need to bargain. While the conflict model assumes that bargaining can be maintained only if the court controls the behavior of its personnel, Skolnick suggests that in the face of pressures on the courts, personnel will make a free choice to cooperate with each other. Skolnick, in fact, describes the court as a system "where professionals will see greater advantage in cooperativeness than in conflict."[85] For him bargaining is a reciprocal relationship between the defense and the prosecution that is based on cooperation rather than Blumberg's essentially conflict-based bureaucratic authority.

The secret of prosecutor-defense cooperation under this model is the way in which their jobs are structured; their roles are such that there is no reason for conflict between them. In the prosecutor's case, for example, depending on the organizational structure of a given court, he may be responsible in varying degrees to political authorities, to the Superior Court, to the District Attorney's office, and to the public. To present to

all of these groups the image that he is doing his job, the prosecutor does not have to win each case, but he certainly cannot lose too many. This aspect of the prosecutor's role removes him from any direct conflict with the defense, since it is not necessary that cases be won, and gives him an incentive to work with the defense to maximize the probability that neither will "lose" a case.

A second traditional aspect of the prosecutor's task is keeping the calendar moving, and Skolnick suggests that the wise prosecutor depends on guilty pleas rather than trial as the predominant mechanism for disposing of cases rapidly. At the same time he must also obtain a respectable number of convictions through trial, and this requirement forces him to predict which cases he has the best chance of winning and which ought to be bargained. According to one observer the decision is guided by an assessment of the gaps in his own proof, the availability of credible witnesses, and the image of the defendant.[86] Having the defense counsel engage in this calculus jointly with him gives the prosecutor the advantage of virtual certainty that he is bringing the "right" cases to trial.

In Skolnick's view the advantages accruing to the defense would, of course, be similar except that the defense must respond to pressures arising from his role as defender of his client as well as from his position as a member of the court community. As a good advocate the lawyer is expected to earn his fee (where there is one) and to keep the client satisfied. By some definitions this means that the lawyer has to work to prove the innocence of the client. Skolnick believes that the lawyer's role in the court organization alters this expectation somewhat. Since he also must be committed to saving time, resources, and expense in the courts, the lawyer has

the same obligation to bargain as the prosecutor. When the lawyer does bargain he becomes not an advocate for the innocence of the client, but an advocate for his freedom from severe punishment.[87] By working cooperatively with the prosecutor he can fulfill his role in the court community, while at the same time assuring that his client will emerge with only a light sentence. With advice from the prosecutor as to the probable disposition of the case the lawyer can describe to his client the way in which the case will be handled, act as a coach "preparing the client to meet behavioral standards acceptable to officialdom,"[88] and give the impression that he has earned his fee.

Whether the lawyer's decision to make this concession is, in fact, the choice of a "free" professional is not at all clear. Skolnick's defense counsel may be as constrained by the pressures on the court as are the personnel described by Blumberg. In each model, the prosecutor and defense bargain because they must see that cases are processed efficiently at the same time that they make a minimal effort to prove that they are fulfilling their adversarial roles of prosecuting cases or defending clients. Skolnick's assumption that relationships between prosecutor and defense are cooperative and Blumberg's premise of conflict are only different in the degree to which they attribute structural coercion to the courts. As long as Skolnick's prosecutor and defense counsel have roles with the very specific demands Skolnick describes, they can "cooperate." Any change in the interests Skolnick depicts might result in a relationship which was essentially conflicting and, in bargaining, only if pressures from the court were escalated.

The defendant as bargainer

Just as the defense counsel can be viewed either as a partner or an adversary to the prosecutor, the assumptions made about the behavior of the defendant can similarly vary. The defendant is often viewed both as a passive object to be processed by the courts and as an active participant in his own case. The question of which role the defendant plays is important not only because it has implications for the bargains the defense and prosecution can strike, but also because it may indicate whether he is indeed being coerced, manipulated, or stigmatized. The critical issues are to what extent the defendant makes a conscious, willing exchange in the bargaining process, what he trades away, and to what extent the bargain is made only by the prosecution and the defense.

While the view that the defendant is an active participant in the bargaining process is consistent with any of the models of bargaining, it is most logically associated with a conflict model.' Positing that court personnel must be controlled through the use of manipulation, complicity, or other forms of bureaucratic authority requires the belief that without control they will question the validity of the system and cease to meet its needs. In the same way, then, the defendant can be seen as threatening to the court because he is able to question what is happening to him and perhaps to subvert the activities of the court. As Goffman suggests in his analysis of institutions which "process human products," unlike other kinds of products, human objects are in a position "to perceive and follow out the plans of the staff" and thus hinder them effectively.[89]

In the courts the defendant's attempts to affect the course of the criminal process have been assumed to take three general forms: insistence

on a trial, direct bargaining, and negotiation of the reality of the case. Ohlin found that defendants would most often try to manipulate the lawyers by threatening to plead not guilty and demand a trial.[90] This is most likely to happen, according to one study, when the defendant sees himself differently from the definition offered by the court and thus, distrusts the court process.

Rather than trying to thwart the court by refusing to bargain, the defendant may also attempt to win by designing and trying to implement his own bargain. Many defendants are thought to be quite knowledgeable about how to use the bargaining process:

> [The defendant] learns that tactical maneuver and delay, the ability of counsel to wear down the [prosecutor], to exploit lazy or over-burdened district attorneys, and to steer the plea before the right judge can have more to do with the outcome than the facts of his offense or anything in his record.[91]

This level of aggressiveness is most often associated with defendants who do not have defense counsel. Represented defendants may also attempt to bargain on their own, but more often this defendant is expected to use his knowledge of the process to manipulate the actions of his lawyer, by hoarding information from him or by threatening him.

Emerson's model of bargaining as negotiated reality also allows for a third role for the defendant-bargainer. At the same time that court personnel are attempting to influence the presentation of the defendant's character through pitches and denunciations, the defendant may also deliberately affect the court's assessment of his character.[92] Here the defendant employs conscious strategies to stave off the effects of

denunciations from members of the court. Varying by the amount of aggressiveness demanded of the defendant, there are three types of strategies which Emerson believes defendants use: innocence, justification, and excuses.

Maintaining innocence is a way for the defendant to refute the accusations which have been made by denying that he had any connection to the offense. In this way the defendant attempts to cast doubt on the reasonableness of the case presented by the court, and thus, to negate any conceptions of moral character the court might have developed, based on the alleged offense. This is a difficult strategy for the defendant to maintain, though, because it does not discredit the entire basis on which the court has established a sense of moral character. In fact, Emerson believes that what the defendant offers in terms of protestations of innocence is still evaluated against what the court has already determined about his moral character. If, indeed, the court decides that the evidence against the defendant is strong enough that innocence is not possible, for the defendant to continue to insist upon his innocence might result in his appearing "unrepentant." Thus, by declaring his innocence the defendant could weaken further the court's assessment of his moral character.

Because innocence is a dangerous strategy, most defendants, according to Emerson, rely on justification or excuses. The defendant who uses justification to explain the offense admits that his crime was wrong, but suggests that there were circumstances which serve to mitigate it. In this sense the defendant is actually redefining the act and in the process trying to redirect the court's assessment of his moral character. Finally, the most frequent strategy employed by the defendant is to offer excuses

for the behavior represented in the crime. Excuses deny responsibility for the offense, thus making the judgment of the defendant's character less harsh. Among those excuses observed by Emerson were that the defendant was under duress at the time, that his involvement was accidental, that the act was committed by someone else, or that the act might be blamed on the social circumstances of the defendant.[93] In each case the effect is to deny the connection between the act and the moral character of the defendant; while the defendant may have committed the crime, it is no reflection of his moral character.

The evidence that defendants do threaten their lawyers, initiate bargains and offer protestations of innocence and justification in court is quite convincing. What can be inferred from these active roles in bargaining is less certain. Though defendants threaten to go to trial, it is not really clear whether this is a deliberate manipulation of the criminal process or a desperate reaction to their distrust of the court. This question is even more critical in Emerson's model where a great deal of knowledge about the dynamics of the criminal process is attributed to the defendant. Emerson appears to assume that because defendants make use of excuses and justifications they have calculated their impact on the court. These attempts by the defendant may, of course, shape the reality of the case, but the contention that this shaping is the result of a deliberate strategy is not well substantiated.

The passive defendant

Perhaps contradicting Emerson and Ohlin are caricatures of the defendant as passive. One view argues strongly that the court system necessarily bewilders defendants; another, more cautiously, that defendants

usually acquiesce to the will of the lawyers. This is perhaps the more common view of the defendant during bargaining, that he is the object of the negotiations, but not a participant. Whether this perspective is valid is central to the discussion of the equity of the bargaining process for the defendant. Does the defendant actually understand the reasons why he must plead guilty? Does he participate in the decision to bargain in any real sense?

There is some support for the view of the defendant that depicts a bewildered, naive person, vulnerable to the pressures of the court. Though this perspective is consistent with either the bureaucratic authority or the cooperative model of relationships among court personnel, it is more often part of the discussion of the cooperative arrangements made between the prosecutor and the defense counsel. In part, this is true because this is a model that accepts the lawyer as a free professional, who is not manipulated by the court. As a professional, the lawyer cannot be led by his client, who is lacking in legal expertise or knowledge of the court.

The President's Crime Commission report offers a number of reasons why it is inevitable that a defendant will be bewildered and passive when he appears in court.[94] Because of the wide variations in the practices of courts, the report argues, even the "jailhouse lawyer" cannot predictably understand his situation. The defense counsel may also be handicapped by the disparity among courts, if he represents a defendant in a court in which he has never practiced before. Because the defendant and lawyer may be unaware of the procedures particular to a court, they could both be unsuccessful in proposing a bargain without this specific information. The

result is that the defendant in a criminal case is very likely to be confused and unable to be an active participant in his own defense, much less a bargainer.

A slightly less extreme view says that the defendant does, indeed, not bargain, but that he is still a knowledgeable and willing participant. Even Blumberg's model requires that the defendant know enough to act out the role for which he is coached by the attorney. Blumberg sees the defendant's appearance in court as a conscious role performance in which the defendant knowingly "cops out," but in a manner that will be acceptable to the court.

> The 'cop-out' is, in fact, a charade during which an accused must project an appropriate and acceptable degree of guilt, penitence, and remorse. If he adequately feigns the role of the 'guilty person' his hearers will engage in the fantasy that he is contrite and thereby merits a lesser plea... What is actually involved, therefore, is not a 'degradation' or a 'reinforcing' process at all, but rather a highly structured system of exchange cloaked in the rituals of legalism and public professions of guilt and repentance. Everyone present is aware of the staging, including the defendant.[95]

Somewhat surprisingly, Blumberg posits that the defendant is willing to participate in this charade because he can rationally assess his situation and weigh his chances. The defendant is seen as having an awareness that it will be difficult to fight the state by electing trial, whether or not he is innocent. Blumberg extends this argument far enough to suggest that the defendant understands "the great statistical probability of conviction"[96] in a trial and thus, the comparatively better odds under a bargained plea. By implication, too, the defendant knows what the role of the

prosecutor and the lawyer ought to be and expects that they will work cooperatively to formulate bargains.

According to most observers the model example of the "rational," but passive defendant is the professional criminal who is a "regular" in the court community. Because of his experience with the court organization this is the kind of defendant who is presumed not only to understand the virtues of bargaining but also to know best how to assist court personnel in working out a bargain. Often these defendants know the sentencing judge, the prosecutor, and the police, and they can enter into the informal meetings leading to bargains. Like the jailhouse lawyers who provide legal advice to their fellow inmates in prisons, these "regular" defendants are thought to have an extensive understanding of the statutes, rules of evidence, and procedures relating to their cases. Thus, they will recognize a good bargain, but they will not disrupt the order of the court by trying to participate in the bargaining process.

Notes

1. Illinois Association for Criminal Justice (in cooperation with the Chicago Crime Commission), Illinois Crime Survey (Chicago: 1929) p. 420, as cited in the U.S. National Commission on Law Observance and Enforcement, The Wickersham Commission Reports: No. 4 Report on Prosecution (Washington: 1931), "Reissue" (New Jersey: Patterson Smith Reprint Series, 1968).

2. Donald Newman. "Pleading Guilty for Consideration: A Study of Bargain Justice," Journal of Criminal Law, Criminology, and Police Science, Vol. 46 (March-April, 1956), p. 781.

3. U.S. Task Force on the Courts, Task Force Report: The Courts (Washington: 1967), p. 4.

4. "The Unconstitutionality of Plea Bargaining," Essays Selected From the Harvard Law Review (Cambridge, Massachusetts: 1972), p. 494. The article cites the Annual Report of the Director of the Administrative Office of the United States Courts, at 260 for 1967 and at 261 for 1968.

5. The American Bar Foundation began a study of "Criminal Law and Litigation" in 1951 and expanded it into an extensive set of field studies of policies and practices of "agencies responsible for the administration of criminal justice." The resulting 2000 field reports (summarized in the American Bar Foundation Pilot Project Report) has spawned numerous articles (e.g., Ohlin and Remington, 1958; Kadish, 1961) and five volumes (e.g., Wayne LaFave, Arrest, 1965 and Newman, Conviction, 1966).

6. "Pleading Guilty for Consideration: A Study of Bargain Justice."

7. Summarized by Arnold Enker in U.S. Task Force on the Courts, Task Force Report: The Courts, p. 109. In this section Enker refers to Newman's later work Conviction: The Determination of Guilt or Innocence Without Trial (Boston: 1966).

8. David Sudnow, "Normal Crimes: Sociological Features of the Penal Code in a Public Defender's Office," Social Problems, Vol. 12 (1964), pp. 255-267. Sudnow refers to these formulas as "normal" crimes: "I shall call normal crimes those occurrences whose typical features, e.g., the way they usually occur and the characteristics of persons who commit them ... are known and attended to by the Public Defender. For any series of offense types the Public Defender can provide some form of proverbial characterization," p. 260.

9. Task Force Report: The Courts, p. 111.

10. "The Unconstitutionality of Plea Bargaining," p. 505.

11. See, for example, Duncan v. Louisiana, 391 U.S. 145 at 154 (1968). "A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government."

12. Mr. Justice White argued, "Our conclusion is that in the American States as in the Federal judicial system, a general grant of jury trial for serious offenses is a fundamental right ... Even where defendants are satisfied with bench trials, the right to a jury trial very likely serves its intended purpose of making judicial or prosecutorial unfairness less likely," (at 157-8).

13. Smith v. O'Grady, 312 U.S. 329 at 334.

14. 315 F. 2nd 204 (4th Cir., 1963).

15. See especially Machibroda v. U.S. 368 U.S. 487 (1962).

16. 212 F. 2nd 264 (7th Cir., 1954).

17. 281 F. 2nd 707 (2nd Cir., 1960).

18. Kuh, Book Review, Harvard Law Review, Vol. 82 (1968), p. 497, as cited in "The Unconstitutionality of Plea Bargaining," p. 498.

19. Rogers v. Richards 365 U.S. 534 at 540-1 (1961) argued that involuntary confessions are excluded under the due process clause "... not because such confessions are unlikely to be true, but because the methods used to extract them offend an underlying principle in our criminal law; that ours is an accusatorial system not an inquisitorial system - a system in which the State must establish guilt by evidence independently and freely secured and may not by coercive powers prove its charges against an accused out of his own mouth."

20. See, for example, Rogers v. Wainwright 394 F 2nd 492 (5th Cir., 1968).

21. 337 F. 2nd 699 (9th Cir., 1964), Cert. denied, 381 U.S. 953 (1965).

22. Dominick R. Vetri, "Note: Guilty Plea Bargaining: Compromises by Prosecutors to Secure Guilty Pleas," University of Pennsylvania Law Review, Vol. CXII (April, 1964), p. 884.

23. Task Force Report: The Courts, p. 116.

24. 249 F. 2nd 293 (10th Cir., 1957).

25. Quoted in "Comment: Official Inducement to Plead Guilty - Suggested Morals for a Marketplace," University of Chicago Law Review, Vol. 32 (1964), p. 181.

26. U.S. ex rel Elksnis v. Gilligan, 256 F. Supp. 244 at 254 (S.D. N.Y., 1966). Judge Weinfeld describes the symbolic power of the judge: "When a judge becomes a participant in the plea bargaining, he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not ... [emphasis added]."

27. 319 F. 2nd 308 (2nd Cir., 1963).

28. At 314.

29. See, for example, Abraham Blumberg, "Lawyers With Convictions," The Scales of Justice (Chicago: 1970); Jerome Skolnick, Justice Without Trial: Law Enforcement in a Democratic Society (New York: 1966).

30. 220 F. Supp. 308 (D. Ore., 1963).

31. At 314.

32. 5 App. Div. 2nd. 975 at 976, 172 N.Y.S. 2nd 640 at 642 (1958).

33. 390 U.S. 570, 88 S. Ct. 1209, 20 L. Ed. 2nd 138 (1968). The Jackson case struck down the death penalty clause of the Federal Kidnapping Act because the act forced defendants into pleading guilty and giving up their right to trial. (The death penalty clause applied only to those who went to trial by jury.) Though the court found that guilty pleas encouraged under these drastic circumstances were a violation of defendants' 5th Amendment rights, it left open the possibility that other circumstances might warrant encouragement of guilty pleas.

34. 391 U.S. 123 (1968).

35. At 134, 135, as cited in "The Unconstitutionality of Plea Bargaining," p. 513.

36. 384 U.S. 436 (1966). Mr. Chief Justice Warren argued: Our decision in no way creates a constitutional strait jacket which will handicap sound efforts at reform, nor is it intended to have this effect. We encourage Congress and the States to continue their laudable search for increasing effective ways of protecting the rights of the individual while promoting efficient enforcement of our criminal laws."

37. Task Force Report: The Courts, p. 10.

38. See especially p. 10.: "Confining trials to cases involving substantial issues may also help to preserve the significance of the presumption of innocence and the requirement of proof beyond a reasonable doubt. If trial were to become routine even in cases in which there is no substantial issue of guilt, the overwhelming statistical probability of guilt might incline judges and jurors to be more skeptical of the defense than at present."

39. "The Unconstitutionality of Plea Bargaining," p. 510. The article cites the principle of "less drastic means" as an "established method of determining a State's interest in practices which threaten Constitutional rights to determine if the State's goals could be achieved by 'less drastic means' that do not constrain the individual in the exercise of those rights."

40. "Official Inducements to Plead Guilty - Suggested Morals for a Marketplace," p. 167.

41. See, for example, Gerald Stern, "Public Drunkenness: Crime or Health Problem?" Annals, Vol. 374 (November, 1967). Stern describes the process by which police "arrest inebriates who are impoverished and charge them with any of an assortment of offenses. In Chicago, for example, the police, having no drunkenness laws to enforce, resort to a disorderly conduct statute to arrest non-disorderly inebriates." p. 148.

42. See especially Geoffrey Hazard, "Rationing Justice," Journal of Law and Economics, (October, 1965), p. 4.

43. Sanford Kadish, "Legal Norm and Discretion in the Police and Sentencing Process," Harvard Law Review, Vol. 75, No. 5 (March, 1962), p. 906.

44. See Vetri, pp. 865-893, for a discussion of the stages at which discretionary decisions are made.

45. Bargain City U.S.A. v. Dilworth 29 U.S. Law Week 2009 (1960). In this case a Philadelphia Police Commissioner announced that he did not have the resources for a full enforcement of Sunday closing laws. When an arrest was made, the court concluded that this constituted selective enforcement and was therefore unconstitutional discrimination.

46. James Q Wilson, Varieties of Police Behavior (Cambridge, Massachusetts: 1968). Wilson argues that there are limits on the utility of decision guidelines for police: "For one thing, it is very hard to do more than list 'factors' to be considered by the police ... For another if the police are too explicit about what they intend to take into account and how, some courts stand ready to throw out any ensuing arrest on the grounds that it was 'discretionary'," p. 294.

47. See, for example, Martin v. U.S., 256 F. 2nd 345 (5th Cir., 1958) Cert. denied 358 U.S. 921 (1958); Shelton v. U.S., 246 F. 2nd 571 (5th Cir., 1957); State v. Ashley 195 A 2nd 635 (N.J. Super. Ct. App. Div., 1963).

48. Lloyd Ohlin and Frank Remington, "Sentencing Structure: Its Effects Upon Systems for the Administration of Criminal Justice," Law and Contemporary Problems, Vol. XXIII (Summer, 1958), p. 501.

49. Harris Steinberg, "The Responsibility of the Defense Lawyer in Criminal Cases," Syracuse Law Review, Vol. 12 (1961), pp. 442-447.

50. 395 U.S. 711 (1969).

51. At 723, quoting Williams v. New York, 337 U.S. 241 at 245 (1949), as cited by "The Unconstitutionality of Plea Bargaining," p. 509.

52. The Pilot Institute on Sentencing, Proceedings, 26 F.R.D. 231 (1959).

53. See, for example, Julian D'Esposito, "Sentencing Disparities: Causes and Cures," Journal of Criminal Law, Criminology, and Police Science, Vol. 60 (1969); M. McGuire and A. Holtzoff, "The Problem of Sentencing in the Criminal Law," The Boston University Law Review, Vol. 413 (1940); T. Sellin, "Race Prejudice in the Administration of Justice," American Journal of Sociology, Vol. 41 (September, 1935); U.S. Task Force on the Courts, pp. 23 ff.

54. John Hogarth, Sentencing as a Human Process (Toronto: 1971), p. 10.

55. p. 7.

56. U.S. Task Force on the Courts, p. 23: "Within certain limits a lack of uniformity in sentences is justifiable. Indeed the reason for giving judges discretion is to permit variations based on relevant differences in offenders. Unequal sentences for the same offense may also result from the fact that statutory definitions of crimes encompass a fairly broad range of conduct ... may reflect geographic factors, such as differences in public apprehension of crime ... or institutional considerations such as the need to offer more lenient sentences to defendants who furnish information or testimony for the prosecution."

57. Hogarth, p. 9.

58. Kadish, p. 926.

59. p. 922.

60. Abraham Blumberg, Criminal Justice (Chicago: 1970), p. 36.

61. p. 171.

62. p. 170.

63. See, for example, Maureen Mileski, "Courtroom Encounters: An Observation Study of a Lower Criminal Court, Law and Society Review, Vol. 5, No. 4 (May, 1971), pp. 473-538. This study is premised on the view that the court is a formal organization, with the processing of defendants as a task and with the courtroom as a "community." Blumberg appears to have a similar perspective and takes the President's Crime Commission to task for not "seeing to the reality of the criminal court as a social system, as a community of human beings who are engaged in doing certain things to and for each other," pp. viii-ix.

64. See pp. 73 ff.

65. p. 78.

66. Summarized in Nicos Mouselis, Organization and Bureaucracy (Chicago: 1968), pp. 15-26.

67. See, for example, Paul Samuelson, Economics (London: 1958), pp. 443-444.

68. See George Homans, "Social Behavior as Exchange," American Journal of Sociology, Vol. LXIII (1958), pp. 597-606.

69. "Revised Edition," (Chicago: 1963), p. 139.

70. p. 33.

71. Asylums: Essays on the Social Situation of Mental Patients and Other Inmates (Garden City, New York: Anchor Books ed. 1961), pp. 74-92.

72. p. 87. Goffman credits this concept to Everett C. Hughes' review of Leopold von Weise's Spatlese, in the American Journal of Sociology, Vol. LXI (1955), p. 182.

73. Social Policy: Issues of Choice and Change (New York: 1970), p. 76.

74. pp. 48-9.

75. Edwin Schur, Labelling Delinquent Behavior: Its Sociological Significance (New York: 1971); Earl Rubington and Martin Weinberg, eds. Deviance: The Interactionist Perspective (New York: 1968); and Howard Becker, Outsiders (New York: 1963).

76. Judging Delinquents: Context and Process in Juvenile Court (Chicago: 1969).

77. p. 85.

78. p. 112.

79. p. 91.

80. p. 119.

81. Quoted by Mouselis, p. 14.

82. p. 78.

83. p. 87.

84. See, for example, Jerome Skolnick, "Social Contact in the Adversarial System," Journal of Conflict Resolution, Vol. 11 (1967), pp. 52-70; and David Sudnow.

85. p. 68.

86. A. W. Alshuler, "The Prosecutor's Role in Plea Bargaining," University of Chicago Law Review, Vol. 36 (1968), p. 52 ff.

87. This view is also reflected in Maureen Mileski, who comments that the court process becomes adversarial only at the sentencing stage, where the lawyer tries to appeal for low or no sentence. Her observations indicated that lawvers will rarely risk arguing for the innocence of their clients. (See especially p. 491).

88. Skolnick, p. 62.

89. p. 80.

90. p. 500.

91. Arthur Rossett, "The Negotiated Guilty Plea," The Annals, Vol. 374 (November, 1967), p. 72.

92. p. 142.

93. p. 153.

94. p. 11.

95. p. 89.

96. pp. 30-1.

Chapter III: Research Questions and Methodology

Questions for Research

The debate over the nature of the bargaining process raises many as yet unanswered questions about what bargaining is and how it affects the courts. The validity of the reformers' assumptions about bargaining is especially critical in the case of those who advocate negotiated justice and the recognition of bargaining as a formal decision making process. To evaluate this reform the critical issue for empirical study is whether there exists a bargaining process which contains such characteristics that it can indeed be harnessed to the goals of the court. Most observers have seen due process as the important goal to be retained and the one which bargaining is least able to fulfill. The overall question -- which cannot be addressed directly -- is, therefore, whether there is a "due process" of bargaining or whether one could reasonably be achieved through reform.

To provide the kind of information which will be necessary if we are to make normative judgments about bargaining, we have conducted an empirical study of the criminal process. Though our study began with no firm hypotheses about bargaining it was guided by five questions which seemed to us most central to the evaluation of negotiated justice:

> What role (if any) does the process we have defined as bargaining have in the courts?
>
> What is the structure of bargaining?
>
> What is the role of each of the court personnel in the bargaining process?
>
> What is the role of the defendant?
>
> What is the impact of the bargaining process on the courts, the defendants, and the personnel of the courts?

While expressing these research interests as separate questions provides a convenient way of presenting our research design and findings, it is true that they proved to be highly interconnected and overlapping concerns. Collectively they express what for us was a preliminary attempt to understand and evaluate the process of bargaining. What is the nature of the structural and political roots of bargaining? What variables seem to determine the occurrence and the shape of bargains? How successful is bargaining in fulfilling the criteria and goals traditionally expected of a system of justice?

The role of bargaining in the courts

What role, if any, does bargaining play in the processes of the criminal courts? What seems to have caused bargaining to appear in these courts? Did it arise as a necessary adaptation to changes in the court? Is it a temporary aberration or -- perhaps -- has it become the dominant mode of dealing with criminal cases? What kinds of cases appear to be bargained, and what variables seem to control the decision to bargain? What functions does it seem to serve for the court?

The most fundamental question as yet unresolved about the role of bargaining in the criminal courts is whether, in fact, there is such a practice. Much has been written about its impacts and methods of regulation, but its existence seems still to be subject to some controversy. We conducted our observations, then,with the existence of bargaining as an open question, at least insofar as we observed the entire criminal process, not merely those stages at which bargaining is most often assumed to happen.

The question of the origin of bargaining in the courts is even more difficult to address because it is virtually impossible to identify a

time in the history of the courts when there were not reportedly bargains, "fixers," or some other form of covert disposition of cases. For this reason the question is often refocused not to ask for the root causes of bargaining but to ask whether it is an inevitable result of the structure of our criminal court system.

Most observers of bargining have either assumed that it is, in fact, a necessary reaction to the shifts in the goals of the court or that it is merely a temporary and curable aberration in the operation of the courts. Though both arguments do see bargaining as a response to structural problems in the courts, they differ in their opinion that it is a necessary response and,thus, that it cannot be eliminated. To suggest that bargaining is an inevitable reaction to the structure of the courts is to argue that the goals of the court could not be achieved under the adversary system, and therefore, that bargaining has emerged as the operating model. If the goals of the criminal process are assumed to have remained fairly constant and the adversary model desirable in its own right, on the other hand, then bargaining is an aberration of the criminal court. It has been suggested that the causes of this distortion in the court can be sought in its administration -- either in a shortage of resources or in a failure to provide adequate regulation of decisions.

It was clearly not feasible for us -- within a single case study -- to determine whether bargaining is, indeed, either a response to changing goals or inadequate resources. Instead, we depended on more intermediate measures and asked how it was that court personnel used bargaining and how well bargaining seemed to be fulfilling the formal goals of the court. By observing the instances in which court personnel bargained, for example,

we tried to determine whether bargaining is most strongly associated with the reduction of delay, the negotiation of reality for correction or treatment purposes, or perhaps yet other possible functions. We also tried to be sensitive to whether bargains are attempted under unusual pressures, either of "procedural" overload or an overload of cases resulting from rising rates of criminal arrest.

Making observations which could lead to judgments about how well the court fills its formal goals is clearly more difficult. If the question is raised as to whether the bargaining process accomplishes deterrence and rehabilitation as well as sentencing, then, it would be beyond the reach of our data. A literal interpretation of the question would require, for example, that workable measures of deterrence and rehabilitation existed. Even more difficult would be the task of determining that it was indeed bargaining which had led to the fulfillment of these goals. In the absence of such measures it has been generally impossible for any study to decide how well trial serves the ends of rehabilitation and deterrence, much less how well bargaining can meet the correctional goals of the criminal justice system.

What we attempted to ask, then, was the slightly less ambitious question of whether the factors which appeared to determine bargains were consistent with the goals of deterrence or rehabilitation. An acknowledgedly weak, but traditional standard for deciding whether any means of sentencing tried to consider deterrence is whether the "punishment fits the crime." The assumption here is that deterrence is somehow achieved when criminal acts receive condemnation consistently and in proportion to their severity.

Bargained sentences then, could appear lenient in terms of the offense charged and on these grounds, might be thought to have no deterrent value.

There is evidence that the degree to which deterrence is being pursued as a goal may be as much reflected in the behavior and attitude of court personnel as in the sentence itself. In her observations of courtroom behavior, for example, Maureen Mileski found that in those cases in which the bargained sentence was perceived to be lenient, the judge tended to maintain a harsh demeanor toward the defendant, in a sense substituting lectures and reprimands for punishment in the form of a severe sentence[1]. Thus, if there is a conscious effort to consider the goal of deterrence during the bargaining process, it should be observable in the encounters of court personnel and defendants, and in the attitudes which the actors express toward the offenses with which defendants are charged.

For assessing the degree to which rehabilitative goals were being taken into account, we intended to make similar observations of the attitudes and deliberations of court personnel during bargaining. In particular, we tried to evaluate the notion that bargaining is actually a means of individualizing sentencing, taking into account the background of the defendant and having the flexibility to alter the charge and the sentence as it seems appropriate to a particular defendant's correctional needs. We hoped to observe enough of the bargaining process to decide whether court personnel were really guided by correctional goals. Is disposition really a focus of the sentencing process during bargaining? To what extent are correctional alternatives considered, in comparison to other more court-centered factors which may influence the bargain? To what extent do court personnel

actually perceive that they are working toward a rehabilitative goal when they negotiate a bargain?

The structure of bargaining

An issue closely associated with notions of the due process of bargaining is what it is over which people in the courts are bargaining. Two models dominate current discussion: that bargaining focuses on exchanging services, largely within the context of sentencing; and that bargaining focuses on the negotiation of reality with an eye to developing individualized treatment for the defendant. Whether bargaining is susceptible to regulation and could thereby be made consonant with notions of due process hangs, in part, on the answer to this question.

We felt that we could address directly the question of what it is that court personnel exchange, by observing overt offers during their conversations and by remaining sensitive to possible "tacit" offers -- watching for patterns of bargains among the same personnel. The negotiation of reality, however, is less easy to watch. Our hope was to collect enough conversations in which the actors in the court were presenting the "facts" of a particular case so that we could compare versions of the defendant, the offense, and the defendant's potential, and see how it was that they changed as the criminal process progressed. During interviews especially, we intended to look for direct evidence that one actor was trying to influence another to change his perception of "reality."

At a more detailed level, the question of how bargaining is structured becomes not only what the object of the bargaining is, but also what "currency" it is that actors in the bargaining process offer one another. The guilty plea has, of course, been the focus of most studies

of bargaining. The evidence points to the existence of many others -- information, favorable case schedules, friendship -- and we felt that these would be observable directly in conversations about bargaining. Whether the major currency offered is actually the guilty plea or something else should have implications for the due process of bargaining. Are the currencies used by the bargainers primarily their own? The defendant's? Does the defendant understand what is being traded? Do currencies vary from case to case? What variables are likely to affect the choice and use of currencies?

The role of court personnel in the bargaining process

Because bargaining is a product of interactions among court personnel, it is clearly shaped by the identity and interests of the members of the court who participate in it. Though models of bargaining assume that bargains are made between the prosecutor and the defense attorney, there is no reason to believe that other court personnel are not involved, or even that the prosecution and defense are the key actors in the process. A critical issue is whether the concentration on the behavior of prosecutor, defender, and judge is justified, or whether the range of participants is in fact much wider, narrower, or variable from case to case. The more widespread and variant a phenomenon like bargaining proves to be, the more difficult may be its regulation.

Whatever personnel are involved in the bargaining process, their behavior during bargaining is dictated by their interests in the criminal process. Observing the juvenile court, Edwin Lemert defines interests as "specialized values or claims that persons or groups have on others or on material things for service, time, attention, use, and employment. Interests

connote immediacy and valuing of something as a means to an end."[2] While Lemert was able to measure the interests of members of the juvenile court directly from the open debates which arose over its reform, the interests of court personnel in this study must be inferred in the context of their attitudes and actions during bargaining, the roles they play, the patterns of initiation of bargains, and the interactions among participants.

In particular, other studies have argued that these relationships and attitudes are best described by asking whether they are based on conflict or on cooperation. The interests of the prosecutor, the defense attorney and the judge have been consistently depicted in most descriptions of bargaining as built primarily on the basis of a conflict relationship. The prosecutor's concern is assumed to be the maintenance of a conviction rate and the speed with which cases are processed. It has also been posited that the responsibility of the prosecutor as a public servant urges him to focus on maintaining the image that he does not lose cases, but does not necessarily demand that he prove that he can win cases.

The interests of the defense lawyer are seen as ambivalent, alternating between the need to cooperate in whatever activities might please the court and the specific need to defend a client in the same court. How he balances these two roles may be dependent on the nature of his relationship with other personnel. If there is inherent conflict between the defense and the court, for example, the lawyer may be able to act as a true adversary toward the prosecutor, but he could experience difficulty in securing the information and services of the court.

If he behaves in ways that are not acceptable to the court, does this prevent him from access to the bargaining process? Are lawyers who design aggressive defense strategies, make lengthy statements, or otherwise consume court time excluded from bargaining, or does the relationship to the court change as cases change?

If, on the other hand, the defense attorney works cooperatively with the court he may be in a position to negotiate sound bargains for the defendant, but perhaps at the expense of the single-minded representation of the interests of the defendant. Under a cooperative model the defendant is presumably represented by a lawyer who already has a complex web of relationships which may shape his decisions[3]. The critical issue in this model is whether a lawyer bound by a history of organizational obligations and battles can negotiate a bargain that is in the interest of the defendant. In what ways is the character of the bargaining process different when it takes place between lawyers and court personnel with longstanding personal relationships than when it happens between lawyers and other personnel who have only occasional contact?

It is argued, for example, that public defenders assigned to a court are much more likely to develop long term cooperative contacts with the court than are private lawyers who are paid by the defendant or who are assigned occasionally to the court on a voluntary basis[4]. Do public and private lawyers appear to have different kinds of relationships with other court personnel? Are public defenders more likely to work cooperatively with the court and more apt to develop and accept bargains than are private lawyers?

The judge's role is equally ambivalent. He is both the giver of justice and the administrator of the courts. As the guardian of due process he must maintain a procedurally correct image, appearing to sentence defendants without such external influences as bargaining. On the other hand, he is clearly required to demonstrate that the court is functioning smoothly and that cases are efficiently cleared. How much overt involvement in bargaining can the judge afford? Is his major interest in bargaining the efficient processing of cases? Does the judge attempt to enforce a due process of bargaining?

The role of the defendant

In most discussions of bargaining, the role of the defendant is rarely even as defined as those of other actors in the courts, especially those of the judge, defender, and prosecutor. In particular, whether the defense counsel is portrayed as a protector or advisor to his client or is seen as an "agent mediator" who "cons" his client into pleading guilty, the expectation of most observers of the courts seems to be that the defendant is a passive observer of his own trial or plea process. A few studies, though, do suggest that the defendant knowingly participates in a charade and is active in his own defense. The kind of regulation which would be needed to insure that bargaining was protecting the defendant's rights clearly depends, in part, on the role of the defendant in bargaining situations. Does he have an independent voice in the outcome of his case? To what extent does he bargain with his lawyer? What are the grounds on which he bargains?

When the defendant is attributed purposeful behavior during bargaining the focus would logically seem to be on his need to avoid conviction. In fact, interpretations of the defendant's interests in bargaining have been diverse and not at all in agreement that the defendant bargains only to escape conviction. As often as it is assumed that the intent of defendants who bargain -- and who are bargained -- is to avoid conviction, it is suggested that they bargain to minimize the amount of penal time they will be given, to remove a damaging criminal label, to modify a criminal record, or to encourage consideration from the court in a related case or charge[5].

Just as it is difficult to determine the interests of court personnel, the evidence on which to decide what interests do guide defendants during bargaining is scant. The problem is further aggravated in the instance of the defendant, since defendants in no way constitute a group with the ability to participate in the academic debate over bargaining and, thus, to express their interests in the issues that emerge. Instead, this study must be dependent on discovering the interests of defendants from their behavior during bargaining. How willing are defendants to enter into a decision to bargain? What appear to be their attitudes toward the concept of bargaining and toward court personnel? What currencies do they offer to those with whom they bargain? What are the purposes of the bargain they participate in? How does the way in which the defendant defines himself compare with the image which he must convey in court?

Other studies lead us to believe that we may find that a description of defendant interests must be disaggregated further by defendant "types." Distinctions have been drawn, for example, between experienced

and naive defendants, between innocent and guilty defendants, and among defendants of different socioeconomic characteristics and with different types of offenses. The most attention has probably been directed toward the interests of the experienced or professional defendant.[6] This kind of defendant is seen as legal-wise and cognizant of how to avoid trouble in court. Since his interest is thought to be primarily to minimize the length of the sentence he is given and to reduce the apparent severity of the offense in his record, the experienced defendant is assumed to use bargaining aggressively and eagerly. Is it true, on the other hand, that the inexperienced defendant has a different set of interests or perhaps no opportunity to bargain at all?

Many unanswered questions exist about other types of defendants, as well. One writer found that black defendants were more likely to demand trials since they mistrusted the offer to bargain and felt that their best interests lay with the chance to fight the case in a trial and to try to win[7]. It is equally possible, however, that the kind of offenses with which black defendants are likely to be charged are those which are less likely to be bargained. Do defendants charged with different types of offenses have different interests in the bargaining process? How do interests in bargaining appear to correlate with the socioeconomic status or the race of the defendant? Finally, are defendants who see themselves as innocent less likely to engage in bargaining than those who believe that they are guilty? Is the interest of the "innocent" defendant most centrally to prove his innocence?

The impacts of bargaining

The differences in form between bargaining and trial are widely recognized. Compared to the highly structured trial model, bargaining appears to be informal, largely hidden, and primarily non-adversarial. What is less well-known is whether these differences in form have measurable impacts on either sentencing or the defendant's experience in court. Is there any consistent set of differences between pleaded cases and cases taken to trial? Does the bargaining process have observable impacts on the defendant or other personnel?

Some observers argue that there are no distinctions between the kinds of sentencing decisions made during bargaining and those made after trial. The assumption is that even trial judges make sentencing decisions on the basis of "non-correctional factors," since they must be influenced as much by the culture of the courts in which they sit as by variables relating directly to the defendant and the offense[8].

Another view, though, focuses on the latency of bargaining, arguing that decisions resulting from a bargain must be influenced by non-correctional factors to an even greater degree than are the sentences of trial judges. Since bargaining is a "hidden" process, it has no provision for the defendant to present his case publicly and,thus, no assurance that the facts of the case will be fully revealed. This is taken as evidence that court personnel will take advantage of the lack of scrutiny and recommend sentences that are not based on "equitable" criteria.

There is no agreement about what factors do determine bargains, just as there is no consensus as to how sentencing decisions are made. We

hoped to discover the basis for bargained decisions by observing court personnel in the process of bargaining. Are bargains made solely on the basis of relationships and obligations among court personnel or do their deliberations take into account the individual characteristics of the defendant and the offense? If the defendant and his crime are part of the considerations which give birth to a bargain, are the factors considered essentially correctional in nature? One description of courtroom encounters for example, suggests that bargains are calculated, in part, on the basis of the defendant's level of disrespect for the court[9]. Still another analysis argues that court personnel use stereotypes of defendants to dictate appropriate bargains[10].

The remainder of the debate over the impacts of bargaining focuses on its consequences for the well-being of the defendant, rather than for the particular sentence levied. A few supporters of bargaining have, for example, contended that the court process is inhumane and bargaining is less likely than trial to have stigmatizing effects on the defendant. The evidence most usually offered is that the trial is designed as a kind of "degradation ceremony,"[11] trying to assure that the criminal process is deterrent by impressing the defendant with the severity of his crime. Even on these grounds it is not clear whether bargaining is more "humane" than trial. While it may free the defendant from participation in the trial ceremony, for example, it could actually substitute perfunctory treatment and a mandatory confession of guilt for the stigmatizing effects of trial.

The long term impacts of bargaining are clearly immeasurable within the scope of this study. Several studies have tried to establish

that the impacts of any appearance in court are undesirable and may extend beyond the expectable sanctions which arise from a criminal record. Skolnick and Schwartz, for example, found that even a defendant who appears in court and is acquitted of a crime may experience difficulty in finding employment, as a result of the stigma associated with adjudication by the criminal court[12].

There is evidence, however, that the direct, and more easily measurable effects of being processed by the criminal courts may be equally important. Theory which has focused on the ways in which institutions "label" their clients suggests that the definition the court gives to a defendant and his problems may exert significant impacts on the defendant[13]. In particular, the manner in which the court views the defendant may influence the way in which he sees himself or in which others view him. To understand how bargaining affects defendants who are its object, we may well ask how court personnel view defendants. How do court personnel describe defendants whose cases they bargain? What types of defendants do they perceive? What attitudes toward defendants do they express when they are in the presence of the defendant?

Some observers have suggested that the most critical point for gauging the relationship between the defendant and the court occurs during the guilty plea. Officially, of course, the plea is a statement of the defendant's factual guilt and can be accepted only on that basis. In practice the distinction between legal and factual guilt appears to be ambiguous for the court. What is the defendant's understanding of the plea as an admission of guilt when he enters a plea as a bargaining device? In

effect, the plea is also thought to constitute an acknowledgment that the action taken against the defendant was legitimate and that the defendant is ready for correction, but does the plea convey these meanings to the defendant?

A position worth testing is that offered by Blumberg who argues strongly that the defendant understands the plea as a necessary charade and nothing more[14]. As evidence he suggests that after his experience in court the defendant will typically see himself as an essentially good person who might have acted guilty in court, but who really was innocent and can quickly reassert his innocence. To what extent do defendants perceive that they are part of a charade while their cases are being bargained? Do defendants see and describe themselves as innocent even while they are formally entering a guilty plea?

Development of the Case Study

The concerns that first led us to examine the phenomenon of bargaining in the courts also led us to formulate a very ambitious set of research questions. Because we were studying a process which has had only a sparse history of previous investigation and for which there is no well developed theory, we were enticed into asking more global questions than common sense might have dictated. Since our interest was in using our results to evaluate a reform, moreover, our questions tended to deal with the systemic aspects of bargaining -- those variables which might have consequences for its impacts on the organization of the courts. For both of these reasons we were encouraged to undertake an exploratory study of bargaining, looking not so much for tests of hypotheses about bargaining as for indications of what are the critical variables that guide the bargaining process.

In this respect we choose to do what Gans has called a reconnaissance[15] or what Weiss refers to as the "holistic" approach to social research.[16] The study we set out to do most closely resembled that described by Gans in The Urban Villagers:

> This, then is not a scientific study, for it does not provide what Merton has called compelling evidence for a series of hypotheses. It is rather an attempt by a trained social scientist to describe and explain the behavior of a large number of people, using his methodological and theoretical training to sift the observations, and to report only those generalizations which are justified by the data...Properly speaking, the study is a reconnaissance, an exploration of a community to provide an overview, guided by the cannons of sociological theory and method, but not attempting to offer documentation for all the findings.[17]

Like Gans we were concerned with describing what we anticipated would be a complex phenomenon, drawing its dynamic from the behavior of a number of people, and discernible only through participation in the life of the courts. Rather than isolating particular elements of the bargaining process for observation -- even if we had had the information on which to make that kind of selection -- we wanted to know how all the elements fit together and how bargaining as a process "worked." Thus, we set out to observe a large number of cases being processed by the criminal courts and to sift from our observations a description of bargaining.

Because of their proximity, our research was conducted in the Massachusetts District Courts. As the next section will show our attempts to observe the dynamics by which criminal cases were processed ultimately led us to employ several forms of data gathering, including statistical analysis of available documents pertaining to criminal cases, interviews with a wide range of personnel of the courts, and direct observation of the operation of the courts. Analysis of each kind of data was under way throughout the period in which our data was being collected, and the results were compared with the questions we were asking and the data obtained from other sources of information. At each stage, we were able to redefine our questions and to focus our observations with greater confidence. The specific path which this process followed is detailed in the next section.

Organization of the research

Like so much of social science research our case study owes its being less to carefully preplanned investigations, than to chance. All studies of the courts are frustrated by the difficulty of breaking through what is described in police research as the "blue curtain." Ours suffered doubly from the problem of getting access to information about the courts, since we were asking to observe what everyone agrees is a latent process. The chronicle of our research,then,is an account of how it was shaped by our attempts to get access to the bargaining process, as well as a history of how our research design was conceived. In the early stages of our research our efforts were primarily directed to finding auspices, and in the later stages, to participating in the life of the court.

Two assumptions guided our search for the best way "inside" the bargaining process. We felt that at least our first efforts to observe bargaining should center on the lawyer-client relationship. This seemed a necessary point of departure not only because studies of bargaining had suggested to us that the lawyer and the prosecutor were the key actors in the process, but also because we felt it was important to observe the role of the defendant as closely as possible. As far as it was feasible, though, we felt that we should make our observations free from the auspices of either the prosecution or the defense. At the same time, entry into the closed community of the court and, especially, to the bargaining process definitely required an official explanation for our presence in the court.

Our initial approaches were addressed to the administration of the District Courts, since we felt that with an essentially "neutral" yet authoritative backing, we would encounter the least bias in the responses

we would receive and the least difficulty in making our observations. The office of the Chief Justice of the District Courts offered us their approval but not their auspices. They responded to our request by suggesting that a study such as ours would, indeed, be hampered if it were regarded as an official inquiry of the Chief Justice, since court personnel would feel less candid about revealing "irregular" behavior.

Our assumption that we would need to observe lawyer-client relationships in the court eventually led us to groups of private attorneys responsible for defending indigents in the District Courts. These lawyers uniformly declined to be observed because they felt that we might infringe on the privileged relationship between themselves and their clients. During this period, however, the Massachusetts Defenders Committee -- the State-funded public defender agency -- underwent a significant change in leadership.[18] This led the incoming Chief Counsel and Associate Chief Counsel to seek basic information on their organization, with the hope of formulating proposals for reorganization. They were receptive to our offer to investigate the methods their attorneys and other personnel used in the processing of cases, including the relationship between lawyer and client. They, in turn, requested an evaluation of the ways in which their attorneys collected and used information. The only restriction placed on our work was that our observations of attorneys' behavior in the courts would be conducted with the attorneys' consent and knowledge and that the results would be reported in such a way that individual identities of lawyers and clients would not be revealed.

Though our chance arrangement with the Defenders did not give us the "neutral" auspices we thought we needed, it gave us access to the court

and as a bonus the opportunity to use the files of the organization. We had not initially planned on analyzing case files, but the presence of over 90,000 case histories of defendants processed by the District Courts was too compelling to resist. At this stage we felt that our observations of bargaining might be greatly facilitated if we could discover in advance what the variables were that influenced whether a case was bargainable, what types of defendants had pleaded guilty, what perceptions of defendants the lawyers revealed in their notes on cases, and whether the court, the lawyer, or the offense seemed to exert significant influences on the outcome of the case.

The first step of our empirical analysis, then, was to draw a statistical sample of closed cases from the Defenders' files.[19] Our study included more than fifty variables which we selected because we felt that they would act as useful measures of the charges, the defendant's background, the attorney's handling of the case, the actions taken by the court, and the outcome of the case.[20] As a concurrent step, we traced the "criminal careers"[21] of several randomly selected defendants, seeking to trace the defendants to observe if there were long-term relationships between Defenders and their clients and whether the outcomes of the cases changed as the client became more experienced or perhaps involved in progressively more serious crimes.

As a first effort, designed to give us a quick "reading" of the results we would obtain, we conducted an analysis of case statistics based on 300 cases and criminal histories of twelve defendants.[22] The results of these studies were sufficient to convince us that the information contained in the files would not give us any insight into the process of bargaining.

In the first place, we discovered that all the variables we had selected were correlated, so that whether a defendant pleaded guilty, the offense charged, the socioeconomic background, age, sex, and race of the defendant, and the outcomes of the case were all highly intercorrelated. We were not able to isolate any variables which might be said to be correlate uniquely with guilty pleas. More important, however, the information itself was suspect. As our later interviews and observations confirmed, these records -- which were kept by the Defenders on their own cases -- were artificial. They did not exist to provide the organization with information about an ongoing case, but rather more as protection for the lawyer against any future charges of malpractice. Information which might have provided us with insight into bargaining and especially, into the lawyer's treatment of the client and the ways in which bargains were actually made was largely absent from the files.

What we did learn from this statistical data was that if bargaining was indeed occurring in the District Courts, we would have to observe it inside the court itself, not through its records. We accepted the auspices of the Defenders for this purpose, and in the process knowingly skewed our observations to emphasize the role of the lawyer in the bargaining process. Initially, we tried to gather basic data on the criminal process and the lawyer's attempts to shape it. We conducted over twenty interviews with attorneys working in all divisions of the Defenders, in order to understand the processes by which they prepared a case from the initial assignment at the district court through the final post-conviction appeal, and to see at what points "bargaining" occurred.[23] Our approach to these interviews was to ask the attorneys to describe the process they each

employed in handling a case, then to direct them to describe how cases and defendants differ, which are the most time-consuming, the most interesting, etc. In each case we were looking for the ways in which lawyers perceived their clients and the criminal process, as well as for what they did. As a last step we employed a content analysis on these interviews to form a structure around which to build our observations in the courts. In addition, of course, the interviews served the added purpose of introducing us to the attorneys and indicating what our interests in the attorney-client relationship were.

Interestingly, we experienced a great deal of difficulty in this effort to communicate with the Defenders. The attorneys were generally hard pressed to understand our belief that there would be any patterns in the way in which they prepared cases. One attorney was, for example, convinced that it would be impossible for him to describe the thought processes, the information, or the strategies which he employed in representing a client, since he believed that each case was absolutely unique. Other attorneys were more receptive to our notions, but they, too, stressed the differences, the specifics of the cases they represented. Since few were able to generalize their experiences, much of the information we received was highly anecdotal. Our efforts to communicate, however, succeeded in enough cases that several of the attorneys invited us to observe their daily rounds in court, and several others, whom we specifically asked, followed suit.

For three months we accompanied these Defenders on their rounds of the District Courts, participating in their interviews, their conversations with personnel in the court, their coffee breaks, their conferences

with other defenders, and their trips to and from court. Our contact with the lawyers and the court was intensive and, we believe,thorough. We were able to watch cases at every stage of preparation and in each part of the formal criminal process. In addition, though we could not observe defendants being arrested or cases being appealed,we were able to hear second-hand accounts of both processes from the police, defendants, and lawyers involved. As faithfully as possible we recorded these observations, including as far as possible verbatim transcripts of all the conversations we witnessed.

As we began to see that bargaining did not occur merely at the plea stage of a case, we began to appreciate the complexity of the process we were trying to understand. In this respect we were particulary concerned with three methodological problems which arose from our choice of auspices: whether our presence was altering the "latent" process of bargaining, how to assure that we sampled all the stages of a process that appeared to include all the personnel in the court,and how to best understand the role of the defendant in the process,when we saw him only in the presence of his lawyer.

At the outset of our observations we had worried that we would interfere with the orderly and natural process of bargaining or at least that we would be unable to take notes on what we observed. Within a few days, however, we found that our role in the courts was not only accepted by court officials and defendants alike, but that our presence was, it appeared, largely ignored. The Defenders introduced us to each person they met merely as being "with us" [the M.D.C.] and explained that we were studying the criminal process. Within a week our main problem was avoiding

assignment of cases, since most of the judges had forgotten that we were not MDC attorneys. Whatever impact we had on people in the process of bargaining, then, was probably limited to modifications they would make in their behavior because the "MDC" was present. Both for these people and the MDC attorneys themselves, we are confident that we observed enough of their behavior to assure that we observed the "range" of possible behavior during bargaining, even if our presence affected particular conversations or activities.

Because of the obvious complexity of the bargaining process, it became evident to us that, however accurate our observations, there were steps in bargaining which were not conducted in the presence of the defender, despite his central role in the bargaining system. Because we were labeled as somehow affiliated with the MDC, we could not step out of that role to observe prosecutors, police, or other attorneys. We owe our understanding of bargaining "outside" the lawyer's presence, then, to observations and data gathered by two of our students with our advice and supervision. Judy Levenson conducted a study parallel to ours, observing the members of the Lawyer's Panel -- a group of "prestige" attorneys who volunteer their time to defend indigents in Boston Municipal and Dorchester Courts.[24] Her data has provided us with a comfortable test of the generalizability of our views about how lawyers prepare cases. Scott Hebert studied the prosecutors of the Suffolk County District Attorney's office,[25] and we were able to use his observations to trace the strategies which the prosecutors use to prepare their cases and their bargaining positions.

Finally, we were, and still are, concerned about our ability to understand the role and treatment of the defendant during bargaining. We

had hoped to include conversations with defendants, alone, as part of our observations and to determine how much they understood about the bargaining process, how they perceived their lawyers, and whether they felt they were getting a fair settlement. While we were able to observe interviews with the defenders and their clients, and to discuss the defendants with each of the court officials with whom the Defenders worked, it became clear to us that little would be gained by attempting to interview the defendants themselves.

Two barriers, in our experience, exist to making contact with defendants who are being processed by the courts. First, while the defendants could understand us as "with the M.D.C.," there was no other role in which we could talk to them with a sufficiently convincing justification about what is understandably a very sensitive topic. Indeed, even the Defenders were typically able to get their clients to "open up" only by deliberate attempts to urge communication, and even then without any certainty that they were being told the "truth." Moreover, even if a credible role were available, the difficulties inherent in interfering in the sensitive relationship between lawyer and client in an ongoing case might well prejudice the outcome of the case for the defendant. This ethical problem has led nearly every other observer of the criminal process to limit conversations with defendants to those whose cases have already been processed by the courts, and who were in jail.[26] Since for our purposes the bias in data obtained from convicted defendants would have been overwhelming, we chose to observe defendants only in the context of our general study of the criminal process.

Analysis of the data

Our observations in the courts, combined with our interviews with the defenders, provided an overwhelming tangle of data, covering more than 600 pages of single spaced notes. The data included not only verbatim accounts of conversations among participants in the court, but a rich blend of our own insights into the bargaining process, asides from the lawyers, partial transcripts from trials, and formal interviews with court personnel. In light of the distinction that Weiss makes between "holistic studies" and "analysis," it would certainly seem inaccurate to refer to the process by which we tried to understand and use this data as "analysis."[27] Clearly, what we attempted is much more a synthesis of diverse kinds of data leading toward a holistic assessment of bargaining than an analysis which seeks to test a hypothesis.

If we employed any particular method for drawing inferences from our data it was what Glazer and Strauss call a "constant comparative" method of "analysis."[28] Our strategy was to cull through the assembled materials, seeking recurring patterns of events -- commonly used words; repeated patterns of bargaining; generally accepted opinions, interests, and perspectives. But most simply, we read through our notes, underlining terms which seemed to be of value in understanding the processes of the courts, attempted to sort them in a useful way, considered their implications and attempted to see if those implications were consistent with other data. Often we were able to learn from testing our emerging hypotheses against our several sources of data. For example, when our observations yielded a set of categories which defenders and others appeared to employ to describe

defendants and cases, we tested them against our statistical data, and found that they were indeed more significant predictors of the outcome of a case than the more expectable measures such as "length of record." Often, too, we were led to make additional observations as our data began to point to a bargaining process.

Our observations of the criminal process and our understanding of bargaining, then, moved forward together, connected by our discoveries of patterns in our data. While we had expected to find regularities in the relationships among professionals, and between lawyers and clients -- which would in turn describe bargaining for us -- we found that our observations were clustering around the objects of bargaining rather than relationships during bargaining. The themes that emerged dealt more with court personnel's needs for information, for friendship, or for dispositional alternatives than with types of defendants or the social structure of the court. Our attempts to understand bargaining, then, became directed toward trying to discover the types of bargains struck in the courts we had observed and the variables which influenced them.

The manner in which we have chosen to report this data is also clearly affected by the fact that it is not the result of a tightly controlled, "representative," or complete analysis. We cannot verify by any objective means the representativeness of what we choose to describe; its validity rests only on our abilities as observers and the care with which we collected, compared, and analyzed our data.

As one test,we have proposed our theories to several of the people whom we had inverviewed or observed, and have found that they, in general, concurred in the presentation we made. To paraphrase a comment of Gans',

the test of a sociological statement can be that a person familiar with the situation will say, "Yes, that's obvious. Why didn't I think of that myself?"[29] While none of our respondents were nearly that enthusiastic about our observations, they were at least not surprised. By this test our general observations may not be grossly inaccurate, though perhaps this test also reveals they are not as much of an "unmasking" of bargaining as we might have hoped.

When we selected cases or quotes to illustrate our findings, we could not be guided by any systematic indicator of representativeness. It would be satisfying to say that they are typical or selected randomly from the quotes and incidents available. It is doubtful, however, that this is true. Instead, they are an attempt to illustrate what we believe to be the dominantly operative mode of behavior with respect to a particular activity. Clearly, they are chosen in part because they are more vivid, clearly drawn, or presentable than are other examples from our data. Our purpose in selecting illustrative material is to communicate as clearly as possible what we feel is a useful view of bargaining, which has important implications for reform of the courts. At the same time, we have been careful to verify that what we report in our case study are not idiosyncratic or perverse instances, which might be prone to distort the reality we are presenting.

The Setting of the Case Study

The Massachusetts District Courts

Our observations of defendants being processed by the Massachusetts criminal courts could have taken place nearly anywhere in the complex system of courts, whose legacy is still strongly that of Colonial Massachusetts. In fact, the Constitution of the Commonwealth dates from the mid-1700's, antedating even the U.S. Constitution, and the present court system still reflects the concepts of judicial organization which prevailed at that time. Neglecting several special courts, the primary system includes a Supreme Judicial Court, an Intermediate Appellate Court, Superior Courts in each of thirteen Counties, and a district level "system" of seventy-two District Courts. In addition, there is a single, separate Boston Municipal Court with its own rules and procedures and four Juvenile Courts, one in each of Massachusetts' largest cities.

When we decided to focus our study on the District Courts we acquired a research setting which is profoundly affected by the structure it has inherited. For our purposes, the district level was the only logical court in which to study bargaining. It is these courts which try better than 94% of all criminal defendants, most of whom are urban and poor.[30] In this sense, the District Courts seemed to be most representative of the bulk of criminal courts in this country, both in their clients and their caseloads.

The structure of the District Courts, however, still retains its colonial legacies.[31] In particular, our research must be seen in the context of the limited jurisdiction, the generally jury-less trial procedure, and

a system of appeal through trial de novo, which is characteristic of the Massachusetts District Courts.

The inheritance of the District Courts, as successors to the local courts of an era in which Superior Courts "rode circuit" through their counties, is that they have concurrent jurisdiction with the Superior Court over misdemeanors and a growing list of "minor" -- one might well read "common" -- felonies. A second anomaly of the District Courts which is a result of their history as a local court is the "probable cause hearing," a quick review of the State's evidence which precedes the process of Grand Jury indictment in all but the most unusual circumstances.

The concept which underlay the peculiar jurisdictional structure of the District Courts was that, since a great deal of time might elapse between sessions of the Superior Court, defendants should have another, faster way of having their cases heard. It was believed that the existence of a local court would prevent arbitrary and capricious treatment of innocent people between sessions of the Superior Court and the Grand Jury (which, in Massachusetts, is a creature of Superior Court). Through these local "district" courts, minor miscreants could have their "day in court" and a final disposition without waiting for the Superior Court, while the more "serious" felonies would be given a probable cause hearing at the district level and if "probably guilty," bound over to the Grand Jury for indictment. Consistent with this philosophy of "quick justice" which underlay the District Courts in their early forms, the trials were conducted by a judge, often part-time, without a jury or transcript.

Since the trial at the District Court was initially looked upon as a device to protect "local people" from irresponsible prosecution, and

to assure an equitable resolution of minor infractions, the appeal which the Commonwealth offered was also designed to be rapid and simple, while still providing a full hearing by the Superior Court. The system of appeal which was selected -- called trial de novo -- would give the defendant a completely new trial in Superior Court, which would once again hear the evidence on the facts and consider points of law. Since the defendant was given a clean slate in Superior Court, of course, there was also no review of the original District Court proceeding.

Since its earliest appearance, the District Court System has undergone many important modifications. The qualifications and salaries of judges have been upgraded, common procedures have been instituted, and the office of Chief Judge has been added to create a District Court "system." Limited provisions for jury trials in the District Courts have also been made, and the District Courts have become, at least in a very limited sense, courts of record.

Nevertheless, it is clear that the idiosyncratic nature of the District Courts of Massachusetts might have an effect on the behavior of their personnel, which could be great enough to alter the shape or extent of the bargaining process. We tend, however, to doubt that the impact of trial de novo and judge-only trials are great enough to invalidate our conclusions about bargaining. From a limited period of observation in the Superior Court and from our interviews with the attorneys, we were unable to detect any systematic, consistent differences between the District Court and the "trial court," which would have altered our findings. The attorneys, in fact, contradict each other concerning what differences trial de novo and jury-less trials make in the processing of cases. Some indicated that

in Superior Court, "judge shopping" was impossible; others claimed that it was easier. Some indicated that the District Attorneys bargained less than in District Court; some said more.

Our attempts to compare District and Superior Courts, though very limited, indicate that, at least, the attorneys appeared to go through identical processes, except at trial. At a jury trial, the lawyers' behavior does appear to be somewhat more intensely geared to making an impression of formal adversarial effort than at District Court, since juries are seen by the attorneys to be more impressed by courtroom histrionics than are judges. Since less than 20% of all cases disposed of at Superior Court go to trial, however, and a minority of even that 20% are jury trials, it is unlikely that the process of impressing a jury significantly alters the behavior of court personnel.

Dorchester, Cambridge and Boston Juvenile Courts

Our search for specific courts in which to study bargaining was in part guided by criteria we developed for "representativeness" and in part by the auspices for our research. In order that our observations might have a greater chance of generalizability we were looking for courts which were primarily urban and which had a diverse clientele. We began, then, with the 23 urban district courts, which process over one half of the total cases of the District Court.[32] From these, we decided to eliminate courts which have jurisdictions wholly or predominately within one of the traditionally strong ethnic neighborhoods of the city. We also discarded the Boston Municipal Court, which hears cases from the downtown area, two "low-crime" ethnic neighborhoods, and -- significantly -- the city's "skid row"

and a large area of comparatively disorganized residential and commercial development.

When we chose to conduct our research under the sponsorship of the Defenders, our choice of courts was decreased. At the time we began our work, the Defenders had ceased to represent defendants in all but three courts at the district level in the Boston area -- the Third District Court of Eastern Middlesex at Cambridge and the Municipal Court of the Dorchester District, and the Boston Juvenile Court. The two District Courts met all of our criteria, and they were known to have widely divergent reputations as institutions. The Boston Juvenile Court is a special-purpose court, devoted to adjudicating charges of delinquency in an area which includes the jurisdictions of the Boston Municipal and Roxbury District Courts. As such,we would not have chosen it on the basis of our own criteria, but it appeared to be very useful for increasing the range of cases we could observe.

In terms of a structure and caseload Dorchester and Cambridge Courts proved to be nearly identical. Each handles approximately 15,000 criminal cases and 5,000 to 6,000 civil cases each year.[33] At the time of the study, the Dorchester Court had two full-time justices and one "special" justice who worked on a part-time basis for a daily fee. In fact, the special and full time judges were indistinguishable in attendance -- all three were present from three to four days a week on the average during our observations. The Cambridge Court -- because it provided a limited kind of appeal procedure -- was authorized three regular and three special judges. Because of absences and a death, however, the court usually had the same number present as Dorchester.

The neighborhoods represented by the two courts, however, were noticeably -- and for our purposes, fortuitously -- diverse. The Dorchester community at the time of the study was divided nearly equally between two neighborhoods -- white and black -- and its economic conditions were even more depressed than those in the city of Boston as a whole. Cambridge District Court, on the other hand, serves the City of Cambridge and the suburban Towns of Belmont and Arlington. This is not to say that Cambridge does not have its share of poor neighborhoods and housing projects, which have for several years been the focus of extensive racial and social unrest. In this respect, there was some overlap in the populations with which each court actually dealt, but the suburban and university populations of Cambridge allowed somewhat more diversity in the populations served by the court.

Though we were satisfied that the caseloads handled by the two courts were similar to those in other urban misdemeanor courts, there might be grounds for charging that Dorchester Court and especially, the Boston Juvenile Courts are "unique." At the time of our study there was an extensive and successful campaign to remove a judge of the Dorchester Court. Among the allegations made was that the judge had "consistently and repeatedly violated the rights of poor people appearing in criminal sessions"[34] by failing to follow rules of procedure set by the Chief Justice of the District Courts of Massachusetts. The fact that his behavior was so extreme that it resulted in his removal has left many observers of the courts convinced that the Dorchester Court was particularly corrupt and, hence, unique. While we did observe that individual judges each had idiosyncratic patterns of behavior, our comparisons between Cambridge and Dorchester convinced us

that Dorchester was in no way unique, especially with regard to the uniform observation of procedural rules. In fact, we came to believe that the peculiarities of individual judges -- at least in the Massachusetts system -- do not have an inordinate influence on the patterns of bargaining which occur in their courts.

What makes Boston Juvenile Court seem unique is that it is limited to delinquency cases. The court has a Chief Judge and one other full-time judge and, at the time of this study, two special justices who participated irregularly in the proceedings of the court. In addition to the usual court personnel described in the next section, the "BJC" also had several resources unique to it -- a psychiatric evaluation clinic, more carefully selected probation officers trained to deal with juveniles, and priority in access to outside helping agencies such as the Boston Court Resources Project. These resources may, indeed, have had an influence on the quality of treatment that defendants received. Our observations indicate, however, that the structure of bargaining in Boston Juvenile Court was not affected by these differences, or at least, it did not diverge from what we found in the other courts.

Methodological Issues

Despite the fact that our study was hampered by a lack of theoretical base and by our own difficulties in watching a latent process, we are confident that we have an honest -- and we hope useful -- analysis of bargaining in three Massachusetts Courts. Our desire to generalize from this data to provide a basis for evaluating negotiated justice as a reform forces us to acknowledge a number of philosophical and methodological problems. In addition to the methodological issues we have already discussed -- our identification with the lawyers' perspective, our sparse contacts with defendants, and our use of participant observation -- there are a number of other problems which should constitute a cautionary note to our findings.

We see five major areas of concern to users of this case material. The most insoluable relates to the fact that we came to see truth in the courts as inherently undiscoverable and the process of bargaining itself as latent. With these two assumptions we are also forced to a position of great scepticism about the validity of our own observations, since they are a product of the same system whose observability we doubt. At a more concrete level, our method, since it is "post-factum" theorizing from a single case study, leaves us with an interesting model, but with little certainty as to its validity, generalizability, or even "accuracy." Finally, we must face a serious ethical problem arising from the extent to which we were able to tell our informants about the purposes of our research.

Our observations cast very serious doubt that there is anything such as "truth" in the criminal courts. Witnesses to nearly every "criminal"

incident with which the courts deal were unable to agree to the simplest facts. At a higher level of abstraction, the information which the courts collect is usually contradictory, and often "artificial" since it serves a number of latent functions for the court.[35] Because of the latent uses of information in the courts and the need for informants to distort what they report, there are several probable limitations on our data. It is clear, for example, that we have had to impose our own biases in order to organize data which is "suspect," others have misled us intentionally or innocently, and our memories have altered still other observations in ways we cannot test. Finally, of course, the statistical data which we have employed as a "check" on our observations is itself an output of this very system.

A second important consequence of the "Through the Looking Glass" qualities of information in the courts is that our model of bargaining borders on being a "total" theory. Since we claim that truth is undiscoverable in the courts and that evidence produced by the system is distorted by the process we are describing, we probably make it impossible to refute our own theory. Any evidence which might contradict our model is also disclaimable on the grounds that it is probably distorted. It is impossible, for example, to refute our contention that the reality of a case is negotiated at all points in its processing. To be sure, any observations we made of a case could be argued to be the product of a negotiation: both agreement and disagreement among court personnel over the facts of a case, for example, could be assumed to be evidence that negotiations had taken place.

Were we studying a less complex process, we might face the charge that our model is neither validated nor (perhaps) validatible. While planners who try to develop an understanding of prospective reforms must always face this problem (for, after all, it is impossible to conduct an experiment on a reform before the reform is tried), we are not thereby exonerated from the difficulties which a reconnaisance study imposes on those who use it.[36] We frankly have no way of testing whether or not our model of bargaining is valid without conducting a separate empirical study using a methodology more amenable to the refutation of hypotheses. In particular, while we may have illuminated the question of "how it all works" with our case study, it is impossible for us to establish whether our case study includes a typical sample of bargains and bargaining roles, either for the courts we studied or for a range of other courts. We have already, of course, outlined the steps we have taken in trying to limit the likelihood that our results are wholly inconsistent with "reality," but these techniques do not gives us the traditional kinds of comfort about the credibility of our results.

The final problem we faced is an ethical dilemma probably common to all social scientists observing latent processes. The ethics of observation ordinarily argue for an open announcement of the observer's interests and identity.[37] In observing a process such as bargaining, however, there are also serious ethical and practical grounds for withholding that information. The bargaining process is one which may shape the defendant's life for several years -- arguably for the rest of his life. Moreover, it is a latent process -- it contradicts the formal ideology of the courts. Therefore, an outsider observing the bargaining process is faced with the

following dilemma: to disclose that it is bargaining which is being studied may resolve the problem of deceit, but it might very well alter the behavior of the bargainers, the course of the case at issue and the future of the defendant; to withhold identity reduces the researcher's imposition into the bargaining process, but at the risk of "using" the people who are being observed.

Faced with this dilemma, we chose to deal with each person in the process as openly as possible. We did let the attorneys we observed know that we were studying the ways in which they prepared a case for trial or disposition, though we did not indicate that our emphasis was on bargaining (in part because we were not at the time certain that that was the principal focus of our study and in part because we feared that to bring up the issue of bargaining might alter their handling of a case.) With all other personnel of the courts we maintained silence concerning our identity and purpose except when questioned about who we were. In those instances, we answered all questions truthfully but did not volunteer more than necessary.

It is with the defendants that our deepest ethical concerns lay. The difficulties of explaining our role would have been the most serious with them, and it was also with them that there was the greatest risk of influencing the bargaining process. We therefore generally relied on our attorney-escorts to explain that we were "with them," that the information we gathered would in no way be used against the clients, and that we were studying the ways in which cases were prepared.

Notes

1. "Courtroom Encounters," An Observation Study of a Lower Criminal Court," Law and Society Review, Vol. 5, No. 4 (May, 1971), pp. 525-527.

2. Social Action and Legal Change: Revolution Within the Juvenile Court (Chicago: 1970), p. 17.

3. See, for example, Abraham Blumberg, "The Practice of Law as a Confidence Game: Organizational Cooptation of a Profession," Law and Society Review, Vol. 1 (June, 1967); Mileski, pp. 488-490.

4. Jerome Skolnick, "Social Control in the Adversary System," Journal of Conflict Resolution, Vol. 11, No. 1 (March, 1967).

5. See "The Unconstitutionality of Plea Bargaining, Essays Selected From the Harvard Law Review (Cambridge, Massachusetts: 1972); Donald Newman, "Pleading Guilty for Consideration: A Study of Bargain Justice," Journal of Criminal Law, Criminology, and Police Science, Vol. 46 (March-April, 1956).

6. For discussion of the role of the "professional" or "regular" defendant see Mileski, p. 521; Newman, p. 784; Yale Kamisar, "Equal Justice in Criminal Procedure," Criminal Justice in Our Time, eds. Yale Kamisar, Fred Inbau, and Thurman Arnold (Charlottesville, Virginia: 1965), p. 89; Wayne La Fave, Arrest: The Decision to Take a Suspect into Custody (Boston: 1965), p. 407.

7. Mileski, p. 515.

8. John Hogarth, Sentencing as a Human Process (Toronto: 1971), p. 9.

9. Mileski, p. 503.

10. David Sudnow, "Sociological Features of the Penal Code in a Public Defenders Office," Social Problems, Vol. 12 (1964), pp. 255-277.

11. The concept of a ceremony which focuses on degradation--the stripping away of the identity of a defendant or inmate--is classically developed in Harold Garfinkel, Conditions of Successful Degradation Ceremonies," American Journal of Sociology, Vol. 61 (March, 1956), pp. 420-424.

12. Richard Schwartz and Jerome Skolnick "Two Studies of Legal Stigma," Social Problems, Vol. 10 (1962), pp. 133-142.

13. See, for example, Martin Rein, Social Policy: Issues of Choice and Change (New York: 1970), p. 74: "The way in which an institution defines a person can affect his life chances and career alternatives in two interrelated ways: through self-definition and through social definition by relevant others ... the intensity and severity of the institutions response may lead the individual to act and to become the way he is defined ...".

14. Abraham Blumberg, Criminal Justice (Chicago: 1970), p. 177.

15. Herbert J. Gans, The Urban Villagers (Glencoe, Illinois: 1962), p. 349; The Levittowners (New York, 1967), p. 449.

16. Robert Weiss, "Alternative Approaches in the Study of Complex Situations," Human Organization, Vol. 25, No. 3 (Fall, 1966), pp. 198-200.

17. p. 349.

18. Growing dissatisfaction in the Massachusetts legal community had led to an investigation of the Massachusetts Defenders Committee. An evaluation by the National Legal Aid and Defenders Association (1970) recommended the replacement of the Chief Counsel and Associate Chief Counsel and total reorganization of the assignment and supervision of the Defenders. At the time we began our study the recommended personnel changes had occurred and the new Chief Counsel had as far as feasible implemented the NLADA recommendations as a starting point for organizational reform.

19. At the time of this study the Defenders maintained a chronological file of nearly 90,000 cases. "Cases" were material related to a single defendant and to all charges connected with a single incident in which that defendant was involved. An alphabetical card file attempted to aggregate all cases pertinent to each defendant to allow for cross references (e.g., prior cases in which a client was involved which might be useful in understanding a current case under preparation). The contents of these case files are described in Appendix A.

20. The method by which we drew our sample and selected our variables and the specific variables used are presented in Appendix B.

21. For each defendant selected we read through each case file, beginning with the earliest case brought to the Defenders by that defendant and moving through each successive case chronologically. We looked particularly at the types of offenses the defendants had committed, the lawyers who had handled the case, the types of dispositions made, and the socioeconomic background of the defendant. We found no

systematic determinants of defendants' "careers" with the Defenders and no consistent types of defendants, except for the obvious finding that all had records which began at the juvenile stage and their dispositions (though not necessarily crimes) tended to become progressively more serious. Most significantly, rarely did the same lawyer handle a defendant more than once.

22. The techniques by which we coded and processed our data is discussed in Appendix C.

23. Appendix D contains a sample interview format, including the particular questions we tried to ask each lawyer.

24. See Judy Levenson, "The Role of Private Counsel for the Indigent" (unpublished paper, Wellesley College, June, 1973).

25. See Scott Hebert, "The District Court Prosecutor Program: An Examination of the Interactions of Court Personnel With Assistant District Attorneys in the Lower Courts," (unpublished paper, Department of Urban Studies and Planning, Massachusetts Institute of Technology, October, 1973).

26. For a study of this type, focusing on interviews with prison inmates see Jonathan Casper, American Criminal Justice: The Defendant's Perspective (Englewood Cliffs, New Jersey: 1972).

27. Robert Weiss, pp. 198-200.

28. Barney Glaser and Anselm Strauss, The Discovery of Grounded Theory (Chicago: 1967), pp. 101-115.

29. Herbert J. Gans, classroom lecture, Massachusetts Institute of Technology, 1969.

30. Steven Bing and P. Steven Rosenfeld, The Quality of Justice in the Lower Criminal Courts of Metropolitan Boston (Boston: 1970), p. 2.

31. Our understanding of the history and structure of the Massachusetts court system comes primarily from Edwin Powers, The Basic Structure of the Administration of Criminal Justice in Massachusetts (6th ed.; Boston 1973).

32. This figure is obtained from a comparison of the 1972 Annual Statistical Reports of the Clerks of the District and Municipal Courts of Massachusetts, which are collected and retained by the Office of the Chief Justice of the Massachusetts District Courts and of the Boston Municipal Court.

33. Clerk of the Third District Court of Eastern Middlesex, 1972 Annual Statistical Report and Clerk of the Municipal Court of the District of Dorchester, 1972 Annual Statistical Report.

34. Affidavit by the People First Inc., filed with Chief Justice Franklin Flashner of the Massachusetts District Courts, as part of an administrative hearing to determine the fitness of Judge Troy to perform his administrative duties, 1972.

35. We owe the idea of the "artificiality" of the criminal justice system to conversations with Donald Schon of the Massachusetts Institute of Technology.

36. See, for example, Howard Becker, "Problems of Inference and Proof in Participant Observation," American Sociological Review, Vol. 23 (1958); Robert Merton, Social Theory and Social Structure (Glencoe: 1947).

37. See, for example, Gans, The Urban Villagers, p. 342.

CHAPTER IV

CASE STUDY: BARGAINING IN THE MASSACHUSETTS COURTS

Organization of the Case Study

Our observations of plea bargaining confirm that the practice is indeed prevalent in the Massachusetts District Courts; but more important,that bargaining at other stages of the criminal process is pervasive. The structure,content and outcome of these bargains, moreover, appeared to be affected by nearly every aspect of the criminal process: the participants, their interests, the crime alleged, the background of the defendant, and many others. From the moment the Commonwealth initiates criminal action against a defendant until he has received a final judgement and disposition -- indeed, sometimes even for years afterwards -- the defendant's case is subject to a series of complex negotiations. To understand the impact of bargaining on the criminal courts, then, it was necessary to look not only at the process of bargaining which takes place between the prosecution and the defense immediately prior to trial but to examine the entire process of criminal adjudication in the District Courts.

Bargaining among court personnel not only appears at each stage of the processing of a case, but each stage is characterized by a distinct mode of bargaining -- a unique configuration of actors and interests. For this reason, we have chosen to present our case material in the sequence of the criminal process. This method of organization is intended to underscore the way in which bargaining changes at each stage of a case, and at the same time to illustrate the interdependencies of each manifestation of the bargaining process. Bargaining, in fact, appears to be cumulative, building from a chaotic situation at arrest toward a

highly structured understanding of reality and a settled prescription for professional action (a "plea bargain") at the end of the criminal trial.

In the cases handled by the defenders in the District Courts of Massachusetts, the sequence in which defendants are processed appears to be divided into four distinct stages, which are marked by changing relationships between defendants and court personnel and among the court personnel themselves: initiation of prosecution; arraignment; preparation of the defense between arraignment and the day of trial; and the events of the day of trial. The case study which follows will examine each of these stages separately, indicating how negotiations are altered as cases are processed.

The process by which cases are handled is, of course, not the only important determinant of the content of negotiation. Many other factors intervene. Clearly, in a court which holds public hearings and trials on all crimes from murder to overtime parking, court personnel develop a wide range of interests in bargaining based on their perceptions of the importance to their professional lives and to their constituencies of the outcomes of cases. Within each profession and interest group in the court, of course, there are variations in the approach to bargaining based on the background and attitudes which they bring to the case. Finally, the background of defendants, too, has important consequences for the handling of a case. These variables will be examined at each stage of bargaining to trace their shifting influence on the shape of the bargaining process.

Initiation of the Prosecution

The court's activity concerning a crime officially begins when the judge or clerk signs a complaint formally alleging that a person has committed a particular crime. The mechanism with which the court will deal with the crime, however, is influenced by the events which take place before the signing of a complaint. In particular, the path which a defendant's case will follow is to a great extent "set" by the type of offense with which he is charged and the way in which the police or other officials react.

This initial stage is by far the most diverse of all stages in the processing of cases. Typically it is seen as involving the police officer and the defendant and consisting of the process of arrest, booking, and formal lodging of charges. In fact, a variety of other mechanisms may be involved, and the actors might also include the probation officer, the assistant district attorney, or even the judge. Our observations reveal at least four distinct modes by which cases were initiated, in addition to the more elaborate "planned arrest.": the police being called to the scene of a crime; the police watching court proceedings for "familiar" defendants; chance encounters between police and suspects; and formal civilian complaints.

The planned arrest

Only 15% of the cases we observed could have been seen as the result of a carefully planned strategy of investigation and arrest developed by coordination between the police and the District Attorney's office. The limitation of the resources of both organizations limits the

crimes for which an elaborate investigation can be mounted to a small fraction of all crimes, and special attention must be given to those particular crimes which might arouse public interest. Typically, the kind of crime selected for concentration is limited to murder, arson of a dwelling, rape, armed robbery, aggravated assault, and possession of heroin with intent to sell. To these crimes the police and District Attorney assign specialized units of highly trained and experienced officers and attorneys who employ specially developed techniques. The result is, that in the case of these major crimes, there is a distinctive mode of behavior used by the police which includes the process of investigation, arrest, interrogation, booking, and complaint, and which does not tend to occur in other kinds of cases.

Typically, the police first decide to direct attention to a case when they obtain information -- usually from a regular informant -- that a crime will be committed, has been committed, or is regularly being committed. An arrest warrant, a search warrant, or both are sought, usually with the help of the District Attorney's office and, once obtained, used to authorize a "raid" which often results in the arrest of several people and the confiscation of considerable evidence. From that point on, care is taken by the prosecution and police to protect their case by adherence to court-sanctioned procedures, and by employing the defendants regarded as less "important" as witnesses to the major crime, in exchange for dismissal of the minor charges against them.

At arrest, then, the attention of the police is particularly focused on a wide-ranging search for information, witnesses, informants, and potential defendants. Once the arrest has been made, the activity of

the police becomes narrowed -- concentrating on employing resources less to gather information and more to "protect" the case and assure the conviction of the defendant. Two cases illustrate this process and also show how this pattern of arrest can set in motion factors critical to the adjudication of a defendant's case.

One group was being sought on both local and Federal levels for possession of narcotics with intent to sell. The initial step the police took was to swear out a warrant to search the home of John Doe, alias "Henry" at a specified address because, in the words of the policeman's affidavit supporting his request for the warrant:

> a reliable informant who has proved reliable in the past... has been in the dwelling located at [Address] on several occasions, and on each of these occasions has observed large quantities of Heroin, and..the occupant, known to my informant as "HENRY", sell same Heroin....

Working from the warrant issued on the basis of this affidavit, the police then entered and searched the house described in the warrant. They found not "Henry" but a woman named Carolyn Hill and her six children, and in another room over 250 grams of heroin, and quantities of apparatus for "cutting" the narcotic.

At the station house, the police interrogated this unexpected defendant -- Carolyn Hill -- especially trying to establish that she knew several people, "Jesse, Amos and Rico" or could "locate Henry" -- a line of questioning they pursued heavily both at her apartment and at the station house. At each point, the police took a great deal of time interrogating the defendant, and from their questioning the police obtained Carolyn's contention that the suitcase and briefcase which contained

heroin had been put where they were by "Henry" and a friend of his and that "Henry" was a new boyfriend of Carolyn's, who sometimes lived there, but used the apartment mainly as a mailing address.

Later the same day the police arrested Henry Kursley on the assumption that he was the "Henry" in the warrant. He in turn was interrogated extensively by the police, especially concerning his relationship with Carolyn -- in particular, how long they had been together. He explained that they had been together for six years and that four of Carolyn's six children were his, though since being here, she had taken a new boyfriend. He also admitted that he was using her apartment as a mailing address. Though Mr. Kursley insisted vigorously that he had had no prior contact with heroin, the police also questioned him extensively about instances in which they alleged he had sold heroin to one of them. When they had completed this line of questions, they turned to the question of whether he knew "Jesse, Amos, and Rico." According to the defendant, they said, "You can go free if you know about them, but if you don't cooperate, you'll do forty." Although flatly denying knowledge of these men or of the incident, the defendant was charged with possession of heroin with the intent to sell. In this instance the police made the decision to initiate criminal proceedings despite the fact that at the time of arrest Henry did not have possession of the heroin.

For the next several days, the police watched Carolyn's apartment, searching everyone going to or near it and arresting those for whom some basis of arrest could be found. On one occasion, three friends of Carolyn's came to the apartment. As they left, the police stopped them and searched their car and their personal effects. When they found a

small quantity of a substance they believed to be heroin in the purse of one woman, they arrested all three -- two for "possession with intent to distribute" and the other with "being present." The police knew they had very little grounds for the arrests, but they also knew that the three were friends of Henry and Carolyn and would be more useful as witnesses if faced with serious charges of their own.

The case outlined above is typical of a carefully planned arrest by the police, especially in the use of warrants and preplanned arrests of co-defendants. It illustrates the tendency of the police to try to turn defendants against each other and to offer them immunity in exchange for information; at this point the thrust of police activity is directed toward maximizing the amount of general information that can be obtained from a defendant. The case is also typical, on the other hand, since, like Henry, most defendants arrested for major crimes are too "legal-wise" to accept the offers made by the police at this stage.

An example of a less sophisticated defendant involved in a planned arrest and asked to become an informant is the case of Richard Lauphinee. Offered $300 to burn "about $3000 worth" of a building (presumably by its owner), the defendant "set up" the building by setting out gasoline and rags, returning at night to set the building afire. A neighbor, when he saw the fire, notified the police that he had seen a stranger at the building that afternoon, and, based on his description of the defendant and his automobile, they arrested the defendant a few minutes later. It was on the basis of several items of circumstantial evidence (his hat, which the witness had described, the fact that his socks and pants smelled of gasoline) that the police were able to justify his arrest.

They took him to the station house, where, although he was informed of his rights, he confessed to the arson, explicitly stating that he had done it for money, but refusing to produce sufficient evidence to allow the police to arrest the man who paid him. As Lauphinee's attorney pointed out later:

> Lauphinee talked because he was inexperienced. He just didn't have any idea how important that was. Now that he's seen how weak the police story is without that confession, he's beginning to regret that he talked. Now he's backed into an ugly corner -- he has to talk or he'll get about 10 [years] in Concord [Massachusetts Correctional Institute], but if he talks and they don't get his backer, he's in hurt -- he could get wiped out.

Although the police need this kind of information to increase the chances of prosecution, they too recognize the dangers to a defendant in becoming an informant -- that the defendant could get "wiped out." As an incentive to the defendant to take the risk involved in informing, the police may tend to use a strategy of combining very high charges (as in the case of Richard Lauphinee) with the promise of freedom if the defendant informs on his friends, acquaintances, or codefendants. To the extent that they are organized or experienced, the defendants may resist this strategy at least until they are dealing with the Superior Court District Attorney.

Arrests on patrol

Most crimes, however, are too common and have too little visibility to most of the public for the police to make heavy investments in an active strategy to arrest defendants. Though most defendants are arrested at or very near the scene of their alleged crimes and the police

are often called to the scene, there are rarely organized informers involved, and rarely any witness but the police officers who arrest the defendants. Arresting officers, moreover are usually assigned to patrol units rather than specialized investigation details and make the arrest with no more than two officers at the scene.

The defendants in these cases are, like the police, somewhat less organized and sophisticated about the process of arrest and interrogation than are defendants in preplanned arrests. Still they have often been arrested several times before, so they are moderately familiar with the encounters which will take place between themselves and the police. In this kind of arrest, however, contact with the police is less formalized and police attention is directed to the ad hoc apprehension of defendants rather than to the planned pursuit of information.

The conditions under which arrest for crimes like property offenses take place tend to reinforce whatever tendencies toward tension and suspicion between police and these experienced defendants may already exist. In general, the situation is an unoccupied building, after dark, and both the defendants and police may well be surprised by the encounter. Unlike the police role in major crimes, the police in these cases typically cannot plan the apprehension of defendants, are unfamiliar with the areas in which they must make the arrest, and are patrolmen, not investigators. The result is that after the arrest there will usually be disagreement between the defendant and the police about what happened at the arrest, and defendants in this kind of case very often complain of police brutality and failure to inform the defendant of his rights.

A good example of the kind of encounter which take place between police and defendants in arrest and booking of a property offense is the Tilson and Wall case. The two co-defendants had been observed by neighbors "fooling with the mailboxes" at a six-family apartment building. When the police were called, the two patrolmen who answered the call, being unsure of what they might find, split up, one going up the front stairs, the other going around to the back of the building. In the dark, the second officer, according to his testimony, saw the following:

> On the terrace of the second floor, one door ajar and the lights on in the apartment. The door was standing ajar by about four to six inches, and I could see that there were fresh wood marks in the doorframe. I also saw those two gentlemen [referring to the defendants] in the apartment looking around like they were deciding what to do next. I climbed onto the balcony and told them to freeze. The short one, who was holding a screwdriver, went to the right into the bedroom. I put the taller one into the wall and told the other one to come out or else. The short one came out. I then advised them of their rights, and they understood.

On the basis of the patrolmen's observations both defendants were taken to the station house where Tilson,the "taller" defendant was booked for breaking and entering in the night time. Quinon Wall, the shorter defendant, observed with the screwdriver, was charged with less serious offenses -- possession of burglar's tools and breaking and entering in the day time. Because the detail of the patrolman's observation was considered sufficient, no lengthy interrogation took place at the station house,and complaints were issued without question on the charges on which both were initially booked.

As related to their attorney, the defendants' version of what happened as they were being arrested differs in several significant details and points of emphasis from what the police describe. First, despite the contention of the police that the event took place at about 7:15 PM and was thus a "breaking and entering in the night time," the defendants claim that it occurred at about 4:30. They also claim that the screwdriver which the policeman claimed Wall was carrying and using as a "burglarious instrument" was in fact lying on the floor of the bedroom. While the policeman claims that he held Tilson against the wall to force Wall back into the kitchen, the defendants claim that they had chosen not to run as they could have, and that the policeman had hit Wall in the mouth and beaten Tilson on the back and stomach. They also contend that the Miranda warning was never given. Both did, however, admit to their attorney that they had chosen the apartment for breaking and entering and had broken in with the intention of stealing enough money or goods to support their need for drugs.

Warrants issued in court

Many police take advantage of time spent in court by routinely watching the proceedings of the court and searching for the defendants wanted by the court for complaints already issued. One defendant we observed who was being arraigned for drunkenness, for example, was recognized by one of the police in the court and was served with a default warrant for several breaking and enterings reaching back over the previous 15 months. In an instance like this, of course, there was no confrontation between the defendant and police officers, but the nature of the evidence which the police would present and the type of defendant involved would be similar to those described in the Tilson and Wall case.

The fact that charges are initiated against a defendant by this mode (or by arrest during patrol) rather than through planned arrest has important consequences for the outcome of the defendant's case. First since there is no witness but the police, the police have no need of using the defendant or his acquaintances as informants. Similarly, the police are much freer in the presentation of their case, and can and do take liberties to bolster its strength. There is general agreement among defendants and most court personnel, for example, that in this kind of case the police often embellish their stories, especially when the evidence in the case is weak. Many defendants complain that the police also "plant" physical evidence, such as weapons or stolen goods, and claim non-existent resistance to arrest and assault and battery on a police officer. The defense attorneys generally recognize this phenomenon, and as one of the district attorneys said, "I have to turn to the experienced police to get help in figuring out if I'm getting a solid case or if it's one that the police have built up."

A second consequence of the weak case that may result from this kind of arrest is that the police may attempt to encourage the prosecutors to overcharge in order to induce a guilty plea, and thus, forestall trial. It may be the case, for example, that Wall was "overcharged." Possession of burglarious instruments is a more serious charge than breaking and entering in the day time, and likely to urge Wall to consider pleading guilty to the breaking and entering charge.

Chance encounters

The largest group of cases before the District Courts of Massachusetts is made up of cases which are initiated as a result of chance

encounters between defendants and police as they perform their normal patrol. The decision to arrest and seek a complaint against a defendant is based on whatever information the police officer can obtain from visual inspection of the defendant or from a cursory frisking for weapons. Arrests in this category, therefore, tend to be confrontations between defendant and officer, and it is quite common that the two know each other.

Indeed, a typical case -- that of Brant and Garvey, who were arrested for possession of dangerous weapons -- began apparently because the police officer recognized Brant. As the officer described it to Brant's attorney:

> I went after them because I saw something that looked like a shotgun on the tall one [Brant]. This guy is a real bad actor. I don't know what they told you, but it's for damn sure they weren't going down to Brigham's for an ice cream cone lugging that arsenal. I knew that we had seen him before....

Brant himself described the earlier encounter in an interview with his attorney:

> Brant: Yeah, I've met him [the patrolman] before -- I seen him around, driving a yellow Pinto.
>
> Att: Have you ever had a run-in with him before?
>
> Brant: I don't know -- maybe I did.
>
> Att: Well, have you ever been to court before?
>
> Brant: Yeah, I got taken in by Jordan's for trespassing or something like that. They said I'd taken a shirt from them, but they didn't find it on me, so they just made it a trespass.

Att: Was this cop in on that one?

Brant: Yeah.

The conversation with Brant indicated further that Brant's apprehension by the police may have taken place because the police felt that he had "gotten off too easy" in the prior encounter at Jordan's. Since the arrest began -- according to both the police and the defendants -- by the police stopping the two as they were walking down the street and ordering them to hold their hands up, there is some evidence to suggest that the police indeed knew Brant as a "bad actor" who was likely to be involved in criminal activity, and was "due" an arrest.

Civilian complaints

In sharp contrast to the prearraignment histories of cases brought to court by the police are those cases which are initiated by civilian complaint -- often the defendant's spouse or friend. If the police are involved at all it is only in those instances in which there is physical violence, and, as a result, there is seldom a police officer who is a material witness or who in fact has a strong personal interest in the outcome of the case.

The case of Herbert Fefferman is typical of this pattern of initiation. The defendant had been under treatment at Boston City Hospital for alcoholism and psychotic depression for an extended period before the case was opened, and had previously been granted a general discharge from the Army for substandard intelligence. His wife, however, felt that he was making inadequate progress in his efforts at rehabilitation, since he had become delinquent in his attendance at a halfway house at which he was an outpatient.

Believing that the courts could provide adequate incentive to get her husband active in his rehabilitation again, Fefferman's wife came to the court for assistance. The clerk suggested use of restraint order requests and a non-support complaint, since the family (defendant, wife, and five children under eight) were on welfare. At this point, the wife was persuaded to sign and submit the non-support complaint, but she refused to sign the restraining orders. Thus, when the defendant was served with a summons to appear in court to answer the complaint for non-support, his wife immediately went to the court to try to withdraw the complaint. The court refused, and the defendant was arraigned.

From the position of the prosecutors and police the close association between defendant and the complainant makes these cases disruptive to the court, and less desirable than other modes of initiation. As an Assistant District Attorney put it, "The family cases are the worst. You're damned if you do, damned if you don't. If you prosecute the case, you're attacking her husband and she'll jump all over you, but if you let him go, she'll call downtown and complain that she can't get justice."

The impacts of arrest or complaint

Following one of these modes of initiation, a formal filing process marks the introduction of the case to the courts. The complainant -- whether civilian or arresting officer -- goes to the Clerk's office and swears to the Assistant Clerk that a set of facts which constitute the commission of a crime are true. At this point, no matter what factual disputes have arisen, the Assistant Clerk checks only to see that the alleged crime is substantially and geographically within the jurisdiction of the court.

The arrests, encounters, and complaints which bring a case into the court are important even beyond their role in initiating the case. The way in which a criminal case becomes a formal matter for the court's attention also determines, in part, the interests which court personnel will have in the prosecution of the case, the strategy which will have to be followed to build a case, and even the information that each actor in the case will probably need to collect. In this sense, as we will see, they provide the initial trajectory to the bargaining process.

Indeed there are some evidences of direct bargains between police and defendants even at this stage. In planned arrests, especially, the police may overtly offer the defendant a chance to be forgiven some of his charges if he will agree to provide information. Overcharging by the prosecutor is a similar attempt to urge the defendant to agree to be an informant, or a witness in another case. If the defendant does consent to cooperate with the prosecution, he can often obtain a reduction in his charges or a concession at sentencing.

Even more important than these traditional types of bargains are the interests which are loosed at arrest and which begin to point toward later bargains. In planned arrests, for example, the level of resources which the police must invest give them a strong stake in seeing that the case actually results in a conviction. Even from the beginning, then, the police are likely to be willing to give easy concessions to the defense at least as they affect the sentence the defendant will receive. Similarly, the mode by which arrest on patrol or at a chance encounter takes place is very likely to result in conflict between the defendant and the police over the facts of the case. This sets in motion a clear need for both sides to

consider negotiating over the "story" in the case -- so that they can avoid a direct confrontation over facts in the courtroom. As the next section shows, these initial conditions of a case will have immediate impacts on the defendant's fate at arraignment, as the police, the defense, and the prosecutor begin to assert their interests and search for information.

Arraignment

On the day set for arraignment the court conducts its first formal consideration of the complaint and the case. As we have discussed earlier, the arraignment serves a number of purposes. Formally it is focused on assuring that the defendant has the opportunity to know the precise charges against him and the identity of his accusers, on recording his plea to the charges, on setting a date for the trial, and on arranging a system of security to insure that he will appear in court for the trial. If the case has been initiated by the police or a civilian without arrest, these procedures are especially important to the defendant's most basic understanding of his situation. Even if he has been arrested the defendant may not know what his charges are, since the specific charges may depend on whether the police hope to use him as an informant or on how strongly they need a verdict of guilty. In most cases, however, arraignments are actually quite brief and perfunctory, with the defendant still unaware of what he faces.

The procedures which each court chooses to follow at arraignment are evidently clear to regular court personnel, but defendants rarely appear to understand. On a typical day in court when over twelve defendants were arraigned, only three knew where to go in the courtroom, or when to stand or sit. It was clear, for example, when four of them tried to leave the court after being ordered to post money bail, that they did not understand even the most basic meaning of the arraignment procedure.

The arraignment process, then is very much a procedure in which defendants can most often be seen as confused and passive subjects. Each

court maintains its own unique interpretations of arraignment procedure and leads the defendant through them formally, and with little explanation. Although the defendant may not understand what has happened to him at arraignment, a number of events critical to his case take place at this stage: the entering of the plea, the assignment of counsel and the setting of bail. The particular configuration of decisions made at arraignment will tend to reflect the predictions court personnel make about the probable trajectory of the case, and, in the case of bail, will in part determine how the court will come to view the defendant.

Entering the plea

The initial step of the arraignment -- the reading of the charges to the defendant and entering his plea -- is officially the central purpose of arraignment. It is usually conducted in such a way, however, that the defendant cannot help but realize that his participation is ceremonial at best. When his name is called, the court officers identify him and bring him to the place where he should be standing, tell him to remove his hat if he is wearing one, and guide his actions through the process. At the same time, the clerk is reading in a barely audible and very rapid voice the fairly complicated formal complaint such as that we observed in the case of Ronald Noire:

> Complaint number 863; Ronald Noire, you are charged with robbery not being armed, in that in violation of Chapter 265, Section 19 of the General Laws of the Commonwealth of Massachusetts, while not armed, you did by force and violence rob John Woodens of forty-two dollars in U.S. currency and one bottle of whisky of value $1.55, the property of John Woodens, 143 Centre Street, Milton, Massachusetts on January 13, 1973.

Without any further explanation the judge then asks for the defendant's plea and, before the defendant can respond, the clerk announces that, "In the absence of counsel a directed plea of not guilty will be entered in the defendant's behalf by the Court." At this stage most defendants still remain unaware that they have been arraigned or that a plea has been recorded in their behalf.

Appointing counsel

For the indigent defendant the next stage focuses on the appointment of counsel. In contrast to the rather cursory approach of the court to the issues of announcing the complaint and receiving the defendant's plea, the process of appointing counsel is largely taken seriously, though the grounds on which decisions about counsel are made vary significantly from judge to judge. What appears to be common to all the judges is the sense that the presence or absence of counsel will significantly affect the course of a case. Thus, implicit policies toward the assignment of counsel range from by-the-book decisions to overt bargaining between judge and defendant to avoid assigning counsel at all.

The most formal of the district court justices, for example, will inquire first of the probation officer whether he believes from his interview that the defendant is indigent and, based on that report, will assign counsel or warn the defendant that it is his own responsibility to obtain and pay for a lawyer. This procedure is, of course, the closest to that dictated by national standards for the assignment of counsel, but even here the weight of the decision may rest on the report of the probation officer and the way in which the probation officer presents the defendant.

Other judges tend to rely much more heavily on their own interchanges with the defendant in court. Many judges, for example, merely ask the defendant if he has a lawyer and if he says,"no," ask if he needs one. If the defendant says, "yes," the judge will then ask if he can afford one. Receiving a negative response, the judge may assign the Massachusetts Defenders or another court-appointed counsel. Some judges even more explicitly discourage defendants from asking for appointed counsel. One judge in a suburban court is reputed by members of the Massachusetts Defenders to urge defendants not to ask for counsel by offering to handle their case immediately or assign counsel, with the threat being that the defendant may be unable to make bail.

Despite these variations the majority of courts, however, apparently prefer to deal with represented defendants and, whatever their procedures, routinely assign counsel.

Setting bail

The court turns next to the issue of bail. If the judge intends to alter the original station house bail decision by increasing bail, he must hold a formal bail hearing. Under these circumstances, the defense counsel will first enter the dock and conduct a brief interview with his new client. The content of the interview is sparse; the Defender introduces himself, asks the defendant questions about his term of residency in the area, his employment, and his record. Typically, the defendant will want to know what is happening to him, but the content of his questions will depend on the defendant's knowledge of the court and the process. One defendant, for example, put his concern this way: "Will this judge hold

me?" The Defender replied, "Don't know -- he's not the type to really lay it on you unless he thinks he needs to." Others expressed the same issue in terms of how much his crime was "worth" in this court, or emphasized that they had never defaulted (by not appearing in court) or if they had, that they had always come back voluntarily. The attorney will, just before returning to the courtroom, routinely tell his client what he is going to say and assure him that he will return to conduct a longer interview and discuss the client's problem as it looks then.

If, on the other hand, there is to be no bail hearing the Court merely returns to its monotone reading of the formal statement of recognizance. An elaborate two-sentence statement is called for, and the distinction between being incarcerated and being free to go is expressed only in the difference between the clerk reading "with surity" or "without surity" in the middle of the statement. On the basis of this kind of statement, few defendants observed knew whether they had been released or jailed, and several had to be removed, not understanding that they had been released on their own recognizance.

The bail decision is much more complex than other events in the arraignment process. To a great extent the entering of a plea and even the assignment of counsel are allowed by most court personnel to remain fairly ceremonial, largely uncontested acts, since both decisions can be altered at any point in the case. The defendant's bail status, however, is viewed by most defenders, prosecutors, and judges as highly reflective and, in a self-fulfilling way, determinant of the strength of the defendant's case.

In theory bail decisions are guided by the principles of the Massachusetts Bail Reform Act of 1971, which was an attempt to make the criteria for bail decisions uniform. The Act stresses the importance of considering the community ties of the defendant, his prior record, and patterns of violence which might represent a threat to the community or to the defendant himself. These criteria do in fact play a role in the court's assessment of the defendant, but they do not constitute the primary basis on which decisions about bail are made. In fact, bail decisions appear to be the result of implicit negotiations in court between the defender and the prosecutor.

In the cases we observed defense attorneys attempted to present their clients in ways calculated to result in the granting of personal recognizance or in the setting of bail, depending on the attorney's prediction of the strength of the case and on his need (and the need of other actors) for information. If the attorney feels that the defendant has a probability of conviction, he will not usually present a vigorous portrait of his client as a person deserving of bail. It appears that both the defense and the prosecution have a tacit agreement to avoid making a strong argument in too many cases, and thus, in a case in which the odds of defeat are high each must conserve his opportunity to fight later by not making a strong case for bail.

Henry Kursley's case provides a good example of an instance in which the defense doubted the information his client had given to him, and thus, the strength of his case. In addition, both the attorney and the prosecution realized that the police had a major stake in interrogating

the defendant and, thus, in having him remain in jail. Thus, Kursley's bail hearing proceeded rapidly:

> Defense counsel: Your Honor, the defendant has come from New Jersey seeking employment as a long-haul truck driver. He has connections to the community in that he intends to marry Carolyn Hill and is now supporting her children and receiving unemployment compensation while he seeks work. He has no prior record.
>
> Judge: Do you have anything else to say?
>
> Defense counsel: No, Your Honor.
>
> Assistant District Attorney: Your Honor, the defendant is charged with possession of a class A substance with intent to sell, and we believe there is a federal warrant for sale of heroin and flight to avoid prosecution. We request a high bail be set.

The judge signed an order imposing bail, and the Clerk announced $25,000 bail.

This unusually high bail was, of course, appealed immediately by the defender, but there were several issues raised by this brief hearing which the defender apparently chose not to pursue. In particular, the ADA's assertion that the defendant was wanted on federal charges of flight must have been influential in the bail decision, but could not have been substantiated if the defender had challenged it. The defender, who later commented on this bail hearing, indicated that he was concerned that he

hadn't fought hard enough, but commented that, considering the charge and the defendant's brief history in Boston, he had felt that further effort would have been futile, and, considering Kursley's own abilities at negotiating with the police, not critical to the case.

In less serious cases, especially those in which the police have no particular stake in information which the defendant has, the efforts of the prosecution to hold a defendant tend to be less vigorous, and the efforts of the defense, correspondingly, tend to be stronger. Thus, the patterns of argumentation used by the attorneys tend to correlate strongly with the bail decision of the court. It seems reasonable to suggest that there is a mutual interaction between the attorneys' projections of the court's behavior and the pattern of behavior itself. If the defense attorney does not make a strong argument for bail because he thinks the defendant may be convicted, the defendant is not likely to be granted bail, and the odds that he will be convicted are increased.

The bail decision, then, is definitely constrained by the strategy used by the actors in the hearings, the strength of their presentations and their own influence in the court structure. The role of the judge in the bail decision, however, should not be discounted. Since the attitudes toward bail vary so greatly among judges, it is certainly true that in some courts judges will impose very high bail or refuse bail despite the arguments of the defense. Within a single court, for example, Judge King has a generally agreed reputation for leniency in setting bail, whereas Judge Scott has a reputation for setting very high bail, especially on Saturday, when no public defenders are in the court. Judge Scott, for example, set bail at $7500 on Stephen Maynes, who had no prior record,

whose contacts with the community were strong, and whose offense was larceny of $6.50 of gasoline,a relatively minor offense. Typical of Judge King's bail decision was one in which he released a defendant in a receiving stolen goods case, even though the defendant was a potential witness to a murder and had an extensive prior record, and there was strong pressure from the police to have him held. In still another decision, Judge King released a defendant on personal recognizance for breaking and entering a dwelling in the night time, in order to allow him to appear in Quincy District Court to face a default warrant for another breaking and entering charge. While these two judges are probably extremes of bail philosophy, they do illustrate the power which a judge has in this part of the processing of a defendant.

In most cases, however, these differences in judicial attitudes toward bail are well known to the regular personnel in a court. Both defenders and prosecutors can often jockey case schedules to insure that they make presentations before a judge whose bail philosophy will not conflict with the outcome they want. Because defenders and prosecutors see the attitudes of judges toward bail as being highly correlated with particular types of crimes and their perpetrators, they can also sometimes influence a bail decision by the type of presentation they make of the defendant, his crime, and his "type."

An example of this type of influence is illustrated by the case of Tilson and Wall. The two defendants were charged with breaking and entering a dwelling and possession of burglarious instruments. Both had extensive records including outstanding probation, although neither had been involved in violent crime or defaulted in a prior case. The judge

in the case, however, was unwilling to release either one. At this point, Tilson was represented by a volunteer private defense counsel, and Wall was represented by the Massachusetts Defenders. The two attorneys took divergent approaches to the ball hearing; the private counsel chose to argue from the bail statute that his client was entitled to release on recognizance, and he listed Tilson's characteristics which favored release. The Defender, in contrast, began his argument for personal recognizance by stating that Wall was a heroin addict who wanted to be cured, and that he had agreed to participate in a local drug treatment program. In this way, the Defender was able to divert the issue from a question of releasing a "housebreaker" to allowing a "repentant" drug addict to participate in a withdrawal program.

Appealing the bail decision

In recognition of the possibility that bail hearings at the District Court might produce widely disparate decisions, the Bail Reform Act provides for a process of "immediate" appeal of bail decisions by petition to the Superior Court sitting in the county in which the District Court is located. Procedures vary slightly from court to court and county to county to accommodate local conditions. In Suffolk County, for example, appeals for indigents are taken to the Superior Court by the Suffolk County Bail Appeal Project on the basis of petitions filed by court-appointed attorneys in the District Courts.

Bail reductions were obtained by this process in nearly half of all appealed cases from Dorchester Court and a large number of those not effectively reduced were changed from bail with bonded surity to cash bail

roughly equivalent to the cost of the bond. Thus a defendant might have a $5000 bail (for which a $250 premium bond would have to be put up) changed to $250 cash only bail. The net effect of the decision for a poor family is that the bail bondsman no longer is needed, and the family is saved the expense of his fee.

The defendant who appeals his bail decision from Dorchester Court, however, may be thwarted by a number of problems in the operation of the appeal system. First, Dorchester Court Officers are instructed to return prisoners to Charles Street Jail, not, as in other District Courts, directly to Superior Court if they have an appeal pending. Second, the Clerk's Office, according to the Public Defenders, "lose" or "forget" one of the necessary papers in a majority of cases, so that appeal must be delayed until the missing paper is found. Of the cases we observed in which an appeal from bail had been taken, there were delays or completely neglected appeals in a large number of instances. While one defendant's appeal was heard in two days, for example, his co-defendant never had his appeal heard in the week between arraignment and trial. Still other defendants have had their appeals ignored completely.

The defendant's situation may be further complicated by the fact that if he is wanted by several courts, whether for outstanding defaults, violation of probation (which can occur at the discretion of the probation officer upon arrest), or an arrest warrant for a new crime, he is held separately by mittimus papers ("mitts") from each of the several courts. Each has a status with respect to bail, and paying the bail for one court merely frees the defendant from that mitt; if others are still in the pre-arraignment stage, the defendant will be taken to the second court for

arraignment and the setting of bail. For a defendant who has committed several crimes in a short time or who has been on suspended sentence from several courts, the process of securing arraignment on all charges can be both costly and time consuming.

The impact of bail

The nature of the bail decision -- and thus, the effectiveness of the bail appeal system -- is critical to the defendant to an even greater extent than the monetary penalties which bail imposes. It is clear, for example, that the bail decision is most important for the effect it has on the ensuing steps of the trial process. Our analysis indicates that the pre-trial status of the defendant, while highly correlated with the defendant's crime, age, and prior record, does not represent merely a reflection of those variables, but in fact is a significant independent predictor of trial outcome (even when these correlated variables are controlled for).

In part, according to our statistics, this significant correlation is "explained" by a high degree of correlation between the pre-trial status of the defendant and the plea entered at trial, since 85% of defendants in jail before trial plead guilty, while only 46% of those on personal recognizance do so. As the following sections will show, our observations of court personnel indicate that the statistical correlation between pre-trial status and plea is largely explained by the impact that the defendant's pre-trial location has on the defendant's own decisions and self-image, and on the strategies available to the prosecutor and the defense counsel.

The most important impact on the defendant in the long run may be the psychological effect of his isolation on the ensuing processing of his case. Because he is isolated from family, friends, and his job -- if, indeed, he still has a job -- delay in his trial bears very negative immediate consequences which naturally affect his decisions concerning his defense and make him likely to plead guilty. Compounding this pressure is the knowledge, which experienced defendants will understand and pass on to the less experienced, that the time spent awaiting trial is very likely to be "dead time" -- that is,time which is not credited to a jail sentence.

The defendant's desire to avoid spending "dead time" is likely to be increased by the kind of environment found in most jails which house defendants awaiting trial. Charles Street Jail, which incarcerated most of the defendants we observed who were detained prior to trial, is apparently typical in its physical condition. At the time of this study, the Jail was recognized by everyone including the Sheriff of Suffolk County as being totally inadequate, both in sanitary conditions, and in efficiency of operation. Its most widely known characteristic is, as one of the Defenders put it, that "Charles Street is about as tight as a Swiss cheese. The prisoners can buy anything -- and just about anything they get, they buy." Judging from the several defendants we observed with fresh "track marks" (from shooting heroin), following incarceration at Charles Street, it is possible that "everything" includes drugs as well as the food, toiletries, laundry, and cigarettes which are openly available for sale inside the Jail.

A final pressure on the defendant to plead guilty and minimize time spent in jail is the impact of his incarceration on his family. To

secure release, an indigent defendant's family must dig heavily into limited resources and deal with an obscure and complex system of bail. District Court bail is generally "bonded" bail, requiring that a 5% bond be submitted to the court by a bail bondsman but Superior Court usually imposes "cash bail" which calls for a small cash deposit -- comparable to the bail premium on District Court bail. The difference to the defendant's family is that the Superior Court system allows them to get their money back after trial, but the District Court system means they will lose much of their money. Unfortunately, as we have seen, the process of bail appeal to Superior Court is both slow and unreliable.

To make it even more difficult for the family to understand and deal with the complexities of the defendants' bail situations, the bail bondsmen often put considerable pressure on them. The bail bondsmen are aggressive about soliciting clients, and wait at the District Courts and the Jail for the families. The pressure they apply to urge families to bail their prisoner causes many to put up a bond on a high bail before the cumbersome appeal process can review the bail imposed. Many of the defenders contend that the bondsmen will actively deceive families about the defendant's status, collecting a fee to post bond when the Superior Court has reduced the bail to the cash equivalent bail or bailing a defendant knowing he has another "mitt" which cannot be removed for several days, but telling the families otherwise. One Defender -- a black woman -- described being solicited on her way to interviews with defendants at the Jail by several bondsmen who said they could "get her man out right away" for a small extra fee.

Many of the impacts of the defendant's pre-trial status on the attorney's approach to the defense, of course, arise from these psychological pressures on the defendant. In addition,the physical presence of the defendant in jail has practical consequences for the defense's case. A defender whose client is incarcerated has less chance to "stall out" prosecution witnesses, to build a solid client-attorney relationship, or to bargain with the same assurance that his client can hold out for a good settlement. The client's mere immobility, of course, has a major impact. It is much more difficult for the attorney to seek out defense witnesses than it would be for the client,who is more likely to know them. Dispositional bargaining based on the client's success with a treatment program, of course, depends on the availability of the defendant and hence, his freedom from jail. Finally, the appearance of the defendant in the dock at trial has an effect on the conduct of the defense. The attorney is less able to confer with his client during the trial or hearings; his client's appearance after being in Charles Street will make the presentation of moral character more complex; and the attorney must cope with the impression made by the fact that his client is plainly labeled by the court as unworthy of trust to appear at trial.

At the same time that pre-trial incarceration limits the ability of the defense to build a case, there is considerable advantage for the court if the defendant remains in jail. The court officials most concerned with the pre-trial status of the defendant, of course, are the police and the prosecutors. A defendant in jail cannot, as a prosecutor put it "get to your witnesses," or commit another crime which would embarrass the District Attorney's office. More directly, though, the

defendant is convenient for further negotiation and has a great incentive to cooperate if he has evidence the State needs for its case. Judges have a general concern -- which several of them articulate in open court while setting bail -- for "protecting the community" from "dangerous" defendants; protecting defendants (such as drunks) who are most dangerous to themselves from hurting themselves, and devising a bail decision which will be sustained in Superior Court (though any conflict between these criteria is usually resolved in favor of incarceration.)

Initiation of the Defense

The arraignment, then, though often perfunctory, nevertheless is an important first stage in the negotiation of a case. At arraignment, the charges are formally defined and lodged, the defendant and his attorney meet and in some cases begin to define their relationship to each other, and the court demonstrates to the defendant his helplessness in the face of legal formalism. Perhaps most important in setting the structure of the following stages of the process -- the defendant has been jailed, bailed, or released on his own recognizance. Thus, arraignment defines the actors and some of the variables controlling their future relations, acts as a vehicle for a preliminary set of bargains, and begins to define, in terms the court can use,the events which are alleged to constitute a crime.

It is necessary, then, to explore next the structure of the relationships among actors involved in a case between the arraignment and the trial. Who are the dominant actors at this stage? What kind of bargaining goes on between them as the case nears its trial date? What interests are they pursuing? What aspects of the case are typically negotiated at this point?

The role of defense counsel

From the moment of appointment, the defense counsel replaces the police and the District Attorney as the dominant court official in the process of negotiation of the case -- a place he holds until the day of trial. In that period, the Assistant District Attorney who will prosecute the case and the judge who will hear it are not yet assigned, and formally,

the court regards the case as being in a state of suspension awaiting the preparation of the defense for trial. Hence, the defense attorney is both formally and situationally responsible for initiatives in gathering information and thereby shaping the issues at trial. The activities of the attorney after arraignment, then, are directed toward choosing and implementing a strategy for handling his case.

The motivations of attorneys in choosing a strategy for conducting a case and in deciding how much effort a case deserves are, of course, diverse. Some are, no doubt, motivated by their need to conform to the culture of the court in which they serve. Some regard their main objective as social change in the courts. The Lawyers' Panel, for example, was conceived as a device for calling attention to the inequities of the District Court by increasing the number of private, influential lawyers who had contact with the lower courts.

Members of the Defenders, too, often see themselves as playing a conscious role in changing the courts. As a whole, of course, they vary greatly in the extent to which they see their objective as social change or "getting along with the people in the court" or "winning." Some regard legally complex cases as the "best" to defend and, thus, the most worthy of effort, and others are more interested in the process of dealing with clients whose prospects for rehabilitation seem good.

Despite the diversity of basic motivations, however, a single theme runs through the descriptions all attorneys give of their thoughts in preparing a case: they want to avoid being surprised by what happens in court -- or in the argot of the local courts -- they want to prevent "being croaked." To that end, the Defender places the most stress on a

complex information gathering process before the case is to come to trial. He wants to find out as much as he can about the defendant and the case, even to the point of anticipating any points that might be raised by the prosecutor or the judge. The first step in this process, then, is for the defense counsel to interview the defendant and, as efficiently as possible, form a first impression of him.

Typing the defendant

The way in which the attorney uses the first interview with a defendant and, indeed, the manner in which he conducts the rest of the case are to a large extent dictated by the fact that he has limited resources with which to defend a large number of clients. Many defenders contend that most of their clients can actually be defended with relatively little expenditure of time. One Defender estimates that 50% of his cases are "in and out -- one interview and then nothing until the case comes up. The rest take a lot of time." Others estimate that as many as 80% of the cases call for a minimum of effort. Based on our study of the Defenders' records, the cases to which they allocate extensive effort probably constitute less than 15% of the total caseload. Thus, the strategy an attorney designs for a case may be initially determined by the amount of time he chooses to allocate to it.

The effectiveness of a defender, then, may in part be dependent on his ability to identify the cases to which he will need to devote his efforts -- whether because they are important to him or because they are likely to cause him "trouble" by "getting him croaked." Apparently the most common technique used by defenders for deciding rapidly how to approach a case and how to allocate time is to use a set of categories to sort

defendants and crimes, on the basis of the first interview. One Defender, for example, dismisses the importance of non-support cases by contending that they are "all junk." Another feels that the "real pro is the best kind of defendant to have." Most Defenders seem to have such a set of constructs for "typing" their clients at the outset of their preparation of the case. The particular characteristics they each use to sort cases are closely tied to their motivations and theories of how defendants come to commit their crimes, and these categories are then strongly reflected in the strategies the Defenders pursue.

Perhaps the most common criterion an attorney uses for sorting out cases which will require extensive preparation is the defendant's charge. As one Defender put it, "The charges sort the cases out. Use without authority, larceny, shoplifting are all junk." The Defenders see this as a useful sorting mechanism because the proof required varies according to the charges ("In a 'B and E', you merely have to find out where the kid was caught and whether and how the building was secured,") and because the different kinds of crime imply,as we have already seen, different pre-trial behavior by the defendants ("In an armed robbery, it is likely that [the defendant] made a statement to the police; in an A and B, it is likely that he did not.") A variation of this way of looking at cases is to assess the likely conditions of arrest for a crime. ("We often have to defend people caught in the act. There's just nothing you can do for this kind of case.")

In addition to aspects of the case, defenders also describe personal characteristics of the defendant as being important in assessing a case. Two aspects of the defendant are most often mentioned as

important -- whether the defendant is likely to be "cooperative" and whether he is of a type who can get a "good out." Both because the attorney is concerned with the amount of time a case will require and because he needs to assure that the defendant will follow the strategy he selects for handling the case, the defendant's probable cooperativeness is seen as a critical determinant of strategy. The defendant's experience, his crime, his personal background, and the court in which the case is to be heard all provide for the lawyer a kind of calculus for deciding whether a defendant is likely to be a good client. Younger and less experienced defendants, for example, are seen by the attorneys as being inherently "hard to get along with." Minors are considered by many attorneys the most difficult of this group; "[they're] white teenagers hanging around on the streets. Some of them think they know what they're doing, but if they have a record, they're pretty good."

Just as in some respects the most desirable of the juvenile defendants are those with records, the defendants most universally seen as good clients are the "old pros." One attorney explains that these highly experienced clients are good clients for much the same reasons that less experienced defendants are regarded as bad: "They know the ropes and whether to trust you or not. They also know how much to tell you. This kind of defendant gives you everything you need." Thus, attorneys seem to consider good clients to be those who understand the criminal process -- and thus, whose level of hostility toward the attorney is likely to be low -- and who are able to give the attorney the kind of information that will prevent surprise.

The predictions of the defenders as to who will be difficult defendants are often based on the defendant's crime. Some describe this linkage in very vague terms:

> "Rapists are the hardest to judge." "The dumb defendants don't know the right story to tell and they are hard to deal with." "I hate non-support cases the most." "I have the losers of society -- the drunks, the auto cases."

Others are more precise about the differences in clients:

> "If a kid is a truant, he isn't likely to talk with the lawyer at all. The same is true of runaways. Those with little contact with lawyers will have no faith in the attorney that they have been assinged."

In each case, though, there is a clear feeling on the part of the Defenders that particular crimes tend to be associated with defendants who will behave in ways that will thwart the attorney's efforts to build a case.

Assessing the degree to which he will be able to "get along" with the defendant may provide for the attorney a rough measure of how much time the case may take to prepare, and in fact, how much effort the defendant "deserves." Many defenders we observed also make a more explicit attempt to calculate the odds that the defendant will be easy to "get off." Is this a defendant who will be a "good out?" Is he likely to be seen sympathetically by the court? For their own purposes, at least, attorneys often answer these questions by considering some additional characteristics of the defendant: his medical condition, his age, and again, the crime he is accused of committing.

From the attorney's point of view a medical record can be seen as either an advantage or a disadvantage to a defendant in court. One experienced attorney felt that defendants were "generally organically

flawed" and therefore usually not successful candidates for rehabilitation, since their difficulties were not within their control. The majority of attorneys, however, seize upon a medical problem associated with the causes of a defendant's crime as an important piece of leverage for developing a favorable disposition. Alcoholism, drug addiction, or psychosis can be invoked as justification for regarding a defendant as being in need of treatment rather than correction. Especially in the case of drug treatment programs, the lawyers believe that the court is apt to be lenient with a defendant who is "sick" and who volunteers for a treatment program.

Medical problems are not the only personal characteristics which defenders calculate will evoke sympathy from the court and, thus, indicate a "good out." Judges are seen by the defenders as being more lenient with juveniles and youth than adults, for example, in the expectation that they are more likely to respond to rehabilitation:

> "I would prefer to work with kids. If a fourteen-year old and a twenty-two-year old commit the same crime, the fourteen-year old will get all the breaks. So if there is no other way, if you have a kid, you can work on the sympathy of the Court."

While age or medical condition may be likely to induce leniency in court, these factors must be weighed against the type of crime the defendant is accused of committing. Most defenders indicate that their experience supports the notion that particular crimes are consistently dealt with harshly while a second set is predictably less apt to arouse hostility in a court. Simple assault, breaking and entering not in a dwelling, disorderliness (unless an assault on a police officer is involved)

and possession of a dangerous weapon are regarded by the defenders as the offenses which are most likely to result in a "good out" for a defendant. In part this is thought to be the case because these are crimes which do not as generally arouse public sentiment as do violent crimes or "offenses against public morality." Perhaps more important is the theory that these crimes are committed by the kinds of defendants who are likely to arouse sympathy from the court.

At the root of the defenders' approach to sorting and categorizing cases, then, is often the belief that the defendant's charge communicates predictable information both about the defendant's character and about his chances in court. Whether the defendant is likely to be cooperative and whether he is apt to receive a favorable disposition from the court are both gauged by the attorney largely on the basis of the type of crime with which the defendant has been charged. At least at this initial stage in the processing of a case, moreover, the defender is apt to base his strategy largely on a theory of what works for handling each type of crime and its associated type of defendant.

Time, schedule and structure of the preparation of the defense

Having assigned the defendant to a category, attorneys report that they then decide how much time to allocate to the case and how to use the time they will spend. Each Defender has his own theory about why he cannot spend equal amounts of time on each case and, rather, why some types of cases have "priority." Some posit that they can have the most personal impact by concentrating on cases that make "legal points," some reason that defendants who are most likely to go to trial most need attention;

still other lawyers try to gauge the degree to which a client might be hurt by a case,and thus, need protection.

Our data, in fact, does not support the notion that the degree of effort a lawyer makes in a case actually determines the case outcome. The level of activity of the lawyers as reflected in their case files has proven to be uncorrelated with the final plea, the type of defendant, the seriousness of the consequences of the crimes, the finding or disposition, or whether the defendant defaulted or otherwise failed to cooperate.

Regardless of whether the time an attorney devotes to a particular case substantially changes the outcome of the case, the question of allocation of time is still central to his thinking about the strategy by which the case is managed. It appears to be critical to the operation of the court structure that attorneys do not defend all cases with equal vigorousness and effort and that special attention be reserved for these cases which are important to the attorney -- whatever his criteria. Thus, attorneys are careful to set aside particular types of cases for special effort,and the court generally takes seriously the lawyer's priorities, unless he abuses the privilege by making too many cases seem "special."

Within each case the attorneys also try to maintain priorities as to how much effort should be devoted to each element of strategy. Within the group we observed we found at least three types of strategies for preparing cases, each stressing a different set of priorities for the gathering of information. At the heart of each of these approaches to the building of a case appeared to be a distinct philosophy about the proper role for the lawyer. One strategy stresses the construction of a strong

legal case, another emphasizes the efficient processing of cases, and the third seems to build toward diagnosing the defendant.

The first approach to organizing a case is best illustrated by Brownlow Speer, who heads the Lawyers' Panel. He expresses a strongly held belief that the lawyer's role in defending a criminal case in the district court should be basically the same as that of a civil lawyer -- focused on the issues of law and fact as they appear to the attorney and on making use of the formal procedures open to the defense. He contends that the defense lawyer should be guided by the following schedule in preparing a case: obtain a copy of the complaint, locate and record the defendant's record, interview the defendant, determine from his statement whether the state can prove the defendant's guilt legally, investigate the technical elements of the crime (day or night time, motions to suppress evidence, validity of the search warrant or search without warrant), review the defendant's quality as a witness, and finally, prepare a defense. The emphasis here is, of course, on giving priority to those pieces of information which will justify an aggressive defense and allow the use of formal courtroom procedure.

Other attorneys, who tend to be more concerned in their own practice with the efficient processing of a large number of cases, depend more on intuition gained from the interview with the defendant, using an initial discussion with the defendant to reveal both the defendant's knowledge of the incident leading up to the case and his willingness to negotiate. One Defender follows an initial interview with the client with a check of the Commonwealth's case, a discussion of a plea with the District Attorney, and finally, a second interview with his client to

discuss the possibility of a plea. But only if the client persists in asserting his innocence and demanding trial will a lawyer with this perspective make use of formal procedures like motions and discovery or of courtroom strategy.

A final model, proposed by attorneys whose perspectives on their practices focus more on their efforts to understand their clients and, thus, select an appropriate disposition for them, emphasizes an assessment of defendants' characteristics which will in these attorneys' minds most directly affect the outcome of the case. As a result, they recommend that an attorney ought to obtain as much background on the defendant and on the crime as possible, and have the client tell his own story. Since there are likely to be discrepancies between the defendant's story and other sources the lawyer must try to make both types of information coincide by attempting to convince the defendant to change his presentation of the case and by testing the implications of the contradictory sources of information. As a general guideline for this approach to preparation one attorney suggested:

> "Everything must strike you as consistent.... At this point, then, you analyze the case.. the most basic decisions are the plea and, if indicated, is the case ready to go to trial?"

Despite differences in the conception of the lawyer's role, it is clear that each of these attorneys attempts to gather substantially the same information: defendant's record, police and defendant's version of the crime and arrest, background information on the defendant, and the provisions of law with regard to the crime alleged. Their perceptions of the goals they are fulfilling, however, leads them to develop different schedules

for gathering that information, and to use the information for purposes as diverse as justifying treatment alternatives or filing formal motions.

These types of strategies which attorneys perceive that they use in gathering information for a case do describe the general differences in emphasis that we noted in their pre-trial activities. The specific methodologies used by the defenders in organizing their search for information, however, rarely resemble the ideal models described by the lawyers. The actual process of preparing the case -- both in allocation of time and in the specific kinds of information sought -- is in fact affected greatly by the interests of other actors in the case and by the surprises which any particular case brings. In fact, these constraints force most lawyers to compromise any pre-set model and depend on a more ad hoc approach to case preparation.

A case involving two defendants -- Hill and Baylor -- illustrates these constraints on the lawyer's ability to predict what strategy he will use to build a case. As is fairly typical in cases involving indigents, the attorney was assigned the case from the "court list," so that he did not participate at all in the arraignment. After he had finally obtained the formal complaints, the lawyer then interviewed each defendant at the Defenders' offices. Through these interviews he discovered that the two who had been assigned to him as "co-defendants" were in fact not arrested together, but were only tenuously associated by the police since they had been both arrested in conjunction with the same narcotics raid. He further found out that there had been two other co-defendants with defendant Baylor, who had been arrested in the same car with her.

At this point, then, the lawyer's efforts had to be focused on understanding the details of the case and the complex relationships among the actors. He checked with the probation officers to compare their records with the defendants' assertions about their criminal histories and checked with the District Attorney's officer to obtain further information about the "parent" case -- the one from which the two unrelated arrests had evolved. At that point he also copied the search warrant, the complaints on each of his defendants, and the affidavits which supported the search warrant.

Before the trial, the attorney's job was complicated by the fact that one of the defendants chose to hire a private attorney. This change necessitated that the defender meet with the new attorney -- with whom he must work -- and at this meeting he discovered that the co-attorney had chosen to follow a stragegy of suppressing evidence. They were able to agree that the private attorney should prepare a motion, especially since it was his client who might have been illegally searched. In the interim the defender arranged for the Probable Cause Hearing to be held before what he thought would be a sympathetic judge. At the hearing, however, the Assistant District Attorney presented the issue as being the defendant's possession of heroin and had the case continued pending additional laboratory analysis of the heroin.

The defender's strategy in a case like this one, then, must survive the incompleteness of the information he has and respond to the shifting interests of other actors. In many of other cases we witnessed, the defenders were surprised by an anomaly in the case and forced to modify a pre-planned strategy. The defender's pre-trial investigation

process was deflected, for example, in one case because the defendant had confessed under apparently Constitutionally acceptable conditions to the specifics of the crime with which he was charged.

In another case a defendant, who was wanted for an assortment of major and property crimes as well as for a witness to murder, complicated the defender's plans for defending him by disappearing for a while in the middle of the case. That case was further complicated by the fact that several of the charges were introduced well into the process of earlier cases involving the same defendant, so that while he was being arraigned on one set of charges, he was served with default warrants for others, and being tried for yet another crime.

The Defenders expect that these kinds of surprises will occur in many of the cases they defend. Despite the fact that a case will unfold slowly -- and often in surprising directions -- the lawyers still contend that they pursue a definite strategy in building a defense. They must be flexible in the face of new information, but they still stick to a general approach to the preparation of cases -- dictated by their own motivations, their typing of the defendant, and a sense of priorities for their time. In the next section we will see how the Defender pursues his strategy to collect the information he thinks he needs, and most important, how information becomes the object of bargaining,

Information and Negotiation with Court Personnel

While the order in which the defenders prepare their cases and the kind of information they want are subject to many modifications as the case unfolds, the sources from which they collect information remain constant. Whatever specific pieces of information the case requires, the defender will still need factual data about the case and intelligence about the interests of other actors in the court. In particular, he will need to know how and why the defendant came into court, what the legal status of the case is, what the defendant is like, and what perceptions other court personnel have in each of these areas.

In each instance, defenders believe that the information is clearly best gathered from two independent sources -- the defendant and the court official who knows most about each specific aspect of the case (the police officer, clerk, and probation officer respectively.) Only very rarely is there a third party to a case whose knowledge is more extensive than these sources, and the defender's approach to these "civilians" will be analyzed separately. The defender's early strategy, then, is usually addressed to ensuring that he can reduce whatever discrepancies he discovers between the versions of a case as seen by the court officials and as seen by the client. Typically, it is with the court personnel and the records which they maintain that the attorney begins.

The complaint

For the attorney, the most basic information about a case should be contained in the complaint. It is especially significant because in most cases it contains the official version of the name, alias (if known),

and address (also if known) of the accused; the crime alleged, with specific reference to the state relied upon by the complainant; the location, time, and circumstance of the offense; the name of the complainant and his address or organizational affiliation; and the names and addresses of witnesses (though not necessarily all witnesses.) If this document were readily available the defender's search for information would clearly begin with a strong factual base. Often, however, information in complaints is either lost, misinterpreted, or never recorded at all.

In crowded courts, especially Dorchester, copies of complaints occasionally get lost and are often misplaced for periods long enough to inconvenience the attorney. As one lawyer put it, "The clerk's offices are a problem -- slow in getting records. You often get (them) after they're no longer useful." Perhaps even more of a problem is the prevalence of hand copying of information in the process of preparing the complaint. A defendant named Millis, living at 21 Worcester Street, was recorded on the complaint as living at 21 "Wareeslis Street" as a result of misread handwriting. Since the only record which the court retains from each case is the complaint, the findings and rulings of the court are also written by hand on the face of the complaint, with the result that the status of the case is often unclear, especially after the fourth or fifth appearance.

Finally, in many cases, even if the information is recorded and legible, it may be of little use to the attorney. For example, in some cases such as non-support or juvenile offenses, the specification of the charge is essentially only a restatement of the allegation -- stating only that the defendant is charged with "failure to support" or perhaps, with the status of "being deliquent." Often, too, the witnesses to a crime are

not all recorded on the complaint, so that it is difficult for the attorney to know whether the prosecution, too, has access to information which his client has disclosed to him.

The result is that despite the seeming centrality of the complaint it is impractical for the attorney to rely on it heavily except in those cases in which the defense must be essentially "legal" -- focusing on formal legal procedures in the case rather than relying on a presentation of the defendant's character. For these cases, the attorney is apt to take extensive care in locating and recording the content of the complaints, since he will probably need to respond to the legal language of the statute and to file motions which refer to the details of the charge.

The police

In some instances, perhaps the most important piece of information the complaint yields is the identity of the arresting officer. Of all the actors in court, the police provide the defender with the most factual information about the case, and more important, with the best insight into the probable strength and direction of the State's case. Most attorneys agree that they are highly dependent on the police for this kind of factual background:

> In the District Courts, the facts come from the police. The police will give you everything you need. We don't need any investigative staff. At least in the time I've been in District Courts, I've never run across that kind of case.

> The cops in Cambridge are wonderful. They sit down and tell you all about the case.

For this reason, the defenders usually interview the police as early as possible in the period in which they are establishing how the defendant came to be in court and what the legal case is. The supervisor of Defenders in the District Courts emphasizes the need for getting to the police officer early:

> "You must always be sure to get to the policeman within the first day. That will give you a sense of the holes in the State's case....I place little faith in what the defendant says, but I can get a tremendous amount from a fair-minded cop."

In the crimes for which the police have invested considerable resources to round up defendants and bring them to trial, attorneys are likely to make an exception to the generalization that the "cops are wonderful." Generally, police are reluctant to share information about these crimes with the defender. Since much of their information involves informants, police may reason that telling the defense of the informant's testimony in advance would invite intimidation of their witnesses, or at least result in an acquittal and, in their view, jeopardize the informant. In one case, for example, the District Attorney chose to indict a defendant directly, rather than allow him to have a public probable cause hearing. His intent was to protect the information that would be offered by informants by "saving" it for the Superior Court case.

Many attorneys -- both defenders and prosecutors -- report that often the police will also "clam up" to protect a weak or illegally gathered case. They reason that the police could not discuss illegally gathered evidence with the defense for fear that the illegal nature of the search or interrogation will become evident to the defense counsel.

If they "clam" up, however, and,thus, the defender does not discover the nature of the evidence until trial, it might be impossible for the lawyer to reconstruct the situation in sufficient clarity that doubt could be cast on the policeman's testimony.

While in these situations the policeman is trying to protect his case by hoarding information, he may also not cooperate with the defender because the policeman has had a prior association with the defendant. Especially if the policeman has arrested or tried to arrest the defendant previously, he may have a strong personal interest in this arrest. There is also a strong chance that the defendant resisted arrest, further intensifying whatever personal stake the arresting officer may feel. Because this situation is most likely to arise with status crimes, moreover, little or no tangible evidence will be needed to support the officer's statement at trial. Thus, the police officer's perceptions become as important as the facts of the case.

While the attorneys view the police as a factual resource they are also acutely aware of the likelihood that the policeman has his own strong stake in the case. At the same time that they are gleaning the facts of the case -- as the police see them -- the attorneys are also consciously assessing a number of aspects of the policeman's attitude toward the case. Most critical, of course, is the degree to which the policeman has a strong opinion on what the disposition in the case should be. The Defender in a drug case, for example, made use of the fact that the police were sympathetic to the defendant to propose a drug treatment center as a disposition. The Defender notes:

> "Lt. Crocker is the gentleman who arrested the D [the defendant] on this charge and was instrumental in getting the case continued for two years."

Since it is usually the case that the police have strongly held opinions in a case, the defenders must also try to gauge the extent to which the policeman is likely to stick to his original story when he testifies in court and the extent to which he and the prosecutor are likely to be in agreement. By checking the extent to which an officer feels that the defendant can be treated as harmless, or better yet, in need of treatment, for example, the attorney may be able to put moral pressure on the police officer not to be more harsh at a later stage. In this regard, it is also possible for the attorney to discover what the long-run interests of the police are -- whether, for example, they are looking for the defendant either as a witness in this or another case, or as a defendant in another case, and whether their attitudes toward the defendant are likely to change.

The second issue of strategic importance that can be gleaned from the police is the extent to which the police and prosecutor are at odds. At the time of this study, the police, who had for the entire history of the District Courts prosecuted all cases themselves were being largely replaced with prosecuting attorneys. One lawyer advised using the resulting rivalry to develop sources of information:

> Play on the rivalries between the police officers and the [Assistant District Attorneys] dropping a casual remark about the one to the other. The person will often respond eagerly and you end up getting a lot of information about your case.

In addition, of course, it is important for the attorney to identify a rivalry between police and prosecutor so that he can use the inclination of the more sympathetic of the two to apply pressure to the other, in and out of court.

The interview with the police, then, can in a number of respects be the most significant determinant of the attorney's strategy. Whether the police will actually cooperate with the defender and reveal the kind of information which he would find useful is, of course, dependent on the "stakes" the policeman has in the case. As a general rule, the defenders do not expect to obtain reliable factual information from the police in cases in which they have invested considerable resources in the collection of information, in those instances in which some of the information is weak or illegally gathered, or when the police know the defendant well. When the police case is very strong, on the other hand, the police may be very cooperative about sharing information, often with the hope that the defender will be persuaded to urge the defendant to plead guilty rather than go to trial. Finally, there are cases in which the police have less strong attitudes toward the case, and can be urged to cooperate with the attorney.

The distinction between those cases in which the police will be protective of information and those in which they will deal openly with the defenders is clearly fine. The most obvious situation in which the police are eager to reveal their case to the defense is when it is very strong. When the police have solid evidence, for example -- like a confession which will stand up in court and, perhaps, convince the defense counsel to advise his client to plead guilty and turn state's evidence on a "bigger"

defendant -- they will be eager to share their information. Police may be equally willing to share documentary and physical evidence in almost any case, since this does not reveal their strategy or the real strength of their case.

A less clear and more typical instance of police-defense cooperation occurs when the police have no strong commitment to a disposition, though they may still need to protect some aspects of their own case. A good example of this kind of situation -- and how the attorney discovers the precise limits of the policeman's willingness to share information -- is the case of two co-defendants who were accused of breaking and entering. The attorney established that the primary concern of the arresting officer was the safety of the victim and to some extent the rehabilitation of the defendants. In interviewing the police officer in the case, the attorney was able to determine that the two defendants had not resisted arrest, nor had they taken anything, but were rather arrested inside the apartment which they had broken and entered. During the course of the interview the attorney also tested the policeman's interest in a drug program for the defendants, saying that he and the probation officer were thinking of trying to place the defendants in a drug program in Topsfield. The officer indicated that he didn't much care, but that he would certainly not oppose it.

When the lawyer began to ask how the police had handled the case, however, he discovered the point at which the policeman would resist giving information. The officer claimed that he had given the defendants their rights and had only had to put the larger up against the wall with a gun at his head to effect arrest. He was especially silent about

witnesses and the seizure of contraband -- failing to mention the existence of two witnesses who had called the police to the scene or evidence concerning a burglarious instrument which the defendants were alleged to have had. This exchange indicated to the defender the wisdom of emphasizing in court the placement of the defendant in a drug rehabilitation program and avoiding any legal issues of evidence or arrest procedures.

In general, then, the arresting police officer is a useful source of information about the crime, and especially in cases in which he knows the defendant, he has an important stake in the outcome of the case. By talking early to him, the attorney gets an independent check on the defendant's version of the case and subsequent police and prosecution versions. An early interview also allows an attorney to determine whether the police officer will be amenable to negotiation over the disposition, sympathetic to a negotiated settlement, rigidly opposed, or completely indifferent.

The process of obtaining information from the police, of course, carries with it implicit obligations. Specifically, it is agreed by both the police and the defenders that the information which they each pass on to the other can't be used against them in court. To a large extent, then, a defender pays for the information he gets from the police by agreeing to protect them from a vigorous investigation of any admitted irregularities. As a result, attorneys who are contemplating basing their defense on suppression of evidence will carefully avoid talking to the police before trial.

Probation officers

Because the probation officer fills the triple role of pre-trial investigation and reporting, supervision of the defendants, and inter-court liaison, he is -- next to the policeman -- the most important person with whom the attorney must talk and work out the case prior to going to trial. Several of the Defenders routinely arrange their schedules so that they can arrive at court before the opening of the session and negotiate with the probation officers (who are less busy then than at any other time of the day.)

With the probation officers more than any other of the personnel of the court, the attorneys develop personal friendships and generally pleasant relationships. One lawyer, for example, often spends her breaks in Boston Juvenile Court with the probation officers and other "helping" professionals, and another attorney admits to regular conversations on "Celtics or Bruins" with the probation officers in his court. As we shall see, these informal relationships between defense and probation officer seem, in part, calculated to insure that each gets the favors he needs in court, but they are also a result of their mutual interests and similarity of education and perspective.

The record

The most fundamental reason why the defense and the probation officer must develop a working relationship is that the defense attorney needs the defendant's probation record, both as a formal source of facts and as an informal check on the lawyer's own perceptions of the case. If, for example, the record revealed the existence of outstanding probation or default warrants, it would change the defendant's status before the court,

raising new problems for the defense -- whether to try to get the defaults cleared separately, have them consolidated with the more recent offenses, or bring the present charges to trial quickly to open the way for the defendant to resolve the other charges. The record, too, can be used by the attorney to determine whether the defendant can testify in his own defense. If he has no record or only a minor and unrelated record, then the lawyer reasons that the defendant can testify without having the record color the court's perceptions of the testimony. If, however, he has a serious or closely related record, the judge is unlikely to believe the defendant, and his appearance might prove to be more detrimental than beneficial.

In addition to alerting the defense to legal complications in the case, the record is also central to the lawyer's unfolding intuitions about the defendant. First, it gives the defender an efficient means of "sorting" defendants beyond the typology he can develop by using the complaint. It also gives the defender an (almost) objective -- and usually detrimental -- set of facts against which to test the validity of the defendant's statements to him. Finally, the record may identify the known aliases of the defendant, which occasionally give the lawyer the opportunity to know of other current or recently past offenses by his client under one of those other names.

Unfortunately, the record is simultaneously the most important piece of personal information on the defendant and the most difficult document to locate and assemble correctly. In a number of the cases in our study the records were unavailable at critical times. In one case, for example, the defendant was going to trial in a few minutes, and there

was a contention by the prosecution that he had an outstanding probation violation for armed robbery. Since the defender did not believe the prosecutor, he went to the probation officer in charge of the case and asked him for the record. It took nearly thirty minutes for the probation officer to locate the record,which had been put out of alphabetical order in the list of the day's cases. In another case, the same attorney found that the probation office had lost several of the "continuation cards" used to record an extensive record. The resulting record was chaos -- appeals were recorded for offenses for which no initial trial existed, and cases were left in the middle of their course.

The problem of inaccurate or missing probation records appears to arise only in part from overworked personnel and an unwieldy paper record keeping system. More than anything else, records are made obscure by the efforts of the defendants themselves. When most defendants are faced with the rising prospect of jail which accompanies a lengthening record, they are apt to begin using an alias or to change some detail of their personal history, such as date of birth, parents' names, place of birth, etc. The experienced defendant realizes that this can be a very effective strategy since the record is the only document which connects him to his personal and criminal history, and it is precisely this history which will have a significant impact on the defendant's sentence.

Defender-probation officer relationships

Because of its clear importance to the defense's case, the record becomes an issue over which the probation officer and the defender must bargain. The defender finds himself in need of the information the record supplies, but without the ability to secure a complete, accurate version.

Because the probation officer "knows" the defendant, moreover, he often becomes the court's interpreter of the record and the defendant's character, and in this sense, can heavily influence the defendant's disposition. In short, the probation officer is an actor who must be dealt with by the attorney, since the probation officer not only has a stake in the outcome of the case, but also has the power to recommend a disposition for the client.

The probation officer's relationship with the defender is influenced in part by the role the probation officer must play in the court. As the supervisor of defendants on probation he is expected to maintain a good record of supervision, evaluated by the number of his probationers who are subsequently arrested, especially for violent crimes. As the person to whom the court looks for recommendations concerning disposition, on the other hand, the probation officer is expected to propose dispositions which are likely to be acceptable to the other members of the court.

The first of these interests seems to encourage the probation officer to pursue a comparatively conservative pattern of recommendation, since his likelihood of having a "bad" probationer rises with each poor risk he takes. On the other hand, he is pressured by the necessity of developing a bargain which the defense will accept, and he must try to find a safe placement which will allow the defendant the maximum freedom consistent with the prosecution's interests.

Probation officers are, of course, not wholly (or even dominantly) motivated by these interests. They often share with the defenders a conspicuous interest in the defendant's well being. Since the defendants are

often personally known by the probation officers, they often have a long-term concern for the best resolution of the problems which they feel underly the behavior of the defendant. Also shared with the defenders, of course, is a concern by some probation officers to avoid unnecessary conflict between their positions and those of the other personnel of the court.

The defender and the probation officer, then, meet with some shared interests but also with some personal objectives and some background which they have experienced separately in preparing the case. The result is that often the defender and the probation officer bargain with each other over the defendant's case. In observing these meetings between the defense and the probation officer we were able to identify at least four types of service that the probation officer can provide for the defender as part of an agreement: interpreting or modifying the defendant's record, endorsing the defender's actions in court, developing dispositions for the defendant, and as a "negative service," violating the defendant's parole. In return, the defender offers his influence to encourage the defendant to cooperate in the probation officer's recommendation, his friendship with the probation officer, and his tacit agreement not to fight him in court.

The most typical favor which the probation officer can extend to the defender relates, of course, to his unique access to complete and up-to-date records. Especially in cases in which defendants are accused of serious crimes, the principal issue to be resolved becomes getting the defendant's whole record together. More than any other group of defendants, these are apt to employ aliases and "scatter" their crimes and, thus, their records into several jurisdictions (an easy feat in Boston, where

there are eight district level courts, and a single subway ride carries you through three counties).

In this regard the probation officer can be very helpful to the defense, if he chooses to do so. For example, while an attorney was interviewing a defendant, we observed a probation officer come to tell the laywer and the defendant that he had "heard upstairs that there was a Federal warrant on [the defendant] for possession of heroin with intent to sell, and also a fugitive warrant." He reported further that he thought that the marshals might be on the way. By providing this kind of intelligence -- to which the defender would otherwise not have had access -- he helped the defense both in deciding what strategy to take with respect to the court and in assessing the truthfulness of his client's story.

Besides helping to get together the "facts" in a serious case, the probation officer has the power to offer (or withhold) endorsement of the attorney. Since many of the defendants are likely to have lengthy records, they often have been working with the same probation officer for years. It is typical on the other hand, that the attorney has never before worked with his client, and thus, the influence of the probation officer can be considerable. In the process of the interview between defendant Matthias and his attorney, for example, the probation officer Colis entered the dock and the following exchange took place:

> Colis: I've got a warrant for you, #2177 NC; receiving stolen goods, a color TV set serial number 15043, valued at $200, owner unknown, on complaint of Thomas Mattheson and Courtland Ballard, police officers. Well, I have to go through a bunch of questions with you again. Where are you living?

Matthias: [Address]

Colis: Occupation?

Matthias: Laborer

(The interrogation continued through the defendant's personal characteristics; he and Colis went through it with an attitude of extreme routine)

Colis: Hey, now you talk to this guy, OK? -- because he's an OK guy. Say, didn't you ever play for [one of the professional basketball teams]?

Matthias: No man.

Colis: That's funny, you look just like [a basketball star].

Matthias: I don't know what you're talking about.

Attorney: Hey, man, he's pulling your leg.

Matthias: Oh,..yeah. [Laughs]

Following that interchange, the defendant -- who previously had been distant and even hostile -- turned to the attorney and admitted "I'm up to my neck and choking," reflecting on his discouragement over his outstanding warrants for larceny and possession of a deadly weapon. While it is not clear that Colis' efforts were necessary to Matthias' cooperation with the attorney, many of the probation officers do consciously employ small talk of this kind as a method of trying to ease difficult situations and seem to exert their influence to help attorneys and clients talk with one another.

Though access to the record is a very valuable currency which the probation officer can give the defense, his role in the disposition process

is perhaps an even more powerful tool. Since it is the probation officer who works with defendants on probation, he is often in a position to develop correctional alternatives to incarceration and to recommend them to the court. In the case of the defendant Tilson, for example, the probation officer had been working for two years to convince Tilson that he was addicted to heroin and that he needed to break the habit. Before the attorney had even been assigned to the case, the probation officer had begun to try to locate a good program for Tilson. At the initial meeting between the probation officer and defender he filled the attorney in on the efforts he had made for Tilson. The defendant had been arrested recently for narcotics (he has a massive record for property crimes headed by an armed robbery) the probation officer had gotten him and his brother into The Third Nail, a Roxbury secure drug program. Though Tilson's brother had taken to the program, Tilson evidently had not and now he had found Tilson a place in yet another treatment program. "They have a good program out there and I can get along well with them. They have always done well for me. And they are out of the city, you know, and there's nothing for a cat to do up there but concentrate on getting his head back together."

Implicitly, of course, he was suggesting that the defender should have Tilson plead guilty in exchange for getting placed in the drug program. The attorney responded, "This just isn't something that you can walk up to a person and say, 'Plead guilty on this one and you'll only get five years suspended sentence.' You can't get that across in two minutes, anyway." While the attorney appeared to be putting the Probation officer off, his intent here was probably to allow himself time to check with the defendant

before continuing with this line of negotiation. Subsequent complications -- default warrants on breaking and entering charges at Quincy District Court -- made this compromise impossible in this case, but not until after both the defender and the probation officer had worked hard to try to accomplish it.

Refusing to locate a placement for a defendant or failing to provide the defender with information are, of course, actions which could be taken by a probation officer who feels that an attorney has not been sufficiently cooperative with him. Though we observed its use in only a few instances, the probation officer's power to "violate" a defendant's probation can be used as an even stronger sanction against the defender. This authority derives from the probation officer's ability at any time to issue a summons which indicates that the defendant has committed an act in violation of his probation agreement. In effect, then, merely being arrested is sufficient cause for the probation officer to summon the defendant back into court for reconsideration of his sentence (or finding, if no sentence has been given), no matter how unjust the arrest might have been.

In practice, most probation officers do recognize that their probationers will often be arrested, occasionally without adequate cause, and that to "violate" them might well be worse for the defendant's hopes of rehabilitation than to ignore the incident from the standpoint of probation. The Tilson case is an example of this approach. Tilson's probation officer, was willing not to "violate" Tilson's probation on another charge in light of his new arrest on the charge of breaking and entering, provided that he would participate in a drug program which the probation officer believed would help the defendant.

This kind of discretion with regard to violations is, of course, exercised in the context of a complex set of pressures which lean toward "violating" defendants. The Wilson case was probably an extreme example of what the probation officer could accomplish. In the process of negotiating the disposition, the probation officer at one point said to the attorney, "I won't violate him unless I'm forced to -- you know, I don't really mean that, but they can put a lot of pressure on, and I might have to do it." In other cases, where the probation officer is himself not convinced that the defendant is a "good risk," or the charge which causes a violation is particularly serious, the probation officer may not hesitate to "violate" the defendant.

Whatever the specific number of incidents of probation violation, it is evident that the attorneys perceive it as an implicit threat, and thus, they are led to be even more cooperative with probation officers when there is a risk of "violation." Because the exchange of services between the probation officer and the attorney for the defense is an implicit process, however, it is not always clear how an attorney repays the favor of a forgotten violation or an advanced notice of "breaks" in a case. Our observations suggest that there is a tendency for favors done on one case to imply obligations in ensuing ones. While the parties to the agreement would never openly recognize this as a formal requirement, under the guise of being helpful and being seen as "on the ball," as one lawyer put it, there is some significant evidence that attorneys who are cooperative also find probation officers more willing to provide information and to exercise discretion for their (future) clients.

Contrasting the experiences of the Defenders with those of the members of the Lawyers' Panel tends to confirm this impression. The Defenders, who are in daily contact with probation officers, were usually able to obtain information and assistance especially on their serious cases. Private lawyers, entering the court for the first time, on the other hand, had difficulties in obtaining accurate records for their cases of this type, and few indicated that the probation office was at all useful.

The repayment of obligations owed to probation officers by defense attorneys appears to take a number of forms, all labeled as "cooperativeness" by the attorneys. At one extreme the lawyers we observed seemed to make a general effort to extend friendship to the probation officers, by making small talk with them and by meeting them for lunch or breaks in the court schedule. Another level of cooperation, however, appears to be that the defense attorney tried as often as possible to urge their clients to cooperate with dispositional alternatives generated by probation officers and to avoid fighting with them in court. Though in most cases the judgments of the defense and the probation officer about what would constitute a desirable disposition tended to coincide, in a few instances, the need to assist the probation officer resulted in the attorney fighting less vigorously for a client than he otherwise would.

Probation in non-support and juvenile cases

The close cooperative relationship between the defense attorney and probation officer appears to make it possible for them to exchange favors without an explicit agreement. Two exceptions to this pattern, however, tend to suggest that this kind of implicit bargaining is possible

only because the defense and the probation officer are essentially trying to fulfill the same goals within the court. Both are primarily interested in providing a feasible way to help the defendant minimize the amount of time he must be incarcerated. When the role of the probation officer changes radically, as it does in non-support and juvenile cases, the relationship between the attorneys and the probation staff is also noticeably changed. In particular, because the probation staff in both of these types of case has an essentially prosecutorial function -- rather than one more aligned with the defense -- the defense attorney must either forgo the practice of bargaining altogether, hope for favors only when he can find especially friendly probation officers or bargain overtly with a "contract spelled out."

An analysis of the juvenile and non-support cases we observed illustrates these altered bargaining patterns. Probably because of the monetary interest of the State in the "crime" of non-support, the probation officer is part of a separate staff which is responsible soley for non-support probation. This specialization is justified by the fact that men are typically held on non-support probation for as long as six years at a time, and they are required to pay through the court while they still have dependent children or a wife whom they have not supported without supervision. The relationship between probation officer and probationer is, therefore, radically different from that which exists in other cases. Here, the probation officer is not the defendant's advisor and "helper" but rather his principle creditor -- since it is he who receives the defendant's payments. A creditor with the force of the courts already on his side, the probation officer often comes to describe the defendant as a "deliberate deadbeat" with the intent of defrauding the court.

Ironically, perhaps, in light of the association between the probation officer and the probationer, their relationship is much more long-lasting in non-support cases than in other kinds of crime. Defendants convicted on a non-support charge are typically given a six-month sentence to a house of correction, which is then suspended for six years on condition of payment of court-ordered support. Because most of these defendants pay in person in the courthouse, they necessarily have a long-term close personal contact with their probation officers. One defendant, for example, had been under court order to pay $50 per week support. When he was employed -- which was not often -- he apparently paid the $50 on schedule. Revocation of probation hearings were held at each default of payment or three months, whichever came first. In each appearance, the probation officer attended and acted both as prosecutor and as advisor to the court. In the same period, in which the probation officer had such consistent contact with the defendant, six different attorneys were assigned to the case.

Combining this long relationship between probation officer and client and the inherent interest of the court in the outcome of the case, it is not surprising that the probation officers in the non-support section come to take roles which are more similar to those of the prosecution than those of other probation officers. In their roles as "prosecutors," they encounter some of the same problems of client definition as do the Assistant District Attorneys. In particular, as in other domestic cases, the complainant in non-support cases often does not desire to have the case prosecuted.

Under these circumstances the pressure is greater for the probation officer, though, because both the judges of the court and the Department of Public Welfare do have an interest in seeing that the defendant is punished -- even if the complainant does not. The court is anxious to prosecute the case because the judges feel that when a defendant fails to pay his non-support judgment through the court, the court's dignity is insulted. There is also pressure from the Welfare Department because they tend to regard non-support as a form of welfare fraud. Thus, to resolve the conflict, most of the probation officers in non-support must develop a "hard" line toward defendants and accept their prosecutorial functions.

In the face of these pressures on the probation officer, he can rarely afford to give ground to the defense. A very typical exchange between defense and probation occurred in the case of Theodore Brown, who was summoned into court in the third year of his probation, charged with violation of the conditions of his probation -- failure to pay the court-ordered support for his family. Brown's attorney tried to talk with his probation officer, to argue that the defendant had in fact been supporting the complainant and her children to a greater extent than the court required, though outside the court's collection system. The probation officer replied that the issue was not whether the client was supporting his family but whether he was fulfilling the exact conditions of his probation, which specifically required that he pay support through the court. He further indicated that there had been several previous instances of non-payment, and that he intended to have the probation revoked.

The experience of most defense attorneys with exchanges like this discourages them from attempting to argue for leniency on behalf of their non-support clients, and in fact, causes them to try to avoid handling non-support case altogether. When they are assigned to a non-support case, most attorneys we observed respond by fighting with the probation officer in the courtroom, despite strong sanctions in the District Court against this kind of open, time-consuming confrontation. The only exception we observed in this pattern was a particularly gregarious lawyer who invested a great deal of time in fostering friendships with non-support probation officers. Even this effort worked with only two of the probation officers, who found the attorney's friendship worth some favors. The following exchange illustrates their relationship to the lawyer:

Pro: Hi, tall Paul; how's it going today?

Att.: Bad night last night.

Pro: Yeah? Say, did you see the Celtics last night?

Att.: Yeah, stunk, didn't they?

Pro: What's wrong with them?

Att.: Well, first of all, the damn fools were shooting from the outside all night. Not only that but Cowan couldn't hit at all....

(There followed a five minute conversation among the three discussing why the Celtics had lost the night before.)

Att.: Well, I gotta take care of a couple of guys ... Who's got Fefferman and Eraoline?

Pro: Vaughn

Att.: I can see it's going to be one of those days. I've already got another case where I just found out about a Co-D the MDC is supposed to be defending. The guy's been in CSJ since a week ago and nobody told me.

Pro: Well, you can't win 'em all -- maybe you'll get one of mine next time.

Except for rare and limited relationships such as this one, defense attorneys have little to offer a non-support probation officer, whose main interest is the prosecution of the defendant. The situation is perhaps even more complex for the attorney in juvenile cases, where the probation officer is both seeking dispositional alternatives for the defendant and acting as a "prosecutor." As we have already pointed out, there is no organized prosecution in cases brought on juvenile status complaints, so that the probation officer becomes forced into a prosecutorial role -- at least insofar as seeing that the defendant receives a "strong" disposition. Like the non-support probation officer, however, the juvenile probation officer is also the most likely dispositional alternative open to the court, (though in juvenile cases it is the lack of a juvenile correction system rather than the need to have the defendant employed at a job which limits the use of jail as a sanction.) Like the non-support probation officers, too, the juvenile probation staff is isolated and has long-term relations with its clientele.

Since treatment is the critical objective in juvenile cases, the image the probation officer presents of the defendant's problem is critical to the disposition of the case. It would be logical, then, for the attorney to work with the probation officer to shape this image and in this

way influence the disposition. As the following case illustrates, however, the juvenile probation officer is likely to see a defendant (other than a first offender) as the "type" who will require harsh treatment if he is to be rehabilitated. If the probation officer has strong opinions of this kind, the defender has little chance to influence the dispositional decision.

When one attorney heard that a case involving charges of truancy and stubbornness was coming up, he sought out the probation officer, Ms. Jones. Ms. Jones opened the conversation by announcing that she wanted to put the defendant away for fourteen days observation, since the girl had been "in" before on truancy and stubbornness. She then introduced the mother of the defendant, and led the attorney and mother into conversation by establishing that the mother didn't know what to do with the child.

Before the case began, but after he had talked briefly (and unfruitfully) with the defendant, the attorney reopened discussion with Ms. Jones:

> Att: What do you want on this case?
>
> Jones: I want two weeks examination.
>
> Att: Where?
>
> Jones: Charlestown Y or Judge Baker; rather have Baker, but they're busy most of the time. She's been in before a couple of times, but it doesn't do any good; she just stands there and just stares at the judge -- you know just sort of glares at him, like she hates his guts.

The discussion continued, with the attorney trying to persuade Ms. Jones that it was "too late [in the school year] to bring in defendants

on truancy charges" and that the defendant should be let out until trial. In each instance, however, the probation officer pushed the image of the defendant as a highly confused and hostile girl who needed a strong hand. As evidence she described a shoplifting case in which she claimed the defendant had been involved. The defendant and a two hundred and thirty-five pound black girl were, according to Ms. Jones, arrested by a security guard, who accused them of possessing stolen goods, and the defendants had assaulted the security guard. The guard prosecuted the co-defendant for assault and battery but the defendant was "let go" with "only" a larceny charge. Thus, Ms. Jones indicated that the fact that the defendant had, as she saw it, "gotten off" so easily for that case argued against letting her off "soft" this time.

In the face of the juvenile probation officer's ideology of treatment combined with her role as the person who sees to it that defendants don't "get off soft," the attorney was unable to press for immediate trial or for any alternative pre-trial disposition. Lacking a separate source of information, he could only appeal for a "good" location for the pre-trial observation. In fact, he failed even in this effort, and the defendant was taken directly to the lockup and transferred to Lancaster -- a particularly unpopular institution of the Department of Youth Services, which its director had been trying to close.

Outside agencies, friends, and witnesses

At this stage in the preparation of a case the lawyer for the defense is casting out his nets for information -- trying to identify the positions of actors in the case and looking for support for the defense

wherever he can locate it or create it. Often the attorney extends this search outside the court to "helping professionals," to friends of the defendant, or to witnesses. What he may be looking for from each of these sources is assistance in endorsing a placement alternative he is planning to suggest to the court, in defining the defendant as needing treatment rather than punishment, or in influencing another actor in the case to shift his position.

In many of the District Courts there are external agencies which take responsibility for helping to locate placements for criminal defendants. In cases heard in Boston Juvenile Court, for example, there is a general agreement that personnel of the Youth Services Board's Court Liaison Project are particularly useful for establishing alternative dispositions which will be accepted by the judge and probation officer. In other courts, their usefulness varies, and other community agencies often take the same role. In Dorchester, for example, the Roman Catholic Church is active in arranging placements in children's homes operated by the Church and others. For adult offenders with no prior records, the Boston Court Resources Project offers diversionary services, including jobs and job training, counseling, and referrals to places to live. For drug cases, several groups are active in the courts, especially The Third Nail, a residential treatment center.

In some instances, these agencies not only function to develop placements for defendants but they may actually offer their endorsement of the defendant, thus helping to change the court's image of the defendant's chances for rehabilitation. In one particularly eloquent case,

a defendant had incurred the wrath of her probation officer by failing to admit that she used an alias, until the matter came up in court. At this point a representative from a referral agency indicated that he and his agency would "stand behind her...we remain committed to helping her." This kind of support can provide a strong incentive for a court official to take a chance on a defendant whom he would otherwise regard as a "bad risk."

While all of these agencies appear to deal cooperatively with attorneys working on behalf of criminal clients, it falls to the attorney to convince the agency that his defendant is properly part of its clientele. When the attorney makes use of resources like these, then, he invests some time at this stage in building an image of the defendant and his problem that will appear appropriate to the services of the referral agency. As a result, a second task that the attorney often faces is convincing the defendant to accept the definition of his problem, as it has come to be defined by the attorney and the agency.

A second group of professionals with whom the defense may be involved at the pre-trial stage are the physicians and psychiatrists. They, in general, serve two roles, both also largely oriented to defining the defendant's personal characteristics. One of these roles involves deciding whether or not the defendant is competent to stand trial; the other is diagnosing the defendant's mental or physical diseases in order to provide the court with a rationale for disposing of a case in an essentially non-criminal fashion. Though these professionals most often participate in domestic, non-support, and juvenile cases, they are also

frequently brought into cases of driving under the influence of alcohol. One of the defenders, for example, called into evidence the records of her client at Beth Israel Hospital. He had indeed been charged with driving under the influence of alcohol, but at the time he had been in a program of treatment using an anti-abusive chemical which prevented him from drinking, but which made him appear drunk. Thus, the hospital was able to provide an alternative explanation for his behavior.

While the lawyer may seek out -- or in some cases avoid -- the testimony of outside professionals, he is forced to deal with witnesses and with friends of the defendant. His ability to employ either of these groups to enhance the image of the defendant in court is hampered by their complex relationships to the defendant. In the case of witnesses, for example, they usually come forward only in cases involving rape, armed robbery, or assault and battery,or when property has been lost,and they can assist in the identification of stolen goods. Those who most often serve as witnesses are the victims of the crimes they are testifying about, and thus, they are likely to have strong feelings about the defendant. In crimes against the person, this attitude is likely to be strongly against the defendant; indeed, few need the prosecutor's admonition not to give assistance to the defender. Witnesses in most domestic and juvenile cases, moreover, not only see themselves as victims but also are the spouse or relative of the defendant.

Though there is usually little a lawyer can do to influence a witness who has been the victim of a crime supposedly committed by the defendant, the lawyer does intervene with witnesses in domestic or juvenile cases. In both instances the attorney can usually convince the relative

that the court will "treat" the defendant's problem, without resorting to harsh measures. The result of the lawyer's efforts in domestic cases is that after an initial period of anger most complainants are cooperative and provide information to the defense with little need for negotiation beyond the assurance that the defendant will be protected. Since witnesses in juvenile cases are generally the defendant's parents, they usually do not want to hurt the child, but they also believe (or have been convinced) that the court can do the disciplinary work they could not do. Discussions between defender and witness in such cases, then, also focus less on the testimony the parent will give than on the nature of the treatment which the court will propose.

Most lawyers are acutely aware that if witnesses of this type -- or the defendant's family and friends -- are cooperative,the defendant is much more likely to impress the court as a stable citizen. Experience shows that a court assumes that a defendant whose family and friends are supporting him will be a better risk for rehabilitative strategies. With this kind of assumption, the defenders often invest time not only in talking with witnesses but in working with the defendant's family to urge them to play this supportive role. Families are urged to visit the defendant, provide him with money and food if he is jailed awaiting trial, and especially, to appear in court with the defendant at his arraignment and trial. It is likely that the defendant himself benefits from this kind of effort, to the extent that his own willingness to cooperate in his defense and his appearance in the courtroom also improve.

At this stage the lawyer's purpose in dealing with the defendant's family and friends, and with court-affiliated agencies is similar to his intent in talking with police and probation officers. In each instance, the Defender appears to be searching for information which might constitute a "case." What does each actor know about the alleged offense, about the defendant, or about dispositional alternatives for the defendant? Closely related, of course, is the defense attorney's need to know what the interests of these actors are in the case -- whether they are likely to be supportive of the defendant and of a disposition the defense might propose, or whether they must, in fact, be cooled out, avoided, or fought. Even at this point, too, the attorney may be trying to shape the ways in which these people view the defendant and the case as much as he is simply trying to gauge their attitudes and interests.

Information and support in the courts is typically purchased at a price. As the attorney is trying to learn from these actors and to line up support for a case, he is also either explicitly or implicitly incurring obligations. Witnesses or family who agree to support a lenient disposition may want assurance that the defendant will receive treatment, and the attorney must try to gain their confidence on this score. Police, on the other hand, may give information with the expectation that the defense will not fight too hard on later cases in which conviction turns out to be particularly important to the police. Probation officers perform the service of securing the record and perhaps of endorsing the client to the court. They appear to know that the attorney will reciprocate through friendship and cooperation in the dispositional recommendations the probation officers makes.

The Pre-trial Interview

The structure of the interview

The formal pre-trial interview is the first time at which the lawyer must establish a relationship with the defendant whose case he may already have been preparing. Up until this point the lawyer may have devoted considerable effort to filling out his own view of the case, its probable outcome, and the interests of the police, probation officers, and other actors who will be involved in the case. From a previous brief interview with the defendant and from the other resources he has consulted the lawyer may already have developed a strong view of the defendant's "type" -- his moral and psychological characteristics, his problems, and his interests. He may even feel that he had a complete view of the facts of the case, without the benefits of the defendant's story.

However solid a defender's grasp of a case appears, most of them agree that an adequate defense cannot be built without the development of a relationship between the lawyer and his client through at least one interview. Even the most confident lawyers try to compare the versions of the case they have developed with the defendant's story, to try to avoid "surprises" in court. Most lawyers actually depend on the interview to fill in factual holes in the case, especially with regard to what the defendant can remember about the circumstances surrounding his arrest and what he can supply about his personal life that might create a favorable image in court.

Perhaps an even more important function of the interview is to establish the grounds on which the lawyer can "represent" the defendant.

On one level this means that the interview may be used to discover what the interests of the defendant are so that these can be more honestly represented by the lawyer in court. In practice, of course, many lawyers find it difficult to discover what it is the client wants and instead, assume that his sole interest is to minimize time in jail. Most attorneys, however, will abandon this as a working assumption for a client who says he wants a trial. Most will honor their client's interest in taking a case to trial, even if the client still insists after being warned that trial could mean an increase in his chances for incarceration.

The interview is critical to the process of representation in another sense, too. If the lawyer is going to succeed in any courtroom strategy, he must make certain that the defendant will cooperate with him in court. Many lawyers use the interview, then, to determine whether or not they can establish a working relationship with their clients. A second purpose is often to relate both the lawyer's and the client's versions of the story during the interview and to make corrections where the facts or the manner of presentation do not coincide.

Most of the attorneys we interviewed reported that they consciously pursued some of these objectives in their interviews by developing a format that would lead the defendant in the desired directions. One particularly articulate attorney was able to relate to us the format which he uses as a guide for his own conversation with defendants. Since it is representative of other interviewing styles and a complete statement of what might be included, we will report it in full:

In the beginning the attorney should try to establish a background of basic data. Most of it comes directly from the defendant. At the bail hearing you try to get a sense of the charges, the defendant's prior record, and the "file" types of data on addresses, occupation, etc. At this stage, too, you make a point of asking the defendant for the same information you intend to get from other people. This way you can begin to look for contradictions. Even at this stage you try to press the defendant for information since even then I know more than he knows that I know. Above all, I don't assume that the defendant is lying.

The lawyer should try to direct the defendant to answer a series of questions. What do the police know about you? What do you think the police officer will say at the trial? This is important since you cannot always get to the police to find out what they know. Ask the defendant point blank what he believes the police observed. Whatever information you have at the time should be used to probe -- people have poor memories and need some stimulus to remember. Ask the defendant, "What did you see?" The next step is to discover what the defendant was likely to have said to the police. In an armed robbery case it is likely that he made a statement to the police; in an A and B it is likely that he did not. Ask him to try to remember any ways in which he was grilled by the police. "Did you know the person that you hit? What did you say about that to the police? What did the police say to you? What in detail happened at the station? What in general do you think will be the police story? Do you know the officer? Has the police officer ever seen you before? Did anyone talk to you in court? Did you see the police talking to any of the witnesses or anyone else?"

Then you should let the defendant tell his own story. This is a different type of information than you get when you direct him.

Next you ask yourself a number of questions. Can this guy talk? Is he intelligent? Is he perhaps

> hard to hear or understand? To help establish this you can begin to play verbal games with the defendant. Find out whether he is likely to be killed by the DA on the stand.
>
> Next you ask yourself whether or not the defendant has a believable story. Try to establish impressions of the defendant from several angles. What is his real problem? Is it divorce? Is it alcoholism? Play games with him. Use any information you have to probe, compare. This is where it all comes to a head and you begin to sound like an adversary. You tend to look at things with a jaundiced eye. It is surprising how many people lie to their lawyer. They see him as part of the court.

The process of conducting a complete interview with a defendant as seen by this attorney clearly involves a staged set of attempts to obtain information. Each type of data as it emerges is then used as leverage to probe for new information or reactions from the defendant or to encourage the defendant to "open up." The attorney conducting this type of interview is clearly, in turn, probing for the facts of the case, and then assessing the credibility of the defendant's story. His questions about the arrest not only round out his knowledge of the case, but also search for "legal angles" which might be used as strategy. The lawyer then explicitly turns to evaluating the defendant both as a potential actor in the courtroom and as a person. In the final series of comments the defender may be trying to "break" the defendant -- to discover information that he might have intentionally or unintentionally neglected to give the lawyer and to pressure him to cooperate.

Though these goals and these kinds of questioning style were present in nearly all the interviews we observed, no interview was like an-

other in its detail. This diversity is due in part to the differences in the personal styles and philosophies of the attorneys themselves, and, therefore,to the objectives they choose to emphasize in the course of any interview. Many see, for example, the primary object of their strategy as being to break the defendant's facade to "get at" the truth. Others do not believe that they could recognize the truth if the defendant were to tell it, and will settle for a credible and consistent story; preferably one which can be reconciled to that told by the police.

Thus, the order in which attorneys ask questions and the time spent in pursuing each element of the case will vary with the centrality they give to establishing the "facts" of the case, and their faith in the defendant's willingness to tell the truth. One attorney, for example, describes himself as employing a strategy aimed primarily at getting "facts" from defendants [D's].

> The D comes in and tells me his story. I usually give him as much time as he needs. I have a format for translating interviews into files. When the D first comes in, I usually tell him to just talk about himself and to ramble on about what happened. I don't take any notes at first. I try to establish a little camaraderie with the D; then I get specific. Then finally I go through the outline.

The director of the Lawyers' Panel, on the other hand, is less concerned with determining all the facts of a case than with making an assessment of possible "legal" strategies. He recommends to members of the panel that in interviews they concentrate on the details of the events leading up to arrest, looking always to the question of whether the Commonwealth can prove its case. Since he feels much more sanguine about

defendants' truthfulness than do other lawyers, he pays less attention to the issue of the defendant's truth or credibility than to these technical aspects of the case. In discussing his "legal" strategy for defense, he reflects his perceptions of the proper relationship between lawyer and client. As the person responsible for understanding the legal aspects of a case the lawyer should work out an advisory relationship, in which he is careful not to recommend courses of action but to limit himself to giving information and advising his client of the consequences of alternative actions.

In addition to the differences in the sense of mission which lawyers bring to the interview, the defenders tend to articulate differences in the interests which they are pursuing and in the influence they can exert over the defendant. In turn, each defendant appears to come to the interview with his own set of interests and, perhaps, strategies, though they may not be as clearly articulated as the attorney's. Thus, the main dynamic of the interview and the primary explanation for the differences among interviews is the complex of interests with which the attorney and the client each approach their initial meeting.

We have already cited a number of objectives which we felt that the attorneys were explicitly pursuing when they interviewed clients. These range from the most general desire not to be "surprised" in court to the immediate need to get to know the defendant. For the purposes of analyzing the interviewing process we will concentrate on three interests that seem to be common to all the attorneys we observed. Foremost, of course, is the attorney's need to create a relationship between himself

and his client which insures that the client will cooperate, especially in court. A second purpose which appears to guide the interview is the need to obtain information about the client and the crime, while also urging the defendant to adopt an acceptable interpretation of that information. Finally, the lawyer also feels that he must try to assure that the defendant will accept the disposition he has in mind -- to redefine the defendant's goals in such a way that they can be feasibly met within the constraints imposed by the court and the abilities of the lawyer.

While the attorney does not expect to accomplish all these goals in an interview, he does bring to the interview a large number of attributes which may influence the defendant greatly. The lawyer has the definite advantage of a knowledge of the law and the court, license to act with authority within the court structure, and experience with similar sets of facts and personal presentations gained from representing other clients. Perhaps more important, he can offer the client access to other members of the court community who would otherwise be unavailable to the defense. Through this contact with other court personnel the attorney can also bring to the interview information gathered from sources independent of the defendant. Clients tend to be highly influenced by the lawyer's "inside" knowledge of their cases and to lose much of their ability to hoard information when the lawyer is able to contradict their stories. Finally, in every lawyer-client interaction there is an implicit threat that the lawyer will withdraw from the case, which the defenders occasionally invoke with recalcitrant defendants.

In contrast, of course,the interests of many defendants are not well-practiced,and defendants are not usually aware of the influences they

can bring to bear on the lawyer. The initial motivation for the defendant's behavior during the interview seems most often to be the need to decide whether the lawyer can be trusted and thus to "test" him. Many defendants do, of course, come to their interviews with explicit faith in their attorneys, but most seem to spend some time evaluating the lawyer before discussing any particulars of the case. If the defendant decides that he can enter into a dialogue with the attorney about the events of his arrest, he often has a second objective -- to present himself and the conditions of his arrest in the most positive possible fashion, as he gauges it.

In fact, of course, the defendant's position in the interview can be quite strong, and in a number of ways, he is more able than the lawyer to shape the course of their meeting. The defendant, for example, brings to the interviews first person knowledge of the events at issue in the case and, of course, of his own identity and character. To some extent, too, he brings a degree of monopoly power over that information, though the defendant may not be aware of how to use it, since he does not know the scope of the attorney's knowledge of the case. Finally, he brings the ultimate power to refuse to compromise his perceptions of the alleged crime and of his own character, even if his refusal means that a successful presentation cannot be made to the court.

Given his lack of knowledge of the court and of these possible strategic advantages, then, the defendant most often bases his conduct in the interview on his own perceptions of the reliability of lawyers, his notions of what attitudes he ought to express, and his conjectures about what information is most likely to be harmful, if it is revealed. For many defendants, behavior in the interview is conditioned by these

perceptions rather then any articulated plan. As the defendant becomes more experienced in the ways of the court, however, he may begin to negotiate with the lawyer with a well-articulated, distinct strategy of his own.

The pre-trial interview, then, becomes a meeting of the complex interests of the lawyer and the defendant. By virtue of the kinds of influence which each can exert, moreover, the interview can tend to resolve some of the conflicts among the interests and attitudes of each side. This process is, of course, rarely explicit, especially on the part of the defendant. In each interview we observed, however, we were able to see the control of the meeting shift constantly between defendant and lawyer, as each exerted the influences he had available. In nearly every instance, the lawyer emerged as the dominant figure in the relationship and to some extent "taught" his client what their relationship should be. Even more striking were the changes in the definition of the reality of the case which occurred during the interviews. Often the interchanges between the lawyers and clients not only altered the facts of the case into a common version, but they also tended to modify the way in which the defendant viewed his problem, his interest, and the disposition in the case.

Patterns of bargaining in the interview

In the three cases that follow we try to illustrate this process of bargaining between lawyer and client. Though all the interviews we observed revealed the attorneys trying to assert their interests in the attorney-client relationship, we have selected a set of interviews which are particularly illustrative of the three major objectives we attributed

to the interviewing attorneys: shaping the facts of the case, "selling" the defendant on a dispositional alternative, and attempting to obtain the cooperation of the defendant. At the risk of losing representativeness, we have also selected cases in which the defendants were somewhat experienced, to illustrate as vividly as possible the roles played by defendants in pursuing their own interests.

An interview between the defendant Henry Kursley and his attorney illustrates a lawyer's attempt to use the interview as a basis for establishing and shaping the defendant's version of the facts of the case. The interview is also a good example of the kind of relationship which develops between a lawyer and an experienced defendant -- who has an interviewing strategy of his own. In fact, defendants like Kursley who have already participated in the life of the court are considered by lawyers as being easiest to handle, since they "know the ropes" and understand what the lawyer is trying to accomplish. In most of the interviews we watched, the defendant lived up to this role expectation. Many were, of course, more wary than the attorneys had expected, but the most uncooperative of these were also the ones who faced the most serious charges.

Kursley's case was typical of the "seasoned" defendants represented by the defenders. He was assigned to the Massachusetts Defenders after he had been arrested for possession of heroin with intent to sell, and he was alleged to have a prior history of drug related offenses.

The attorney [A] began the interview with the defendant [D] by introducing himself:

A: Hi. I'm your lawyer -- I'm from the Massachusetts Defenders Committee. My name is Paul Manckowski. What's your name?

D: Willie Kursley.

A: I thought they said "Henry" Kursley upstairs.

D: (Firmly) My full name is William H. L. Kursley.

Even at the very outset, the attorney and defendant were beginning to employ strategies designed to influence the interview. They both knew that the entire drug raid in which Kursley was caught was based on a search warrant authorizing the search and detention of "John Doe," alias "Henry." Thus, the defendant was apparently preparing his position so that he could deny that he was referred to as "Henry" and, moreover, showing that he was unwilling to cede autonomy readily to the attorney. The Defender, on the other hand, had shown the defendant that he would not allow superficial discrepancies to go unnoticed. By responding so quickly, too, he might have alerted the defendant that he understood that it was the name "Henry" which was at issue.

The attorney then pursued another question which further developed background facts and at the same time may have given him another chance to make clear his relationship with the defendant.

A: Where do you live?

D: I'm living with my old lady,...

A: (Interrupting) Don't tell me. She's Carolyn Hill.

D: Yeah! How did you know that?

The defendant seemed quite surprised by this, since he had not known that the court was aware of his relationship with Carolyn Hill. The attorney moved to try to retain his advantage in the exchange by getting quickly to the critical issues of the case, while the defendant was still impressed with the fact that the lawyer knew a great deal about the case already.

A: Where is that?

D: 109 Stanwood St.

A: How much junk did they get you with?

Once again, the attorney was moving to try to take advantage of the fact that he thought he had gained the initiative in the conversation. By changing the topic quickly to the arrest and by asking the question in such a way that it implied the defendant's guilt, he was probably trying to shake the defendant into presenting his version of the story in a way which could be harmonious with prior evidence. The defendant, however, stuck to his effort to dissociate himself from the crime:

D: None. It was my girl friend's house. I didn't know what they were talking about. All I know is that they came charging in -- I was alone in the house -- and busted me for having drugs.

A: Do you use drugs.

D: Hell, no. I ain't never been on Horse -- never touch the stuff.

A: Ever arrested?

D: No.

Having pursued the defendant's answer in terms of its implications for his use of drugs, the attorney turned to the defendant's association with the house at Stanwood Street.

A: What were you doing at the house when they arrested you?

D: Making a visit. I stay a couple of days at Carolyn's house, and sometimes stay downtown at the Midtown (motor hotel). Carolyn has another boyfriend who sometimes stays with her for a while.

The defendant appeared to present the other boyfriend as a technique of offering an alternative to himself as "Henry" in the warrant. In addition, he seemed to be making an effort to regain an equal footing in the conversation. Thus the attorney refused to respond directly to the defendant's initiative, but rather asked about other aspects of the police version of the crime:

A: Did you ever leave any clothes there?

D: No.

A: The police report said something about a suit.

D: Well, it wasn't mine.

A: You ever leave any bags there?

D: No.

The defendant indicated at this point that he was merely "trying to remember the important things," and set out again to take control of the interview. The attorney tried to get him to admit some further connection to the Stanwood Street address. After further denials from the defendant, however, at least at this stage, it became clear to the attorney that he was not going to get any additional information about the alleged crime.

It is at this point -- given the defendant's solid unwillingness to acknowledge any association with the crime -- that this case is somewhat

atypical of interviews with experienced defendants. Other defendants of this type are more open about giving information, though the most experienced of them refuse to admit directly their involvement in criminal activity. In other interviews, one defendant, for example, went through the details of his participation in several armed robberies and accessory activities to a murder, and another went so far as to explain not only his role in an arson but also to identify the person who paid for the arson.

Thus, Kursley's initial reluctance to admit any involvement in the drug case may require some explanation. It may be, for instance, that he was not in fact the person sought in the arrest warrant (though, as we will see in the course of the interview, this theory is unlikely to be valid). Another possibility is that he might have realized that his case could not be helped by telling his lawyer of his involvement. Unlike other defendants, he probably could not turn his information in for freedom: if he were "Henry" he would be the object of the whole series of arrests and, thus, probably too large a figure in the total prosecution effort to be released. Since the attorney, moreover, demonstrated unexpected knowledge of the facts he may have convinced Kursley that so much of his case was already known that there was no advantage to a confession of guilt at this point.

Whatever the reasons for the defendant's recalcitrance, the attorney had to abandon the question of the defendant's arrest for the moment. Changing tactics yet another time, the attorney turned to questions about the defendant's background -- age, record, education, etc. This shift was probably designed to develop some of the information the

attorney needed, to break the defendant's concentration on the facts surrounding his arrest, and to deflect the defendant's attempt to take control of the interview by forcing him to answer short questions. The attorney then returned to his original line of questioning:

> A: Let's get back to the point at which you were arrested. What happened next?
>
> D: My girlfriend came in and asked, "Come to turn yourself in?"
>
> A: Did you ever bring a bag or briefcase into the apartment?
>
> D: No. They must have been left by Carolyn's other boyfriend.
>
> A: The warrant states the owner of the bag as being the one who is selling H.
>
> D: Well, it isn't me.

At this point, the attorney dropped this tack, apparently satisfied that in court the defendant would be able to stick with this part of his story, and turned to the arrest. With little guidance from the attorney, the defendant told of the arrest, booking, and interrogation. One brief portion of this description shows several characteristic techniques of expert defendants in anticipating the kinds of information they can safely give their attorneys:

> D: Well, they [the police] kept asking me questions about Carolyn and how I knew her, and about the others. They said, "You can go free if you know about them, but if you don't cooperate, you'll do forty." Then, they took me to the print room for an hour and a half. I got questions from one and then from the other -- all the time like that. One said I had sold him drugs. The other said something about a federal marshal having been there at some hotel

> and having seen me sell to him. He also said that I had met with Jesse at some hotel I've never been to.

This brief statement performed several tasks simultaneously for the defendant. It alerted the attorney to areas in which he might fruitfully bargain for information with the prosecution; without indicating any admission, it showed the attorney what the police information is apt to be in areas in which the attorney had not indicated that he had any prior knowledge; it alleged extensive interrogation which, combined with the defendant's prior claim that he was not told his rights, might provide the basis for a defense based on violation of the defendant's rights in the arrest.

Apparently satisfied that the defendant's account of his arrest -- while not necessarily "true" -- would provide a solid basis for building a case, the attorney returned to the question that had continually dominated the interview -- the relationship between Kursley and Carolyn Hill. In the process of answering the attorney's questions, the defendant remained insistent that the other "boyfriend" had been the one to bring the heroin into the house, while he quickly assured the attorney that "[the boyfriend's] a real nice guy -- decent to the kids, too." At the same time that the defendant described Carolyn Hill's "new boyfriend Henry" the defendant admitted that three of the children were his own and remarked, "They all call me 'dad.'"

In apparent hope of approaching the question of the defendant's "family" indirectly, the attorney next turned to the defendant's finances. In response to his questions, the defendant observed that they "got by":

D: She gets a little help from the welfare, and I'm on unemployment compensation. I got my first four checks all at once, and she had gotten two months' welfare payments, so when they arrested us, we had $700 in cash in the apartment.

Following a probe of the defendant's employment (he's an "Asphalt truck driver") and reasons for coming from New Jersey to Boston ("better pay"), the attorney terminated the interview by explaining to the defendant that the case would be continued for a probable cause hearing. He reassured his client that the probable cause hearing was not a trial, but only a hearing to determine whether enough information had been presented to warrant a trial in Superior Court.

On the basis of this interview the attorney entered in his running narrative of the case the following observation:

D'S STORY: D states that he knows Carolyn Hill, that he has been going with her for approximately six years, that he has four children by her, and that he and Carolyn had moved up from New Jersey. He plans to marry Carolyn Hill some day, he had no knowledge of any heroin being stored in the Hill apartment, and he feels that it was some other man, another boyfriend of Carolyn's. He denies having anything to do with the heroin, or ever using heroin or ever using any other kind of drugs. He states that his profession is a truck driver, long-haul, and that he heard the pay was good and that is why he moved up here.

COMMENTS: Concerning Willie H. L. Kursley or A. K. A. Henry Kursley. Problems with Mr. Kursley's statement. He talks about $700 being in the Carolyn Hill apartment, stating that $500 of this was Carolyn Hill's welfare check and $200 being from his unemployment checks, seems like a lot of money for the D to have being unemployed or even that the Co-D Carolyn Hill had being unemployed. Also Henry is very philosophical about this third party guy that supposedly was a friend of Anna Gordon who has been visiting his 6 - 8 year girlfriend, Carolyn Hill. He doesn't seem to be at all upset that Carolyn Hill has been hussling someone else.

It is my opinion that Henry Kursley is the one that's involved with the briefcase of heroin in the Carolyn Hill apartment. This is certainly what the police think.

It was primarily from the interview, then, that the attorney built his reconstruction of the arrest and his estimation of the defendant's probability of guilt. His deduction concerning the defendant's involvement with the briefcase full of heroin is most interesting in this respect. It may explain why the attorney spent so much of the interview pursuing Kursley's relationship with Carolyn Hill. It illustrates, moreover, the extent to which the lawyer's conclusions at this stage were drawn from very limited information about the case and the defendant.

The interview is particularly interesting in the complexity of interlocking bargaining which it illustrates. In a sense, each question and answer represents a small bargain in which the participants struggle with each other for the control of the conversation. At a somewhat more

expansive scale, they are negotiating reality -- about the arrest, about the identity of the defendant and his social contacts, and implicitly about the shape of the defense. Finally, at the broadest level, the defendant may be attempting to bargain for as large as possible a share of the defender's time and talent by presenting his case as interesting and himself as worthy of a vigorous defense.

While Kursley and his lawyer negotiated the "facts" of his case, bargaining in the pre-trial interview can be much more explicitly concerned with developing agreement about dispositional alternatives to jail. An interview with a defendant accused of several breaking and entering offenses, and arrested in possession of allegedly stolen goods illustrates this kind of interchange. The interview had been proceeding through a series of routine questions supplied by the Defenders to assure that all lawyers with the Committee obtain the necessary minimum information about each client. When the question of drug usage came up as part of this format the Defender probed the issue, and began to build toward a treatment disposition:

A: You into drugs?

D: Yeah, heroin.

A: Shooting or popping?

D: Shooting.

A: In heavy?

D: In real good.

A: You should begin to think whether you want to request a drug examination.

D: Yeah, I will [said without enthusiasm].

A: Well, think about it. They are supposed to have a reasonable place; you know, not great, but not bad either.

D: Yeah, that's what I heard, too.

A: How bad is the habit? I mean, about how many bags a day?

D: I don't know. See, the people I buy from, they are in it big. They sell in quantity. I buy a quart from them for a hundred.

A: Hey, you know that's a good way to get busted for selling?

D: [No response].

A: So you're cutting it yourself?

D: No. I just buy in quantity; you know, they just don't bag it into dimes. I get it in big bags and use it that way.

A: Do you sell part of what you get?

D: No.

A: You hip to what you're into?

D: Yeah, I'm hip.

As with many of the interchanges between lawyer and defendant each actor appeared to be trying to accomplish several purposes at once. The attorney was simultaneously expressing his views and advice on the defendant's drug habit and trying to enlist the defendant's assistance in a strategy which he had decided would be necessary to keep this defendant "in the street" -- even in light of his record, unemployment, and undeniable habit. Finally, the attorney was demonstrating to the defendant that he understood the drug culture and could speak its language sufficiently that he could communicate with him. The defendant, in turn, seems to have been countering by assuring the attorney that, at least at that time, he

considered the drug culture not altogether negative. In fact, he spoke of his suppliers with some touch of awe for being in so "big."

Having attempted to plant the idea of a drug program as a suitable beginning of a rehabilitation program, the attorney abruptly shifted the focus of the interview to the facts surrounding the arrest. He did this by suddenly warning the defendant that the case might have dire consequences: (this comment followed directly after the defendant had said, "I'm hip.")

> A: Man, this looks like it's heading for Concord. [Correctional Institution]
>
> D: Why?
>
> A: It all depends on this B&E. Were you arrested in the car?...

By introducing the situation surrounding the arrest as the pivotal point in whether or not the defendant would go to Concord, the attorney seems to have been trying to put pressure on the defendant to see that the options open to him were likely to be a drug treatment program or Concord. The attorney continued the interview, shifting from discussion of the circumstances of the defendant's arrests and warnings about how damaging the evidence was to return regularly to the issue of a drug program as an alternative to Concord.

While all these lawyer-client interviews move toward a clarification of the roles each will play, some interchanges between the two are devoted solely to this objective. For the lawyer, this clarification of roles is a necessary preparation for an appearance in court, since he must be able to rely on the defendant's cooperation. The interview between the

defendant Brant and his attorney provides a vivid, though extreme, case of a lawyer attempting to urge his client to cooperate with him.

Brant and his co-defendant Garvey had been charged with breaking and entering. At the first interview the lawyer met with the defendants in order to resolve their bail status. Initially both had been put on high bail, largely because Lee Garvey had some outstanding probation. Since the defendants had been brought from Charles Street Jail to the court for trial (though a lack of ballistician's report had forced another continuance) they were anxious to secure their release. Thus, the attorney began their first interview of the day by telling them about progress in clearing up their bail situations:

A: OK, now, I think we're going to get you out. [Talking to Lee Garvey] I just got a call from Charles Wiley, and he says that the probation in Stoughton is finished and that the Superior Court "pro" is the only thing on you. That way, she [the Judge] has no reason to hold you.

[David Brant at this point was making negative comments about getting out.]

D Brant: I've just got to get out of here. It's driving me crazy.

A: We can't go to trial on the case because the ballistician isn't ready.

D Garvey: It don't make any difference, that thing couldn't shoot anyhow.

A: [To Brant] I gather you couldn't make the $250 cash bail. [Lowered by Superior Court on appeal from $15,000 set by the District Court].

D Brant: Hell, no. If I could have, do you think I'd still be here? What kind of stupid question was that?

A: David, I'm in no mood for your attitude. If you want to get out, you're going to have to tell me what I need to know and trust me.

To break the tension, the attorney turned to Garvey and got information from him for use in trying to get his bail reduced during their appearance in court. When Brant seemed to have calmed down the attorney returned to asking him how long he had been in the area. Brant didn't answer.

A: A year? Two? Five? Ten?

D: You might say so.

A: Might say what?

D: Oh, what fucking difference does it make? I ain't going to get out of here unless I bust my way out.

A: How long, David?

D: [No answer.]

The attorney tried to ask questions about the defendant's background, but the only statement Brant gave was that he had been in the Marines, and that he "might" have been back in Boston ever since.

Deciding that further efforts to probe into the defendant's background would prove as futile, the attorney went to the courtroom to wait for the Garvey-Brant case to be called, and despite his difficulties with Brant, to try to negotiate the defendants' bail. When the case was announced, the prosecutor argued that he was not ready for trial, and he requested a continuance for a week. When the defense counsel requested a reconsideration of the bail, the Judge agreed to hear argument on bail continuation.

A: Your Honor, considering the fact that Mr. Brant has no prior record and Mr. Garvey has never defaulted and has a job which he is in danger of losing, I would like to ask the court to reduce bail on both defendants to $1000 personal recognizance.

P.O.: [Addressing the Court] That man isn't David Brant; he's David L. Smith.

J: [To A] Didn't your client tell you this?

A: No, Your Honor. To be honest, he has been an uncooperative client.

C: This case will be put on second call.

It was clear that this exchange with the court had humiliated the attorney. Being "croaked" in this way has serious implications for both the attorney and the clients. After that incident, moreover, neither defendant could be put on bail, since in the eyes of the court personnel, they were part of a single case and there was "something wrong" with the case. The attorney perceived that he lost prestige and credibility as a member of the court community, and feared that, in future cases, he would be required to have much more detailed assurances of information to convince the court of a defendant's worth.

After this encounter, the attorney and the two defendants left the courtroom. At this point David Brant began to scream at the attorney:

D Brant: It's crushing me -- I can't breathe. I'm going to bust out of this fucking place -- I'm going to bust out, do you hear? It's more than I can take. They're trying to pin it all on me. They said they were going to pin it on me good....

A: [Yelling] David! Now cut out the shit and talk to me. What's going on? Who is David Smith?

[The defendant was at this point incoherent, both raging and crying]

A: David! David! Who is David Smith?

D: He's my cousin.

A: What do the cops have on him?

D: [Resentfully] I wouldn't know. I never see him.

The conversation was regularly interrupted by outbursts of rage from the defendant, who kept screaming about the "screw job" the "fucking pigs" were doing to him. It was difficult, therefore, for the attorney to get information from him about David Smith, despite the fact that the focus of the case had shifted to determining the defendant's identity.

The defendant continued to maintain that David Smith was his cousin who might have a serious record -- though he had no idea what for -- and that he thought David Smith was in jail somewhere, though he didn't know where. The attorney left, saying,

A: Look, David, you've really screwed yourself by not telling me these things. If I had known, I could have planned how to deal with them, but as it is, I just can't help you. Now, I'm going to check out what the police have about this "cousin" of yours, then I'll be back.

The attorney's investigation revealed that the officer who had identified Brant as Smith indicated that the police had been "looking for him" because he was a "bad actor." The officer himself had spent some off-duty time hunting down the records on Brant and had identified him as Smith by his fingerprints. The probation officer further indicated that Smith/Brant had an extensive record under five other aliases. He was able to give the attorney a fairly conclusive piece of evidence -- a surrender

of probation warrant made out to Jason Smith, David L. Smith, Jackson L. Smith, Daniel Smith, and David Jackson as well as to David L. Brant.

Armed with this warrant, the attorney returned to the lockup and called David Brant over to the gate of his cell. When Brant received the document, he became quite violent, crying and cursing.

> D: That thing don't belong on me. They just trying to hand me all that shit -- this belongs to somebody else. Why don't they go out and find him and leave me alone. Don't you lay that on me. It ain't no fucking business of mine.... They just trying to keep me in here....
>
> A: David, if you keep this up, I can't be your lawyer. Now, I'm leaving. [Turns to go]
>
> D: Like -- be my lawyer.
>
> A: If I do, you're going to level with me. No more bullshit.

They then sparred over the defendant's identity. The defendant tried to argue that he was responsible for only some of the things done in the name of David L. Smith, claiming that he was none of the other people named in the warrant. The attorney was able to get him to admit progressively more about his activities, however, until he had tacitly admitted them all.

This case provides an extreme example of the tactics a lawyer will employ to establish rapport with a difficult defendant. In this sense the interchanges between the lawyer and Brant negotiate neither the case nor its disposition, but merely whether Brant will allow himself to be represented at all. The lawyer's efforts in part show this need to develop a minimal relationship with Brant before he will represent him,

but perhaps also show the need of lawyers to "break" their clients, when the stakes are high enough to create a risk that they will be "croaked" in court. The energy with which the attorney in this case pursued the question of David Smith's identity was certainly due in part to his embarrassment over having been surprised by the court's knowledge of the defendant's aliases. (It is also important to note, however, that despite his peeve over this lapse in court, the attorney did vigorously represent both defendants in the bail hearing immediately following.) Because of the tense nature of the attorney-client relationship, this case is also able to suggest the importance of the attorney's ultimate power to refuse to represent a client, and the perception of even the most difficult defendant that the lawyer is somehow necessary to survival in court.

Preparation of the Case for Trial

The stage at which the lawyer's attention may finally be directed to creating a strategy for defense is the period immediately before the case comes to trial or the defendant waives trial. It can be the most critical stage in the processing of a case, since in effect the trial is the playing out of the strategies which are developed during this phase. During this period all the decisions which directly shape the trial or "bargain" following a plea of guilty are made: the choice between plea and trial, the legal strategy to be followed in the case, the assignment of the judge and the prosecution, and the negotiations with the prosecuting attorney.

For a study of bargaining this is also the most important stage, since it is here that the attorney makes use of all the bargains he has developed previously and for the first time engages in open bargaining with the court. In his search for information, the attorney has usually bargained with the police and the probation officer to obtain the "facts of the case." In the process, he has undoubtably gauged the positions of both of these actors and entered them into his calculus about the odds of conviction in the case. If the interview has worked, moreover, the attorney may have succeeded in influencing the attitudes of the defendant toward the case and in preparing him for what the disposition is likely to be. With this background, the lawyer must for the first time ratify the decision to take the case to trial or to have the defendant plead guilty "for considerations." Either declaration results in open bargaining with the prosecution, whether in the courtroom or outside.

Plea-trial decision

Though the lawyer and client discuss a number of options for the strategy and disposition of the defendant's case, the first point at which the lawyer perceives that there has been a decision made is when they elect to take the case to trial or they choose to have the defendant plead guilty. Lawyers describe this decision as evolving from a process in which the lawyer and client review the case together, and the defendant decides whether to admit guilt in exchange for a "bargain" appropriate to the case. The fact that the defendant knowingly makes this decision is critical to the lawyer's perception of what the plea-trial decision ought to be. In fact, most lawyers contend vigorously that they do not allow a person who denies guilt to plead guilty (though some feel that the standard should be less actual guilt than the recognition that a judge and jury would probably find guilt). One Defender went so far as to say the following:

> A lawyer usually considers his first obligation to get his client "off" if he is not guilty. To get the lightest possible sentence for a defendant might mean having him plead guilty to an offense even if he is innocent.

While these lawyers argue that the decision is made entirely by the client, when they describe the plea-trial decision, they speak in terms of the criteria which "you" -- the lawyer -- must consider when "you decide whether or not to plead [guilty] your client." In fact, this ambiguity about who makes the decision is explained by the lawyers in terms of the client as decision maker with the lawyer as advisor. As one defender put it, "the attorney lets the defender choose, but informs him of the odds of winning the case. It's important for me for the defendant to choose a strategy that will win -- after all, it's no fun to lose."

Our observation of this pre-trial period, however, suggests that neither the defendant nor the client actually makes the plea-trial decision at this stage. Rather, the "plea-trial decision" meeting between the lawyer and his client constitutes nothing more than a ratification ceremony for the necessary result of previous negotiation. The entire pre-trial process has been one of bargaining for information and a process of mutual adjustment of personal interests on the parts of the attorney, defendant, police, and probation officer. From this process a mutual understanding has usually grown up between the defendant and the attorney, regarding the odds of conviction in the case and the types of disposition that are feasible. Discussion between them about whether to bargain or go to trial, therefore, must be seen as ultimately being merely a part of this process, not a distinct decision making step.

In fact, even if a firm decision were made at this point alone, it would still be constrained by the prospect of future negotiation. In the District Court, as we shall see in the section which discusses the trial, the distinction among forms of "trial" (probable cause hearing, plea ceremony, adversarial trial, and even juvenile hearing) are often quite blurred. In this setting, all forms of trial become extensions of the negotiation process, so that there is not a real choice between trial and bargain at any point.

Why then do attorneys insist that they do make a plea-trial decision at this stage? The answer in some cases may lie in the attorney's need to strengthen his relationship to his client. By presenting the defendant with two options -- "plead guilty or go to trial" -- and providing advice which tends to make one choice clearly preferable, the attorney may

gain several important advantages in future negotiations with the client. First, the decision does reduce the range of possible options in a still complex negotiating situation. Because the defendant must choose the strategy to be followed, too, his interest in the outcome of the case may be altered; from here on, the defendant may be more likely to identify the strategy as "his." This involvement of the defendant in the attorney's stance for negotiation reduces one major potential area for surprise -- it is now much less likely that the attorney will be "croaked" by his client's defection from a bargain. Finally, the process of ratification of the bargain strategy tests the relationship between attorney and client. More than any other stage in the criminal process it serves to foster the relationship of dependency and trust which the defendant may feel for his lawyer, since the client can see for himself that the lawyer is "only doing what I told him to do."

Preparation of the defense

Even if the lawyer and the client have agreed that the case should be pleaded rather than tried, the defender nearly always prepares the case as if it were going to trial. Failure to prepare for the eventuality that the bargaining process might not work or for some other reason the case might actually go to trial is seen as an invitation to get "croaked." Whatever the plea-trial decision, then, the lawyer will construct at least a rudimentary legal defense at this stage, based on his assessment of how strong the prosecution's case appears and whether the facts of the case will suggest a refutation of the charges.

For most cases, there is general agreement on both sides to a set of facts, and those facts are often sufficient to justify a finding of

guilty. A slightly smaller number of cases presents a clear problem of fact or law based either on disagreement about the facts or even an agreed flaw in the prosecution's case. Finally, there are cases in which the defendant claims to have or be able to produce facts which would refute the Commonwealth's charges totally. It is generally on the basis of the defender's assignment of a case to one or the other of these groups that he structures his preparation of the legal defense for trial.

In cases where both prosecution and defendant agree in principal that there are sufficient facts to support conviction, the defender tends to rely on a long established set of standard responses which attorneys have developed to attack a "solid" or "pat" prosecution. An example is that the attorney may point out that the defendant's arrest was a "cliche arrest." Just as defendants are accused of using "cliche alibis," -- defenses used so often that the court finds them incredible -- individual police often repeat testimony. During the trial, then, the attorney may plan to question the credibility of the police officer or other complainant, pointing up, for example, the fact that the same police officer has testified to the same facts time and time again. Another common strategy in a case of this type is to try to elicit from the prosecution witnesses extenuating information for the defense. For each of these strategies the defender may prepare a brief agenda for cross-examination.

For those cases in which defense and prosecution disagree on the facts in a case, a somewhat more aggressive preparation is required. Typically, the disagreement will fall into one of three areas: the legality of arrest, search, or entry and the behavior of police officers during each of those stages of the arrest process; the identity of the

defendant, particularly if the identifying witness is a civilian who does not know the defendant; and the adequacy of the prosecution's evidence to cover all the elements of proof required for conviction. In any of these cases, but especially for cases of false identification, the defense must not only prepare an attack on the prosecution's case but also mount an affirmative defense, if the case is to be won. Despite the legally recognized standard of "proof beyond a reasonable doubt" required for conviction, the defense cannot be satisfied with depending on casting doubt on the prosecution in any of these cases, since there remains in the courts an operating presumption that the police had "some reason to pick your defendant out of all the people in the city to arrest for this crime."

The most time-consuming and -- because of the lawyer's fear of being croaked -- the riskiest type of case for the defender to prepare is the one in which the defendant claims to have a positive defense. Preparation then means locating and interviewing witnesses whom the defendant identifies. Defenders consistently suggest that locating witnesses, especially in poor and black communities, is the most difficult of the tasks they face. As one defender put it, when your client only knows that "a dude numed 'Shorty' saw the whole thing" and that "He hangs at that corner," finding the witness is nearly impossible. Cultural differences between the lawyer and his client come to the fore here especially, and as a result, if the defendant is free before trial, the attorney usually tries to have his client do much of the work of finding witnesses.

Once in the defender's office, the witnesses have to be interviewed. Again, this is a most difficult task, since, unlike the defendant,

they are not under any real pressure to work with the attorney, yet he must cross-examine them even more closely than he must his own defendant and with less corroborating evidence. Because of the danger that witnesses will not appear for the trial or that they will be impeached during cross-examination, the attorney cannot build the defense solely on the testimony of witnesses. Instead, where a positive defense must be developed, the lawyer is usually faced not only with finding witnesses but also with constructing a second defense, if he wants to assure a strong case.

Assignment to the judge

Between arraignment and trial, the initiative for shaping the criminal process lies primarily in the hands of the defense attorney -- and to a lesser extent the probation officer and the police. Until the day of the trial, in fact, many of the other court personnel are not even named. In particular, neither the judge who will hear the case nor the Assistant District Attorney who will prosecute it will have been designated until then. As a result, both the final preparation of the case and any direct negotiations over the plea must wait until the identity of these actors is known. This information allows the defense attorney to employ last minute tactics which are at his disposal to affect the outcome of the case, such as "judge shopping."

The identity of the judge -- and thus the ability to shop for a judge -- is seen as critical by the attorneys because of what they perceive to be great differences in sentencing philosophies among judges. Part of the case preparation strategy, then, is to try to have the case scheduled before a judge likely to be sympathetic to the type of defendant

the attorney is representing and the disposition he has in mind. In this regard, the attorney must reckon with the Assistant Clerk, since the weighty responsibility for assigning cases to individual judges falls to him through his job of making out the day's docket. This same clerk acts as the Clerk of the First Session, where arraignments are generally held and in the (usual) case that two or more sessions of criminal business are required, he refers cases to the other sessions.

The strategies which attorneys use to jockey for a preferred judge range from a very tacit kind of negotiation to open bargaining with the clerk. Tacit bargains usually involve being ill or occupied with another case when the case is being called; asking for "second call" to "bargain" a case which, in fact, the attorney intends to take to trial; or simply, as one Defender put it, "being nice to [the Clerk] a guy nobody else in the court will speak to." In any of these ways, the attorney may be able to stall a case scheduled before an unfavorable judge, though the same kinds of strategy are clearly being used by the prosecutor who may see a particular judge as too permissive for a case which seems important. In the District Court, he may engage in his own tacit judge shopping, by asking for a continuance on the grounds that lab reports haven't arrived or, in an extreme case, go to the Grand Jury without a probable cause hearing to avoid a reduction on a plea.

There were several cases which we observed in which attorneys used explicit mechanisms to influence the assignment of the judge. The following interchange between a Defender and an Assistant Clerk in the hallway of Dorchester District Court illustrates an explicit request for a change in judicial assignment:

A: Dick, is Troy going to sit today, or is this his golf day?

C: He just came in.

A: Which session's he going to be in?

C: [Nods toward second session door]

A: Do you have the Olford case? It's going to be a plea -- it's the kind he'll like.

C: OK, I'll see that it gets on the list for His Honor.

Whether an explicitly requested favor or a diversion to avoid a particular judge, these strategies are not open to all attorneys, and they must be rationed by those who can use them. In particular, only those attorneys who are "regulars" in the court even attempt the process, since it is by no means obvious to an outsider which clerks are apt to be willing to move cases for an attorney, nor would an outsider lawyer know what the peculiarities of each judge are.

For those "regulars" who participate in judge hunting, too, there are limits which most lawyers recognize. Although the "toughest" judges are usually the slowest in processing cases, there still must be some cases handled in their sessions. Thus, each defender must take his turn in presenting a case before them. Since both prosecutors and defenders are in the business of judge swapping, moreover, each side must agree tacitly to use the process only when it seems important and "fair" in terms of the numbers and kinds of case moved. The prosecution, for example, is not likely to object too strongly when a case involving a breaking and entering of a dwelling is moved away from Judge Troy -- who is acknowledged as a "bear" on such cases. In turn, the defenders tend not to object when a

serious case for which probable cause is to be decided and on which there is little disagreement is placed before Judge Scott, who, among the judges available, is recognized as being most prone to find probable cause in almost all cases.

In a sense, then, there are two kinds of bargains being struck at the same time in the process of judge shopping. At one level, the attorneys who have a case moved are tacitly bargaining away their right to complain in the future when a case is adversely affected by an opponent's successful attempt to be assigned to a sympathetic judge. More directly, there is an explicit bargain by which the clerks are able to keep two or three sessions moving smoothly without irritating any of the judges, in exchange for their assistance with a matter of considerable consequence to the lawyers.

Assignment of the Assistant District Attorney

The second assignment made just prior to the day of trial -- that of the prosecutor -- is also the object of bargaining. Both the police and the Assistant District Attorneys themselves have a strong interest in influencing the matching of prosecutors to cases. In this instance, the responsibility for assignment falls not even to a clerk, but to a law student intern. Each afternoon when the list for the day is published, the intern at the Assistant District Attorneys' office posts the docket and assigns a prosecuting attorney to each case. Cases scheduled in this way include only the felonies and selected "serious" misdemeanors, and they are, at least formally, assigned to attorney-prosecutors on the basis of their experience. The police prosecutor -- a sergeant regularly assigned to the court -- handles the bulk of misdemeanor trials.

The police, in particular, have an interest in the effectiveness of the prosecutor in obtaining convictions, and thus, in which prosecutor is assigned to a case. If they do not believe that an attorney can handle the prosecution of the case to their satisfaction they can and do persuade the supervisor of the District Court prosecutors to reassign the case to someone more of their liking. The supervisor himself can also assign the prosecutors to cases based on his assessment of their abilities to deal with particular defenders or judges.

The prosecutors, themselves, of course, have strong preferences for the kinds of cases they want to be assigned. Each of them has police officers and types of defendants with whom they can work well and others whom they find difficult. Because they all have private civil law practices in addition to their responsibilities as prosecutors, they also have a strong interest in having a set of cases which will not interfere with their private practice (although when a conflict arises, their prosecutorial duties do take precedence).

All of these influences on the assignment of the Assistant District Attorneys have the effect of reinforcing the structure of interests in the criminal courts. In this respect they do not significantly alter the lawyer's ability to prepare a defense, since he has usually anticipated the interests of the actors involved. For cases in which the police have a strong stake in the outcome, they are able to obtain the "hardest" prosecutors. The prosecutors most adept at bargaining,moreover, tend to want the most "bargainable" cases and to know how to get them. Thus, the remaining routine cases are apt to fall to the prosecutors with the

least inclination to negotiate and, according to some court personnel, the least talent for legal argumentation.

Preparation of the prosecution

In contrast to the defense counsel, the prosecution typically can mount only a very brief effort to gather information and to build a courtroom strategy. In fact, except in the case of planned arrests in the most serious cases, the prosecutor's search for information is unlikely to extend beyond the arresting police officer and the complaint. By far the greatest constraint on his activities is that the prosecutor is usually assigned a case the day before the trial is scheduled. Since many prosecutors also have extensive private practices, the time he could devote to any one case is limited, whatever lead time he was given.

Because he must ration the time he spends on a case, the prosecutor will depend heavily on the information he can glean from the complaint and the information and assistance he can coax from the police. Like the defender, his first step is to check the complaint -- an efficient source for the essentials of a case. He also consults it in an official capacity, since it is the job of the prosecutor to review the complaint to make certain that the case is in the correct judisdiction, that the details of the complaint are all correct and correctly spelled, and that there is no evident procedural error in the manner in which it was drawn up.

The arresting officer is probably the most important source of the prosecution's case. Typically, the arresting patrolman is also the complainant and the witness, and he often has the only supporting evidence -- some tangible evidence which can be placed at the scene solely through his testimony. In these cases, his only preparation consists of going

over the story with the arresting officer, looking for glaring inconsistencies, judging from his own recollection or the advice of his colleagues and senior police officers how reliable the arresting officer's cases have been, and in this way deciding whether to offer a bargain. What he hopes to get from the police in these brief meetings is their version of the facts of the case, their assessment of the defendant, and their feelings about an appropriate disposition of the case, including their interests in information or a "string" on the defendant.

The only exception to this pattern of investigation are those cases in which arrests are preplanned. These instances provide the prosecutor his only chance to prepare a vigorous prosecution. Typically, police confer with the prosecutor early in the development of a "proactive" investigation and keep him abreast of the development of the case. Often they consult with him about the case's strategy -- the adequacy of the information and the tactics to be employed in protecting the convictions in the case. Since a serious case of this kind will undoubtably be resolved in the Superior Court the prosecutor's activities are focused on protecting the case in the District Court and, if possible, convincing minor defendants to "go state's evidence" early in the process, when their effectiveness will be greatest.

Whether the prosecutor is involved in this kind of active strategy or merely piecing together a routine case, he makes the same assessments of his case as the defense counsel does for his own case. Is it solid, dependable, and not likely to surprise him in court? His actual legal basis for evaluation is unlikely to consist of more than a cursory reading of the statute, since he doubtless has four or five other cases pending and

he has probably gained a working knowledge of the statutes. Instead, he concentrates his assessments on the strength of the police story and on the nature of the civilian witnesses, if there are any. He will ask whether the police have embellished their version of the story, whether this is indeed a case which the court will be willing to hear, and whether the police have obviously violated procedural due process to the extent that the case will probably be thrown out. He will want to know whether the civilian witnesses are being threatened. Are they going to have a change of heart in court; are they likely not to show up if the case is continued?

While a particularly weak case might dissuade the prosecutor from preparing it for trial, the actual plea-trial decision may be made on different grounds. To a great extent the prosecutor must remain sensitive to the external pressures on him. An incentive to take the case to trial may be the insistance of the complainant if he is a civilian. A case covered by the news media must be viewed as a more serious trial prospect by the prosecutor than one that had received no publicity. Counterpressures to consider trial may come from the Superior Court, which is always badly overloaded and encourages cases to be settled at the District Court level.

If the prosecutor does decide that a case should not go to trial, he has many more options open to him than does the defense. He can offer the defendant a reduced charge or a recommendation of a lenient sentence. As an even stronger incentive he can withdraw prosecution altogether. The negative sanctions in his power are also clearly persuasive to the defense.

It is within the province of the prosecutor to impose a direct indictment in serious cases or to pile up potentially "dead time" on the defendant, by continuing the case indefinitely.

Prosecutor-defender bargaining

Immediately before a case is to come to trial the prosecutor and the attorney for the defense often meet to negotiate a settlement to the case. They both approach this meeting with some feeling of urgency, since their ability to avoid surprises or defeat at trial is dependent on how fully they can together prearrange the presentation and the outcome of the case. The process by which they come to this kind of agreement in the case may be as brief as a few words exchanged in the lobby of the courthouse or as long and complex as both sides can endure. With each new case the shape of the bargaining process appears to vary, depending on the factual disagreements the defense and prosecution discover, the intensity of their interests in the case, the defendant, and even what each side had for breakfast.

Common to all the exchanges we observed was the tacit understanding that agreement should be achieved as quickly and efficiently as possible. As in other aspects of the social life of the court there are strong sanctions against vigorous argument in the bargaining process and against very frequently rejecting an easy compromise. The result is that bargaining between defense and prosecution appears to proceed through four stages, each an escalation of the previous one, but with the attempt made to reach a bargain at as early a stage as possible.

Initially, for instance, both sides attempt to assess each other's cases and the intensity of interests in the case. The hope is that a very strong or a very weak case on either side will indicate grounds for a compromise. Barring agreement, the two parties may then discuss the details of the case, particularlythe character of the defendant and the likely disposition. The next phase responds to a failure to reach a mutually agreeable disposition,by returning each attorney to his "corner" to improve his position in the case. The final step is usually a very pressured compromise.

The stages of bargaining

The first attempts of the prosecutor and the defense to reach an agreement in a case focus on a comparison of each of their cases and on their hopes for the outcome of the case. Usually they share a desire to see a bargain reached at this stage, and are eager to find a marked difference in the strength of the cases or a common conception of what the disposition might be.

The most explicit part of this process is the discussion of the facts of the two cases and the evidence collected thus far. The art of this conversation can be very delicate since, without divulging the details of his own presentation, each lawyer tries to determine the weaknesses of the opposition case. In the process of comparing versions of the case, the discussion usually turns to the defendant's moral character and thus may also become a negotiation about the character of the defendant. As one prosecutor put it, "Whether the defendant is just a guy who ran into some bad luck or instead he's a bad apple" is a critical issue behind the discussion of the positions each side takes. Likewise, the issues to be decided

in assessing the strength of each other's cases boil down, according to the same prosecutor, to "whether the case is reliable or it's something fabricated by the cops."

Whether either side ought to forgo trial because of a weak case can be fairly quickly -- though delicately -- determined by this process. Whether either side will agree to end the negotiation at this stage, even when a weak case exists, is a function of a complex set of interests which may surface in some cases. Certainly the tacit assumption is that where a compromise is possible it should be accepted, but strong personal or professional interests in the case, or unusual characteristics of the case itself may sometimes override the need to bargain quickly.

Since the prosecutor and the defense often know each other well, they are aware of the kinds of professional and personal pressures that may affect their ability to bargain with each other. Personal factors affecting the bargaining process may range from the prosecutor's interest in clearing his cases quickly when private practice is pressing him for time, a police officer's interest in adding a day of court time to his pay, and defenders' need to minimize the time spent on most cases. The bargaining relationship between the prosecutor and defense may also be altered by the extent to which the defender has become personally involved with the defendant and thus will bargain more or less vigorously, depending on his affection or antipathy to the particular defendant. The strongest form of personal pressure on the prosecutor,on the other hand, arises when the defendant appears to have some grounds for a civil suit against the arresting officer for false or illegal arrest. A credible threat of

countersuit from the defendant is perhaps the greatest incentive to the prosecutor to give ground to the defense.

Both sides are also subject to pressures arising from the structure of their roles in court. Professional pressure on the prosecutor, for example, comes from the belief that the assistant district attorney will "catch hell from downtown" for a poorly handled case, especially one which irritates the police or the complainant. The Defenders and Panel members are under less direct pressure, since they are under less public scrutiny, but they still appear to feel a sense of professional failure at a case which does less well than it should. Unlike the prosecutor, they must face the problem that if they fail it is their clients who pay for their errors, often in years. Thus, the defenders are most inflexible about compromising with the prosecutor when the client faces time, and the prosecutor's bargaining is stiffest when the police or public are aroused about a case or when a complainant is insistent on a vigorous prosecution.

The bargaining process is, of course, constantly in the shadow of these influences, though neither side is free to invoke them often. The prosecutor will see that he wins just enough cases to satisfy "downtown," and the defenders may try hardest to protect defendants who risk the most time in jail. A more immediate kind of pressure to drive a hard bargain sometimes arises from the situation which the case itself presents. These influences tend to be special problems which are not directly relevant to the facts of the case, but which tend to put pressure on one or the other side to bargain with unusual eagerness. The defense, for example, is most typically put in an unfavorable situational position when the defendant is in jail awaiting trial and thus, by his presence in jail,

"appears guilty." Similarly, when it looks as if the case could be drawn out by continuances, each side may be pressured to find a speedier solution through bargaining. The prosecutor, likewise, is subject to situational pressure to cede to the defender when a major witness is an undercover informant or is an unreliable or impeachable witness.

A defendant in special jeopardy, a missing piece of evidence for the prosecution, or any of the ever-present personal and professional problems faced by the two sides can prevent an easy bargain in a case. When no agreement is reached initially, they must make a second and more thorough attempt to resolve their differences. This usually means trying to develop a common theory about the defendant's character and problems and negotiating a proposal for disposition. The real hope of the defense in this process is often that the defendant can be portrayed as a person who is not dangerous, who is salvageable, and whose charges, therefore, could be safely reduced or dismissed.

Unlike the informal discussion in earlier stages of bargaining, the questions raised about the defendant at this point are addressed by reference to the written documents in the case. Often the attorneys will read and consult the defendant's record. They may consider in detail the defendant's history of probation, and look for other cases pending -- in the same court and in other courts. Finally, they will determine what the chances are that the defendant would go to jail, considering his prior record of offenses.

When the prosecutor makes this calculation -- and thus gauges the possibility that he will offer a charge reduction to the defense -- he balances the possibility that a dangerous criminal might be released, who

would otherwise go to jail, against the prospect for a more successful rehabilitation for that defendant. If, in his judgment, the charge reduction will not seriously endanger the community or will probably be beneficial, then he is usually willing to be liberal about reductions. On the same basis he may also offer the defense a "consolidation" of all charges against the defendant -- clearing all his offenses at once.

A special instance of this kind of bargaining prospect occurs when the police want the defendant as a witness or informant and thus, are more interested in his testimony than his punishment. Under these circumstances the major issue in deciding whether charge reduction or dismissal is possible is the likelihood that the person to be convicted could be incarcerated on the basis of the defendant's testimony. If he were not successfully incarcerated, the defendant could be in danger, and the defenders are clear that their professional responsibility as lawyers extends to their advice concerning such a potentially risky endeavor. At the same time, the prosecutor is apt to be unwilling to reduce charges against the defendant unless he does agree to testify, thereby sometimes making the possibility of offering testimony attractive despite its possibility of risk.

If the prosecution is not convinced that the defendant is a good prospect for reduced charges, the defender may try to portray the defendant as someone with special rehabilitative needs. What the defender must be able to show is that the defendant has a problem which requires treatment, more than he deserves punishment, and that he will be a willing (and likely successful) participant in his own treatment. If the defendant has already been successfully involved in a rehabilitative effort, the attorney's

chances of selling a program are, of course, enhanced. As usual, too, the enterprising attorney who has located a program which will accept the defendant is more likely to convince the prosecution.

Most cases, are in fact, settled during one of these attempts at bargaining. Defenders and prosecutors develop a good working knowledge of the "prices" that will accrue to settlement of cases with particular types of defendants and offenses, and both usually know how to make an offer that will succeed. In those few cases in which agreement over a bargain is not yet possible and trial is not viewed by both of them as an appropriate option, the process may change from a cordial discussion to a full scale confrontation. Strategically, the only choice left to either is to find a mechanism for increasing the pressure for a settlement.

The two strategies most often employed to induce a bargain are judge swapping and the process of continuance. By changing the judge who will hear the case either lawyer may increase the pressure on the other. This route will be followed, for example, when the defender knows a judge who will probably be especially sympathetic to the kind of defendant he is representing and who is not likely to allow the prosecutor a conviction. Using the process of continuance, on the other hand, exerts pressure by extending the length of the case. Either on the grounds of a missing witness or evidence in the form of official records and reports the prosecutor can request that a case be continued. Especially in cases in which the defendant is incarcerated while awaiting trial, this kind of delay in trial places a great deal of pressure on the defendant. Defense lawyers, of course, can also request continuances when the defendant is

free awaiting trial, but they less often have reasonable grounds to seek a continuance. Thus, they may find it a less reliable device for urging the prosecutor to bargain.

Only in those instances in which he must drive a hard bargain is the prosecutor likely to use a more powerful strategy. Especially in those cases in which he knows that the Commonwealth has a weak case but still wants the defendant to be given a record, or in cases in which he does not want the identity of his witnesses to be discovered in advance of trial, he can bring direct indictment against the defendant in the Superior Court, bypassing entirely the District Court procedure of probable cause hearing. This action has the effect of depriving the defender of a probable cause hearing and, thus, of adequate information with which to go to trial in Superior Court. Armed with this kind of pressure the prosecutor can often increase the likelihood that the case will be settled by bargain.

If a successful agreement has not been reached after the process has been escalated to this stage, the attorneys may make one final attempt to review their positions and try for a complete bargain. This process is handled in the same way as previous encounters, except that both sides now operate under overwhelming pressures to find a compromise, at the same time that the prospect of reaching no agreement looms large. At the end of this stage, then, prosecution and defense may have negotiated anything from total agreement over facts and outcome to a sharpened awareness of how sweeping their disagreements are. The instances in which the bargaining process remains unsuccessful are few, but when they occur, they must be resolved during trial.

Types of defense-prosecution bargains

The characterization we have offered of the bargaining process between defense and prosecution emphasizes the complexity of the variables which shape the process and the difficulty of predicting its outcome. Though the types of relationships which can take place between the two attorneys in any particular case are indeed complex, the majority of bargains can be divided into discernible types. In fact the strongest predictor we did find of the kind of bargain that would be struck is the nature of the defendant's offense. Because the charge to a great extent dictates the strategy and the stakes of both sides and is seen as indicative of a type of defendant, it appears to relate closely to the nature of the prosecutor-defense agreement.

Classifying these bargains by the category of offense reveals three general types of compromise. In serious cases, bargains are most likely to be for information essential to the prosecution and to give the defendant a chance to reduce his otherwise predictably high penal time through charge reductions. Bargains struck in property and narcotics offenses are also likely to be for reduction in charges, but the prosecution usually asks that the defense agree not to argue the case and that the defendant agree to treatment. In domestic cases bargaining appears to change radically and become a mechanism for creating a disposition rather than a real resolution of differences between prosecution and defense.

Bargains which exchange a reduced charge for information needed by the prosecutor occur primarily in those cases which the court sees as serious. These "serious cases" are those which are rarely brought to final

disposition in District Court, and rather are only there as an intermediate step in their adjudication. Where bargaining occurs in these cases, the practice is for the prosecution to give the defendant a "soft indictment" in Superior Court, in return for his willingness to give testimony or information, usually about a second defendant.

It is the serious cases in which a bargain for information is most likely because of the emphasis the prosecutor must place on bringing these crimes to justice. Most kinds of bargains, in fact, would be unacceptable in serious cases. One prosecutor suggested, for example, that there is a tacit prosecutors' "code" which prohibits reducing the charge for almost all crimes included in the "major" category, and thus, greatly limits the possibility of bargains over the charges. Because information is so critical to the conviction of defendants in major crimes, however, this tacit code does allow the prosecutor to trade incriminating evidence on a major defendant for reduced charges for a "secondary" defendant.

When the pressure on a prosecutor is great to convict a defendant in this type of case, he may take a number of steps to protect information held by a secondary defendant. First, he may issue a direct indictment to prevent district court personnel from interfering with his witness and then hold him with continuances to assure that he is safe from interference. His guiding premise is that given a chance the principal defendants in the case will threaten his witnesses and that the prosecutor must at all costs guard the information.

The intensity of the prosecutor's need for information in these cases -- as illustrated by his elaborate system of protecting informants --

forces on the defense a bargain it cannot easily reject. Because of the seriousness of the charges in these cases and the likelihood that the defendants have extensive records, the defense has almost no other route to bargaining, outside of trial. In this sense, the lure of reduced charges in Superior Court is not inconsiderable. In addition, the prosecutor's liberal use of direct indictments and continuances may force the defense to comply with the proposed bargain.

In spite of these pressures, the defenders we observed did discourage their clients from taking a number of bargains of this type. While the offer of soft indictment is attractive, it was weighed against the probable safety of the defendant from endangering his case. Clear rules appear to exist among attorneys for deciding whether or not their clients should accept these bargains. As one attorney put it:

> The ground rules for going state's evidence are
>
> 1. be sure your testimony will suffice to put the other defendant away
> 2. only bargain with the DA [prosecutor] assigned to your case at Superior Court
> 3. have your lawyer there
> 4. don't talk at the first meeting
> 5. tell nothing about anything but the case where you're the witness

A second kind of bargaining for reduced charges trades away not information, but rather the right to argue the case at all. The situation which best fosters this kind of bargain tends to be property and narcotics crimes which are haunted by weak, unarguable cases on both sides. This is often true because there are usually no "civilian" witness and no evidence

in property and narcotics cases, and the cases tends to rest heavily on the testimony of arresting officers. Given the tendency of police to embellish their story before talking with the prosecutor, the Assistant District Attorneys often becomes somewhat skeptical of the police case, and therefore willing to bargain rather than risk a weak presentation in court.

The position of the defense is often very similar. Not only is the defense unlikely to have a secure factual case, but also the testimony in narcotics and property cases is apt to be the word of the police against the word of a defendant who has an extensive record. The court's perception of the defendant's moral character and criminal history, moreover, tends to raise the pressures on the defense to bargain. It is an important factor in the sentencing process, for example, that most of these defendants have extensive records, making an aggressive defense difficult and the likelihood of incarceration farily high.

The pressures often leave both sides nearly equally inclined to bargain. Because of the extensive records of these defendants, bargains often center around the consolidation of charges. The prosecution agrees to recommend that sentences which would be given for a number of charges be collapsed into a single sentence. In return the defense attorney does not bring the case to trial and often urges the defendant to accept a place in a treatment facility.

The Tilson and Wall breaking and entering case is an example of favors a defendant may receive for agreeing to participate in a treatment program. Tilson, who had an extensive record, several outstanding charges, and an admitted $100 a day habit, promised to join Concord's drug

program. As a result he was able to get consolidation of three breaking and entering charges. In addition a violation of probation offense was consolidated and cleared for a single "six year" sentence to Concord (which will mean in practice that he will spend one year at Concord).

The agreement between prosecutor and defense to bargain in these cases is in a sense a recognition that since the facts will allow neither one assurance of winning, they are better off minimizing losses through a bargain. Domestic cases and juvenile cases present quite a different bargaining situation. Bargains happen in these cases with the prosecutor most often absent altogether and the probation officer as prosecutor. The "prosecution" is likely to bargain, sometimes because of disinterest, but more often because of the very strong court sanctions against punishing a defendant of this type. These are bargains that are used less to reduce differences between prosecutor and defense than they are employed as a way of fulfilling the court's responsibility to defendants in need of treatment, especially where dispositional alternatives are limited.

Domestic cases are a good example of cases which foster bargaining over a disposition and change the roles predictably played by court personnel during bargaining. Since each member of the court seems to be searching for a solution to the defendant's problem, formal bargaining as we have outlined it here simply does not exist. What discussions occur between the defense counsel and the prosecutor (if there is one) focus only on how the presentation will go in court. In the absence of a prosecutor, the probation officer takes more of a prosecutorial role in discussing cases with the defender. The judge, who in other kinds of cases

tends to stay more or less out of the province of negotiation, tends to become very concerned with the details of this kind of case, with the extent of the defendant's understanding of the case, and with his chances of fulfilling his part of the bargain which other court personnel are proposing.

In addition to this confusion in roles, there are several other factors which tend to suppress the more usual forms of bargaining in domestic cases. The strongest is that the prosecutors see themselves in a situation from which they can't "win." Since the complainant is often also the defendant's wife, relative, or friend, any bargain the prosecutor can feasibly make will be unsatisfactory. Thus, most of the Assistant District Attorneys happily use the excuse that they haven't time for minor cases so that they can avoid domestic cases whenever possible. The withdrawal of the attorneys-prosecutors from the cases, of course, also tends to reduce the chance of formal bargaining, since the police who prosecute the cases the A.D.A.'s leave are not usually as likely to bargain. In non-support cases, especially, the pressure on the police not to interfere with a search for disposition is increased by the unusual status of the probation officer as complainant, prosecutor, and Commonwealth witness as well as probation officer.

In the absence of any explicit bargaining process in domestic cases, however, a system of tacit bargains has developed based on a generally understood set of regularized dispositions for domestic cases. Non-support cases, for example, are by agreement handled by a six months sentence suspended for six years; non-violent behavior which seems disturbed or which is accompanied by a record of mental disease will most often

occasion a one-year continuance on condition of out-patient treatment at a mental clinic. For a defendant convicted of assault and battery on a spouse, the case is typically continued or the defendant is placed on probation (depending on how many previous A&B's the defendant has on his record). If an amicable resolution of the quarrel is reached before trial, or if the complainant wishes to withdraw prosecution, the case will be dismissed -- sometimes after a continuance.

The intent of these bargains is not only to resolve the complex interests in the case, but also to develop new alternatives to the criminal sanction. The disposition of juveniles, for example, was complicated at the time of this study by the loss of incarceration as a dispositional alternative, since the Department of Youth Services had shut down their residential "industrial schools." For a juvenile committing a major crime, of course, the state provides an option for prosecution as an adult and a prison sentence upon conviction, but this is reserved as a severe sanction. As a result, court personnel often use incarceration awaiting trial as a substitution for the incarceration which would have taken place if correctional alternatives were available. A second result of the scarcity of traditional correctional options is that bargains for rehabilitative placements in controlled environments (half-way houses, for example) dominate the bargaining which does exist.

We observed even more creative use of tacit dispositional bargains in domestic cases. In most cases court personnel choose to help the defendants by continuing these cases for great periods of time -- as much as six years and occasionally more -- under condition that an essentially

civil remedy is carried out. For example, a woman who was regarded by her neighbors as a nuisance and charged with trespass had her case continued for a year on the condition that she "stay away from [her neighbors]" for the year.

The structure of pre-trial bargaining

Even these tacit bargains in domestic and juvenile cases are more open illustrations of the bargaining process than we have seen in previous stages. With the pressure of an impending trial or plea ceremony, the prosecution and the defense move from indirect negotiations over facts and interests to more overt bargaining over the disposition of the case and the shape of the trial. In this sense, this stage corresponds most closely to the more typical conceptions of plea bargaining as a direct exchange between prosecution and defense -- with the prosecutor offering reduced penalties and the defense conceding that the defendant should plead guilty.

In fact, however, even at this point in the bargaining process, the negotiations we observed still barely resembled this more expectable model. There is certainly not a single instant at which the defense and the prosecution decide whether or how a case will be bargained. As we have seen, the defense counsel, in effect, bargains with the defendant over the possibility of a guilty plea, and lays the groundwork for the defendant's cooperation in the bargaining process. At this point, too, the defense and the prosecution may both bargain rather openly with the clerk or interns who assign judges and Assistant District Attorneys, respectively -- in the hope of prearranging a favorable hearing for the case. Finally, the form which the negotiations between prosecutor and

defense take are much more extensive than a simple concession in the case at hand. They may bargain for information, for dispositional alternatives, to minimize lossess, to cool out witnesses or complainants, or merely in anticipation of future favors. The process by which concessions emerge is often complex and lengthy, and always in the shadow of the professional interests of each side and their competing conceptions of the defendant. As we will see in the next section, even the agreements that are the hard won products of this very intricate set of interests are subject to further negotiation or modification at the trial stage.

Trial

In the context of the full sweep of events by which the court arrives at a decision concerning a defendant, the trial -- whether in the guise of an adversarial confrontation or of a "plea ceremony" -- must be seen as no more than a single step in bargaining over the outcome of the case. From the instant of apprehension until the case is finally called for trial, the officials of the court have been sifting facts, impressions, and moral character types, testing and negotiating over personal and political pressures, and resolving or isolating areas of disagreement. By the time the case comes to trial, either a decision concerning the nature of the defendant and the events which has led to his appearance as a defendant has been consummated or the range of possible decisions has been explored and reduced to two or three options.

It would be an error, however, to assume that, merely because the trial is imbedded in the bargaining system of the court, it has no impact on the course of negotiation. While many cases pass through the trial stage quickly and with no perceptible impact on the participants or the outcome of the case, many others are radically altered during their time in the courtroom. Even in those cases in which the effects of the trial are not observable, the case was often altered discernably by the negotiations conducted in anticipation of the trial. The very presence of a new actor in the case -- the judge -- also increases the influence of the trial itself and sometimes changes completely the balance of interests in the case.

The trial is imbedded in the web of bargaining in a case not only because it may alter the previous course of bargaining but also

because it is also the object of bargaining. Whether the case comes to trial, to a probable cause hearing, or to a "plea ceremony" is determined intentionally and unintentionally by prior negotiations. The prosecutor's decision to charge a defendant with breaking and entering in the night time rather than the day time, for example, is often the outcome of bargaining. By choosing to charge the defendant with the more serious crime -- falling under the jurisdiction of the Superior Court -- the prosecutor has made it necessary for the case to be given only a probable cause hearing, not a final trial in the District Court. The distinction between juvenile hearing and criminal trial is similarly negotiated by the defender and the probation officer in dealing with juveniles charged with serious felonies; if no satisfactory placement can be developed, the juvenile can be tried as an adult rather than in the more informal juvenile hearing.

Precisely because the trial itself is part of the negotiation system of the courts, however, the distinctions among the several types of formal trial (probable cause hearing, juvenile hearing, "adversarial" trial) are less significant than they would be were the district court proceedings rigidly structured. To some extent, of course, the form of the trial does limit the object of the negotiation which can take place within it. Negotiating about disposition, for example, would be inappropriate in a probable cause hearing at which no disposition could be reached, and bargaining for information would be inappropriate in a plea ceremony. In general, however, what distinctions might exist among the forms is blurred by the informality of the court. In the District Courts, for instance, an attorney may change his client's plea at any stage in the

proceedings, or the judge may change the charges against a defendant so that his case can be decided by the District Court, even though the trial began as a probable cause hearing. As a result, the course of a "trial" and the strategies and bargains pursued by the participants in the case are more affected by their interests and the unresolved conflicts which need to be negotiated than by the form of the trial.

Our interest in trial, then, is not so much in the differences in process which might occur in the alternative forms of trial, but in the role of trial as a stage in the bargaining of a case. Because trial is in part a playing out of bargains previously made, what actually occurs in the courtroom appears to depend heavily on the strength and explicitness of the prior bargain. Where the bargaining process had been incomplete before trial or where a bargain is violated, these differences will be worked out during the trial itself. Completed and tacit bargains require only that their rationale be "sold" to the judge in order to be ratified at trial. In the following cases, we will examine the effects that each kind of bargaining status -- completed, tacit, violated, and incomplete -- has on the bargaining which takes place at trial.

Cases with settled bargains

When the prosecutor and the defense come to a strong agreement about how a case should be resolved, the bargain almost always includes the defendant pleading guilty. In the courtroom, then, the presentation of the case usually includes only a brief substantiation of the defendant's guilt followed by a proposal for the agreed upon disposition. What is expected of the prosecutor and the defense in this process is that they act as advocates for the agreement rather than for their clients, since it is felt

by most court personnel that with all areas of contention resolved, the clients' best interest lies in the attorneys' success in selling the bargain to the judge. Their hope is to assure that just enough evidence is presented to convince the judge of the credibility of the "reality" which they have negotiated. In most cases they are successful and the judge ratifies what they propose, though as we will see the probable reaction of the judge must be gauged carefully and anticipated in the presentation.

A narcotics case involving a college student illustrates the way in which a settled bargain is handled in court. The student, caught in a raid on an on-campus living area, was found in possession of two "bennies" -- comparatively mild stimulants, but nevertheless controlled substances. Since the search warrant used by the police was indeed broad enough to cover the evidence presented, the defender had chosen to bargain. She agreed to a guilty plea to possession of a controlled substance and in exchange, was to be given a dismissal of a charge of receiving stolen goods (the pills) and the cooperation of the prosecution in recommending to the judge that the student not be convicted, but that instead the case be continued for six months.

The manner in which the defender presented the bargain in court -- first perfunctorily conceding the probability of guilt and then indicating the basis for lenient disposition -- is typical of the court-room ceremony for settled bargains. She first indicated that her client would admit to facts sufficient to warrant a finding of guilty. The case then continued as follows:

J: May I have the summary of the evidence to support this admission?

DA: Officer Green.

C: (Swears the officer in)

DA: Directing your attention to (time), please tell the court what happened.

PO: Myself and Officer Milano were assigned to a narcotics detail. Having obtained a search warrant, we proceeded to (address) and entered and searched the building. Among others, we found (defendant), who appeared to be in an excited state, and three tablets were in his desk. These are the tablets, and here is the laboratory report on them (Hands both to the judge). They are class A controlled substances.

A: Was the defendant apparently incoherent?

PO: No, ma'am.

A: Was he abusive, or did he attempt to resist arrest?

PO: No, ma'am.

A: Thank you, no further questions.

J: May I hear arguments on disposition?

A: Your Honor, I would like to plead extreme mitigating circumstances. My client is a solid and responsible member of the community. He is a junior at (University) preparing to enter law school. He has a wife and two children, so that he must work a full day in addition to his full time study. On the day of the arrest, he had worked an eight hour day, attended classes, and was studying for his finals. While he now realizes that it was foolish, he took some pills to stay awake to study. I would like to enter into the record these documents. One is a citation which accompanies his Distinguished Service Medal, the second is the citation for his third Purple Heart, and the third is certification from the

Veterans' Administration that he is 80% disabled as a result of his combat injuries sustained in Viet Nam. The Dean of [University] has kindly consented to come to testify in the defendant's behalf if Your Honor would care to hear him.

J: I don't think that will be necessary. What is his prior record?

PR: No prior record, Your Honor.

J: Would you (the attorneys) please approach the bench?

C: (Following the conference) On the charges of Receiving Stolen Goods, the case is dismissed. The complaint of possession of controlled substances is continued [for six months.]

Even in a case where an agreement between prosecutor and defense counsel is set, there is a possibility that the judge will not accept the premises underlying the bargain. To a great extent the bargain must strike the court as justifiable on the basis of the evidence in the case, and the defendant must not appear to be "getting off easy." An example of judicial rejection of a bargain occurred in a case involving possible mistaken identity. Before the case went to trial, the police, prosecutor, and defender went into the dock to see the defendant, who was charged both with drunkenness and, in a separate incident, with breaking and entering and larceny -- which he claimed his cousin had committed. Since the defendant in the breaking and entering case had been arrested and then had defaulted on bail, there was some possibility that this defendant in the dock might indeed not be the person the police had arrested in that case. Since the officer agreed that the defendant was in fact, not the

person found at the scene of the break-in, the prosecutor and the defender agreed that the defendant should be acquitted on the breaking and entering and larceny charges and that the drunkenness offense ought to be dismissed.

At trial, however, the judge rejected this testimony:

A: Your Honor, this is a case of mistaken identity. The arresting officer identified the defendant as not the same person he arrested, and the DA agrees.

J: Don't you tell me about the prosecution's case. Get the DA.

DA: Your Honor, this case should be dismissed, as the person in the dock has been identified as not being the person arrested.

J: Who is the police officer?

DA: Officer O'Rielly.

J: Then get Officer O'Rielly.

PO: This is a case of mistaken identity, Your Honor. The person here is not the same as the one I arrested.

J: Please let me see the photo (The officer had the "mug shot" of the man arrested.)

Having looked at the photo and the person in the dock, the judge commented, "I don't know; they both look like the same person to me, but we'll dismiss the B and E." Clearly not convinced by the argument, the judge not only did not acquit the defendant, but by only dismissing the breaking and entering case he left open the possibility that the defendant could be called in on the same case again and tried for the same offense.

The enterprising and careful lawyer can evidently often anticipate the kind of bargained reality or disposition that a judge might reject.

When rejection of a bargain seems a risk, the attorney may try to establish testimony that would show that the bargain has a strong, justifiable evidentiary base. Most often he may try to show that there are extenuating circumstances surrounding the defendant's offense. The case of a defendant who had been arrested on a disorderly person charge on the final day of a three-year probation for possession of heroin illustrates this tactic. In order to prevent the old drug charges from being reopened, the defender had bargained for a guilty plea in exchange for a fine for the disorderly person charge and dismissal of the drug charges. Because a fight had been involved, the attorney could not merely propose his bargain, but he had to demonstrate that the fight was not serious.

At the trial the attorney began the proceedings by announcing that this was to be an "admission" (of facts sufficient to warrant a guilty finding) and that he wanted to point out at the outset of the hearing that the outstanding probation on his client was on a nearly three-year-old drug charge. The judge then asked the police officer to testify, which he did:

> I was called to [the scene] at [time] where there was an altercation in progress. I saw the defendant in a group of people having an argument. He was swinging a cane. I ordered the group to disperse, and they did. I later arrested the defendant with the cane still in his possession walking back toward the scene.
>
> A: Officer Green, do you believe from your own knowledge that this was a family argument; basically a domestic matter?
>
> PO: Well, the argument began as a family dispute. I believe that if I had not stopped it, it would have spread.

In this interchange, the attorney was apparently trying to have the police officer enter mitigating information about the situation of the defendant's arrest. In his earlier conversation with the attorney, the policeman had agreed to testify that the problem was only a family quarrel. In court, however, the officer appeared to realize that this arrest could be called into question if it had been "only a family dispute," and he asserted that it could have become more serious. The attorney allowed him this change without pressing it directly, and tried instead to establish that no one was hurt by the fight:

A: So you are saying that it started as a family argument but might have gotten out of hand if you had not acted when you did?

PO: Yes, sir.

A: Did anyone to your knowledge receive any injuries?

PO: No, sir, there were no injuries.

A: No further questions, Your Honor.

Following this brief encounter, the attorneys conferred with the judge at the bench and the clerk read the decision, which showed that the attorney had been successful in supporting the bargain with proof of extenuating circumstances:

C: In the complaint of possession of heroin, the court dismisses the charges, and on the complaint of being a disorderly person, the court finds you guilty and fines you $50. Be sure to speak with the probation officer on your way out of the building to arrange for payment of your fine.

The main intent of the attorneys in this kind of case, then, seems to be convincing the judge of the equity of their agreement on a bargained outcome. Of course, the extent to which one or the other lawyer must argue for his position depends on which judge hears the case and how close their agreement conforms to the court's general notion of the "normal" outcome for the type of case being tried -- that the defendant is not "getting off too easy," that there is some evidence to support the plea, and that the disposition is justified. The difficulty of selling a bargain is affected by the credibility of the attorneys' claim not only that it is fair, but also that the two attorneys have thought it out carefully. A bargain which is not enthusiastically endorsed by both attorneys or, as in the next section, is a "tacit" bargain which the attorneys cannot really claim to have worked out in advance, is subject to a great deal of judicial scepticism.

Cases with a tacit bargain

When a bargain can be rejected despite its careful preparation, it is easy to see that a tacit bargain would leave the attorneys in a very weak position at trial. Tacit bargains -- those in which the defendant pleads guilty without knowing the disposition will be -- most often occur when a case is assigned to a lawyer immediately prior to trial. In a circumstance like this, the lawyer may depend heavily on his knowledge of the prosecutor and the kinds of disposition the prosecutor will accept. He will usually make the assumption that the prosecutor will accept a standard solution to the type of offense involved and that the defendant will certainly be better off with this tacitly bargained solution that with trying to fight the case.

In most instances the prosecutor will indeed understand the solution the defender is proposing and cooperate with him -- even if they have no time to confer outside the courtroom. The problems in tacit bargains stem less from the attorney-prosecutor relationships and more from the uncertainty of what will happen to them in the courtroom. As the following case shows, tacit bargains place attorneys in grave danger of being "croaked" and demand flexible strategies of argument from them.

In the typical pattern of cases which use tacit bargains, a defendant charged with driving under the influence of alcohol came to court without an attorney. The court, after some chiding, assigned counsel, and following only a ten minute recess, was ready to try the case. While he was not able to confer extensively with the defendant during this period, the assigned counsel did discover that his new defendant was drunk. The only route open to the attorney was to enter a guilty plea for the defendant and hope that the defendant's condition would not be discovered by the court. In this regard, he made plans to rest heavily on the defendant's right to remain silent and to argue that the defendant would be a good candidate for treatment.

Thus, the appointed counsel (a regular non-M.D.C. attorney in Dorchester) announced that his client "admitted to facts [sufficient to warrant a finding of guilty]." After brief supporting testimony from the arresting officer and the probation officer's report of the defendant's lengthy record of alcohol-related offenses, the judge invited statements on disposition:

J: Do you want to make any statements regarding disposition?

A: Yes, Your Honor; the defendant is employed and supports his family; he has been dry for eight months...

J: I don't care how long he has been dry -- his kind cannot be allowed to drive and he must learn that he cannot control his problem.

Among court personnel this judge is known to impose harsh sentences on "driving under" cases in the belief that this charge is serious and that drunk drivers are a serious community hazard. Most other members of the court community regard the charge as somewhat less serious, and agreement to undergo treatment at the Alcohol Safety Action Program (ASAP) combined with probation or continuation constitute the "normal" resolution of the charge. At this point in the trial, both the prosecutor and the defender worked to promote the "normal" resolution of the case and at the same time to keep the defendant from speaking in court:

A: Your Honor, I believe that ASAP would be able to help my client.

DA: We would have no objections to his assignment to ASAP on continuance, Your Honor.

J: Don't worry, if I'm going to let him out on probation at all, he's going to have to be in ASAP. (To the defendant:) Do you know what that means?

A: Yes, Your Honor, he does.

J: If you don't mind, I'm talking to the defendant.

A: Your Honor, if you want, I'll be glad to explain your question to the defendant and determine his answer.

J: Look. If he doesn't understand, how can he participate in the program? And I can't tell if I don't talk to him. Now do you want him to get into probation?

During this conversation the prosecutor was conferring with the defendant, explaining ASAP to him.

At this point in the case, the attorneys appeared to be effectively allied in a defense of a tacit bargain -- securing a place for the defendant in the ASAP program. At the same time the judge was trying to negotiate a harsher disposition based on her assessment of the moral character of the defendant. In the process of attempting to work out this conflict, the defender was forced into a role of trying to convince the judge to accept the bargain being offered at the same time that he appeared to be making a vigorous stand on the legal issue of the defendant's right to remain silent. When the judge showed obvious irritation at what she thought was the defender's overly eager protection of the defendant's rights, the defender made a last effort to alter her attitude toward the defendant's character and its implications for disposition:

A: Your Honor, we request that you let this case go on continuance without finding with the ASAP program. It is, after all, acceptable to the Commonwealth.

J: No, I'm going to enter a guilty finding in any event to be sure he loses his licence.

A: But, Your Honor, that will interfere with his holding a job.

J: Well, there are such things as busses, and lots of productive people walk to work. Either one is healthier than drinking and driving.

A: (Confers with the defendant and prosecutor) Your Honor, that would make it impossible for my client to go to work at his present job.

J: That's too bad. He should have thought of that before getting drunk. He'll just have to get another job.

Throughout the course of this conversation, the defendant had been smiling. When the judge finally noticed it, she turned to the defendant:

J: You really think this is funny, don't you!

D: (Silence).

J: Do you understand that I will send you to the farm for six months on top of everything else if you don't straighten up? (To the attorney): He's drunk right now, I think. I simply won't continue with this. Willie, do you promise me you won't drink until you come back here?

D: (Nods head.)

J: Are you sure?

D: (Nods vigorously.)

PR: Now Willie, you know that means you can't drink even on St. Patrick's Day. (General laughter in the court -- the defendant is black.)

Though this case was resolved in the direction of the bargain proposed -- probation combined with treatment at ASAP -- the tenuousness of the attorneys' position was clear. In tacit bargains of this type they must substitute a mutually understood set of common solutions for the creation of an unique strategy appropriate to the case at hand. This standard solution must serve not only as a basis for presenting the bargain to the court, but for explaining the defendant's moral character and justifying the use of the rehabilitative device.

In this kind of bargain, then, the attorneys do not merely act out a previously written script, but they must make ad hoc responses to what are often surprising events. The two factors which may represent the greatest change for them from the conditions under which a settled bargain is acted out are the fact that they do not control the flow of argument in the case and that the defendant and the judge may interact -- without proper coaching of the defendant. In this case, for instance, the lawyers had to remain flexible in the face of constant shifts in foci. A case which began as an apparently routine "admission of guilt" shifted into a conflict over the proper disposition of the case. From there, the attorney and judge first disagreed over the defendant's right to remain silent and to have counsel speak for him, then debated the issue of whether the defendant was essentially a hard working family man or essentially a drunk.

For the lawyer the impacts of not having time to assess and, perhaps, train the defendant can be even more staggering. In this case it is clear that had he had the opportunity the attorney would have at least tried to prevent the defendant from appearing in court while he was drunk, and thus, improve greatly the strength of the case. The difficulty of predicting the exact personal reaction a judge will have to a defendant -- whether coached or not -- is also illustrated in this case. Though the judge clearly discovered that the defendant was drunk, in that final interchange, the defendant took the role of "cute drunk" -- that is, he smiled at the judge, "mugged" for her, and took a very submissive attitude -- while the judge took on a parental and much less adversary air. Somehow, despite her well-recognized dislike of alcohol, the judge seemed impressed by the submissiveness displayed by the defendant, and she apparently

assumed from this attitude that he would respect the court enough to remain sober.

Cases with violated agreements

Attorneys who participate in bargains are under strong pressures -- not only from their peers, but also from the rest of the court -- to hold up their end of the agreement. The equilibrium of the court to a great extent appears to depend on the ability of court personnel to rely on the sanctity of bargains and to avoid the disruption that a violated agreement causes in the courtroom. When an attorney does violate a bargain in court, other court personnel may try to rescue the situation and make the bargain work despite the defection of one of the participants in the bargain. In addition, attorneys who violate bargains can be punished by the court in a number of ways -- ranging from a very unpleasant experience at trial to a loss of future access to information and negotiation.

One case we observed provides an especially good illustration of the impacts of a violated agreement on a trial. In this instance the prosecution and the defense had agreed that a case involving a charge of drunkenness and a charge of "making threats" would be dropped on the grounds that the prosecution did not wish to prosecute the case. Perhaps in the face of pressures brought to bear on him from the wife who had filed these charges against her husband, the prosecutor changed his mind and called the case up for trial without warning the defense counsel. When the case was announced the defense counsel was surprised and quite angry.

A: (To the other defenders beside him) What the hell is this thing doing coming up now? I thought they [the prosecutors] had agreed the complainant didn't want a trial.

DA: Ready for trial, Your Honor.

A: (Again to those near him): Oh, Christ -- here we go again! (The particular prosecutor in this case had a reputation for being unreliable.)

The clerk swore in the witnesses, who looked as surprised as the defender had a moment earlier. When it dawned on the complainant that they were going to trial, she began to cry, saying that she "didn't want [her] man sent away."

The prosecutor called her as his first witness, and she described -- as well as she could through her sobbing -- what she termed a "drunken brawl." After two sentences, the judge interrupted to cross-examine:

J: I'm not sure I understand you. Are you saying that you, being sober and detached, observed a drunken brawl, or are you saying that you and he were both participating in a drunken brawl with someone else?

W: I was drunk and fighting, too.

Next, the prosecutor asked her to testify that she had been sent to the hospital as a result of her injuries. She testified that shortly after the fight, she had been admitted to Doctors' Hospital. The judge stepped in again, asking just what kind of treatment she might have been receiving. In reply, the witness admitted that she had been taken to the hospital for psychiatric examination and treatment, and not for physical injuries incurred in the fight.

By now the constant surprises in the case and the reluctance of the witness and the complainant had reduced the trial to chaos. Both witnesses for the prosecution were crying hysterically. The defense counsel was trying to calm them down and advise them how best to patch up the

situation, while the prosecutor stood alone in the middle of the courtroom doing nothing. To attempt to return some sense of order, the judge spoke to the defendant:

J: Do you want three months at Bridgewater or two years at the [Deer] Island"

D: (Staggering to his feet, revealing that he is very drunk) Can I speak in my own defense?

J: You may, but whether you can? I don't know.

D: I don't want to go to the farm. I can dry up by myself.

J: (To first witness) Do you think that's true?

W: Well, Your Honor, I don't know. The drinking stops and starts in two to three month intervals.

A: Your Honor, if it please the court, I don't believe this defendant is able to participate in his own defense....

J: (Addressing the defendant) How do you think you are going to be able to dry up by yourself if you can't even participate in your own defense?

D: (Mumbles).

At this point, the other prosecution witness decided she wanted to speak for the defense. Although he protested that he didn't really want to hear it, the judge allowed the woman to testify for the defense, and she pleaded with the judge not to send her brother-in-law to Bridgewater (the state "farm" for alcoholics convicted of drunkenness). After checking with probation, the judge dismissed the charge of making threats, continued the drunkenness for two days, set bail at $1000, and commented that, while Charles Street Jail wouldn't help at all, at least it was better than anywhere else he could have sent the defendant.

As the witnesses and the defendant left, the judge turned to the prosecutor and said in a heavily sarcastic tone, "Mister [Name]. May I suggest that, the next time you get the idea that you'd like to bring one like this to me, you forget it." Following that interchange another of the prosecutors came up to the prosecutor and "chewed him out" in the now-empty courtroom for taking up so much time, violating an agreement to bargain, and irritating the judge. Later in the same day, the Massachusetts Defenders met and decided that there would be "no further negotiations with him [the prosecutor] until he learned to keep a bargain."

In addition to the evidence it provides of a strong sanction which the members of the court will apply to those who violate the standards of behavior which are commonly accepted for the bargaining process, this case demonstrates the extent to which the trial itself can become a bargaining forum. Because the prosecutor failed to carry out the role in the bargaining process which other personnel of the court felt he should have, others filled in the role he vacated. The judge, for example, undertook the process of seeing that the moral character of each actor in the case was portrayed, while the defense counsel negotiated the complainant's interests in the case. Finally, in a sense, the judge took the lawyers' accustomed role of trying to reduce the length of the hearing in addition to playing his own of participating in what he gathered would have been the "normal" negotiated settlement of the case.

This case illustrates the degree to which a disagreement which arises unexpectedly at trial disrupts the court. Bargaining roles are severely altered, and strong sanctions are applied to the offending party.

The cases in which there is known in advance to be no settlement, however, do not cause a similar disruption in most instances. Personnel of the court apply a different set of standards to behavior in these cases, primarily because they are able to anticipate the disagreements that may arise.

Bargaining at trial

Cases come to trial, rather than being settled by a plea of guilty, when the attorneys either do not bargain at all or, more frequently, when they try, but fail to complete a bargain. Even when a case comes to trial with no bargain or with one that is yet incomplete, it is still being processed by a system which recognizes bargaining as its dominant mode of behavior. To one extent or another, then, the trial itself becomes a forum for bargaining the case, though the bargaining process is definitely constrained by its transfer to open court, with its formal adversarial structure. As a result bargaining during trial takes place within rudimentary outlines of the formal notion of adversarial confrontation.

The kinds of bargains which are made in this framework are best characterized by the area of disagreement they attempt to settle. When attorneys come to court without a complete bargain, they rarely disagree about all aspects of a case, but rather their differences most often focus on the disposition, the character of the defendant, or the facts of the case. When the bargaining process is transferred to the courtroom, then, the interactions of the attorneys, the judge, and the defendant are often centered on one of these areas of disagreement. The particular area being discussed appears to determine the character of the bargaining process.

Bargains over disposition and over a defendant's moral character tend to be conducted openly and as recognized matters of opinion. Bargains centering on interpretations of fact, however, are more often styled to resemble the adversary process, and in this sense, made tacitly.

Cases in which the attorneys are known to be in substantial agreement about everything but the disposition provide the most consistent examples of explicit bargaining in open court. In this type of case, it is quite usual for the judge to talk to the defendant in the courtroom, offering him the chance for a non-criminal disposition in return for a promise that he will "go straight." The degree to which the judge conducts this bargaining process as a formal exchange with the defendant or merely enters into conversation with the defendant, of course, depends on the seriousness of the charge being bargained. In either instance, it is clearly the case that the judge considers the disposition a matter of opinion, not fact, and thus, often a suitable object for bargaining, even in open court.

In an attempt to discover how complete a bargain the attorneys have reached, for cases of this type the judge generally begins with a bench conference about the case and a discussion of potential dispositions. At this stage, the judge will generally indicate a preference for one or the other of the two attorneys' proposals. Because the defendant's motivations are usually critical to the decision, the judge will often address him in court and test out a dispositional option on him. This process can be a very tight, formal bargain between the judge and the defendant, as in the following trespass case:

J: Do you think that you can stay away from these people if I let you out?

D: Yes, Ma'am. I've been to the Hospital [Boston State] a lot, and they've done a lot for me.

J: That's what they (a representative of the hospital and the probation officer) say, but these people (the complainants) want me to put you away so you'll stop bothering them. Will you go the the Hospital regularly if I let you go?

D: Yes.

J: All right.

C: This case is continued for one year, until February 26, 1974, on the condition that you do not trespass on the property of [complainant] and further that you attend one year of therapy at Boston State Hospital on an outpatient basis.

J: You understand that you must stay away from these people for a year or you will be brought back here and sentenced.

D: Yes.

J: And you understand that if you don't go to your sessions at Boston State Hospital, you'll come back here?

D: Yes.

The interview may also, however, be much lighter in tone -- though not necessarily less serious in consequences, as this case of a defendant charged with drunkenness indicates:

D: Good morning, Your Honor.

J: Good morning, Charlie. How did it happen this time?

D: Well, Your Honor, I got my veteran's check yesterday, [every time he came in, he

thought that he had just gotten his check] and I had one drink at the tavern.

J: One, Charlie?

D: Well, maybe two, then, but no more. I can't hold it anymore.

J: Go ahead. Where did they pick you up?

D: [Address].

J: But, Charlie, that's not on your way home.

D: No?

J: No.

By this point -- if the conversation has gotten this far -- the judge usually has decided whether he thinks Charlie can make it home. If not, he continues the case for two days, stipulating that the case is continued "for dismissal," and sets a $10 cash bail. Otherwise -- if he thinks he can go home -- the following conversation takes place:

J: Charlie, I'm going to have to send you away. You're not getting sober. Which would you rather have this time, thirty days at the Farm, or six months at the Island?

D: I don't need to be locked up, Judge, I'm sober now. Just let me go home.

J: OK, Charlie, just this one last chance. But if I see you in here tomorrow, it's right off to the farm with you.

It is in dealing with Charlie and others like him who constitute a continuing caseload of people whose problems are not "clearly criminal," but appear to be regarded by the judges as emotionally unstable or physically ill, that the judges seem to turn most often to bargaining openly with the defendants, offering to let them out into the community in exchange for a

promise not to return in the immediate future. The other circumstance which tends to induce the judge to enter into open bargaining with the defendant is a case in which the attorneys either disagree about the defendant's moral character or need to impress the judge with the extent of the defendant's incapacity to make moral judgments.

Though the moral character of the defendant appears to be as fit a subject for bargaining in open court, it is more tacit than bargaining over the disposition. As a problem for the court, determining moral character is unarguably similar to the problem of disposition since it is also accepted by court personnel as a matter of opinion more than of evidence. In this sense the concept a court has of the defendant can be bargained by the ways in which the defendant is presented in court and by any resulting changes which occur in the court's view of the reality of the defendant. At the same time, because it is a conception of reality that is being bargained rather than a concrete proposal for action, the process is not as structured or as explicitly traced as bargaining over disposition. What is clear is that during trial both attorneys and judges may become involved in trying to present new formulations of the defendant's moral character. Attorneys rely heavily on efforts at cross-examination of witnesses or on direct interrogation of the defendant to convince the court of the defendant's character. Cross-examination is an especially common tactic for assuring the court that a view of the defendant's character is valid, since through it an attorney can select only the most favorable characteristics for presentation.

Direct judicial interrogation of defendants to determine moral character occurs most often in those cases in which the defendant is

presented as being "sick" by the defense attorney, who hopes to argue for treatment of the disease rather than punishment for misdeeds. Under these circumstances, the interchange between the judge and defendant tends to focus on whether the defendant is prepared to fulfill the requirements of the treatment program being proposed. The other instances in which the judge raises the question of the defendant's moral character are those in which the defendant is a "regular" in the court and the judge and defendant know each other as individuals. In such instances, the judge will talk to the defendant to bring himself up to date on the defendant's attitudes and motivations. Though the following interchange took place, not at trial, but at a bail hearing, it suggests the quality of these interactions between defendant and judge:

J: Hi, Jimmy, Are you behaving yourself?

D: No, Your Honor.

J: Not really, eh?

D: Well, there's not much to do in here [the dock].

J: If I were going to let you out, would you run?

D: Gee, I don't know. You know me, though -- every time I run, I come back. You never had to bust me to get me back.

From conversations which the defendant in this case had with his lawyer before this hearing, it is clear that he perceived that by appearing open and ingenuous with the judge he could convince the judge that he was a good risk for probation -- and that he wouldn't "run." In effect, the defendant was conducting a knowing bargain with the judge. From the fact

that the judge released the defendant without any further hearing despite the strong desire of the prosecution that he be held, we can only conclude that the judge accepted the version of his character that Jimmy presented, especially when it was bolstered by the promise that he wouldn't run.

The extent of the court's tendency to allow moral character to be determined in this informal manner is further demonstrated by its failure to make use of competency hearings. In theory, the District Court structure provides for competency hearings to determine what sense of moral responsibility the defendant perceives and to ask to what extent he can be held responsible for his actions. In fact, however, few competency hearings are ever held in the District Courts, largely, it seems, because the judges tend to dislike what they characterize from the bench as attempts to interfere with their authority to determine a defendant's moral character. Indeed, even when competency is formally raised as an issue at trial, the judges tend to depend on their own negotiations with the defendant.

An example of this kind of bargaining involved a young man charged with larceny by means of a check. His attorney had arranged for psychiatric observation of the defendant, and the examining psychiatrists submitted to the court their written opinion that the defendant was unable to distinguish right from wrong as a result of a combination of "diminished reasoning power" and "depressive psychosis." The defendant was interrogated, over his attorney's objections, by the judge:

J: Do you know what you did?

D: Yes, Ma'am.

J: Did you know that the check wasn't yours?

D: (Mumbled).

J: Would you do it again?

D: (Hopefully) No Ma'am.

J: Then, didn't you know it was wrong?

D: (Appeared to be trying to understand; looked puzzled).

A: Your Honor, I must insist that if you want to ask my client any questions, you address them to me. I will be glad to consult with my client and convey his response to you.

J: And I must talk to him if I'm going to know if he understands the difference between right and wrong.

Unlike cases in which the disposition or the defendant's character are at issue, cases brought to trial because of a disagreement about the facts or the means by which the prosecution's evidence was gathered are less subject to direct bargaining in open court. For one thing, it is far easier to bargain about a matter which the formal ideology of the court recognizes as being legitimately opinion than to attempt a bargain about facts, which the court may see as being absolute and objective. In addition, arguments about the facts of a case can be viewed as casting doubt on the accuracy or, possibly, the honesty of court officials, especially the police, and cannot therefore easily be negotiated.

The attorney who wants to alter the court's conception of the facts in a case, then, is more bound to the adversarial model then he is in other bargaining situations. The attorneys we observed tended to use such explicitly adversarial techniques as cross-examination of their own witnesses and, especially, prosecution witnesses to convince the court that the "facts" of the case exist in conflicting versions. By trying thus to present a single version as having special utility for the court -- because

it justifies a disposition, casts doubt on another member of the court, or depicts a defendant's character in a new way -- an attorney can sometimes bargain with the court to accept it.

The case of two defendants in a "B and E" and is typical of one in which an attorney tried to bargain with the court to accept facts favorable to his defendants. Since the bulk of the case had been bargained successfully, the prosecutor led the arresting officer through only a minimal presentation of the facts of the case:

> DA: Directing your attention to the time of [the alleged crimes], would you tell the court what you observed?
>
> PO: On notification by radio that there was a cause of trouble in the hallway of 86 Ithaca Street, we proceeded to that address. When we arrived there we received certain information that two black youths had been fooling with mailboxes in the hallway of 84 and 86 Ithaca Street and that they had just moved before we had arrived on the scene and had gone to the rear of the building.
>
> . . . .
>
> DA: What did you observe there?
>
> PO: I observed on the terrace of the second floor -- on the terrace one door ajar and the lights on in the apartment. The door was standing ajar by about four to six inches, and I could see that there were fresh wood marks in the doorframe. I also saw those two gentlemen (referring to the defendants) in the apartment looking around like they were deciding what to do next. I climbed onto the balcony and told them to freeze. The short one, who was holding a screwdriver, went to the right into the next room. I put the tall one into the wall and told the other one to come out or else. I then advised them of their rights, and they understood.

DA: Did you talk with them?

PO: No sir, we did not converse with them.

DA: What happened then?

PO: We notified the owner of the building.

DA: Did you notify the owner of the apartment?

PO: Not at that time, sir. The owner was away and one of the men waited until she arrived about an hour later.

DA: No further questions your honor.

He then put the owner of the apartment on the stand to show that the defendants had broken into the apartment and had not been granted permission to enter.

The defender focused his cross-examination for facts on the police officer. Since his clients had readily admitted that they had broken and entered the building, he had no purpose in trying to shake the policeman's testimony about that aspect of the crime. They denied, however, that they had actually used the screwdriver to break in, and thus, the defender concentrated on that issue in cross-examination:

A: Where did you say that you located the screwdriver?

PO: We picked it up in the bedroom.

A: Where in the bedroom?

PO: On the floor in the corner.

A: Who located it?

PO: My partner.

A: His name?

PO: Officer Berg.

A: So that it is possible that the defendants might not have used it.

PO: That is possible, sir.

A: Did you see the defendants using the screwdriver?

PO: No, sir.

A: So that, to your knowledge, they may not have touched the screwdriver?

PO: Yes, sir.

This approach to the conflict over the facts of the arrest was by far the most effective for the defender. By using the prosecution's witnesses, the defender could not only place reasonable doubt on the content of the testimony but also leave the impression that the prosecution has been overzealous in negotiating disposition and characterization of the defendant. In effect, the defender is both presenting the judge with information which could be used in negotiation about the charge of possession of burglarious instruments and about the disposition of the case.

The defender in this exchange was also attempting to indicate that the arresting officer might have been overzealous in his interpretations of evidence. In effect he is trying to change the "facts" of the case by redefining the characters of the actors involved.

This approach is often employed successfully by defense attorneys in cases which involve crimes which carry major moral stigma. A classic example is the defense of a rape case by cross-examining the victim concerning evidence that she had enticed the defendant or, as in one case we observed, merely showing that she had not shown any hostility to the defendant:

A: When did you say this took place?

W: at 10:30 in the morning of (Date).

A: Where did he pick you up?

W: I don't know really; about three miles from Harvard Square, I think.

A: Were you hitching?

W: No. He stopped to offer me a ride. I never hitch rides.

The attorney continued the questioning in this line, showing that the girl had taken a ride of several miles, including several stops, all away from Harvard Square, which she had said was her destination. Having discussed the details of the intercourse, which included the defendant leaving the automobile at one point, the defender asked about what happened afterwards:

A: What happened then?

D: We talked for a while.

A: About what?

W: Bowling.

A: Then what?

W: We drove around for a little. He let me out near the bus line....

In this way, the defender was able to present an alternative version of the moral character of the defendant by questioning the character of the victim. Through this strategy he succeeded in obtaining a dismissal of the case even though the prosecutor had produced adequate technical evidence of resistance to argue that rape had indeed occurred.

Bargaining, then, constitutes the basis for the court's behavior during the "trial" phase of dealing with a criminal case, even in those instances in which the attorneys do not prearrange a bargain. It is at trial, too, that the interaction between adversarial structure of the court and the bargaining process come in most obvious contact. The nature of that interaction appears to be largely complementary rather than conflicting; indeed, the presence of the adversarial norm merely forces members of the court to bargain with each other through more tacit modes and then only in circumstances in which one actor or another ostensibly is seeking relief for his constituency or client through the adversarial process.

While the trial constitutes both a forum for completing and ratifying previous bargains and tacitly developing new ones, the process of issuing a finding and imposing a disposition for the case constitutes an even stronger instance of the same phenomenon. A similar distinction arises here, too, between cases with a completed bargain and those for which the adversaries still do not wholly agree -- those with a settled bargain are merely ratified by the Court, while those still at conflict are generally handled by the judge in such a way as to create yet another set of bargains.

Finding and Disposition

While formally distinct, the processes of coming to a finding of guilt or acquittal and the imposition of sentence or other disposition on the defendant are really seen by members of the court as a single process; indeed, the attorneys speak of the outcomes of their cases in terms which mix findings -- acquittal and dismissal-- and dispositions -- a variety of suspensions, continuances, and sentences -- in a single set of "outcomes." These outcomes are, of course, closely related to the bargaining system.

The outcome of a case has long been seen as the main object of the plea bargaining process. In the district courts which we observed, however, it served not only as the object of much of the bargaining which we have already described, but also as yet another link in the bargaining chain. This second relationship between outcomes of cases and the bargaining process arises from the court's use of what we have chosen to label "intermediate" findings and dispositions. The court employs findings of "filed" "continued without a finding," and "dismissed" and dispositions such as probation or suspended sentence as devices to extend the court's influence on a case after disposition. Through this continuing informal supervision, the court can arrange dispositions which lie beyond the scope of the criminal code -- including informal injunctions against particular acts, required restitution, and enforced medical treatment, among others.

The role of finding and disposition as a resolution of bargaining conducted during the pre-trial and trial periods varied little from our expectations. In the cases we have already discussed, the outcome tended to fit the bargain struck. We did observe two divergences of the practice

in the district courts from the patterns we had expected. First, the extent to which outcomes of cases were influenced by the actions of the attorneys and other court officials in prior cases was much greater than we had anticipated. Sanctions for violating the court's informal norms of behavior appeared to be applied not only to the case in which the violation occurred, but to all the remaining cases for that attorney -- or sometimes for the entire Massachusetts Defenders Committee -- for the day.

In one example, a Defender pursued a vigorous defense of a non-support case, basing his case on the premise that the defendant had not received counsel at the earlier stages of the case. In doing so, he had attacked the credibility of the non-support probation officer. The resulting trial was tense and long, and the judge became noticeably irritable as the case wore on. When the defender had exhausted the last possible due process issue, the judge found the defendant guilty and asked for arguments on disposition.

> J: What do you have to say for your client before I make a decision about disposition of this case?
>
> A: Your Honor, I want to appeal for a second chance for my client. He has been reconciled to his wife, and they are now living together. He spends much more than the court originally ordered on the support of his family. He just didn't know that he had to pay it through the court. If you let him stay free, he will continue to keep his job and support his family...
>
> J: (Interrupting) I am thoroughly uninterested in your client's problems or whether he is supporting his wife. This case is a borderline case of contempt in the proceedings I have just seen here themselves. Not

> only that, but he [the defendant] has shown utter contempt of court through his failure to keep one of the promises he made when he was here before. You are not asking for a second change for your client, but a fifth or tenth chance. I do not intend to let him think that he can get away with making light of the Court's orders. I am sentencing him to two years at the House of Correction.

It was clear, from the judge's tone and from the fact that she addressed this statement to the defender, not his client, that it was he, not the defendant, whom the judge accused of "making light of the Court's orders." Nor was her displeasure limited only to that Defender. In cases later that day, the same judge who had presided at that trial imposed $15,000 bail in a case of driving under the influence of alcohol and sentenced a seventeen year old girl to two years in the House of Correction for a first offense of use of an automobile without authority. In both instances, the judge commented that, "If you Defenders want to fight this Court by the book, I will start using the book, too."

In addition to the degree that judges punish court personnel at this stage, we were also surprised by the degree to which cases which went to trial were not punished by significantly worse dispositions. In effect, the process of bargaining does not appear to give as much advantage to those who avoid trial as we would have expected. In part, this result appears to follow from the pervasiveness of the bargaining process; there simply is no adversarial system operating as competition to the bargaining system. Since trial is also bargained it does not have significantly different implications for case outcomes.

The dispositions of cases in the district courts, then, may reflect accurately the concerns of the court for the bargaining process.

Cases are generally dealt with by bargain, and sanctions are administered not so much for insisting on trial but for creating strains in the relationships which underly the bargaining process. These sanctions, moreover, tend to attach to attorneys, not defendants, and it is only in very serious instances that the defendant is punished through the finding and disposition of the case for his attorney's breaches of the normative system.

The finding and disposition process also serves to continue the bargaining system beyond the termination of the trial. This second function arises since the judge in a District Court has far more options in making a finding than simply "guilty" and "not guilty." In fact, only slightly more than half of the cases (51%) handled by the Defenders are terminated by findings of guilty (45%) or not guilty (6%). The rest are usually resolved by the intermediate findings; continued without finding (12%); filed (7%) and dismissed (25%). None of these "findings" prohibits the court from reopening the case in its discretion, none leaves the defendant with a conviction on his record, and yet, each can be employed by the court as a mechanism for "keeping a string" on the defendant. Among those found guilty, too, the court has considerable discretion in making a disposition of the case, and most findings of guilty are coupled with dispositions which leave the defendant "in the street" subject to continued "good" behavior. Sixteen percent of the defendants found guilty are placed on "straight" probation -- that is, probation without a specified penalty for violation of its conditions. A more common disposition (36% of guilty defendants) is probation accompanied by suspended sentence to a house of correction or state correctional institution.

Fully seventy percent of all cases, then, are disposed of by outcomes which represent release of the defendant "to the streets" under the continuing supervision of the court. The specified details of the outcome, of course, reflect the strength of each side's bargaining during the case, the skill of the attorneys who arranged the settlement, and the judge's willingness to subscribe to the bargained outcome.

A common feature of the intermediate findings and dispositions is that they include an agreement on the part of the defendant to participate in an ongoing "bargain" with the court, in which he is released from formal custody in exchange for promising to comply with some limitation on his behavior -- typically participating in a program or agreeing not to bother someone -- which the court could not formally require. In these cases, the judge is always careful to impress the defendant with the seriousness of the promise he is making and the penalties for breaking it.

The continued bargain which intermediate sentences represents also shows itself in a second form -- exchange of an intermediate sentence for an agreement not to appeal the decision of the District Court. Because Massachusetts law allows for an appeal to the Superior Court in the form of a trial de novo -- allowing an entire new hearing of the facts as well as the law of the case -- the right to appeal a case can become "currency" for bargaining. The defense can employ it as an "escape hatch" from decisions which they regard as having been unjust (or worse than they can expect to receive at Superior Court.) In fact, the defense may even pursue a conscious strategy of going to trial at the District Court in order to obtain information or improve their bargaining position at Superior Court.

The prosecution, on the other hand, is under great pressure to try to keep cases from being appealed to that badly overloaded court. Judges of the District Courts, too, often attempt to keep cases at their level, both because too many appeals from one court may be regarded as a sign of poor court management and because a high rate of appeal suggests to the judge that his authority is being undermined.

The mechanism by which the court discourages appeal, of course, varies with the development of the case -- in particular, whether the case was fully bargained or not. When the outcome is explicitly bargained, the defense is constrained by the ethics of the bargaining system to live with the bargain. Cases which are not resolved by the court until trial, though, are more often resolved by a disposition which contains a further tacit bargain. One case, for example, which involved a person charged with breaking and entering and with drunkenness, was resolved in such a way that the defender, while he disliked the outcome, could not afford to appeal the case. The defendant had been identified by the police as not being the person arrested for the breaking and entering. The judge had doubts of his innocence, however, and wanted the case to be held within the court's jurisdiction, not permanently settled in the defendent's favor. She, therefore, dismissed the breaking and entering and "filed" the drunkenness, thus leaving the case open and implicitly holding the threat of a jail sentence for the drunkennes over the defendant's head should he take an appeal of the breaking and entering finding. Whether bargained in advance or imposed at trial, though, this approach to reducing appeal is highly effective, since less than 14%of the Defenders' cases at the District Court are appealed.

Chapter V: Findings and Conclusions

The Role of Bargaining in the Criminal Courts

Bargaining, it is clear from our case study, not only does exist in the Massachusetts District Courts, but it is also the basic mode of interaction among members of the courts and between them and the defendants they process. It is not confined either to the exchange of a plea of guilty for a reduced or altered sentence or to the negotiation of moral character -- though we observed many bargains made with these purposes. It is not only that bargaining dominates the decision making processes of the courts -- as many critics have noted -- but rather that it is the only mode in which decisions are made, whether the case is formally bound for trial or for resolution through a complete bargain.

It is clear, in other words, that bargaining is far from being an aberration within an otherwise functional adversarial court or even an adaptation of that truth-finding process brought on by severe administrative burdens. Our case study showed that, while the courts were busy, they were not so heavily burdened that cases were severely delayed, and defendants or prosecution clients who actively sought the trappings of adversarial process could probably have it if they chose to. Bargaining was in no way seen by court personnel as an alternative to the adversarial treatment of a case, but rather it was viewed simply as the process by which cases were resolved.

As the mode by which decisions are made in the courts, by definition, bargaining fulfills whatever goals the courts fulfill. Our observations indicate that bargaining enables the court to make efficient decisions and even maintains it as a symbol of justice. As a decision-making

process, bargaining emerges as a natural response to the ways in which our institutions of justice are structured. It is clear, for example, that the decisions which the court is forced to make occur not in the logically prespecifiable order which is called for in the adversarial model of the courts. Adversarial justice presumes the existence of accurate records, truthful (and present) witnesses, evenly balanced adversaries, and problems which fit easily into the categories of the criminal law. Yet, the reality we observed in the courts is that the information with which the court must work is unreliable, surprise is a constant risk, and the order in which aspects of the case must be addressed cannot be specified in advance.

In light of the particular organizational environment of the courts, then, a workable process of decision-making must be able to develop stochastically -- that is, it must be able to follow a path which is modifiable during its course and able to take into account previous events in a case. A stochastic decision-making system in an organization with specialized personnel, moreover, implies a mechanism which allows the focus to shift from one member of the court to another as the decision-making process evolves. Our case study shows that bargaining as we have seen it does fulfill these requirements and, in this sense, alone "meets" the goals of the court.

Even more is required of bargaining, however, since the courts are expected to act not only as a decision-making system but also as a symbol of justice. Because this society does not recognize bargaining as a legitimate means for levying justice, it is inevitable that -- for the time being -- the more public of the bargaining processes remain implicit

or pre-rehearsed. The observations we made confirm that the bargaining process can fulfill this requirement as well, and does so precisely by becoming implicit or indirect during the processing of most cases in open court. Strikingly, when the pre-trial bargaining process fails through inadequate preparation or an abrogated bargain, court personnel do bargain explicitly in the courtroom, but they ordinarily limit this kind of bargaining to cases which by the court's definition are minor. Thus, the bargaining process allows for the possibility of working out some incomplete bargains in public, without sacrificing the court's adversary image in the majority of cases.

In this sense, then, bargaining does fill a number of the formal and informal goals of the court -- both those which relate to its internal maintenance and those which describe its relationships with external agencies and the "public." During our observations we observed the following functions being performed through bargaining, and there may well be others we failed to recognize.

Swift processing of cases: Notwithstanding our contention that the court did not employ bargaining principally as a mechanism to relieve its caseload, it is undeniably true that if all cases went to formal "adversarial" trial there would be an impossible load on the District Courts. By allowing the parties to a case to work out in advance the issues that would consume time during trial, case processing is definitely facilitated. Because bargains allow only those actors immediately concerned with an issue to negotiate its resolution, bargaining also reduced extensively the amount of time court personnel were required to devote to any single case.

Allocation of resources among cases and personnel: Because they are limited, it is clear that the court's resources -- time, information, and influence -- are distributed (or redistributed) through the bargaining process. We observed clear bargains between attorneys and their clients, for example, concerning how much of the lawyer's and client's time would be allocated

to developing a defense for a case. Likewise, the favors which we observed personnel of the courts offering each other act to reallocate the court's time and the necessarily limited access to particular judges or information.

Organization of the court: Since bargaining ties actors -- including defendants -- into a series of agreements which have consequences for future cases, it defines functional solidarities among the members of the court. Through these relationships, moreover, the division of labor is further adjusted so that actors each share reasonably the bureaucratic duties of the court.

Individualization of the treatment of defendants: Since all factors in a case are fair game for bargainers, the considerations which yield bargains are at least individualized. Given its flexible scheduling, bargaining also tends to increase the time between arrest and trial available for developing sentencing alternatives. The bargains we observed were, indeed, based primarily on correctional recommendations arising from the unique circumstances of the case at hand.

Protection of the surrounding community: By the use of a diverse mix of intermediate sentences, treatment opportunities, and correctional alternatives including incarceration, the courts through the bargaining process can sentence according to a fairly consistent notion of which defendants are likely to be recidivists. Because of its flexible ground rules, the bargaining process enables judges and prosecutors, especially, to fashion a set of standards for treating defendants which is sensitive to what they see as the local communities' beliefs about crime and criminals.

Management of relationships between the court and others -- the public, other agencies, and the clients of the court: By its flexibility, bargaining allows for adjustment of the court's activity in response to changing pressures from public media, police, and complainants. We observed, for example, bargains which served to aid the police in their pursuit of serious felons, and bargains which allowed resolution of the complex interests of complainants who sought judgments against friends or relatives. Similarly, we observed bargaining in open court which served to convince court-related helping professionals that defendants were, indeed, fit clientele for the service they offered and that they were "worthy" of treatment.

Regulation of the bargaining process itself: Bargaining is a self-regulating process. As we observed it, the sanctions against misbehaving personnel were meted out regularly by the court society for failure to observe the ground rules of bargaining, but not necessarily for the attempted use of trial.

The Structure of Bargains

Purposes of bargains

We had hoped to discover that there were, indeed, recurrent "types" of bargains, which would then provide a convenient basis for our normative assessment of bargaining. Instead, we found that bargains can be described only by a complex matrix of variables, relating to the purpose behind the bargain and the currency offered to implement it. Rather than the narrow interpretation of bargains as a means to reduced sentences for the defendant, we found that the bargaining process was just as often used to affect the place of court personnel in the court or to alter the facts of the case. The purposes we were able to infer from the bargains we witnessed, in fact, relate to the personal relationships within the court, to the "reality" of a case, and directly to the strategy of the case, including its disposition.

> Standing with other actors: Bargains which have this purpose focus on interpersonal exchanges, particularly those between lawyer and client. The participants bargain primarily over their own interaction, with each one trying to increase his autonomy and power and define the "place" to be occupied by the other actor.
>
> Presentation of self: This category includes those interchanges in which one actor -- usually the defendant -- attempts to persuade other actors to accept his assertion of identity. This includes both those bargaining interchanges in which the defendant attempts to employ, or deny an alias, and those in which he portrays himself as helpless, ill, a responsible citizen, etc. It also includes, of course, the processes by which the court personnel, too, try to present themselves to the court -- as competent or as holding a particular set of "cards." Their purpose is usually to convince other court personnel to give up early in the face of their advantage or to present a hard line to actors who might want to renege on bargains. (This kind of bargaining, of course, should be kept distinct from that directed mainly at gaining control of future bargaining.)

Allocation of court resources: This bargaining focus is an important variation on bargains over the presentation of self. In this mode, however, there is a clear understanding that the object of the bargain is not to convince someone to take any specific action based on conceptions of the position or character of another actor, but rather to elicit another actor's attention by demonstrating that a case or person is professionally interesting or otherwise worthy of increased consideration. Among lawyers, for example, cases which can be shown to raise legally interesting points are likely to draw attention and resources. Similarly, defendants can be portrayed as salvageable are much more apt to be allocated time by the court than are the proven "losers."

Reconstruction of "reality": We discovered a number of bargains which fit the category some observers have described as "negotiating reality." Bargains with this purpose face a lengthy process of negotiation in which each pair of actors attempts to reduce the degree of conflict between them about what "facts" of the case they are going to agree are somehow "true."

Access to information: Two important subsets of bargains about information exist. One set is related to the lawyer's strategies for preparing cases and directed at gaining or withholding information which might be critical to the case's disposition. Another bargain of this type is more often employed by the police who give favors in return for information about other cases or defendants.

Future actions of participants, especially at trial: This is bargaining as it is usually envisioned. It includes among other things, the classical "plea bargain" in which the defender or defendant agrees to plead guilty, while the prosecutor agrees to recommend a more lenient sentence, give a reduced charge, or perform some other service for the defense.

The future treatment of the defendant: While not recognized by most observers who concentrate on bargains over the plea, we see this as a separate -- but equally important -- entity from the classic plea bargain. Here court personnel negotiate with each other over possible dispositional alternatives. Unlike the plea bargain, the only concessions offered are modifications in the dispositional preferences of each side. Because of its dispositional focus this mode involves more the probation officer and the defense than the prosecution, except to the extent that the latter holds unusually strong feelings about the dangerousness of the defendant.

Currencies

These seven categories of bargain illustrate the pervasiveness of bargaining in the life of the court. Some aim toward hard-nosed agreements about action in a specific case, and others less directly toward defining and defending the rationale for the chosen mode of action. Just as many, however, relate to the general maintenance of relationships within the court, including its needs for information and defined rules for interaction. To be sure, a number of the processes we identified as bargaining were more nearly focused on creating goodwill in the court than on developing any clear consensus about a particular case.

No matter how directed, each bargain does seem to imply that two people will agree to offer a service -- or forego one -- in exchange for a favor, service, or surrender of a service on the part of another actor. There is a limited range of favors and services which an actor can offer within the constraints of the courts. We regard these as the "currencies" of bargaining. Like the purposes of bargains they relate both to the needs of court personnel to maintain the court community and to process specific cases.

> Present services: These are currencies which are acquired and exchanged during the processing of a case. Typically they include information about the "other side's" case, the records of the defendant or similar information, the power to release or incarcerate a defendant, and the ability to move or continue a case.
>
> Future services specified in the present: This is the traditional bargained plea. It focuses on the promise to plead guilty, exchanged for the guarantee that a mild sentence will be recommended.

Unspecified future service: A typical agreement of this type occurs when a "regular" agrees to plead a client guilty without obtaining any explicit statement of the corresponding service to be rendered (but in which it is clear that the case will be handled in a "typical" manner). A popular example is the clerk who moves a case for an attorney without any indication that he has incurred an obligation in the present case, but with the implicit understanding that the attorney has taken on a general obligation not to overuse the favor and to accept adverse decisions on cases for which it is another attorney's turn for a favor.

Social recognition: Especially in the case of non-attorney members of the court, favors were often granted in exchange for continuing friendship and contact extended by attorneys. This form of currency appears to be used not only by the attorneys but also by other members of the community, including the defendants themselves.

Acceptance of an adverse presentation of reality: Defendants, witnesses and police officers in particular, are able to gain concessions from others in the system by modifying their presentation of reality to conform to the interests of other actors.

Acceptance of a submissive role in negotiation: Defendants in particular, and all actors in the bargaining system from time to time, find that the currency most useful in dealing with a more powerful actor is the acceptance of the other person's dominance in their relationship.

Bargaining without currency: Submission can be taken so far that it no longer truly represents a conscious currency. The defendant who enters the court and pleads guilty without reference to any understanding of the court may be bargaining, but without currency. He is dependent on the tacit agreement among personnel that a plea will yield a light sentence, but he is too removed from the process to be using the plea as a "currency."

While it would be possible for bargainers to employ any of these currencies in exchange for services or favors, our observations show that there are typical currencies used to bargain over each kind of object. The unwritten rules of the court dictate which currencies are appropriate for which kinds of bargain. The more aggressive bargains, usually over the preparation of a case, usually demand more tangible currencies --

information or direct services. Bargains which merely serve to define or cement relationships on the other hand, are most typically consummated with less tangible favors, such as acceptance of a conception of reality or social recognition.

Mismatches between the purpose of the bargain and the currency used most often arise when two actors are engaged in a bargain without having reached an agreement about its intended object, or when, even after an effort, they cannot agree at all. Typically, actors who conflict in this way do so either because one doesn't understand the "rules" or because the circumstances of the case force them into conflict. When members of the court, for example, are censuring one of their number for previous failure to bargain in good faith, this may interfere with his own bargaining agenda. In these instances, the exchange of negative services between a recalcitrant bargainer and the other members of the court interferes with the need to bargain over the defendant's future treatment. The court may punish the bargainer by refusing to give a lenient disposition at the same time that he is trying to bargain for a sentence concession. Ironically, the currency the bargainer is using is not his own, but rather it is the defendant's future.

An even clearer example of the reasons for mismatched bargaining occurs in cases in which the defendant refuses for a long time to settle the relationship between himself and his attorney. The resulting bargaining tends to follow a pattern in which the attorney, forced by the pressures of the formal case processing schedule, is necessarily bargaining over such concrete issues as the final disposition of the case, while the defendant is still trying to assert his dominance in their relationship. The

resulting bargaining typically is acerbic, and -- until the defender employs what would ordinarily be inappropriate currencies -- unfruitful. Because of the level of disagreement involved, the in-court processing of these cases often necessitates explicit bargaining, and most court personnel regard this as threatening to the stability of the court.

Factors influencing the structure of bargaining

So far our model indicates the way in which the purposes of a bargain and the currencies used may be related. To some degree it is true that bargaining proceeds under fairly consistent assumptions about what kinds of currencies should be used when a particular object is sought. In the complex world of the court, however, neither the purposes of bargains nor the currencies available at any one time follow a predictable pattern. Both the purposes the court personnel have for bargaining in any particular case and the kinds of currency they can summon are dependent on factors which relate to the case at hand, and to the structure of the court. At a minimum our observations indicated that the offense and the stage at which the bargain is being made are at most the influential determinants of the resulting bargain, though issues resolved prior to the bargain, the defendant, and the special interests of the court personnel are also significant.

The strongest influence on the bargains sought in a case is, of course, the type of case being handled by the court. If for no other reason, it is ultimately the type of arrest and the limited sentencing options which the court has for each kind of offense which define the end points of the "chain of bargains" in a case. From these "end points" come the issues which must be resolved and the reality which must be negotiated before the court can levy a sentence.

Without excessive generalization, it is possible to identify clusters of bargaining issues which are most commonly found associated with each type of crime.

Major crimes: Most negotiation focuses on access to information and the reconstruction of reality. Bargaining with the defendant is not necessary, since the defendant is generally experienced enough to be clear about his identity and how to present himself. The prosecutor cinches the direction bargaining will take because at this stage his greatest need is for information. His interests on this score are immediate rather than concerned with future actions of personnel at trial or the disposition of the case due to the District Courts' lack of final judgment about these cases.

Property and narcotics cases: These cases probably include the widest range of bargaining purposes. Less time is spent on issues of access to information and more of the reconstruction of reality and negotiation about future action and disposition. This is necessary because by the nature of the arrest process there is more uncertainty about the "facts" of the case, at the same time that in the majority of the cases the District Court must prepare to bring a final judgment. Here, too, there is the most bargaining for the lawyer's time and resources since the stakes are high.

Nuisance cases: More than in any other type, bargaining in nuisance cases is focused on the reconstruction of reality. The presentation of self and standing with other actors are also important in this kind of case, since more of the defendants are unfamiliar with the role expected of them. Negotiation with the defendant is necessary, too, because he is arrested after a complaint and likely to regard his arrest as an unwarranted imposition growing out of a personal animosity.

Domestic and assault cases: The focus of bargaining in these cases tends to be the definition and resolution of the interests of the defendant and the complainant. Much of the bargaining then, attempts to work toward a compromise in which the defendant is treated and the complainant satisfied that justice is done. Bargaining over the moral character of the defendant, too, is clearly a necessary element of these cases, since to make his compromise work the defense attorney (and, at times, the prosecutor as well) must illustrate that the defendant is worthy of the particular correctional or treatment option which has been proposed.

Juvenile cases: Since the formal charges against juveniles and "joyriders" rarely involve complex rules of evidence or any "legal" strategy the primary concerns of bargaining in these cases are the presentation of self by the juvenile and the way in which he is to be treated by the court. Rarely does an issue of information, access to resources, or the future action of participants in the bargaining process require bargaining, since in juvenile cases these aspects are sufficiently well settled by tacit agreement that no bargaining is necessary.

The formal requirements of the legal system for the apprehension and sentencing of defendants with particular crimes does exert influence on the bargaining process. Despite the discretion given to the police and the courts, offense categories still place limits on arrest, adjudication, and as a result, bargaining. To personnel in the criminal justice system, for example, a major crime demands serious prosecution, and bargainers are as much bound by this constraint as any other actors. In a similar fashion, the stages of the criminal process exert their own strong influence on bargaining. Since the formal organization of the court requires that defendants move through a preordained set of decision processes, bargaining, too, is shaped by the formal requirements at each stage. Crosscutting the influences of the offense type the stages of the criminal process also dictate the purposes and appropriate currencies for bargains.

Before arraignment. During this period, the defendant and the police, or on ocassion the prosecutor, must anticipate the preparation of a case and bargain about the acquisition of information. Typically, this bargaining takes place during interrogation at the station house, and focuses on the circumstances of the arrest and the alleged offense. At this point some defendants react strongly to the police story and try to present their own versions of reality or of themselves. Since the police

are known to violate bargains made at this point, most defendants are aware enough of the workings of the criminal system that they will not participate in bargains until at least the period following arraignment.

Arraignment. At this first formal presentation of the defendant to the court, the bulk of bargaining naturally concentrates on the definition of the defendant's personal character. This may take the form of an attempt to define him as a passive participant by emphasizing the formality and seriousness of the arraignment. At the same time either lawyer may try to affect the setting of bail by presenting the defendant as "dangerous" or as "trustworthy." Ancillary bargains which co-opt a member of the court into accepting one of these presentations of the defendant also take place in the arraignment.

Initiation of the defense, negotiation with court personnel, and pre-trial interview. Bargaining during the period between arraignment and trial is dominantly the negotiation of the relationship between the defender and the other actors, aimed at laying the foundations for the defense's strategy. For the conduct of the defense, the most important of these relationships -- and the one most likely to be difficult -- is that between the defendant and his attorney. Once this relationship is negotiated and relationships have been established between the defender and his circle of bargaining partners he can move on to the actual preparation of his case. Initially, the important issues to be resolved through bargaining are the character and identity of the defendant and the facts surrounding the case. If he is successful in obtaining agreement about the reality of the case, the defender attempts to build on these shared perceptions to reach consensus

about the future actions of the participants at trial -- in effect, bargaining the "choreography" of the public trial. In this way, too, he is able to rehearse the defendant's performance at the "plea-trial" decision.

The plea bargain. At the first contact between the defender and the prosecutor, there is almost always a set of negotiations which leads in most cases to agreement about the future disposition of the defendant -- the classical "plea bargain." It is at this stage that bargaining is most clearly aligned with the adversarial model and the traditional goals of the court -- rehabilitation and correction. The prosecution and defense face each other with the abiding interest being a fair disposition for the State and appropriate treatment for the defendant. In addition to the traditional agreement to plead guilty, the resulting bargain may be a promise to give information or not to expose questionable prosecution evidence in exchange for a disposition which is both favorable and suited to the circumstances of the defendant.

Trial. In sharp contrast to the classical plea bargaining relationship between prosecution and defense, trial offers new actors a voice in the direct negotiation about the dispositional decision. These new bargainers become involved either through ratifying the bargain which has preceded trial or through direct participation in a separate bargain conducted in the courtroom. The main actors become not the attorneys typically, but the judge and the defendant (or in the case of domestic, non-support and juvenile cases, the probation officer). The bargaining usually focuses on the disposition of the defendant, though attendant bargains about the moral character of the defendant and to an extent the "facts" of the case may be necessary to resolve disagreements among the actors.

Outcome. The finding and disposition of the case represents a new form of bargain focused on the future treatment of the defendant and his moral character. At this stage, the defendant may be offered a "soft" resolution of the case, gauged to meet his need for freedom, and predicated on the court's agreement about his moral character. In turn, the defendant may be asked to agree not to cause the court trouble by returning or appealing his case.

In an extremely loose sense, then, the kind of case being processed and the stage of the case form a sort of matrix which generally indicates what kinds of bargaining objects and currencies might be expectable in any given bargain. The bargaining process, however, as the full sweep of events from arrest to appeal, does not lend itself to description by a two-dimensional matrix. Instead, the sequence of bargains in a case depends not only on the offense type and the stages of the criminal process, but also on a number of other factors in the environment of the court.

The most significant of these seem to be the extent to which issues in a case have already been resolved, the experience, prior record, and cooperativeness of the defendant, and the special interests of individual participants in the bargaining process. The way in which these factors shape bargaining, however, seems to make impossible the development of a determinant model of the bargaining process, since they occur in unpredictable combinations and interact stochastically to dictate a "process" and a sequence of many bargains.

Bargaining can be seen as a stochastic process in that the actions of participants are determined only as a case progresses; each stage's bargains are conditioned by the prior events and decisions in the case. Thus,

bargaining progresses by moving from conflict to conflict, with each one dictating the kind of bargain that will follow it, by the kind of resolution that has taken place.

While a general progression from uncertainty about all aspects of the case to a settled negotiation of reality does come to exist, there would be no clear model for describing the particular path a case would follow in that process. In effect, since information is imperfect in the courts and the motivations of the actors subject to wide variation, sudden shifts in the direction of bargaining are inevitable.

The Role of Court Personnel in the Bargaining Process

So far, we have described the factors which we think determine the shape of individual bargains, in a process which we see as stochastic. We have asserted that each bargain has a predictable purpose and currency, and is somehow determinant of the bargains that follow it. What we have not described is the dynamic by which bargains seemed to be linked into a bargaining process, leading to the resolution of a case. What in fact determines the result of a particular bargain and,thus, creates new conflicts or areas of disagreement? Because bargains are in essence a resolution of conflicting needs and attitudes, they are more than anything else products of the configuration of interests each bargainer has. While the purpose of the bargain and the currency used are constrained by the criminal process itself, the intensity of the conflict the bargain must resolve is dictated by the interests of its participants. It is these interests we contend that are the dynamic of the bargaining process, moving it from bargain to bargain and finally to resolution.

What determines the interests of participants in the bargaining process? In all but a handful of cases we observed, the interests of the participants, while variable and negotiable, appeared to follow most directly from their professional stakes in the court. What is important is that these professional interests were clearly divided -- between the responsibilities of court personnel as perceived in the adversary model and as dictated by the social structure of the court. Each official of the court felt that he would be evaluated according to standards drawn from the adversarial model of the court. The prosecutor, for example, was bound

to "not lose," the judge felt pressure to maintain an apparently fair court, and so forth. In effect, these perceived standards articulate a responsibility to a constituency -- the prosecutor to the State (as represented, generally, by the police), and the judge to the community which his court serves. In tension with what they see as responsibilities to their constituencies, however, each sees a clear obligation to the others (and to themselves) to keep the bargaining system functioning.

These notions of responsibility, in turn, determine both the entry of participants into the bargaining process and their behavior in any particular bargain. Generally, a member of the court will become a bargainer if and when the area of responsibility assigned to him becomes an issue in the resolution of a case. By this definition, then, the range of actors who might enter a case is limited only by the size of the court community, including professionals whose association with the court is only tenuous, such as physicians, psychiatrists, and even university deans.

Once these actors enter the bargaining process, their interests in a case may vary greatly depending on the extent to which they have strongly held opinions about the defendant or the alleged crime or they think their constituencies do. The amount and kind of currency that a bargainer will allocate to a particular case is determined by how he balances his professional loyalties to his peers and his clients with his need to fulfill his role as a member of the court and a participant in its bargaining processes.

This view of the interests of court personnel has obvious implications for our ability to build a determinant model of bargaining. Because any member of the court may see the issues in a case as particularly related

to his professional stake in the court, the identity and number of bargainers will vary with each case and each bargain. Typically, bargains have been described as two-sided, but the ones we observed were conducted among as many actors as wanted to join in. It is clear, for example, that the defense counsel usually negotiates with at least the prosecutor, police officer, probation officer, clerk, judge and defendant. Each of them can, in turn, negotiate with at least some of the others and with yet other groups of people.

This complex configuration of bargainers will shift with each bargain in a case. Their interests are equally variable, depending on the choices they make between interpreting their adversarial responsibilities literally and overtly and single-mindedly bargaining. In some cases, the prosecutor, for example, may look to a bargain as a means of processing a case quickly or of allowing him to escape from a difficult relationship with a complainant who isn't certain whether he really wants to press charges. Similarly, he apparently has as his most basic responsibility "not losing," and in the vast majority of cases in which it is clear at the outset that he will "not lose," his interests could shift in any direction. He may merely want to get out so he can work on his personal law practice; he may decide this is his time to conduct an aggressive prosecution; or he may follow the dictates of the police or the civilian complainant.

The loyalties of the defenders are similarly delicately balanced. Often at the outset of a case they would be most concerned with maintaining their place in the bargaining process. They may be driven to collect as much information as possible, both to gain psychological advantage in future bargaining and to avoid being "croaked" by encountering embarrassing

information under conditions of surprise. Just as often -- especially in the later stages of a case -- the defenders will be most concerned with developing the best possible placement or disposition which could be negotiated for their clients, since in this way they receive the approval of other lawyers.

It is the inherent nature of professional discretion and peer evaluation, then, which drives bargainers to identify and resolve the issues in each case. Though no single actor can control the course of the case, nor apply his professional judgment to its resolution, the professionals collectively move the case to a resolution based on a rough consensus of all interested actors.

The Role of the Defendant

The course of a case through the bargaining system is propelled by a dynamic which depends on the interpretation which actors in the court give to their professional roles. As a result, the defendant's part in the bargaining process -- whether he is an active or passive participant -- is reactive. It is nearly impossible for the defendant to take the initiative in his case, since the courts as a rule both formally and informally license the other actors to initiate the steps of the bargaining process, and the defendant's comparative isolation and immobility further limit his initiative.

Because the course of bargaining is largely determined by professional interests and definitions of the defendant's character, moreover, there is yet another limit on the defendant's initiative to bargain. Since he must adjust his behavior to fit the expectations of other actors, even the methods of presenting himself to the court are limited. Because the defendant who wants to affect the bargaining process must define himself in a way which meets the particular expectations of the court, only a narrow range of his interests can be accommodated.

Because the defendant is not in control of the bargaining process -- or even of specific bargains -- the experienced defendant has to make a choice between making a successful play for the attention of the bargainers and expressing what might be his true interests in the bargaining process. Our opportunity to decide what these "true" interests of the defendants were was quite limited, since we did not talk to defendants alone. What many expressed to their lawyers were interests in solving the personal problems which may have led to arrest; others were really most interested in returning

to "the street." In most cases these expressed interests seemed to be less the product of the defendant's felt needs than of a successful socialization into his role as defendant and into the range of "acceptable" interests which the court can recognize. Defendants who could present their interests in a way that was useful to their lawyers in preparing the case appeared to exert at least some minor impact on the bargaining process.

Whether they consciously gauged their self-presentations or merely stumbled through the bargaining process, defendants nearly always affected the course of bargaining, though sometimes in a less direct manner than other actors. The defendants we observed exhibited a wide variety of responses to being involved in a bargaining process. While they were only able to react to others' initiatives, they often knew -- or accidently discovered -- the leverage points in bargaining. By granting or withholding information, accepting or rejecting a role or characterization, or even actively participating in the generation of alternatives for disposition, the defendant could significantly alter the outcome of a case. Development of the subtle skills of indirectly influencing a complex process such as bargaining, of course, takes time, and the inherently reactive role of the defendant places a premium on experience and intellect.

The outcome of a particular bargain and the flow of the bargaining process is affected by the conscious and accidental reactions of defendants to their situations, though only within the confines of the professional interests of the lawyers. This constraint on the part of the defendant, combined with the fact that the defendant may indeed be playing a role, makes it nearly impossible to address the issue which has so attracted court reformers -- are the interests of the defendant being served by the

bargaining process? Even these reformers have shied away from tackling this question directly and looked less at whether the outcome of the process reflects the interests of the defendant and more at whether his participation is voluntary and knowing. They have generally believed that by focusing on what seems a more observable aspect of the bargaining process they can assert that bargaining has (or has not) met the due process rights of the defendant.

It would be comforting to say that by observing the behavior of defendants during the bargaining process we could determine whether they had received due process. Because the defendant plays an essentially responsive, reactive role, however, it is impossible to determine by observation whether he understands the implications of his plea -- or any other deal he makes during bargaining. Since the defendant can only react to the situation as it is structured by the professional actors in the court, the question of whether he bargains voluntarily becomes nearly meaningless. He is involved in a world which is structured by bargaining and the role he can play is predefined and limited. What we can observe a defendant do or say at any one point is obviously not only conditioned by prior events in the bargaining process but by the defendant's own prior experience in the court.

For all these reasons we cannot say with any certainty that defendant's interests were -- or were not -- served by the bargains they participated in and received. We can observe that strong among the professional interests that influence bargaining there is the obligation to see that defendants are equitably treated. While bargaining clearly generates its own standards for fairness, the court does seem to have

inherent in its normative system a set checks to reduce the danger that a defendant will be abused. Because the personnel of the court have a strong stake in protecting the bargaining system itself from attack, and because there are so many participants in any case, there is a strong collective incentive for each participant to bargain in good faith with the defendant and with each other.

Within a system where the pressures on the defendant to submit are enormous and,at the same time, subtle, court personnel often appeared to be trying to insure a "fair" bargain for the defendant. Mostly this concern took the form of trying to educate defendants to what they were up against. Certainly, the defenders we observed played a strong informative role, making plain the conditions of a bargain to each client, refusing to enter a guilty plea for a defendant who wasn't willing, and even confiding to the defendant "inside" information on the bargaining process. It is especially among juveniles and inexperienced offenders that the greatest risk of misunderstanding bargaining occurs, since these defendants have had the least practice at a bargaining role. It is significant that the personnel of the court, including even the prosecutors and police,in most instances assume a protective posture toward these defendants, explaining the bargaining process and its risks. Whether these efforts can be interpreted as protection, as socialization to the proper role, or as both, is very difficult to judge.

The Impacts of Bargaining

If bargaining is, indeed, the only mechanism of decision-making in the courts, then its reign has many implications for the court, the defendants, and the process of reform through negotiated justice. The clearest result of bargaining's dominance is that it gives the court a much broader set of potential resolutions for the issues which it must address than either the adversarial model or the model of bargaining which is assumed in proposals for reform through negotiated justice.

The pervasive kind of bargaining we found appears to have some considerable benefits for everyone in the court -- the judge, the professionals who are associated with the court, and particularly, the defendant. The court, faced with unyielding, contradictory, and absolute demands on its formal decision processes, is able through bargaining to create the illusion that it is meeting these demands, while, in fact, making informal compromises about them. When they bargain, the professionals have the ability to hold to their formal ideologies, show an adequate rate of "success" and yet also collectively and efficientlly manage conflict. The defendant, for his part, typically receives dispositions which are more individualized than the criminal law formally provides. He also reduces his risk of serious penalty, and appears to retain the option of making his claim of innocence at a subsequent trial -- without fear of serious reprisal.

The very characteristics which contribute to the flexibility and mutability of the bargaining mode of decision-making, however, also create negative impacts on the court and its participants. Since, through its

informal processes, the court has abandoned the idea of absolute truth and adversarial confrontation even in its trial procedures, it no longer has an articulated frame of reference from which to evaluate its decisions. At the same time, clearly, the ideal of "truth" finding, adversarial confrontation and due process still dominate the court's ideology. Under these circumstances, the court is forced to present itself to its community as a "jousting ground" for the "champions" of the sides to a legal action.

Because the court operates under a bargaining process which is universal but also clandestine and clothed in the ideology of adversarial due process, unusually great strains are placed on the professional personnel of the court. It is they who must operate the bargaining system and simultaneously convince their constituencies that the court is meeting the diverse requirements of its symbolic adversarial system.

The strains of the dual role required of the court's professionals, in turn, serve to reinforce the existing structure of bargaining. Since they are formally expected to act as vigorous advocates for a constituency or client, court personnel are under strong pressure to demonstrate the pursuit of their special interests. At the same time, other actors must also prove their professional worth, and the counter-pressure on each professional to maintain the bargaining system calls for an acceptance of outcomes which violate their professional interests but support their bureaucratic functions. Each professional, then, is urged both to maintain the system of bargaining which allows him to deal with his colleagues, and to deny its existence to maintain his professional standing.

To a great extent, too, these professionals who are well served by the bargaining process are also its captive. They no longer have an

alternative to participating in it, but must bargain in order to survive in the courts. In effect, then, for their professional reputations and prospects for a successful career they must depend on the goodwill of professionals from all disciplines, with whom they must bargain.

For defendants, too, there are negative impacts of both the bargaining process and the dispositions it produces. The process is gauged to train them to react to the professionals' initiatives and appears to reward a dependent and submissive reaction. Sentences which flow from this process, too, tend to foster dependency, since they most often call for extensive periods of supervisory care or treatment. In effect, they tend to institutionalize defendants at the same time that they are individualized, oriented toward rehabilitation, and more humane than the punishments proposed through strict interpretation of the criminal law.

Finally, the flexibility of the bargaining system does allow extraneous considerations and personal animosities to affect a defendant's sentence. This can happen in bargained cases because it is, sometimes, difficult for the bargainers to distinguish between the professional and personal interests of a participant. It may happen, too, during conflicts among court personnel, when the most efficient sanction for defection of a professional from the bargaining process becomes the punishment of his clients.

Conclusions: The Assumptions behind Negotiated Justice

While it may bring us no closer to solving the crisis in the courts, our study does suggest that proposals for negotiated justice may not accomplish what they claim. If for no other reason, they are handicapped by a model of bargaining which is not grounded, and which we contend is inaccurate. This miscalculation about the process they sought to employ as a vehicle of reform obviously has consequences for the success of their reforms. What are those consequences, and how do we assess them? What processes should we employ in evaluating proposals for negotiated justice?

There are three generally accepted means of evaluating reforms in anticipation of their implementation: analysis of the internal "logic" of the proposed reform, comparing the assumptions of the reform to the reality to which it is addressed; comparison of the means employed to the ends desired, to determine whether the means are appropriate, sufficient, and efficient for accomplishing the intended goals; and analysis of the probable impact of the reform in light of the organizational structure of the setting. Given the limits of our data and the sketchiness of the proposals we are trying to evaluate we have employed each of these methods, with the hope that they together will give us enough information to "predict" the success of negotiated justice.

We begin our evaluation of negotiated justice by looking at the key assumptions made by the proposals of the ABA and the Crime Commission, suggesting the areas in which there is wide discrepancy between their assumptions about bargaining and the reality we observed. In light of that

reality, we also turn to a detailed analysis of the specific recommendations of each proposal, showing what implications the faulty assumptions of the reformers could have for the probable "success" of their reforms. This analysis then provides the basis for our own speculations about the possibilities for court reform through bargaining and court reform in general.

If our conclusions are valid, reform efforts which have tried to regulate the bargaining process will neither succeed in imposing due process standards on the bargaining nor will they limit or eliminate the process itself. Their proposals are based on a conception of a process which simply does not exist in the courts -- a focused decision process based on an exchange of the guilty plea for a reduced sentence. What we see as an oversimplification of bargaining manifests itself in at least six assumptions made in these proposals:

- that bargaining is either an anomaly or an adaptation of the decision-making processes of the court.

- that the bargains produced are either about pleading guilty for a reduced charge or sentence, about individualized sentences and treatment, or about the negotiation of reality and the presentation of the defendant's moral character.

- that the currencies offered in bargaining are limited to a single pair of exchanged services associated with each kind of bargain.

- that the actors who are central to the process are the prosecutor, defender, and possibly the defendant.

- that bargaining follows a predictable course.

- that information about the bargaining process and about the case is immutable and discoverable.

In our view the most serious shortcoming in proposals for negotiated justice is their assumption that bargaining is merely an anomaly or an adaptation of the decision-making system. As its universal use in our case attests, bargaining is the decision-making process of the courts from arrest to appeal. In the courts we studied there was no alternative decision-making perspective from which one could observe the bargaining system. Rather than being alternatives, the plea bargaining system and the trial-adversarial system of presenting cases for decision are both manifestations of the same underlying bargaining system. In light of the court's access to information, its diverse goals, and its social structure bargaining is the logical, efficient basis of the system.

If bargaining indeed underlies all the decision-making processes of the criminal courts then proposals for negotiated justice face an irreconcilable contradiction. Each places great faith in the protection and surveillance made possible by placing one or another actor outside the bargaining system -- whether judge or ombudsman. In our model of the courts, an "outside" observer would either be excluded completely from the bargaining system or more likely would be absorbed, much as the adversarial system itself -- if it ever existed independently -- has clearly been absorbed. Even monitoring bargaining by trying to compare "bargained" and "tried" cases becomes nearly impossible under this model, since as we have seen cases that go to trial are also bargained.

The assumption that bargaining focuses on one of a small number of prespecifiable topics has also lead reformers astray, guided by the

belief that they can somehow circumscribe bargaining and either eliminate it or confine and monitor it. Our study, however, indicates that the bargains in which reformers have been so interested are only a very small and fairly late sample of the broader bargaining process. By focusing only on the regulation of bargaining over the plea, for example, reformers ignore all the bargains which prepare for the plea ceremony and all the negotiations which follow it. Requiring that standards be met at the plea stage would probably not even disrupt the flow of bargains in a case.

With an eye to levying further controls on plea bargains, the reformers have articulated fairly stringent standards for the behavior of the prosecutor, defender, judge, and defendant -- on the assumption, inherent in the adversarial model, that these four actors are the only ones central to the bargaining process. Our study, however, indicates clearly that these four are but a small sample of the actors that give impetus to the bargaining process. Even if it were possible to regulate bargaining, proposals which detailed the roles of these actors only would leave much of the bargaining process still uncontrolled. Such critical actors as the "helping" professionals, the probation officers, and the police are largely -- and we feel incorrectly -- ignored by proposals for negotiated justice, on the assumption that they have no autonomous role in bargaining.

To be sure, our observation has been that, especially in those cases in which bargaining follows the most unpredictable course -- non-support, juvenile, and nuisance cases -- these other actors even dominate the decision-making of the court, and their autonomous decisions can have devastating impacts on the future of the defendants. In effect, the structure of bargaining regulation proposed not only fails to consider important

actors in the bargaining process, but as a result would provide the least regulation in these cases which already have the fewest inherent safeguards.

Because it assumes that bargaining is only a single decision point reached by the prosecution and defense, the model employed by the reformers also logically sees bargaining as following fairly closely a prespecifiable pattern of behavior. Our study, on the contrary, suggests that bargaining is stochastic; that it follows a pattern which varies according to the successive outcomes of a series of bargains. If bargaining does not flow according to a determinant pattern, it is doubtful whether a useful set of regulations or standards for the bargaining process could be formulated.

If nothing else the regulation of bargaining is dependent on the degree to which the information used and produced in the bargaining process is believable, immutable, and at least closely related to the truth. If there is one clear conclusion of our study it is that information is relative, mutable, and as much an outcome of bargaining as every other element of the criminal process. The "truth" about a case is forever shrouded in an impenatrable fog generated by the distortions of memory to which all humans are subject, the deliberate twistings of events accomplished by one, both, or all sides to an issue, and by the simple finitude of humans as observers of a series of events. While we are unable to state with certainty that there is no truth revealed by the courts, we do assert that the "truth" which the court uses to come to its decisions is a product -- a creature -- of the bargaining process, and therefore a suspect source of enlightenment about that process.

It is not sufficient merely to show that the reformers who have devised proposals for negotiated justice have made general assumptions about the court process which are unwarranted and which could probably defeat or at least skew the reforms they propose as overall resolutions of the courts' problems. To assess this as a method of reform, these proposals must also be considered as a set of detailed recommendations. To what extent do their suggestions for regulating bargaining constitute a useful -- though perhaps poorly grounded -- reform, in the sense that they are tools to remedy obvious evils in the criminal justice system? We look next at the specific measures recommended by the American Bar Association and the President's Crime Commission to control the "plea bargain," the roles played by the principal actors, and the procedures employed by the court.

The standards for an acceptable bargain

The ABA proposal sets out two groups of standards, one relating to the traditional measures of knowingness and the other to the motivations behind the bargain. Essentially, it would require that the defendant fully understood his situation and that he chose to bargain either to avoid the risk of a much more serious charge or sentence or to facilitate a wider set of correctional options. These regulations seem well-directed, since they do not basically create or reinforce any major or tendencies we observed in the bargaining process to interfere with the civil rights of defendants. It could even have the effect of placing in good currency the idea that a limited set of goals should be pursued in the bargaining process.

Its impact, as we discussed, may be blunted by the fact that the bargaining process begins at the very first contact between defendants and criminal justice personnel. Bargainers may have had a great deal of

latitude in presenting their cases as meeting these formal standards, without necessarily conforming to its spirit. In placing faith in these particular standards, moreover, these proposals also must assume the existence of an alternative intellectual system which provides support for the contention that a plea is not acceptable and thus, gives teeth to regulation. In particular, there would have to be an alternative to bargaining to which an enlightened defendant could turn if his plea had been coerced, from which the judge as ex post facto observer could draw support, and from which a standard with which to measure the fairness of a bargain could be derived. In short, employing these particular standards is no more than a charade if under the present court structure there is no choice being made between bargaining and trial.

The President's Crime Commission sets essentially the same condition on bargains which are reported to the court. They do avoid, at least in part, the simple reliance on the trial as an alternative against which to assess the outcome of a bargain, fortuitously depending more upon the judge's "inside" knowledge of the court and the bargaining process to assess the fairness of the bargain. This difference may have the effect of allowing bargains to be evaluated less by adversarial standards, than by reference to practices within the judge's own court. This standard, then, trades away whatever regularity an external evaluation would enforce, for a test which is more realistic given the present structure of the court. This is not to suggest, of course, that the Crime Commission proposal abandons the adversarial model completely. Rather, it still holds up adversarial-trial as an option for the defendant, but grudingly acknowledges that formal adversarial standards are not realistic.

Reforms based on the roles of the principal actors

Both the ABA and Crime Commission make at least limited recommendations for the roles which should be taken by court officials. As we have indicated, they both confine their attention to the roles of the prosecutor, defender, and judge. In the process, of course, they have also shaped the role of the defendant through their prescriptions of the roles of the other three actors, though this is a tacit, rather than explicit definition. It is in these assignments of role that we have the least confidence, both because of their focus only on the prosecution, the defense, and the judge, and for their particular assumptions about what those roles ought to contain.

To an awesome degree, the Bar Association relies on the judge to take a post-factum interest in the bargain struck, but strictly as a representative of the adversarial system. Were there such a set of decision-making processes as the adversarial process, this role might make sense. Our findings suggest that not only is bargaining the only operative mode of decision-making in the courts, but that it places too much power in the hands of the one actor most able to coerce defendants. In light of what we identified as the judge's interest in maintaining the order of the court through his power over the other participants' abilities to remain in the bargaining system, the ABA's reliance on the judge may actually encourage resolutions of bargains on grounds directly opposite to what the ABA intended. There is every reason for the judge to evaluate a bargain for its value as an efficient tool or as a reward to a cooperative attorney, for example, as much as for its correctional significance.

Certainly, too, under the ABA proposal there would be a greater temptation for court personnel to jockey for a judge likely to approve a specific bargain. The increased power of the judge under this proposal, would be also likely to enhance the power of whatever agent scheduled the cases to be heard by any particular judge. In the courts we observed, the clerks would be greatly strengthened; in some courts it would be the prosecutor whose hand would be strengthened. Certainly, neither of these outcomes would be consonant with the goals which the ABA articulated.

In addition to its willingness to place considerable veto power over the bargaining process in the judge's hands, the ABA also implicitly asks him to evaluate the merits of a bargain on the basis of information which our study suggests is highly suspect. In particular, their proposal is careful to prohibit the judge from being an actor in the bargaining process. This leaves him -- an interested party (and bargainer, in our experience) -- in the position of having to judge the merits of a bargain based only on the testimony of participants to the bargain. Our findings point up the need of court personnel to defend a bargain once it is made, both because the court community frowns on violated bargains and because personnel usually believe the reality they have negotiated. Whatever they tell the judge, then, will probably also be a product of their negotiations, and it certainly does not provide the basis for an objective test of a bargain.

The Crime Commission proposal does at least avoid several of the pitfalls of the ABA's proposal for the judge's role. They allow the judge to observe the bargaining process at work, thus reducing somewhat the judge's blindness to the possibility that the facts subscribed to in court are

artificial. To do so, however, they place the judge in an awkward bind. He retains some of the same loyalty to the adversarial notions of justice which permeate the ABA's proposal, but at the same time he is a participant in the bargaining process. This duality of role is mitigated,in part,by the Commissions' emphasis on correctional standards for testing the validity of a bargain rather than comparison to a set of standards based on what "would have happened" at trial. From our observations, however, even this concession is still an insufficient recognition of the multiple interests of the judge. The judge is a member of the court as bound as other actors into the bargaining system, and he is still quite likely to be a biased evaluator of bargains.

In our opinion the recommendations of the Commission are not even salvaged by their insistence that the judge depend on the defendant's word as the best check or the bargain. Both models of the role of the judge, in fact, make a common leap of faith by assuming that somehow the judge and the defendant will be able to communicate, at least to the extent that they can conduct a ritual averral of knowingness and voluntariness. In our experience, this is a fragile assumption at best, and it is in precisely the cases in which there is the greatest risk of coercion that we observed the greatest lack of communication between judge and defendant.

The power which both models allocate to the judge is not much diminished by the roles defined for the prosecutor and defense counsel. In fact, the ABA model outlines only dimly the role of the prosecutor. What recommendations they do make seem to be drawn mostly from adversarial assumptions about the prosecutor as the representative of the State in a two-sided bargaining process. They quite sensibly recognize his discretion

to determine charges, and they then try to develop devices intended to restrict that discretion and subordinate it to the judge's discretion. In particular, they forbid the prosecutor from conferring with the defendant, and they limit the grounds on which a prosecutorial bargain can be accepted by the court.

As a reform, this limited formulation seems largely useless. The cases we observed suggest that it is very much the police, even more than the prosecutor, who influence the setting of charges and the vigorousness with which the case is prosecuted. It is they, more than the prosecutor himself, who have the greatest interest in the outcome of the case. Because of the policeman's role,the ABA's proposal is likely to fail to affect bargaining significantly, and instead, it will still lie within the power of the police to alter their presentation of a case to suit their interests. Limiting the discretion of the prosecutor, who is often more aware of the correctional and mitigating circumstances of a case than are the police, may even tend to reduce the court's ability to consider the treatment goals of the criminal process, along with those which focus on community protection.

The President's Crime Commission proposal appears to view the prosecutor more as an agent of negotiation than as a vigorous representative of the State's interests in a case. To the extent that this does recognize the dominance of bargaining in the courts it represents an advance over the ABA Standards. What it fails to recognize is the dual loyalty of the prosecutor to a "client" -- usually the arresting officer -- and to the court community at large. While the development of an explicit role for the

prosecutor-negotiator may be a reform in that it might decrease the likelihood that a prosecutor would abuse his discretion, it would probably also tend to increase the abuses of police discretion and place the prosecutor in an untenable relationship to the police as a powerful interest group.

Ironically, the ABA Standards barely define a role for the defense attorney in the bargaining process. What little they do say evokes the adversarial image of the defender as protector of defendant's procedural rights. In light of what we found to be the wide ranging role of the defender in the bargaining process, this reform, if it could be implemented, would severely damage the bargaining system. Our observations indicate that most defense attorneys would indeed try to take seriously an adversarial responsibility, if it were a legitimated role rather than the "myth" which few courts now seem to take seriously. If this occurred, it would badly upset the balance of power within the bargaining system, since a defender would be forced to violate his official role if he were to function at all within the system, and would therefore be subject to continual risk of being exposed. Perhaps fortunately, the lack of detail supplied by the ABA would probably prevent this proposal from being implemented. If implementation was attempted with this role developed no further than this, the defense attorney would merely continue to behave as he now does and fabricate whatever evidence was needed to demonstrate that he had met the standards.

The President's Crime Commission, oddly enough, does not really draw much of a different model for the defender; its only contribution is a somewhat greater, but no more useful articulation of the fact that the defendant participates in bargaining. Like the ABA, too, the Crime Commission

articulates a role for the defense without ever indicating what the defendant does in the bargaining process. Implicitly, they relegate him to the role of a non-actor in the system.

In light of the varying roles played by defendants, the absence of a standardization or reformulation of the defendant's role seems a vital shortcoming of both reforms -- one which could jeopardize the success of their other proposals. In particular, the reformers seem to have neglected the variety of interests which defendants of different kinds obviously have in the bargaining process, the varying approaches they adopt for dealing with the court personnel they bargain with, and the degree of autonomy some of them display in negotiations. Our findings indicate that these are not inconsiderable influences on the bargaining process.

A common criticism which must be levied against all the reforms proposed by either group based on the roles of actors in the courts, is that they are based on a narrow range of bargaining relationships. They are dangerously limited in their recognition of the power of "peripheral" actors in the court, and the variety of bargaining situations which arise in any court of original jurisdiction. Rather than a unitary process, bargaining is, in fact, a variable phenomenon, moving unpredictably through a wide range of bargains. Our observations lead us to wonder whether any unitary set of standards can take into account the range of purposes, currencies, actors, and interests which might contribute to a particular bargain.

Reforms based on the regulation of procedure

Since the ABA assumes that the judge will, after the fact, assess the plea produced by a bargaining process, it can largely ignore the process of bargaining which produced that plea, except to note that the process

should foster a knowing and voluntary plea. Certainly, it makes no recommendation even remotely resembling a bargaining procedure. The President's Crime Commission, in comparison, does see the regulation of bargaining as its main focus and does suggest specific procedural modifications for the bargaining process: enforced open discovery and free exchange of information and attitudes; a record of the bargaining process; and published prosecutorial bargaining standards.

The Crime Commission's insistence on open access to information would certainly have the tendency to encourage bargaining which was focused on disposition, since it hinges on the availability of information about the defendant and about correctional alternatives. That it would also reduce other forms of bargaining is very unlikely, in light of the degree of control which bargainers can exert over information. It seems doubtful, for example, that the insistence on open information would reduce -- or even detect -- the defendant's tendency to mask his identity or the police's insistence on trading charges for information in other cases. Most of all, it does not appear that any open statement of discovery would discourage actors in the court from hoarding information or -- indeed -- fabricating it for bargaining purposes. In any event, discovery procedures certainly could not be guaranteed to supply the court with "facts" about the defendant and the alleged crime, which are in any way "true" except that they are asserted as such. In effect, bargaining about information will not be eliminated; if anything, it might merely be moved into earlier stages of the bargaining process -- prior to the start of the regulatory process.

The Commission also proposes that a record of bargaining be kept by the participants as a basis for review of the plea and the bargain by

the trial judge. The Commission assumes that such a record will make possible the same degree of review as the transcript of a trial. While at first glance this recommendation does not appear to be as "wrong-headed" as some other proposals for reform, it does seem to have two major flaws. It assumes that the information contained in the record would be an accurate reflection of the bargaining process. Our experience suggests that it is much more likely that bargaining would still take place much as it does now, with the exception that what would be placed in the record of bargaining itself could become a new object of bargaining and a new currency in bargains which already take place. To the extent, then, that the record is seen by court personnel as legitimating a version of reality which predictably could preempt a party's ability to deny it, it would tend to reduce, rather than increase the ability of the court to officially discern "what happened."

The final procedural reform proposed by the Commission, publication of the prosecutor's bargaining standards, has the disadvantage of imposing a set of prespecified standards on the outcomes of bargains which are far too peculiar to each case to allow for formal prescription. While generalizations can be made from the perspective of social science about patterns of bargaining, the stochastic nature of bargaining makes their application to specific instances dangerous. As we have noted before, the bargaining process is sufficiently pervasive and stochastic that it can easily "sidestep" efforts at regulation, usually with consequences which suggest that the balance of power shifts in favor of the person having control over the ostensibly regulated process.

Structurally, too, the focus on a prosecutor's bargaining standards seems to be misplaced specificity. Certainly, if standards are to be published,

they should be published by all members of the court who bargain -- presumably at least the judge, probation officer, defender -- and, perhaps defendant -- in addition to the prosecutor. Even if this were done, though, it seems clear that the balance of advantage among defendants would shift in favor of the more articulate, intelligent, and manipulative defendants. It would probably disadvantage the first-time offender, for example -- hardly the intent of the Commission.

This proposal, then, like the rest of the recommendations of both the President's Crime Commission and the ABA, is most likely to result either in a shift in the locus of bargaining or in some cases in an increase in bargaining related activity. Whether the specific recommendation calls for opening up bargaining decisions to scrutiny, establishing the judge as a monitor or creating new standards for evaluating the equity of a bargain, these proposals fail to consider the nature of the bargaining process, at least as it is revealed in our observations. They are reforming what they see as a constrained decision making process which happens between two sides in a courtroom. Our data describes a process which is not confined to the courtroom (or the court) and which is not subject to internal monitoring devices. As the next section will argue, proposals for negotiated justice can hope to regulate bargaining only if they recognize that the dynamics of the bargaining process extend from arrest to appeal and that the diversity of its participants, whose interests are determined primarily by factors external to the courtroom, is likewise extensive.

Directions for Reform

As we have seen, proposals for reform based on negotiated justice have, in light of our empirical observations, failed critically to account adequately for the informal structure of the courts -- particularly with respect to the pervasiveness of a bargaining mode of decision making and as the basic organization of the courts. In effect, while being efforts to cope with bargaining, both the ABA and President's Crime Commission proposals are in their underlying logic still adversarial models of reform seeking to incorporate limited bargaining into what they see as the "normal" adversarial operation of the court.

Future efforts at reforming the courts could follow a number of paths which might avoid the pitfalls of these two proposals for negotiated justice. They could stubbornly resist the grip of bargaining on the courts and attempt to reinstate the adversary system; they could attempt to regulate bargaining by more grounded approaches to its monitoring and control; or they could work toward new definitions of the role and structure of the courts.

Our data will not support projections of the relative desirability of any of these modes, or indeed the consequences of their implementation. We can, however, speculate on their feasibility in terms of our observations of the dynamics of bargaining.

We have argued strongly that, given the nature of the goals the courts are expected to fulfill, reinstating the adversary system is an unlikely occurrance. The court is society's mechanism for settling disputes, and as such must deal with conflicting interests, uncertainty, and imperfect information. The adversary model is ill-adapted to this kind of

decision making environment, while, on the other hand, bargaining allows for the resolution of conflict among the several "absolute" values of society. In this sense bargaining "works" to fulfill the present goals of the court and will likely remain as the informal operating structure of the courts despite any efforts to enforce the adversary model. Certainly, the history of the courts and of procedural reform supports the contention that bargaining has always been a latent activity of the courts and suggests that it has long reigned with the dominance reflected in our own case material.

If it is not feasible to operate the courts on an adversary model, a second direction for reform is that indicated by the framers of negotiated justice -- the regulation of bargaining to more nearly reflect the spirit of due process. Our observations do indicate that it is necessary that bargaining be regulated, but that, even if new rules were based on a more grounded notion of bargaining, regulation could not feasibly take place within the courts as they are presently structured.

The necessity of regulating bargaining is made clear both in our own data and in more general critiques of the bargaining process. Our study has argued that, while bargaining provides an efficient and, indeed, rational method for making decisions, its impacts on the defendant are at best unpredictable. As we have suggested the defendant is brought into an environment in which he has no real choice but to become a part of the bargaining process, he is socialized to play the role it demands, and he is very likely to be given a sentence which emphasizes treatment for indefinite periods of time. Perhaps more important, the bargaining process itself is fueled by the personal relationships and conflicts among court personnel, and any decision made about an individual defendant is likely to be more a product

of these idiosyncratic variables than of the merits of the defendant's case. Certainly any of these characteristics of bargaining could be construed as inimical to the notion of due process, and even to that elusive quantity "justice."

Perhaps more easily measured is the fact that not only does bargaining appear merely to coerce the defendant, but it in fact appears to sway the balance of advantage greatly toward the State. Especially in the earliest stages of the bargaining process, for example, the overwhelming advantage lies with the State. In a large number of cases, the State has not only prior access to most information but also every advantage in obtaining information from the defendant himself, the privilege of selecting the crime to be charged, and the presumption of "truth" in whatever the police say in their negotiations with other actors. While the State's advantage may decline at arraignment, it still holds many of the "cards." Among these powers are the ability to hold the defendant in jail, (while the actors in the court bargaining system negotiate his case), selecting (in many courts) the time and judge for "trial" of the case, and withholding much of the evidence from the defense. This imbalance between prosecution and defense, moreover, is only weakly compensated by the classic adversarially derived due process safeguards. In a system of negotiated justice, the right to remain silent, to compel witnesses, etc. are of limited value since they rest on the inaccurate assumption that the significant events of a case take place in open court between the representatives of the two sides to the case. Clearly, much of what the courts seek to offer the defense as safeguards are eroded by the extensive bargaining which precedes the appearance of the actors in court.

We would on these grounds, then, support the notion that bargaining must be regulated to protect the defendant from the inequities we have cited and to insure that the defense has a chance to bargain on equal ground with the prosecution. Our observations certainly do not indicate that there is any inherent contradiction between maintaining bargaining as the operating structure of the courts and levying procedural safeguards to protect the defendant. In fact, we found that while they may not be effective in maintaining a balance of advantage with the prosecution nor guarantee the full exercise of the rights of defendants, the Constitutional limitations on the State's power to prosecute clearly serve a useful function for those bargaining about the outcome of a case. They act, in effect, as the tools, tokens, and groundrules of bargaining.

The defense counsel, for example, can offer to make a prosecutor's case difficult by filing a "raft" of motions, petitions, objections, and writs and thus strengthen his bargaining position. Moreover, the due process limits on acceptable official conduct seem to have some effect on official behavior. Since Miranda, Mapp, Escobedo, and the many other similar cases, the police have, at least formally, been more constrained in their efforts to obtain evidence and arrest suspects, even if their behavior is mostly modified in terms of what they will admit they do rather than what they, in fact, do. In effect, procedural due process safeguards, while they do not work as they were intended to, work to the defendant's relative advantage in that they represent a source of currency in the bargaining system. As such, they are useful but insufficient to maintain the defense as a reasonably balanced element of the criminal process.

Where we would part company with those who would choose to reform the courts by creating a due process of bargaining -- a set of procedural safeguards to guide the bargaining process -- is that we do not believe that the leverage points for controlling the bargaining process exist within the courts. The assumption that bargaining can be affected by rules levied within the court is in direct conflict with the fact that the courts are structured on an adversarial model, even if they do not use it as a decision making mode. The adversarial model assumes that the court consists only of a "jousting ground" upon which two external organizations -- termed the prosecution (the State) and the defense -- come to the court and present their cases to the court -- which in the adversarial metaphor is even addressed as a passive, reactive entity (as in "addressing the Court" in posing motions, presenting testimony, etc.) In effect, the "Court" consists at most of the judge and, if there is one, a jury, and their role in the procedings is severely constrained by procedural regulations.

In Massachusetts the Courts are indeed organized as if they were this kind of adversarial fora. In addition to the distance the prosecution and the defense stand from the court, even the clerical staff and probation officers are organizationally decentralized from the control of the "Court" (using the adversarial meaning of the word here). The clerk is a life appointment of the Governor and he appoints his own staff. The probation department is appointed through the authority of the (executive branch) Department of Probation. While in other courts, this organizational decentralization is less stark, few courts have staffs of "helping professionals" and, except for some appointed defenders (an interesting exception for its implications for the conduct of the defense) no attorneys are part of the "Court." In the best adversarial tradition, care is almost universally

taken to avoid the formation of a bureaucracy, and its attendant systems of authority, structure, and control.

If the courts indeed operated on an adversarial model, of course, this mode of organization would be an excellant device for ensuring an isolated and hence impartial judiciary. Given the dominance of bargaining in the courts, however, what this organizational structure implies is that the interests of the actors who participate in bargains are controlled by variables outside the reach of the court, no matter what rules it levies. More specifically this mode of organization makes impossible the regulation of bargaining without some reorganization of the courts and their relationships to the participants in the bargaining process. We will argue this point on three grounds: that the present organization of the courts renders the course of bargaining fixed before a case ever enters the control of the court; that the lack of leverage over dispositional process forces bargainers to focus on treatment and indeterminate sentences; and finally that the interests of the actors who participate in bargaining are all outside the reach of the court.

As the court is presently organized, the portion of the bargaining taking place under the court's aegis happens only after the critical parameters of bargaining have been set within the (external) organizations which actually employ (and hence directly reward or sanction) the bargainers. As a result, the court is greatly limited in the influence it has over even the stages of bargaining which come under its control. In particular, for example, the confessions obtained by police or the psychiatric reports prepared by State Hospitals are very strong factors in the outcome of a case, as are the pressures brought to bear by the firms which employ counsel or

the funding agencies which determine ultimately the caseload of the Defenders (and hence their bargaining style). Yet, formally, none of these factors is even remotely controlled by the court itself.

The consequences of the nature of the court as "non-organization" extend forward to the correctional system as well. The fact that correctional decisions of the court can extend only to a range of probabtion, suspended sentences or executed sentences to specific criminal institutions of correction limits the influence of the court over the bargaining system. While the courts we studied attempted to extend their authority by a variety of "intermediate dispositions" aimed at extending courtroom bargaining into the postadjudicative period, these efforts were necessarily limited.

A third consequence of the non-bureaucratic organization of the courts is that the actors who participate in the bargaining process derive their interests not primarily from the purposes of the court, but rather from the interests of the external organizations which employ them. For example, the prosecutors' function is dictated to a great extent by the pressures imposed by the District Attorney's office and its organizational imperatives. At the same time, they work within the constraints of the court. This seems to be the root cause of the duality of role which prosecutors face -- that of "prosecutor" and of supervisor of defendants. Similar contradictions exist, especially in the roles of the probation officer, the "helping professionals" and the police. Each of these groups of personnel are serving conflicting roles within the court -- sometimes prosecutorial, sometimes protective of the defendant, sometimes objective information sources. Other actors, too, to lesser degrees display the

same apparent conflicts and discrepancies in their assigned roles within the court and in their external professional or personal lives.

In effect, then, the agency which the adversarial model sees as the "gatekeeper" of the criminal justice system -- the decision-making and justice-giving system which persumably dictates policy to the other agencies of the system -- is in fact, in the bargaining process, capable of neither decision making nor justice-giving. Both the processes which set the initial conditions for bargaining and the processes which control the realization of the disposition the bargainers arrange lie outside the court's purvue, and few of the critical bargainers are subject to the court's authority. The courts are rendered ineffectual because they have no means of imposing control over critical aspects of even the latent (bargaining) process they are responsible for performing.

On this basis we suggest that future efforts at reform should aim for a reorganization of the courts which will create what will more greatly resemble a due process model of bargaining. The symbolic importance of the courts as an institution and the necessity of procedural rule as the currency of bargaining (particularly for the defense), however, suggest that this reorganization should neither focus on dispelling the adversarial ideology of the courts nor even on regulating the bargaining process directly. Instead, it is our conjecture that the most fruitful approach would be to work toward a greater centralization of the court's activities which relate to the bargaining process. This means that efforts ought to be made to transfer into the organization of the courts some of authority to sanction personnel and to monitor the bargaining process, thus making possible the enforcement of a due process of bargaining without employing

clients' outcomes as the sole means of reward and penalty. Our data in no way allows us to project what the impacts of these kinds of reorganizations would be. We can suggest where we think the leverage points for accomplishing greater centralization of bargaining might be -- with the caveat that they are illustrative and grounded in our understanding of bargaining, but certainly not in our data.

1. Courts should become more involved in pretrial processes and postadjudicative decisions. The "interface" between police and prosecution should be formally pressed as far toward the arrest process as is feasible. Prosecutors and defense counsel should be involved in interrogation of the defendant at the stationhouse, and the process of release, bonding, or reduction of charges immediately following arrest. Police self-evaluation and evaluation by the court should be detached from the "prosecution batting average" to clarify the line between police and prosecution functions. On the postadjudicative end of the system, the courts should obtain control of a wide variety of agencies responsible for postadjudicative rehabilitation, much as they now operate probation. These facilities should, however, be much more directly responsible to the court than even present probation programs. In effect, we are calling for the courts to be given operating as well as "decision-making" responsibility for the entire process from the stationhouse to release. In a system based on negotiation, if the court is to ensure some semblance of fair treatment, it must be able to enforce the results of both the formal and the informal decision-making processes of the court. To do so without the present practice of punishing clients for the failures of the professional bargainers, the courts must obtain, in effect, the power to compel conformance, and realistically, that requires the ability to hire, fire, promote, and adjust compensation of those who do the court's business.

2. The power of the courts over attorneys representing clients (including the State) should be greatly increased. The courts should obtain strong sanctions over attorneys engaged in the bargaining process, perhaps to the point of determining fees based on the court's opinion of their ability in bargaining their client's case or even having hiring, firing and promotion power over the lawyers. Such a proposal would, of course, be anathema in an adversarial system, since it might suggest undue influence over the independent advocacy of attorneys for their clients. In a court based on bargaining, however, the dissociation of attorney's reward structures from the authority of the court results in the court's sanctioning lawyers through their disposition of cases -- an inherently inequitable outcome which can only be remedied by a reorganization of the court's influence on its attorneys.

3. Personnel of the court should be assigned duties on a basis which corresponds accurately to the structure of interests in the bargaining process. If the court is to function as a conflict resolution agency among many interests in a case rather than the impassive forum for the presentation and adjudication of conflict between two sides to a dispute, the nature of the many interests must be carefully considered in the design of each actor's role and reward system. In particular, this organization must be responsive to the variation of participants' interests as the nature of cases varies. Specialized staffs responsible for protecting the various interests in non-support and domestic complaints, for example, should be established, as should structures for organizing the protection of all interests in major crimes.

4. Existing procedural due process should continue to be observed and provisions made for appeal to its safeguards whether from a clearly bargained case or from one apparently being resolved adversarilly. Since due process provisions are part of the bargaining system, and appear to serve the the interests of justice both under adversarial and negotiated justice modes of resolution of cases, these should not be altered in an effort to create a new and somehow different set of standards of due process. Most of the due process standards are compatible with the operating normative system of the negotiated justice model. Their retention, then, will avoid undue disruption of the present system and consequent unanticipated alterations of the latent normative system.

5. For those so inclined, adversarial trial should remain a theoretically open option. While our observations show that even cases which go to trial are in fact involved in the bargaining system, it seems clear that the presence of the adversarial model is an integral part of the bargaining system, serving many functions, from providing a formally espoused theory of criminal justice through offering a valuable bargaining tool for each side to reduce the likelihood of a greatly disproportionate bargain. Finally, retention of the adversarial trial -- however altered by the existence of the dominant negotiation mode of case disposition -- provides the function of making the courts seem to be the rational upholders of "truth" at least in the eyes of the bulk of citizens who have no familiarity with the courts.

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Appendices

APPENDIX A

Contents of Massachusetts Defenders' Committee Case Files

Each case handled by the Defenders is supported by a formal documentation describing the defendant, the alleged crime, and the actions taken with respect to the case by Defenders and other court personnel. Each case is filed permanently by chronological order of receipt by the Defenders and is retained indefinitely. Access is faciliated by attorneys' logs and by alphabetical files which cross-reference the chronological files.

The information contained in each case file is organized into three parts -- a "face sheet" (attached) which outlines the standardized description of the defendant and the case proceedings, a "running sheet" which records each event in the processing of the case, and copies of the available documentation of the case (e.g., the complaint, the defendant's probation record, motions, notices of appearance, and affidavits filed in the case).

The amount of information filed in each case is generally closely related to the effort put into the case by the Defender and therefore correlates fairly closely with the legal complexity or severity of the case. In nearly all cases of assault and battery with a deadly weapon, for example, the documentation is usually quite extensive, the "face sheet" is fully completed, and the running narrative contains a detailed explanation of the attorney's actions in the case. Drunkenness cases, on the other hand, sometimes even neglect to indicate in which court the charges were filed.

MASSACHUSETTS DEFENDERS COMMITTEE

Case No. Date Case Opened: Source:

Name: Court:
Also Known As: Incarcerated:
Address: Bail:
Residing there how long? Appearance Entered:
Phone: Sex: Race: Religion: Indictment Requested:
Age: Birthdate: Birthplace: Record Requested:
Single: Married: Divorced: Separated: Affidavit Signed:
Occupation: History of Drugs?
Present Employer: Education:
Military Service:
How long at present employment?
Any probation or parole outstanding?
Any previous record in Mass.?
Any out-of-state record?

NAME	ADDRESS	OCCUPATION	AGE
Father:			
Mother:			
Brothers:			
Sisters:			
Wife/Husband:			
Children:			

DISTRICT COURT DISPOSITION

Date Arrested: Day of Week: Time:
Charge: (Show complaint numbers also.)
Final Plea: Represented by Attorney:
Verdict: Name of Judge:
Disposition: (Show on all complaints.)
Date Disposed of: Name of Secretary:

SUPERIOR COURT DISPOSITION

Charge: (Show indictment or complaint numbers.)
Final Plea: Represented by Attorney:
Name of Judge: Check here if jury-waived trial. (_____)
Verdict:
Disposition: (Show on all numbers.)
Date Disposed of: Name of Secretary:

APPENDIX B

Statistical Study of Massachusetts Defenders' Committee Cases

We began our study with a statistical analysis of a sample of cases drawn from the files of the Massachusetts Defenders' Committee. Since the Defenders' files are stored in numerical order beginning with the inception of the organization, our selection of cases for analysis was greatly simplified. We developed an ordered list of 1000 random numbers between 00000 and 99999 and employed this list to draw cases from the approximately 93,000 cases on file at the M.D.C. offices. In order to draw a sample which would yield useful results quickly, a subset of 300 cases was selected by dividing the cases into five groups and selecting and coding cases drawn from each fifth until 60 cases had been drawn from each. Analysis of the results of this preliminary sample discouraged us, as indicated in Chapter III, from continuing this mode of analysis.

For each case, an effort was made to ascertain as much information as possible about the defendant, the crime(s) alleged, the court in which the case was tried (and, if appropriate), appealed, the outcome of the case, and as far as possible, the processes employed by the Defenders in representing their clients.

The variables on the attached list were selected as the most reliable available through the M.D.C. files. Many have obvious meanings and metrics (e.g., age, sex, number of prior appearances in court), but several deserve fuller explanation. The "level of activity" of the Defenders was deduced from the "running sheets" and the documents in the files and was divided into five levels: no activity, appearance only, appearance and

interview, interview only, and "extensive activity" (appearance, interview, and some other evidence on research, documentation, etc.). "Why case was dropped" was used to separate attorney reassignment, appeal, default, defendant retention of other counsel, and M.D.C. withdrawal from the case as causes of limited attorney activity. Dates of significant trial events were recorded as indicators of delay in the court process. "Interviewer of defendant" was employed as a composite variable, indicating either whether the attorney, a student, or a professional investigator conducted the interview (in the event there was one) or whether the lack of an interview could be traced to defendant failure to appear, late assignment of the Defender, or Defender choice not to conduct an interview (usually as a result of caseload). The seriousness of crimes is based on the maximum sentence permitted under Massachusetts law for the particular offense. Within the same category, the subjective opinions of the Defenders was employed as a determinant of seriousness.

Variables Employed in Statistical Studies of the Defenders

Age
Sex
Race
Pretrial Status
Years of Education
Employment
Crime Charged (3 most serious)
Finding (3)
Disposition (3)

Defender First Assigned to the Case
    Level of Activity
    Why Case was Dropped

Second Defender Assigned
    Level of Activity

Arrest Date
Arraignment Date
M.D.C. Appointment Date
Trial Completed Date
Appeal Completed Date

Defender on Appeal
    Level of Activity

Interviewer of Defendant
Trial Court
Appeal Court
Most Serious Prior Offense (based on conviction)
Number of Prior Appearances in Court
Months Served in D.Y.S.
Months Sentenced to Massachusetts Correctional Institutions
Months Sentenced to House of Correction
Months Sentenced to Probation
Number of Prior M.D.C. Cases

APPENDIX C

Coding and Processing Data

Data was gathered and coded to conform to the input requirements of the Statistical Package for the Social Sciences, since it was in operation at M.I.T. in April, 1973, and the most effective analytical package available for processing the data. Coding was accomplished by hand, employing three coders, each of whom was familiar with the operation of the M.D.C. and its data storage system. Information which was not available through the M.D.C. files was sought through public records and added where available. Missing data, which was extensive, was coded in such a way that it could be identified and eliminated (by pairwise deletion) by the SPSS package then in use. Where possible, information was coded in its original form and dummy variables created through the SPSS program to avoid loss of precision in the original specification of the information and to prevent error through misclassification by the coders.

Statistical inferences employed in this dissertation are drawn from statistical tests obtained by employing SPSS to recodify variables and using its CORREL function to perform the necessary mathematical operations on the newly created variables. This procedure was employed to avoid spurious correlations arising from either erroneous coding or insufficient numbers of cases to support a large matrix generated by highly disaggregated data. The CORREL function subroutine of SPSS provides a large number of statistical tests (Chi Square, C, S, Lambda, Kendall's Tau [a, b, and c], Gamma and Eta) from which the appropriate measures were selected for testing the propositions asserted in the dissertation.