THE IMPACT ON PLEA BARGAINING OF JUDICIAL PROCESS CHANGES

by Stuart Nagel and Marian Neef
University of Illinois

To be published in the American Bar Association Journal (1976)

THE IMPACT ON PLEA BARGAINING OF JUDICIAL PROCESS CHANGES

The essence of the criminal justice process is not the trial stage, but rather the negotiation for a guilty plea between prosecutors and defense counsel. Therefore it is important in efficient planning of the criminal justice system to be able to determine in advance how changes in the judicial system may directly or indirectly affect the likelihood or the level of plea bargaining settlements. It is the purpose of this article to describe a simple model of the plea bargaining process which may be useful in making such advance determinations and thereby allow for offsetting changes where it seems appropriate to do so.[1]

I. PLEA BARGAINING AS A BUYING AND SELLING TRANSACTION

The model views the plea bargaining process as being analogous to a buying and selling transaction in a market that has no fixed prices, like that of a push-cart peddler. The defense counsel or defendant is like a buyer seeking as low a price, charge, or sentence as possible. The prosecutor is like a seller seeking as high a price, charge, or sentence as possible within the constraints imposed by the criminal code and possibly his sense of equity. The defendant-buyer has in mind a rough notion of how high he is willing to go before breaking off negotiations and turning to the trial court as an alternative seller. Likewise, the prosecutor-seller has in mind a rough notion of how low he is willing to go before breaking off negotiations and in effect forcing the defendant into the trial alternative.

How high the defendant-buyer is willing to go depends on his perception of the probability of his being convicted and the sentence he is likely to receive if he is convicted. Likewise, how low the prosecutor-seller is willing to go also depends on his perception of the conviction probability and the likely sentence. By multiplying his perception of the conviction probability and the likely sentence, one can roughly obtain the expected value of going to trial for either the defendant or the prosecutor. Those expected values represent the upper bargaining limit of

the defendant and the lower bargaining limit of the prosecutor before adjustments are made for other considerations. They are the outside limits in the sense that if the other side will not go that far, that limit is the expected value which can be achieved by turning to the trial alternative.

The defendant's upper limit, however, needs to be adjusted for such non-sentence goals as getting out of jail while awaiting trial, avoiding the cost of hiring an attorney, and waiving the due process safeguards associated with a jury trial. Those non-sentence goals generally result in the defendant-buyer being willing to offer a bonus above his base price or unadjusted limit for early delivery of the product or resolution of the case. Likewise, the prosecutor's lower limit needs to be adjusted for such non-sentence goals as conserving his litigation resources, preserving his high conviction percentage, and waiving the use of the defendant as an example to others. Those non-sentence goals generally result in the prosecutor-seller being willing to offer a discount below his base price or unadjusted limit for early payment on the invoice or resolution of the case.

If both the defendant and the prosecutor have similar perceptions of the conviction probability and the likely sentence, then the defendant's upper limit would be about the same as the prosecutor's lower limit. If the defendant adds a bonus to his upper limit, and the prosecutor subtracts a discount, then they are likely to arrive at an agreement between the defendant's upper limit and the prosecutor's lower limit, where they both have a sense of having gained something over their outside limits. Any change in the judicial system is therefore likely to affect the likelihood or level of plea bargaining settlements if the change affects their perceptions of the conviction probability or the likely sentence in a case, or if the change affects the defendant's bonus or the prosecutor's discount.

II. RELEVANT JUDICIAL SYSTEM CHANGES

For example, a change that decreases the defendant's bonus factor (such as increased free counsel or pre-trial release) will lower the defendant's adjusted bargaining limit without affecting the prosecutor's limit. This will have the effect of narrowing the room for settlement and the effect of lowering the level of the new settlement if one can still be reached, assuming that the settlement will still be roughly at the mid-point between the defendant and the prosecutor's limits. The opposite occurs from a change that increases the defendant's bonus factor. A prosecutor who is aware that a change has occurred which decreases the defendant's bonus factor can if he wants offset the decreased settlements by offering better offers. He might especially want to do that if the decreased settlements add to his court congestion and thereby increase his desire to raise his discount factor.

A change that decreases the prosecutor's discount factor (such as more resources to the prosecutor thereby in effect lowering the cost of litigation) will raise the prosecutor's adjusted bargaining limit without directly affecting the defendant's limit (although more resources to the prosecutor may also affect the probability of conviction). This will have the effect of narrowing the room for settlement and the effect of increasing the level of the new settlement if one can still be reached. The opposite occurs from a change that increases the prosecutor's discount factor.

A change that improves the ability of one or both sides to predict more accurately the probability of conviction or the sentence upon conviction (such as pretrial discovery proceedings or flat sentencing) will have the effect of increasing the likelihood of settlements by decreasing misperceptions of their bargaining limits by the respective parties. In the normal case, if both parties accurately perceive the probability of conviction and the sentence and thus have

the same nonadjusted limits, then a settlement should be reached when the bonus factor raises the defendant's limit and the discount factor lowers the prosecutor's.

A change that increases the probability of conviction (such as more lenient admissibility of police-obtained evidence) or that increases sentencing payoffs (such as new mandatory minimum sentences) will have the effect of raising both the defendant's adjusted limit and the prosecutor's adjusted limit (if they both accurately perceive the effects of those judicial system changes on the conviction probability and on sentencing) since their respective limits at least partly reflect the product of the perceived probability times the sentence that would be received if conviction occurs. The new limits will then still have as much room for settlement as before, but they will both be higher, thereby resulting in settlement at a higher level of charge or sentence. A change that decreases the probability of conviction or the sentencing payoffs will have the opposite effect.

III. IMPLICATIONS FOR IMPROVING PLEA BARGAINING AND THE LEGAL PROCESS

The main implication that this kind of analysis has for improving the plea bargaining process is to provide a way of viewing the process so that one can better predict how judicial system changes are likely to affect it. One can then try to make appropriate offsetting changes as a prosecutor, public defender, private defense counsel, court administrator, or judge with regard to the offers or counteroffers of the prosecutor or defendant. "Appropriate," in this context, refers to seeking to preserve or change the status quo with regard to the percentage of cases that are settled through plea bargaining, the prosecutor's conviction rate, the public defender's litigation expenditures, or some other criteria.

One example of how the predictive model could be helpful in controlling the effects of judicial process changes relates to the chain of effects produced by

increasing the percentage of defendants who are released prior to trial. One would expect an increased release rate to result in a smaller county jail population, but the opposite might occur if one does not foresee the domino effect of an increased release rate. As mentioned, increasing pre-trial release has the effect of decreasing the bonus which defendants are willing to offer in plea bargaining in order to obtain an early release from jail. To the extent that guilty pleas are thereby lessened, the backlog of cases and the length of time to process them may substantially increase. This could have the effect of increasing the length of time spent in pre-trial detention by those defendants who do not qualify for pre-trial release. As a result, the jail population may actually increase because its size is determined by the percent of defendants held in jail (which has gone down) and by the length of time the average detained defendant is held (which may go up to a more than offsetting degree). That self-defeating chain of effects, however, can be avoided if the prosecutor and his assistants will improve the bargaining offers they make in order to preserve the previous likelihood of a settlement being reached although now at a lower level. In other words to preserve the previous settlement rate, the prosecutor will have to foresightfully offer a bigger discount to offset the average defendant's smaller bonus in light of the throes of trial and error, the prosecutor's intuitive bargaining sense, or the explicit model presented.

On a broader basis, this kind of analysis might also lead one to making policy recommendations with regard to how the plea bargaining process can be made to result in settlements that better reflect the true probabilities of conviction and the true likely sentences. The process can come closer to that goal if three conditions are more prevalent in the criminal justice system than they have been. First, the parties are as capable as possible of accurately perceiving the conviction probabilities and the likely sentences, which can be facilitated by better pre-trial

mutual discovery procedures. Second, the defendant is not forced to offer an excessive bonus, which he otherwise might be (a) if he were being held in jail pending a distant trial, (b) if he could not afford an expensive lawyer and was not eligible for a free one, or (c) if he has a public defender who does not have the time or resources to take cases to trial where a trial will bring a lower likely sentence than plea bargaining will. Third, the prosecutor is not forced to offer an excessive discount which he otherwise would be if he does not have the time or resources to take cases to trial where a trial will bring a higher likely sentence than plea bargaining will.

On a still broader level, this kind of analysis has implications for planning other aspects of the criminal and civil justice systems. The analysis emphasizes that people seek to maximize their respective satisfactions, and that in doing so they must often consider contingent events such as the probability of rain (in a more general context) or the probability of conviction (in the criminal justice context). Many aspects of the legal process involve diverse persons making decisions in light of contingent events like an arraignment judge deciding whether to release a defendant in light of the probability of his appearing in court, a personal injury attorney deciding whether to accept a client in light of the probability of his establishing liability, or a would-be-criminal deciding whether to commit a certain crime in light of the probability of his being caught. Although the subject matters are different, one can apply a similar decision theory analysis in order to obtain insights into how those decisions would be affected by changes in the input variables which influence the decisional outcomes.[2]

FOOTNOTES

*Thanks are owed to the LEAA National Institute of Law Enforcement and Criminal Justice and to the Ford Foundation Public Policy Committee for financing various aspects of the legal policy research of which this paper is a part, although neither are responsible for the ideas advocated here.

[1]For further detail concerning the plea bargaining model which this article presents, see Stuart Nagel and Marian Neef, "Plea Bargaining, Decision Theory, and Equilibrium Models" (Mimeographed paper presented at the Law and Society Association Research Colloquium in June, 1975, available on request from the authors).

[2]For further detail concerning the application of decision theory to the legal process, see Gordon Tullock, The Logic of the Law (Basic Books, 1971); American Bar Association Correctional Economics Center, The Economics of Crime and Corrections: Bibliography (1974); and Stuart Nagel and Marian Neef, "Decision Theory and the Pre-Trial Release Decision in Criminal Cases," Boston University Law Review (1976).

END