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Jacqueline G. Lee
Boise State University

John W. Ropp
Michigan State University

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“Sometimes I’m Just Wearing the Prosecutor Down”: An Exploratory Analysis of Criminal Defense Attorneys in Plea Negotiations and Client Counseling

Jacqueline G. Lee¹, John W. Ropp²

¹Boise State University, ²Michigan State University

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ABSTRACT

As plea bargains have proliferated in the criminal justice system, scholars have been working to better understand their mechanics. There have been a few recent examinations of plea bargaining, but the literature lacks qualitative research that gives the defense sufficient attention. Using a sample of courtroom practitioners in one large, urban county, we examine defense attorney bargaining and client counseling tactics. Results demonstrate that defense attorneys use a variety of strategies for negotiation, including sharing humanizing information about their clients with the prosecutor and utilizing delay tactics. Results also suggest that attorneys counsel their clients about plea offers in varying ways and that they are not in full agreement regarding the level of autonomy to give their clients. Overall, results support some prior literature but also prompt questions of other widely-held beliefs, such as the idea that all courtroom actors endorse "going rates" as the prevailing norm in the courtroom. Although there are likely some expectations for typical punishments, these results also point to individual defense attorneys' ability to alter the trajectory of a criminal case through their negotiation and client counseling strategies. We conclude that more research is necessary on defense counsel strategies and how they may impact case processing and outcomes.

Introduction

Though a criminal trial is a constitutional right afforded to every American citizen, almost all of today's criminal cases are resolved through a guilty plea; this is often a negotiated plea agreement that must be approved by a judge (Pastore & Maguire, 2005; Schulhofer & Nagel, 1989). Due to their prevalence, how these pervasive agreements come to fruition is a key empirical question. Assessing the fairness of plea bargaining as a vehicle for justice (see e.g., Bibas, 2016) is assuredly an important question, however, it is necessary to understand the actual mechanics of how these decisions are made before deeper analyses can occur. This paper adds to extant guilty plea literature by closely examining a crucial part of the courtroom workgroup: defense counsel. There is currently little research focusing on the defense's role in case processing, which leaves gaps in knowledge regarding the process of plea negotiation. Using interviews from court actors with a focus on defense attorneys, our research examines plea negotiation in one large urban county and concentrates on defense attorney negotiation and client counseling strategies. Below, we discuss the defense attorney's role and then examine legal and social science literature on defense attorneys in negotiation and client counseling.

The defense attorney in case processing, negotiation, and counseling

The defense attorney plays an integral role in final case dispositions. With the growth of plea bargains, the ethical obligation of providing "zealous" defense (see Freedman, 1990; Flowers, 2009) has expanded beyond trials and motions to include effective negotiation and plea bargaining.¹ Legally,

there are minimum standards of effectiveness of counsel as determined primarily by ABA standards and the *Strickland* Test, which are generally assessed based upon reasonableness standards (Rigg, 2007; *Strickland v. Washington*, 1984). To what extent these obligations are clearly defined is up for debate (see Uphoff, 1998), however, though most would agree that “[c]ounsel’s responsibility is to make every reasonable effort to protect the defendant from an ill-informed choice” (Henderson & Levett, 2019, p. 74). According to the Supreme Court in *Missouri v. Frye* (2012), a defense attorney must share all offers with their client and advise their clients regarding accepting such offers. Providing unsound legal advice during the plea-bargaining process can rise to the level of ineffective assistance of counsel as ruled in *Lafler v. Cooper* (2012). Moreover, the decision in *Padilla v. Kentucky* (2010) demonstrates that the Court is expanding effectiveness of counsel requirements to include communication as to the effects of collateral consequences like immigration and deportation (see Chin & Holmes, 2007; Smyth, 2010; Love & Chin, 2010). Though counsel’s ethical obligations regarding guilty pleas are not necessarily clearly defined, they undoubtedly play a key role in the process. Below, we review extant legal and social science literature on defense attorneys in negotiation and counseling.

Defense attorneys and negotiation

Legal literature has broached the topic of defense counsel and negotiation in several ways. First, some scholarship has focused on whether there are sufficiently high standards and obligations for defense attorneys in negotiation; much has concluded that there are not (see e.g., Alschuler, 2013; Alkon, 2016; Joy & Uphoff, 2014; Roberts, 2013). Second, another branch has assessed the history of legal education and how skills such as negotiation fit into the American legal education system (see e.g., Dolin, 2007; Fine, 2009). A number of reports have been published over the last several decades demonstrating that law schools historically focused on academics using the Socratic Method and neglected practical abilities such as interpersonal skills, trial techniques, negotiation, and counseling (Cramton, 1982; MacCrate, 1992; Sullivan et al., 2007). More recently, however, law schools have moved towards increased incorporation of skills into their curricula (for an example of a recent legal textbook, see Menkel-Meadow, Schneider, & Love, 2006), and scholarship has assessed specific methods, courses, or clinics for teaching skills (see e.g., Norwood, 1989; Williams & Geis, 1998; Findley, 2006; Patton, 2009; Wheeler, 2016). Despite this movement, Lande (2013, p. 1) quite recently describes that “[t]here is a growing consensus that American law schools need to do a better job of preparing students to practice law. Teaching students to ‘think like a lawyer’ is still necessary, but it is not sufficient for students to act like a lawyer soon after they graduate.”

Lastly, legal literature analyzes how defense attorneys should or do negotiate. Blumberg’s (1967, p. 28) fairly critical view of defenders described them as “double agent[s]” in a confidence game between the defense, the prosecution, and at times, the remainder of the court system. Under Blumberg’s (1967, p. 38) view, defense attorneys serve organizational ends rather than their client’s goals, and thus during negotiation, they encourage their clients to plead guilty. Alschuler (1975) examined the role of the

defense in plea bargaining and argued that there are two ways to attain financial success in defense. One can become a "pleader" with a large caseload of almost all pleas, or an effective trial lawyer whose reputation and trial skills encourage prosecutors to offer their clients better deals (Alschuler, 1975, p. 1182). He also identified several strategies used by both private and public defense attorneys (with varying levels of success), including judge-shopping and delay. Echoing this, Uphoff's (1995) examination of the defense attorney as an effective negotiator begins by noting that many defense attorneys (particularly in the public sector) are working with high caseloads and low pay and that public and private attorneys experience different burdens.

Uphoff (1995, p. 98) also provided guidelines for defense attorneys preparing for and engaging in plea negotiations, stating that "good preparation is the key to successful negotiating" and that even if defendants state a preference for a plea, counsel should still continue to look for valid defenses and identify strategies for bargaining. He explained that defense attorneys must know their clients well enough to humanize them when speaking with prosecutors and identify relevant collateral consequences. He further pinpointed other relevant factors for the plea process: strength or weakness of the case; the prosecutor handling the case; prosecutor office policies; the judge assigned to the case; and defense counsel's reputation, preparation, and relationships with other actors. More recently, Alkon (2016, p. 389) also identified a number of important skills for defense attorneys in negotiation such as "assertiveness, empathy, flexibility, social intuition, and ethicality," while also noting that defense attorneys who regularly practice in a court will learn norms for plea offers.

Importantly, legal scholars have identified that though a guilty plea is often viewed as a rational choice, "it is unlikely that most defendants possess the knowledge of the criminal system necessary to perform an economic analysis; rather, they are likely to depend on their defense attorneys to offer such analysis" (Hollander-Blumoff, 1997, p. 120; see also DiPippa, 2001 for an in-depth discussion of barriers to rational decisions in plea bargains). Hollander-Blumoff (1997) noted that bargaining chips (which should be apparent to good defense attorneys) in plea negotiations depend upon the rules of evidence, the strength of the case, and jury attitudes in the jurisdiction. Each of these is key for all parties when assessing their best alternative to a negotiated agreement ("BATNA"), which is most often a trial. Hollander-Blumoff (1997, p. 123) further identified an additional BATNA for defense counsel: "simply dragging a case out and making it somewhat stale for prosecutors," which resonates with Alschuler (1975) who identified the delay strategy of some attorneys. She also argued that cooperative attorneys who share more information are more efficient and can attain better outcomes for their clients. Schneider (2002) found additional evidence supporting the advantage of cooperation. Problem-solving attorneys were rated by their peers as more effective than adversarial attorneys, and she concluded that a good negotiator must be "assertive," "empathetic," and also "offer enjoyable company" (Schneider, 2002, p. 185). Overall, legal literature stresses the importance of preparation,

knowledge, and cooperation and is also shifting away from seeing negotiation as an art and towards viewing it as a skill that can be taught and learned.

Next, we discuss relevant social science scholarship on defense attorney negotiations. There is a growing body of work on successful negotiation strategies and also teaching of these strategies (see e.g., Fisher & Ury, 1981; Williams, 1993; Fortgang, 2000; Tinsley, 2001; Patton, 2009; Lewicki, 2014), though little is in criminology and criminal justice. However, several key qualitative and mixed-method studies on the courtroom workgroup and plea bargaining in the 1970s and 1980s provide useful insight (Heumann, 1977; Eisenstein & Jacob, 1977; Nardulli, Eisenstein, & Fleming, 1988). For example, Heumann's (1977) analysis found that new defense attorneys (often incorrectly) expected that they would be entering into an adversarial system, but that many quickly adapted to a cooperative style of work. In particular, Heumann (1977, p. 69) stated that "[f]ailure to cooperate leads to harassment, closing of all files, refusal to plea bargain on all of the defense attorney's cases, and finally, to higher sentences for the defendant." He continued to explain that plea bargaining "in short order becomes his predominant activity" (1977, p. 69). Attorneys reported that going to trial was scary for many people and that pressures to settle cases were strong.

More recently, criminal justice research has quantitatively examined outcomes related to plea bargaining (see e.g., Frenzel & Ball, 2008; Kutateladze et al., 2015, 2016), but less has looked in depth at assessments of defense negotiators or the process of plea bargaining. Lynch and Evans (2002) investigated how the "Big Five" personality traits were related to perceived negotiation skills and found that most skilled negotiators were viewed as cooperative as opposed to adversarial and that the most important trait when being assessed by colleagues was emotional stability. Bowen (2009) used observations and interviews to assess how prosecutors and defense attorneys in one jurisdiction adapted to a specialized plea unit. Within the specialized unit, there was significant cooperation within the courtroom workgroup, and attorneys together would "sort" cases based on whether they were "normal" crimes (Bowen, 2009, p. 22). Supporting some of Uphoff's (1995) suggestions for how to best prepare for a negotiation, defense counsel in Bowen's (2009, p. 19) study reported that they begin by "assess[ing] the value of the case based on the seriousness of the case, the strength of the evidence, and the background characteristics." Though there is less social science research empirically examining bargains and negotiation processes, extant literature suggests that personality, the courtroom workgroup, and cooperative skills are key to a successful negotiation; this research also largely complements existing legal research. Lastly, post-negotiation, the attorney's job continues with the communication of the offer to a client and a discussion of how to move forward in the case.

Defense attorneys and client counseling

In this legal system that increasingly relies on guilty pleas, how an attorney counsels his or her client has become progressively more important. Here, we again review extant legal literature, followed by

social science research on client counseling. Freeman's (1966) early work helped open the conversation on counseling in the legal setting, where he advocated for the expansion of counseling education in law schools. As client counseling became a more regular topic of discussion in legal education and practice, others questioned which strategies might be most useful. In general, counseling literature focuses on the amount of information attorneys should share, how they share it, and how to allocate decision-making authority. Simon (1991) described two competing counseling strategies for attorneys. First, under an autonomy perspective, the lawyer's primary function is to inform the client of all necessary information but leave as much decision-making as possible to the client. The second is a paternalistic, or best interests, strategy, which suggests attorneys often know what would be best for their client. Thus, sometimes autonomy must be infringed upon to ensure the best outcome for the client.

Although these approaches appear to be distinct, Simon (1991) ultimately concluded that the division between the two is often not so clear. Spiegel (1997), however, challenged Simon's (1991) argument. Although Spiegel (1997) agreed that paternalistic and autonomous client counseling strategies might look similar in practice, he argued that the underlying intentions were different, and these differences are important. The debate has continued as to how much autonomy an attorney should afford their client (Morris, 1987; Mather, 2003; Strauss, 1987; Uphoff & Wood, 1998; Smith, 2007) and whether law schools should follow the lead of medical schools who use "standardized patients" in simulations with medical students (Grossberg, 2001) or formal informed consent procedures (Spiegel, 1979; Strauss, 1987). Legal academics have taken a keen interest in understanding the specifics of attorney client counseling. Some, though not as many, researchers in the social sciences have also studied this topic.

Moving to the social science literature, there is less research relative to legal scholarship, though the two areas are complementary. Researchers have often attempted to understand how attorneys make decisions regarding the advice to give their clients. Falling in line with Bibas's (2004) the shadow of the trial arguments, attorneys likely make internal calculations about their client's probability of conviction, and this calculation informs the attorney's recommendation to the client (Kramer et al., 2007). Edkins (2011), however, found that the race of the defendant may complicate these calculations. Further, inferences of guilt or innocence may also affect how attorneys advise their clients (Helm et al., 2018). Using a fictional case vignette and qualitative interviews, Helm and colleagues (2018) concluded that attorney advice is determined in part by client guilt or innocence. Social scientists have found evidence that the probability of conviction and other factors are important in determining what advice attorneys give their clients.

Further, some social scientists have explored how attorney counseling techniques can affect a client's plea decision. As DiPippa (2001) theorized, there is growing evidence to suggest that how defense attorneys frame information regarding plea bargains can have a significant impact on client decisions. A recent study using undergraduate students as proxies for defendants found that the students

accepted pleas at different rates depending on whether the vignette framed the plea as a gain, a loss, or neutral (Garnier-Dykstra & Wilson, 2019). Similarly, Henderson and Levett (2018) subjected undergraduate students to a cheating experiment, much like what was previously done (see e.g., Bordens, 1984; Gregory, Mowen, & Linder, 1978). Factually innocent participants were more likely to plead guilty without an advocate, relative to those who were advised to go to trial (Henderson & Levett, 2018). Likewise, a study examining the plea decisions of 152 juvenile defendants determined that advice from attorneys, parents, and friends had a significant effect on plea decisions (Viljoen, Klaever, & Roesch, 2005). These studies demonstrate that attorneys can have a significant influence on their clients' decisions.

As noted above, legal scholars have often categorized counseling strategies into two main themes: paternalism and autonomy. Few social scientists have examined these techniques empirically. A notable exception is the qualitative work of Fountain and Woollard (2018), in which the authors classified juvenile defense attorney counseling strategies as authoritarian, client-centered, or collaborative, which are reflective of the paternalistic and autonomous strategies described above. Fountain and Woollard (2018) also found that many attorneys find a delicate balance between the authoritarian and the client-centered approaches. Their work presents particular benefit in that it attempts to deepen understanding of attorney counseling techniques using a qualitative approach, much like the current study aims to do. In sum, the literature on attorney counseling finds that attorneys can have a critical influence on clients' decisions and that allocation of autonomy is a key consideration for defense counsel.

Research questions

With this in mind, we examine two principal research questions:

1. What are defense attorney perspectives on negotiation, and what types of strategies do they use in negotiating plea bargains for their clients?
2. How do defense attorneys counsel their clients on plea bargains?

Data and methods

We explore these questions using qualitative methods. Although quantitative work provides crucial large-scale findings, qualitative work allows for a more refined and nuanced understanding of social processes. The final sample is a convenience sample of practitioners (judges, prosecutors, and defense attorneys) in County A, Texas. County A is a large, urban jurisdiction with 10-20 permanent trial judges of general criminal jurisdiction.² It has a county-level public defender system and an assigned "wheel" for the remainder of the indigent defense cases. The county's overall demographics demonstrate that racial and ethnic minorities are over-represented in the incarcerated population relative to their contribution to the county's overall population. Texas has no sentencing guidelines, and there is

general opposition to guidelines (see Deitch, 1993), so the present analyses allow for an understanding of bargaining in an unstructured jurisdiction.

Participants were recruited through multiple means. First, courtroom actors were contacted based upon their names appearing in a sample of felony cases in the county. Then, additional strategies such as snowball sampling and securing email addresses from the defense bar website were used to increase response rates and sample size. The final sample includes only courtroom actors with experience in felony cases in the chosen county. This sample is made up of 10 defense attorneys, three prosecutors, and three judges. The sample includes three current public defenders, three who work mainly as assigned counsel, and four who currently work only as private attorneys (three of whom had previous experience on the assigned "wheel"). A key asset to the present study is that six of the 10 defense attorneys and all three judges had previously worked as prosecutors. Moreover, two of the three judges had also previously worked in criminal defense. The sample includes nine women and seven men, and experience in the criminal law system varied significantly, ranging from approximately 6 years to 35 years in practice.

We focused our analysis on defense counsel but based upon the above considerations, other courtroom actors also provided valid perspectives on defense attorney practices. Though we use a convenience sample, interview participants provided very consistent reports of the mechanics of plea bargaining in the county. Themes for strategies for negotiation and counseling diverged to a greater extent, but this is to be expected given that defense attorneys are given wide latitude in their jobs. Moreover, as the purpose of this study was exploratory and meant to guide future research and theoretical development, the current sample provided a rich and detailed set of interviews.

The first author performed all interviews over the phone and these were not recorded.³ Instead, with the subjects' consent, the interviewer typed up notes while the participants were speaking and immediately filled in any required information after the interview was completed. All participants were guaranteed anonymity^[4] and were reminded that responses would remain confidential. The interviews for all participants began with introductory questions to establish rapport. Interviewees were asked to describe their work history and motivations for working in their current position. The questions progressed towards describing plea bargaining in the jurisdiction; these questions were similar, but not identical for all parties. For example, defense attorneys were asked how they think prosecutors generate offers and what factors matter most to them, how they negotiate on behalf of their clients, and how they counsel clients regarding accepting plea offers. On the other hand, prosecutors were asked how they decide what offer to make and what factors play the most important roles in this decision.

To analyze the data, thematic coding was used (see Braun & Clarke, 2006; Charmaz, 2006). This method is appropriate here because it provides flexibility and allows for simple interpretation.

Thematic coding also provides a clear avenue for comparing similarities and dissimilarities in results. Braun and Clarke (2006) provide a six-phase methodology for thematic coding. This method begins with familiarizing oneself with the data and continues to step two, which involves generating initial codes. The third step involves searching for themes. Next, steps four and five involve analyzing the previously-determined codes and themes to create a picture of how they fit together as well as defining and naming themes. Lastly, step six is writing up results. Two independent researchers thematically hand-coded the typed interview transcripts and entered their themes into separate spreadsheets. Researchers then met to discuss their initial findings. They came to a final agreement of the final codes presented here, similar to the methods suggested in Consensual Qualitative Research (see Hill, Knox, Thompson, Williams, Hess, & Ladany, 2005). The next section describes the main themes identified with these interviews.

Results

We begin our results with a brief description of the mechanism of plea bargaining in the jurisdiction before discussing the findings for the two main areas of interest: negotiation and counseling. Underlying the seemingly systematized plea bargaining process is an array of subjective, interpersonal interactions that could have a measurable effect on final outcomes.

The life course of 'typical' cases

To provide a backdrop for the remainder of the analysis and to improve understanding of the "black box" (Bibas, 2010, p. 373) of plea bargaining, this section describes the typical plea negotiation in County A. Each participant was asked to describe an "average plea negotiation" and responses here were very consistent. In this county, prosecutors generally make the initial offer (referred to as a "rec"). An offer is made by prosecutors in almost every case unless there is a compelling reason that they wish only to go to trial. This offer is communicated either in person at the first hearing or online prior to the date the case is set for first announcement. Very rarely, an "exploding offer" that expires at indictment is made after a preliminary hearing (where bail is set) but before an official indictment. With regard to standard offers, all prosecutors were hesitant to state that these existed. They instead stated they made "individual" (Prosecutor 1) or "case-by-case" (Prosecutor 2) decisions and refuted the concept of a going rate. However, most defense attorneys and judges believed that there are "vanilla" recs (Retained Attorney 1) or set offers for a typical case. There was acknowledgment of "rec" guidelines in the misdemeanor system by Prosecutor 3, but there are no such guidelines for felony cases. Prosecutors instead rely on their own judgment (Prosecutor 2 referred to it as an "internal matrix") and the guidance of superior prosecutors. After the offer is presented to the defense attorney, they are required to take it to their client. After discussing the offer with their client, there are three options: acceptance of the initial offer, negotiation, or rejection of the offer and a setting for trial, with negotiation the most likely outcome by far. Defense attorneys overall indicated they would

accept an initial offer under very rare circumstances. Negotiation may also not occur if a case is so heinous that a prosecutor only wants to go to trial, or if a defendant is simply not interested. However, all participants indicated that negotiation is the modal outcome after an initial offer and that everyone expects to engage in at least some bargaining.

Negotiation in this jurisdiction is informal, with little documentation, and was described as "haphazard" by Assigned Attorney 2. Meetings between prosecutors and defense attorneys tend to be brief (5-10 minutes). However, due to high caseloads, it can take months for a case to be resolved and typically two or three different offers are discussed prior to agreement. Public Defender 2 was skeptical of prosecutors and required all offers in writing, but no one else mentioned a requirement of documenting prior offers. After the defendant accepts an offer, all parties appear before the judge who must approve it. Rarely, a judge "busts" a plea and requires the parties to re-negotiate a different offer. Another option for plea bargaining in this jurisdiction is a "slow plea" (also known as an open plea) where the defendant agrees to plead guilty, but the judge sets the sentence; interviews indicated that this also occurs rarely. Despite these possibilities, almost all felony convictions in the jurisdiction are the result of a negotiated plea. It is also possible, though, that even after negotiating, no agreement is made. In that situation, a case is set for trial. Though almost everyone agreed that the state holds the most power in a negotiation, there is also a general consensus that the defendant's main bargaining chip is the ability to set a case for trial. Retained Attorney 1 described this phenomenon:

My power is that I'll set it for trial. I'm going to make you earn it. Prosecutor resistance for setting up a case [for trial] is considerable. How hard can they hurt your client in reality? And how much of a living hell can you make it for them [by setting for trial]?

Actors seemed aware of the significant costs—both monetary and time—of going to trial and seemed keen to avoid them if possible. For example, when probed about whether punishments are longer at trial than with a plea, Assigned Attorney 3 stated that "there are other additional consequences to going to trial and losing," namely the uncertainty of punishment. Next, we further examine the defense attorney in negotiation.

Negotiation

Based upon interviews with defense attorneys as well as perspectives from the prosecutors and judges who work with them, it is clear that defense attorneys hold diverging views on how to achieve the best outcome for their clients. We identified three main themes here: relationships and reputation, institutional knowledge, and defense attorney strategy, where we also identified a number of sub-themes.

Relationships and reputation

Each of the sixteen courtroom actors interviewed said that relationships (of various lengths and types) and prior experiences between individuals affect negotiations. In some cases, long-standing prior relationships do not necessarily have to involve *working* together. An example of this comes from Retained Attorney 2, who stated that prosecutors will treat a friend differently and that sometimes it is old friends "giving you, not your client a break." Moreover, the relationship does not have to be lengthy. Retained Attorney 1 mentioned that a prosecutor might be angry from one single previous case and thus less willing to bargain with that defense attorney for the next one. This same attorney stated that there are not going rates for particular offenses; they believe that there are going rates for particular *attorneys*. Along those lines, Assigned Attorney 2 stated that some defense attorneys would get a better deal than others, simply because the prosecutor knows them.

In this jurisdiction, prosecutors are clustered within courtrooms run by a particular judge. Thus, reputation came up quite often and was important for all three types of court actors involved in plea-bargaining. Retained Attorney 2 noted that when determining an initial offer, a prosecutor may know that the defense attorney will drive a hard bargain and refuse to accept the first offer. This attorney continued to note that "different defense attorneys get treated differently" and that "part of it is credibility." Prosecutors interviewed in this study also sometimes mentioned this when asked how they shape offers. For example, Prosecutor 2, when describing differences between retained and government-provided lawyers, stated that "public defenders are very proactive," but that hired and court-appointed in the county vary significantly—"some mosey in at 12:20 and just want to pass cases for like two years."

Courtroom actors also acknowledged that prosecutors in this jurisdiction have a tremendous amount of discretion and that different prosecutors are known for having different preferences. Prosecutor 2 stated that they were "very liberal," but that each prosecutor has their own method for determining the fairest punishment. They noted that the most senior prosecutor in each courtroom sets the tone for that courtroom, so defense attorneys work around that. Retained Attorney 2, when asked how they negotiate, identified a more personal take on prosecutor reputation, stating, "depending on the prosecutor, you can tug at the heartstrings." This attorney also noted that there is "huge" variation between prosecutors in the jurisdiction:

You learn about it the longer you're in practice and the more interaction you have with them. The biggest factor is their personality: are they oriented to treatment or 'true believers'? There are attorneys who think that everyone is guilty and everything in the offense report is true. The truth is somewhere between what my client tells me and what's in the offense report.

Though prosecutors maintain a high level of discretion in this indeterminate jurisdiction, the sitting judge in the courtroom still must approve all negotiated plea offers. All actors interviewed for this

project acknowledged that plea bargains are crafted with the specific judge in mind. Judge 2 noted their own reputation for being "very big on rehabilitation," stating that some defense attorneys will approach them if the prosecutor will not offer probation. Judge 3, explaining their reluctance to approve a plea bargain for a felony first-time drug conviction, said that a defendant should not get the benefit of a decent recommendation just because they fell into a friendly court. Prosecutor 1 noted that a case might be assigned to a courtroom where the "judge is more concerned about moving cases." Retained Attorney 2 took this sentiment even further, stating, "it depends a lot on the judge and what court you land in. Some clients hit the jackpot, some are screwed." Retained Attorney 1 also described the judge as being a "backstop":

If the prosecutor knows that the judge never sends someone with two or less offenses to jail on a third degree or state jail felony, then the prosecutor won't try to get that from a case. If a prosecutor knows a judge is going to hammer your client every time, then they'll be tougher on your client. And no one likes going to a jury.

Overall, relationships and reputation play a significant role in plea bargaining and negotiation; additional relevant knowledge for attorneys was also described in terms of overall knowledge of jurisdictional practices.

Institutional knowledge

Certain features of this county, including the fact that cases are randomly assigned to a courtroom with a stable judge and set of prosecutors, as well as the lack of sentencing guidelines, increase the impetus for defense attorneys to become well-acquainted with norms in the jurisdiction. They most often learn these through experiences with other members of the courtroom workgroup. Beyond reputation as described above, the district attorney in this jurisdiction is elected; one judge with previous prosecution experience said that elected district attorney policy and directives are "first and foremost:"

There is an office policy [in the DA's office], so you follow the directives of the elected. In the DA's office, there were three separate D.A.s elected [during their tenure as an ADA], so each of them had their own stance on how rough or lenient they want to be with drug cases ... There are often office recs based on the amount of drugs, and given the criminal history of the defendant.

Moreover, Prosecutor 1 noted that while "most prosecutors are trying to do what is right," views on rehabilitation in the prosecutor's office are "all over the place." In an even broader sense, knowledge of the community is vital, as many courtroom actors also noted that plea bargains were often negotiated with a jury verdict in mind. Retained Attorney 2 emphasized that "you need to know your jury pool" because "from county to county, you'll see differences." Multiple defense attorneys noted that a neighboring county was much harsher on certain offenses like DUIs and that a successful

defense attorney must be aware of this split. In addition to relationships, reputations, and institutional knowledge, specific strategies by defense attorneys also play a role.

Defense attorney strategy

We include defense attorney skills in this theme, along with contact with the prosecutor, timing, putting the defendant "to work," and sharing information about the client.

First, defense attorneys must have the requisite skills to negotiate with prosecutors (and potentially judges). Public Defender 3 bluntly explained that "the quality of representation will affect what happens" and that people need a lawyer who "really cares about providing effective representation." Similarly, Retained Attorney 4 emphatically stated that when a person is arrested, "the only job you have" is to get a good lawyer because "your entire existence is dependent upon hiring a good lawyer." This defense attorney also stated that

One of the reasons there are so many people in jail who shouldn't be is because the lawyer didn't do a good of a job as he should have. He did not care what the outcome was ... You need to have negotiating power. Can't give the farm by telling them what you're willing to accept right off the bat.

The difficult part of this, however, is defining skill. Most practicing attorneys work based on their own experiences, with Assigned Attorney 1 describing that "there is a method to doing it the right way." Retained Attorney 3 noted that they use "social science" when negotiating because they have to "gauge the temperature of the DA," continuing to say that the "hardest part of being a defense attorney is finding the leverage points." As attorneys use their judgment with how to negotiate, they must also decide the method and frequency with which they contact the prosecuting attorney.

One aspect of negotiation over which defense attorneys have complete control is when and how often to contact the prosecutor. Public Defender 2 stated that they were always the first to contact the prosecutor, though the remainder of defense attorneys did not volunteer this information. Most defense attorneys expressed aversion to accepting the first offer. Public Defender 1 stated that a defense attorney should never take the first offer, even if it is a good one, and that you have to "keep pushing." Describing a more specific tack, Prosecutor 1 described that some defense attorneys approach them with questions, asking, "he [the defendant] did it, will you give X punishment?" After this first contact, defense attorneys expressed a variety of strategies regarding how frequently they contact the prosecutor. Assigned Attorney 2 stated that sometimes you have to "whittle" the prosecutor down, and Retained Attorney 2 admitted similarly that sometimes they are "wearing the prosecutor down." On the other hand, Assigned Attorney 1 said that

A lot of people—clients—think the more you bug the prosecutor, the better offer you're going to get. I disagree. If I'm bringing something that helps them reach my decision, they don't mind that. But if you just go in there to whine, you won't get anywhere. None of them like to plea bargain against themselves. If you keep pushing, they will decide that you're not reasonable and they won't come down if you're still asking for something that's impossible.

This may be a valuable strategy, given that Prosecutor 2 said they do not want people to "guilt trip" them with constant meetings.

Related to the issue of frequency of contact is timing. Retained Attorney 2 unequivocally stated that "aging a case" by allowing it to linger longer always helps and explained that sometimes the prosecutor may get tired of a case being "old" and ask a defense attorney, "what can I do to get you off my docket today?" Assigned Attorney 3 also said that "unfortunately, the system does reward defendants for setting cases for trial and taking it right down to the wire to see if the state is going to cave." They continued to say:

Prosecutors, for years, have tried to counteract this by putting their best offer up front and putting a sell-by date on it. They have threatened to take it off the table. [The prosecutor says that] once you set it for trial, all pleas are off the table and you won't see this kind of offer again. Everyone knows that is not true and you do often see that offer or a better one down the road. Their threats are toothless and defendants have gotten more and more savvy. The word is out. They understand better the limitations of the criminal justice system and they can't try more than 2-3% of cases, so there is a lot of leverage for setting things for trial. But if he can't bond out, waiting for trial, maybe a year or two, is not for everybody.

This quote highlights the challenges and nuances faced by defense attorneys. While time will most likely result in a better offer for their client, it can take a very long time, and those who are in jail waiting for a case resolution may not have the same feelings towards this as someone out on bond. Retained Attorney 3 said they tell their clients that "time is your friend." Several interviews also highlighted the frequent turnover of prosecutors in this jurisdiction and indicated that this may be to the defendant's advantage. Retained Attorney 1 said they would "kick the can down the road" until a new prosecutor comes in. Judge 2 said that when negotiating, an attorney may "wait until another prosecutor is transferred into the prosecutor's court." Assigned 2 echoed this and said that a new prosecutor may be able to get you what you want.

Some defense attorneys stated that they put their clients to "work" while negotiations proceed in order help to get charges reduced or dismissed. One public defender mentioned that sometimes they have homeless clients do community service on their own to show the prosecutor they are remorseful. Public Defender 2 said that for first time, low-level drug offenders:

Usually, I will request misdemeanor reductions if the client is able to have the ability to get classes or community service done. No matter what their age, who they are, or whatever, if it is a state jail felony case, I will ask for a misdemeanor reduction with conditions—drug education classes, or community service, or both. Sometimes the DA will say they want 1 or 2 clean UAs [urine analysis] first. That is common for me at least. ... The D.A.s that I deal with out of my court are usually pretty open to giving defendants the opportunity.

Likewise, Retained Attorney 3 said they ask the prosecutor if their client does certain things like parenting classes, “would that do it for you?” Retained Attorney 1 encourages their clients to attend Alcoholics Anonymous or Narcotics Anonymous meetings because they think prosecutors “want a reason to justify giving your client a deal.” Retained Attorney 4 explained that they often encourage their clients to do something the prosecutor wants, like going to treatment or performing community service.

Lastly, defense attorneys explained that they share information and history about their clients to make them look more sympathetic. Judge 2 acknowledged that sometimes the prosecutor listens to comments made by the defense attorney about their client and potentially reduce the sentence. Prosecutor 1 described that the “flow of information” can change significantly after the first offer because the defense attorney is now in charge of sharing information from the prosecutor. This prosecutor continued to emphasize that this is their “duty” because otherwise, prosecutors would not have that information. Public Defender 1 acknowledged that it is the defense attorney’s job to portray the defendant in a “beneficial” light.

Just as in a business negotiation, certain skills and techniques can be more effective for obtaining what you want. These interviews highlight variation in views on experience, skill, and strategy among attorneys. Similar to the diverse negotiation strategies employed by defense attorneys, different counseling strategies exist as well.

Counseling

Here, we detail client counseling tactics used by defense attorneys that emerged from the interviews. In this section, we cover information gathering, information sharing, collateral consequences, and defendant autonomy.

Information gathering

One of the primary components of counseling a client regarding a guilty plea is the defense attorney’s focus on obtaining relevant information. This can pertain to the offense itself. Assigned Attorney 2 refuses to negotiate until they have “all the evidence,” and Assigned Attorney 3, as well as Retained Attorney 4, highlighted the importance of obtaining the police report. Public Defender 3 stated that it is important to get a client as much information as possible during the negotiation process: “You can

find an investigator if you need one. Then you go to the prosecutor and ask them what their rec is. Then you tell their client what the rec is and answer any questions they may have." Defense Attorneys also obtain information about their clients, particularly concerning collateral consequences (discussed further below). Many attorneys were keen to avoid felony convictions, particularly the first one, with Public Defender 1 saying they "always ask if it's their client's first felony," because they will not accept any plea deal that will put a felony on their client's record.

Information sharing

When discussing a plea offer, defense attorneys must share information with their clients. Though they all seemed to err on the side of disclosure, exactly *how much* information they share seems to depend upon the attorney. Some attorneys share information regarding the case, evidence, etc., but do not volunteer their assessment of the fairness or quality of an offer. Other attorneys, however, choose to share their own assessments of the offer. Public Defender 1 "gives [the client] a range of punishment, offense report, and evidence. [I] show what the state's case looks like" and tries to share as much information as possible. Assigned Attorney 3 said that they "see their job as giving [the client] all the information they need to make an informed decision." Assigned Attorney 3 stated that they do not share their opinion regarding the quality of the offer unless the defendant asks (though they also recognized that clients "nearly always say yes" to an offer). Retained Attorney 3 similarly stated that they see their job as "giving as much information as they can" to their clients for them to make "knowing" decisions, using language that mirrors Assigned Attorney 1. Retained Attorney 4 also seemed to view this as an integral part of their counseling duties; they stated that they "evaluate whether it's a good plea offer or not" and explain that to their clients.

Closely tied to the sharing of information is whether attorneys can accurately estimate likely case outcomes and whether to provide this to their clients. Throughout the interviews, almost all of the court actors stated that they are often thinking about what would happen if the case were submitted to a jury. Assigned Attorney 1 tells their clients what they believe a judge or jury would do if presented with the case. This prediction is not always easy to make, however. Assigned Attorney 3 explained that sometimes the outcome at trial is obvious, but that "facts are the starting point for considering your options" and that attorneys have to use a "crystal ball" to predict what would happen at trial. Public Defender 1 also stated that courtroom actors are like realtors who know the true worth of a case. Retained Attorney 2 expressed similar sentiments, saying that prosecutors "know what a case is worth" and that both prosecutors and defense attorneys are trying to figure out who would win at trial. Public Defender 3 viewed probable case outcomes through a different lens; they stated that they shared with their clients what the best and worst-case scenarios would be in order for them to make an informed decision. Public Defender 2 explained their method as such:

I never give them a percentage of what I think will happen at trial. I tell them it's 50/50 and this is the good and the bad. Let's go through the evidence. If the bad stuff outnumbers the good stuff, I will show them. I write it on paper, like a pro and con list, to show them what they're facing if they decide to go to trial ... I will tell them if I think it's a good or bad plea bargain. We talk about it, how it will affect them.

In general, sharing information about the case and outcomes emerged as key considerations of client counseling. Attorneys in this jurisdiction also agreed that plea negotiations operate with the possibility of a trial in the background. However, differences emerged when considering whether and how defense attorneys choose to share these likelihoods with their clients.

Collateral consequences

Practitioners in this jurisdiction often identified collateral consequences as key considerations for pleas. Retained Attorney 4 succinctly summed up the weight of collateral consequences: "If a criminal conviction didn't hurt, everyone would take it." All of the public defenders and one assigned attorney volunteered that they discussed collateral consequences with clients, and after probing, a few of the other assigned and retained attorneys noted that collateral consequences are part of the counseling process. For example, Public Defender 2 said they tell their clients that they are waiving their constitutional right to trial; they also discuss whether the client is on government housing or if Child Protective Services would get involved. Public Defender 3 noted that if it is a defendant's first offense, they try to negotiate for a sentence that will not go on their record because "it affects the ability to get employment, housing, the ability to get loans." Public Defender 1 also said they ask clients if it is their first felony and makes sure to tell them if a plea could lead to deportation (as a large county in Texas, this could be of particular concern in this jurisdiction).

Defendant autonomy

Lastly, interviews revealed variation in how much autonomy defense attorneys afforded their clients. Many attorneys expressed similar sentiments to Public Defender 3, who seemed to adhere to a client autonomy perspective when they stated that "ultimately it's the client's decision." Supporting this type of perspective, Retained Attorney 1 explained in detail which choices are their client's:

When I meet with a client for the first time, I tell them there are 4 decisions that belong to them: whether to plead guilty or whether to go to trial, judge or jury trial, whether you want to testify, judge or jury for punishment. My job as an attorney is to help you understand what each of those options means. I am managing variables. Every single case I have I will build a defense.

Similarly, Public Defender 1 said they "try to just let [clients] choose, even though it's difficult" and that they defer to clients because "it's not my life." However, Assigned Attorney 1 expressed more nuanced beliefs, saying, "you don't ever force a plea," but also stating that they will tell their clients that "if they

really want to move on with their life," they should take a jail plea to avoid treatment or probation that they would likely fail. Retained Attorney 1 said they do not usually "tell someone what to do" and if they do, it is because that person is "on meth." Lastly, Retained Attorney 3 expressed more paternalistic sentiments for a client whom they knew "had an issue" and who was offered a sentence of approximately eight months in jail or five years of probation:

I had to tell the client that he probably wouldn't make probation because he was an addict. After probation is revoked, there's a full range of punishment available and then [the client] would be in front of a judge who had already seen him before. I told him that jail time was a better option. You don't have to worry about checking in or drug tests while in jail. Get in, do time, get out. I know that some clients just won't succeed on probation.

In general, our data indicate that these defense attorneys try (though it may be challenging) to let defendants make the final choice regarding whether to accept a plea offer or not. All defense attorneys highlighted autonomy and acknowledged that it was the defendant's choice because it was their life. However, several also brought up the specific case of a client suffering from addiction. As demonstrated above, attorneys differ in how they gather information, share it, and decide how much influence they allow their clients to have on final sentences. Below, we place these findings in the context of extant literature and provide suggestions for future research.

Discussion and conclusion

This study provides insight into the inner workings of plea bargaining in a large, urban, Southern jurisdiction with unstructured sentencing. Although there has been some qualitative research on plea bargaining (see Eisenstein & Jacob, 1977; Nardulli et al., 1988; McDonald, Rossman, & Cramer, 1979; Bowen, 2009; Angioli & Kaplan, 2018), much of it is dated and the intricate process of plea negotiation remains a topic deserving of further inquiry. Further, a great majority of bargaining and sentencing research (though not without good reason) neglects the role of the defense. We aim to fill some of these gaps by increasing knowledge of plea bargaining and negotiation, with a specific focus on defense attorneys.

The overall sense that an individual courtroom actor in a negotiation can have impacts on the final outcome challenges some previous conceptions of mechanized justice (see e.g., Bibas, 2012). However, it supports others, such as Nardulli (1988, p. 398), who stated that "the informal nature of the plea process makes it the most likely arena in which personal relationships can make a significant difference." Interactions between, reputations of, and institutional knowledge of courtroom actors were key points for plea negotiations in the present study. Furthermore, scholars (see, e.g. Hollander-Blumoff, 1997; Bibas, 2004; Bushway et al, 2012) have previously argued that courtroom actors are eager to avoid the costs of trial and that negotiations thus often occur in the "shadow" of the trial.

There is evidence from these practitioner interviews to support that position; for example, Retained Attorney 1 stated that "prosecutor resistance for setting up a case [for trial] is considerable." It seems, then, that Hollander-Blumoff's (1997) argument that a full trial is frequently the BATNA during a criminal plea negotiation holds true here.

Practitioner conceptions of potentially harsh and unpredictable juries are also consistent with work on the "trial penalty" and research indicating that jury sentences can be more severe than judicial sentences (see LaFree, 1985; King & Nobel, 2005). Along these lines, there was agreement among most actors (including one prosecutor) that assistant district attorneys possess vast discretion in making and bargaining over offers, which also supports quantitative work on inter-prosecutor disparity (see Spohn & Fornango, 2009; Kim, Spohn, & Hedberg, 2005) and previous research suggesting that successful attorneys must be well-acquainted with the norms of their jurisdiction, including views of specific actors (Eisenstein & Jacob, 1977; Uphoff, 1995; Hollander-Blumoff, 1997). For the present sample, it appears that a defense attorney who approaches negotiation without appropriate institutional knowledge may place their client at a disadvantage. There are also a few caveats regarding the significance of relationships and reputations. First, in previous conceptions, courtroom regulars were typically identified as such because of their frequent interactions with other actors (Eisenstein & Jacob, 1977), whereas for this study, relationships and reputation could be important because of friendships that form outside of work. It was also somewhat surprising that practitioners described that some reputations were based on only one prior interaction.

When focusing on the defense strategies in particular, results demonstrated that approaches to negotiations varied widely. This is consistent with the fact that ethical obligations for negotiation are vague (Alschuler, 2013; Alkon, 2016), attorneys typically receive more academic rather than skills training in law school (Sullivan, 2007; Fine, 2009; Lande, 2013; Roberts & Wright, 2016), and that attorneys use divergent methods in their work (Alschuler, 1975; Schneider, 2002; Alkon, 2016). The idea of "skill" came up frequently in interviews, but the meaning of this term was unclear. This is in line with some court rulings and previous conceptions that negotiation is an "art," but disagrees with more recent literature on effective negotiation strategies (see Alkon, 2016). Supporting Hollander-Blumoff's (1997) argument that an additional BATNA (beyond a trial) is letting a case linger, many defense attorneys in this study also stated that at times, they would allow a case to sit on a docket until the prosecutor was simply ready for it to be finished.

Interestingly, while much literature focuses on adversarial versus cooperative strategies in negotiation (Hollander-Blumoff, 1997; Schneider, 2002), these actors did not discuss those two extremes (or personality traits—see Lynch & Evans, 2002) in much detail. Defense counsel did speak to how often to contact the prosecutor, but more in terms of whether it would annoy the prosecutor and less regarding cooperation. Defense attorneys also discussed the importance of sharing key facts regarding their

clients in order to make their clients seem more sympathetic, which a key strategy that Uphoff (1995) suggested for successful defense negotiation. A novel theme that emerged was the tactic of putting defendants to work while awaiting their final disposition. This strategy differs from others mentioned in the literature (see e.g., Uphoff, 1995) because while some previously identified strategies were seemingly more centered on the defendant's history, practitioners here were also focused on what the defendant could do *after* being charged.

Our findings for negotiation largely support previous literature finding that successful defense negotiators need to appropriately research their case and their client and be aware of the norms of the jurisdiction. We also identified a few irregularities. Interestingly, the idea that "going rates" exist for specific offenses and are important for defense attorneys to be acquainted with is not new (see Bibas, 2004; Alkon, 2016) and was generally accepted by defense counsel and attorneys, while prosecutors rebuffed the concept. This may reflect prosecutors' desire to look as though they are not simply a part of assembly-line justice, or it could be that their perceptions simply differ from the other courtroom actors. In addition, the significance of non-work relationships and the strategy of putting clients to work post-charging are all less well-known concepts. Results for counseling followed along the same lines.

The four main themes for client counseling are deeply intertwined. First, defense counsel must do appropriate research and gather information to ensure that they can ethically advise their clients, which is closely tied to the need to do adequate research prior to negotiation (see Uphoff, 1995). Second, they must decide how much information to share with their client; we discuss this in more detail below due to its interplay with autonomy. Our third theme demonstrates that a key component of this information sharing is whether there are relevant collateral consequences for their clients. Notably, the defense attorneys interviewed in this study were often aware and concerned about the effects of collateral consequences for their clients. It seems that the concerns of Chin and Holmes (2007) and the Supreme Court in *Padilla v Kentucky* (2010) have been acknowledged, at least by some attorneys in this study. Not only that, but some attorneys seem to be well-informed regarding the "web" of collateral consequences (Smyth, 2010) that may affect a client's decision to accept a plea offer. Another important consequence of the *Padilla* (2010) decision is the emphasis it naturally places on the defense attorney to gather information from their clients, which was highlighted by Public Defender 2, who presented a long list of questions to ask the client in order to determine the full potential effect of collateral consequences and Prosecutor 1 who stated that it is defense counsel's job to portray their client positively.

All of the above is tied directly to our fourth theme of client autonomy, which in turn is tied to ethical requirements. There are indications that attorneys in this jurisdiction are working to meet their ambiguous ethical requirements to provide "zealous" representation (Freedman, 1990; Flowers, 2009),

as they often discussed presenting all offers to their clients, as required by *Frye* (2012), and reviewing potential collateral consequences as required by *Padilla* (2010). There was no explicit discussion by these practitioners regarding incorrect legal advice (such as that at issue in *Lafler* (2012)). However, many defense attorneys expressed that it was critical to share all relevant information so that a client could make the most informed decision possible. Attorneys who view their clients as more autonomous might share information differently than those who view their role as more paternalistic, which is crucial given recent quantitative research demonstrating that the method of information presentation could affect defendant decision-making (Henderson & Levett, 2018; Garner-Dykstra & Wilson, 2019). Moreover, much legal research on client-attorney counseling has centered on the (potentially) dichotomous difference between paternalistic and autonomous perspectives (see Simon, 1991; Spiegel, 1997).

After careful consideration of the data, three possible interpretations of the relationship between paternalism and autonomy emerge. We discuss each of these below and conclude that the most likely explanation for these divergent explanations is that different defense attorneys adhere to different values. First, the relationship between paternalism and autonomy can be viewed as rigid, independent categories. Attorneys can be authoritarian (paternalistic), client-centered (autonomous), or collaborative (see Fountain and Woolard, 2018; Henning, 2005), and there is some support for this perspective in the current data. Public Defender 2, for example, states that they “never give [the client] a percentage of what I think will happen at trial,” suggesting adherence to the autonomous view, or potentially an inability to make accurate predictions. Likewise, Assigned Attorney 3 only gives their opinion if the client requests it, suggesting more of a client-autonomy approach. Retained Attorneys 3 and 4 both mentioned giving more paternalistic advice in cases where they felt the client was ill-equipped to handle the decision. This is the simplest interpretation of client-counseling—that attorneys concretely fit into a category of either client-centered, authoritarian, or collaborative. However, data also suggest that a more nuanced relationship may exist.

Second, it appears that the autonomous perspective may operate as an ideological goal that is sometimes subjugated to paternalism in practice. Because legal and ethical standards regarding autonomy are typically vague (Uphoff & Wood, 1998), attorneys can adopt either view when they feel it is necessary. This may explain why some attorneys in this study preach the autonomous perspective, but perhaps practice paternalism at times. For example, Retained Attorney 1 states that their client makes the decisions unless their client is “on meth,” in which case they take a more authoritarian approach. Retained Attorney 3 identified similar practices when discussing addiction, stating that they usually encourage drug-addicted clients to avoid supervision and opt for shorter incarcerative sentences. It is possible that the paternalistic and autonomous methods are not competing, rather they are selected depending on the individual case and client. In other words, client autonomy is the default, but specific circumstances, such as drug addiction, activate a paternalistic approach. This falls

in with Spiegel's (1997) criticism of Simon's (1991) emphasis on client autonomy, where he argued that an overreliance on client autonomy may result in decisions being made against the client's best interests. It is important to note, however, that some attorneys seemed to adhere to a strictly autonomous view.

A third interpretation of the relationship between autonomy and paternalism is most easily represented in this short statement from Public Defender 3, "ultimately it's the client's decision." From this we learn that the attorney's function could be primarily paternalistic, but ultimately client autonomy reigns. In other words, attorneys try to present information and opinion in such a way that directly influences how a client perceives the decision before them, but "ultimately" it is the client's prerogative to accept the offer. For example, Assigned Attorney 3 sees "their job as giving [the client] all the information they need to make an informed decision." It is entirely possible, and even likely, that "all the information" would include more paternalistic presentations of opinions and possible trial outcomes, while the submission to the client's "informed decision" rests more in the autonomous perspective. The latter two interpretations suggest that paternalism or autonomy perspectives may come into play as counseling strategies depending more on the case-specific interaction between the attorney, the client, and the case itself. The first interpretation, however, submits that attorneys adhere to a rigid counseling strategy in all cases. There is evidence to support all three interpretations in the data; we suggest that the most likely reason is that because ethical obligations are vague, each attorney adheres to their own set of personal values. Nonetheless, further research is necessary to understand better how these processes come into play for attorneys during client counseling.

One of the main goals of this project was to focus attention on the least studied member of the courtroom workgroup. Our results demonstrate that failing to account (or even acknowledge) the various decisions and the defense may lead to a less accurate picture of plea bargaining. Surprisingly, a few themes did not emerge from the data that one might have expected. Differences between publicly-funded defense and privately-retained defense were seldom mentioned in the interviews. Though the differences in public defenders or assigned counsel and private attorneys are nowhere near empirically established (see Williams, 2013; Hartley, Miller, & Spohn, 2007; Cohen, 2014), there is often a perception that state-funded representation is always worse. It is possible that social desirability bias prevented some individuals from expressing such opinions, or that they do not believe that those attorneys are "worse." In fact, one prosecutor stated that public defenders were more "proactive" than some private and assigned attorneys. Second, participants often brought up attorney effectiveness; however, no single attribute, skill, or strategy was universally accepted by all attorneys to distinguish the "good" from the "bad." In terms of the lack of consensus in our sample on what makes a "good" attorney, we hypothesize that this may merely reflect the fact that attorneys possess divergent on how to provide a zealous defense.

There are several limitations to this study. First, this study utilizes a convenience sample and the sample size could be larger. While many valuable perspectives were obtained from these interviews, it is unlikely that they represent views of all practitioners in the county. Future work should strive to engage in more qualitative research to better understand the intricacies of the plea bargaining process as a whole. The sample is also skewed towards defense attorneys, which could bias the overall results; each courtroom actor has a specific perspective and focus on their particular goals. This concern is somewhat ameliorated, however, by the fact that the vast majority of participants had previously worked in different courtroom roles. The sample comes from only one jurisdiction and this limits external generalizability. This is a concern with all sentencing studies that include single jurisdictions because each courtroom is its own microcosm with unique norms and procedures that vary significantly across counties and states. Again, future research would benefit from increased qualitative work in varying jurisdictions.

These results also point to a number of important future directions. First, data on plea bargaining needs to be improved. Though this is not a new argument (see Ulmer, 2012; Bibas, 2016), our results point to a key area for future data collection: information on previous offers. Limited (and valuable) prior research has included this information (see e.g., Kutateladze et al., 2014, 2015), but this is still rare. Only one defender in this sample stated that they required all offers in writing. However, empirical evidence of prior offers would provide a wealth of information on whether there are potential disparities in the offers being made and which defense attorneys are more successful at negotiating offers down. This could also be tied to evaluating whether skills training in law school (or through continuing legal education, employer training, etc.) is related to negotiation and final case outcomes (see e.g., Carver, 1986). In addition, future work on the timing of plea offers and whether delay is an efficacious strategy would be fruitful. It would also help assess whether there are key differences in case types or case severity; the admission by Prosecutor 3 that there are offer guidelines for misdemeanor prosecutors but not felony prosecutors highlights potential variation by severity. Second, though these results suggest that client counseling is a key component of the plea process, it is rarely discussed in social science literature. Additional relevant questions regarding counseling would include how defendants feel about the counseling they received, whether they felt heard, and whether they were overall satisfied with their representation.

Third, these results highlight the importance of qualitative work. As discussed immediately above, practitioners provided perspectives that contradicted underlying assumptions of much of the sentencing research. Specifically, the finding that prosecutors (but not other courtroom actors) often refuted the idea of "going rates" is interesting and deserving of future attention. These types of insights have the potential to alter researcher knowledge of court processes and lead researchers to a deeper understanding of the reality of case processing. Lastly, future research should quantitatively assess whether different training/education, negotiation, and counseling strategies impact final case

outcomes. Despite the knowledge that going to trial is an increasingly rare method of case disposition, many law students and lawyers still receive little training on "soft" skills such as interpersonal skills, negotiation, and counseling (Dolin, 2007; Sullivan, 2007; Roberts & Wright, 2016). If there is empirical evidence that certain strategies directly impact case outcomes, possibilities for improved training and knowledge of negotiation strategies may be greater. Moreover, if some attorneys are more forceful in advocating for their clients to take a prison sentence with potentially negative collateral consequences, this also raises potential ethical and fairness concerns.

In sum, these results strongly suggest that negotiations between prosecutors and defense attorneys result from interpersonal relationships and varying strategies of defense counsel, both in negotiation and in client counseling. Defense attorneys have a considerable ability to alter a case's progression and final outcome, but we know little about their opinions, perspectives, and strategies. In the future, researchers should work to better understand *all* players in the plea bargaining calculus to increase access to justice.

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Contributors

Jacqueline G. Lee is an Assistant Professor at Boise State University in the Department of Criminal Justice. Prior to graduate school, she also earned a J.D., and her research focuses on courts and sentencing, the courtroom workgroup, prosecutorial discretion, and the integration of legal and social science research.

John W. Ropp is a PhD student at Michigan State University. He completed his M.A. at Boise State University. He is primarily interested in researching the relationship between the public and local courts, but also researches sentencing, child sexual abuse, sexual deviance, and human trafficking.

Footnotes

1. There is a growing literature examining whether type of attorney (privately-retained, assigned, or public defender) affects final outcomes. These studies are mixed, though they frequently conclude that assigned counsel fares the worst. This information is important but overall, outside of the scope of the current study which focuses more on individual differences. Key sources for further reading include Cohen (2014); Hartley, Miller, & Spohn (2010); Williams, 2013; Agan, Freedman, & Owens (2017). [↵](#)
2. The exact number of judges is not disclosed in order to avoid identifying the county. We also do not identify gender for any participant in our results section in order to guarantee anonymity to participants. [↵](#)

3. The decision not to record was based upon discussions with practitioners in the county, who indicated that most courtroom actors would likely not consent to being recorded and might decline to participate if asked. This potential "chilling effect" (see Hester, 2017) occurs often with courtroom actors. [↔](#)