Aspects of Sequential Organization in Plea Bargaining Discourse*

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This paper pursues a beginning, formal understanding of negotiation or bargaining as a naturally occurring phenomenon. The approach represents a departure from usual studies of negotiation, which can be classified into two major groups. First, students of the criminal justice process have, especially in the last decade, subject "plea bargaining" to close scrutiny with respect to its status as an instrument of justice and its function as an aspect of courtroom decision making. Second, social psychologists have studied the influence of manipulable variables, such as attitudinal commitment, prior experience, and group and individual differences, on outcomes of joint negotiations. What neither of these perspectives has explicitly addressed, however, is just how some discourse is organized so as to make its status as negotiation and bargaining a rational or accountable feature of the interaction.

The aim here is to understand plea bargaining by close scrutiny and analysis of a collection of tape recorded negotiations, and to provide a social organizational perspective that orders a range of practices subsumed by the term. That is, in defining plea bargaining, a large number of researchers agree that it refers to courtroom transactions in which there is an exchange between the prosecution and defense in criminal cases. When defendants plead guilty, they receive some dispositional "consideration" from the state, which, in turn, gets sure convictions with less expenditure of time and money than going to trial would require (Alshuler, 1968, p. 50; Baldwin & McConville, 1977, p. 23; Bottoms & McClean, 1976, p. 123; Feeley, 1979c, p. 185; Grossman, 1969, chap. 7; Klein, 1976, chap. 1; Miller et al., 1978, p. xxi).1 However, such a definition is well-recognized to

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* A number of persons have made comments helpful to this paper. Gail Jefferson provided an extensive critique of a much earlier draft. Charles Goodwin, Thomas P. Wilson, and Don H. Zimmerman also read different drafts of portions of the paper and gave valuable feedback. To each of these persons, I remain grateful.

1 This research was partially supported by a grant from the Research Committee of the Graduate School at the University of Wisconsin-Madison (Project #110642).

1 Note that the studies cited include two Canadian ones (Grossman, 1969; Klein, 1976) and two English ones (Baldwin & McConville, 1977; Bottoms & McClean, 1976) in addition to American ones, so that there appears to be some consensus among researchers in different countries.
2. B: That's how I felt=
A: =Really

3. A: And I'm not use ta that
B: Yeah me neither (1.4)

4. A: People would say I'm from Marin (.) County

5. A: Are they?
B: Uh huh they are because

6. A: It was unbelievable. I had
B: You did.

7. A: It was three point six? I think.

8. B: I did okacy

9. A: That's where I REALLY want to go

10. A: I told them that there was- well there IS
    a job opening

11. B: That(h)t was really neat

12. B: You didn't have to worry about having
    the hh curtains closed

13. A: "Uh huh

14. B: (Is that right)
ASPECTS OF SEQUENTIAL ORGANIZATION

I. BARGAINING SEQUENCES

Since they represent different parties, we might expect that defense and prosecution lawyers would each hold some position about which course of action is appropriate in each case. More than that, however, we will see there are orderly ways in which those positions are made visible in plea bargaining. In general, we can speak of a bargaining sequence being basic in this discourse, consisting of (1) a turn in which speaker exhibits a position, and (2) a next turn where recipient displays alignment or nonalignment with the initially exhibited position. In this section, I will discuss two forms that initiate the bargaining sequence: (A) Proposals, and (B) Position-reports.

A. Proposals

Negotiators characterize some of the utterances in which they make a position visible as "offers," "suggestion," "asking-fors," and "proposals," the latter being an umbrella term to be used here.

1. 5.025  [Disorderly Conduct]
   PD2: Is there a offer in that case
   DA1: I would say in this case uh a fine, seventy five dollars
   PD1: Arright

In this example, PD2 solicits an "offer" from DA1, who provides it in line 2. Proposals like this are also defined by the replies they obtain, which are acceptances or rejections. In the above, PD2 accepts the DA's offer, in line 3, with "arright." Following are other examples of proposal sequences. In some, the proposal is accepted; in others, it is rejected.

2. 34.084  [Burglary]
   PD2: Well, tell you what, how 'bout the very short jail sentence
   DA3: Arright

3. 25.192  [Breaking or removing vehicle parts]
   DA3: How 'bout three months
   PD1: Naw that's too much.

In each of these sessions of plea bargaining is a delicately managed phenomenon. Still, even in conferences officially designated for plea bargaining, as those reported on here, "discovery" and "disclosure" can be salient issues, such that "bargaining sequences" are delayed until they are settled. More generally, these sequences are locally occasioned, i.e., there are procedures for introducing them into turn-by-turn talk. These matters are not further investigated here, however.

The approach to the empirical materials is conversational analysis, which is concerned with such things as the sequential structure of talk as a moment-by-moment accomplishment (Sacks, Schegloff, & Jefferson, 1974). That structure is capable of description and analysis insomuch as conversationalists themselves describe and analyze what they are doing in and through their talk. Thus, the sociologist is concerned with members' orientations in talk and not problems which are provided by this or that academic discipline (cf. Schegloff & Sacks, 1974). The first-order interest here is to make sense of the plea bargaining data by analyzing participants' own sense-making activities, and not to address issues of traditional concern in social scientific investigations of plea bargaining, such as the "fairness" and "accuracy" of the practice in separating the guilty from the innocent (cf. Newman, 1966).

"Plea bargaining is thus an officially recognized and scheduled occurrence in this court. And this may be a qualitative difference from the Canadian "discovery" and "disclosure" sessions Lynch (1979) has studied, where plea bargaining is not bureaucratically mandated, and any "move" to plea
This is part of a longer stretch of talk which would bear more systematic analysis than space would allow here. Roughly, however, we can characterize DA2’s utterance as the announcement of an “intention” that is non-negotiable, rather than as an opening that implicates bargaining responses or replies of the sort discussed here. PD2 hears the utterance as “throwing” the case in his teeth, and produces the assessment that “this isn’t plea bargaining.” Thus, “demanding” rather than “offering,” “proposing,” “reporting,” etc., seems an objectionable action in these conversations, and results in work which would reestablish their “bargaining” character.

Another way of establishing how basic an organized unit may be, suggests Sacks (1972, lecture 2), is to show that it is involved in the constitution of other features of talk which are not necessarily implicated in the construction of that unit. Here we have seen that the bargaining sequence accommodates a wide variety of bargaining practices mentioned at the outset and explored in the empirical analysis. Some negotiations involve discussion of charges, but not all. Some involve consideration of sentence, but not all. Other times, dismissals, continuances, or trials are posed as courses of action. In some negotiations, one party simply aligns with an initially exhibited position of the other’s, while in others “compromise” is produced as a visible feature of the discourse. In some discussions, “character” and “facts” are argued, making for “adversary” conflict. Others only involve proposals over the course of action to be taken in the case, and appear more “routine.” Thus, while no one of these features is invariably related to the constitution of a plea bargain, it is the case that the bargaining sequence is involved in “charge bargaining,” “sentence bargaining,” the achieving of a dismissal, continuance, or trial, coming to a straightforward agreement, “compromising,” “arguing character,” “discussing facts,” and so forth, when they are done.

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APPENDIX

ADAPTED TRANSCRIBING CONVENTIONS

1. A: Oh you do? Really
   B: [um hmm]
   A: A left-hand bracket marks the point of overlap, while a right-hand bracket indicates where overlapping talk ends.

*From the work of Gail Jefferson
The utterance in line 2 here can be characterized as a proposal because it follows an utterance in which an “offer” has been specifically solicited. And, in line 5, “fifty dollars” can be heard as a proposal regarding the amount of the penalty in that it follows the sequence in which a “modest fine” has been suggested and accepted.1

B. Position-Reports

A second way that negotiators assert their position is by forming them up as reports, marking the utterances with prefophets such as “I’d like,” “I want,” “I think,” and the like, which indicate the position taken is a private or personal idea, preference, desire, etc.

9 20.047 [ Petty theft] 
PA2: I’d like to see it kept off his record

10 45.004 [ Drunken driving] 
PD2: We wanna plead 'im to a first time deuce

11 51.159 [ Drunk driving] 
PA4: I’d be willing to take two movings

1More precisely, the “fifty dollars” (line 5), following the “okay” (line 3), helps to accomplish the latter’s visibility as an acceptance. As a comparison, in the following, a judge exhibits a position (lines 1–2). That “report” (position-reports are discussed in the next subsection) is similarly followed by an “okay” (line 3). In this instance it does not at all indicate acceptance, but rather a mere acknowledgment of the judge’s position since it follows is PD4’s statement of nonallegation (lines 5–6).

[Assault with deadly weapon]
1. J2 My inclination is that he-you know I think he should spend
2. some more time in
3. PD4: Okay
4. (0.2)
5. PD4: My- my problem with that judge is uh their case doesn’t look
6. that good to me

To return to example (8), just as the “okay” (line 3) is partly constituted as an “acceptance” by what follows it, that “okay” is also an “acceptance” because it is positioned after a proposal-utterance. Moreover, it is involved in accomplishing DA3’s utterance in line 2 as a proposal, in that proposals are followed by acceptances/rejections. Thus, characterization of an utterance as a “proposal” or “acceptance” is profoundly dependent on how the utterance is heard in relation to what precedes and follows it, and how what precedes and follows it is heard in relation to the given utterance. In other words, any utterance’s status as a characterizable entity is an achievement of its reflexive relation to the retrospective-prospective sequential content of its production. (See the discussion on how utterances “derive their character as actions” in Schegloff & Sacks, 1974, pp. 241–242.) In what follows, terms such as “proposal” and “reply” should be understood as glosses for the work involved in their ongoing constitution.

1“Four eight four” refers to the section of the California penal code regarding theft.
2“Mal Mishi” refers to “malicious mischief,” the title of the Penal Code section under which vandalism falls.
ances, there is a dispute over the meaning of the prior record. DA3 notes the similarity of the prior to the present charge (lines 2–3), while PD2 devalues that topic ("Will you knock it off," etc., lines 4–5). Next, DA3 undercuts PD2's earlier description of the defendant ("happy go lucky chap") by juxtaposing it with the fact that the present charge is not the defendant's "first encounter..." (line 7). But PD2 produces an utterance minimizing the importance of the prior offense by invoking the defendant's race and its effect on contacts with the police (lines 8–10).

Then, PD2 solicits a display of position in an utterance that is latched to his last one (i.e., there is no gap between "...if you're white" and "new c'mon..."). That may work to prevent a "rejoinder" by DA3 on the issue of prior record.1 It collaborates in soliciting a proposal from the DA (lines 12–13). Given PD2's earlier suggestion of a $25 fine, DA3 counterproposes "seventy five dollars" (line 15), which itself is countered by DA3's offer of a "compromise" fine (line 16). DA3 then aligns with that suggestion (line 17), and PD2 acknowledges the alignment (line 18). Thus, agreement is reached on a sentence by way of proposals and counterproposals which observably focus away from the topic of the defendant's prior record.

In summary, over the course of this discussion, a number of issues are raised, including the moral character of the defendant, the "facts of the case," and the significance of "prior record." Each of these topics is constituted by prosecution and defense formulations which remain unreconciled. For the public defender, "Frank Bryan" is a nice guy, whose only offense was being drunk, fighting with his family, and cursing in this own home. He was intruded upon there by police officers who may have roughed him up during the arrest. He has a prior record by virtue of being black and statistically more likely to encounter the police. For the district attorney, the defendant is one who gave the police much difficulty in making an arrest and who has a prior conviction for the same kind of conduct. Clearly, different interpretations of both the defendant's act and his character are produced and held open over the course of the negotiations. These interpretations articulate with, and provide the "reasonableness" of the original positions DA3 and PD2 take up, and their disparenateness is maintained even while the negotiators, by way of bargaining sequences, reach agreement on both the charge that is appropriate, and what the sentence should be. Thus, in plea bargaining, negotiators do not necessarily "decide" character and "settle" facts. Rather, considerable disagreement and "adversariness" may be maintained in the pursuit of those topics, even while a decision is made on a course of action for the case through the deployment of bargaining sequences.21

III. CONCLUSION

This paper has examined the use of bargaining sequences in the discussion of misdemeanor criminal cases. The sequence consists of two turns: one in which a given party makes a position visible by means of a proposal or position-report, and a second in which the other party replies by exhibiting alignment or nonalignment with the presented position. The bargaining sequence can thus be considered as a basic unit of social organization (cf. Schegloff, 1980, p. 151) which, in its simplest form and by way of its systematic elaboration, achieves the visible "bargaining" character of the lawyers' talk in these conversations. Plea bargaining, as exhibited in negotiators' actual speaking practices, consists in the turn-by-turn display of prosecuting and defense positions regarding what course of action should be taken on a given case.

That this sequence is basic to plea bargaining can be established in two ways. First, in examining the 53 cases in the corpus, the bargaining sequence appears at least once in discussion of every case, with one exception. In this one case, its absence is subject to complaint and repair.3 The following segment is from the discussion of the case, which had been repeatedly "continued" and had been on the court calendar for some months.

21The notion that defense and prosecution come to some agreement on the character of the defendant and the facts of the case before deciding disposition, depicts these actors as overinvolved in their situated bureaucratic identities. As Buckle and Buckle (1977, p. 80) put it, "All the attorneys are, generally, motivated by their need to conform to the culture of the court." In Eisenstein and Jacob's (1977, p. 25) treatment, the members of the courtroom "workgroup," including judge and attorneys, . . . share values and goals. These shared perspectives undermine the apparent conflicts generated by the formal roles of workgroup members—the prosecutors' push toward convictions, the defense attorneys' quest for acquittals, and judges' inclination toward neutrality.

In example (25), as said, different interpretations are placed upon the defendant and his act, and are actively preserved in relation to bargaining sequences that are utilized to decide charge and sentence. Thus, defense and prosecution attorneys appear capable of enacting bureaucratically appropriate activity (clearing the docket), and yet sustaining and displaying their commitments to wider identities as defense and prosecution representatives. See Goffman's (1961) discussion of "role distance."4

22The "at least one" provision points to the fact that there may be a series of bargaining sequences employed in the discussion of any one case. Example (25) shows this, and see Maynard (1981).

23Schegloff and Sacks (1974, p. 236) argue that if conversational features are normative, and not merely analytic constructs, there ought to be procedures for locating violations or for "noticing" the "absence" of the features. "Complaint" and "repair" are two such procedures.
Reports, like proposals, exhibit varied sorts of positions. In example (8), the utterance indicates a preference for dismissing the case; in (9) and (10), the positions reported concern charges; and in (11), the issue is sentencing.

As with proposals, we should not place too much emphasis on the prefacing items in position reports, because the sequential context in which these utterances is crucial to their constitution. Take, for example, the following two segments, where the discussion involves a defendant named Kevin Castle. DA2 asks for, and gets, a statement of an unequivocal want from PD2.

(13) 35.013 [Disorderly conduct]
1. DA2: What do you want on it
2. PD2: I want you to dismiss it

Following this, there is some discussion regarding the police report, and then the talk is interrupted when another DA enters the room. After he leaves, PD2 takes up the case again.

(13a) 35.028
3. PD2: What about Castle

4. DA2: I’ll dismiss that
5. PD2: Arright

PA2, in line 5, aligns with PD2’s position by indicating his willingness to take the course of action that PD2 “wanted.” But DA2’s utterance thereby seems to be more of an acceptance of a proposal, rather than a reply to a position-report. This is a matter that requires some argument.

What may be distinctive about utterances in which some personal state descriptor prefaxes a possible course of action for a case is that in contrast with proposals, different foci and response options are thereby presented to a recipient. An acceptance (or rejection) can be done by focussing exclusively on the “course of action” part of the utterance. To also focus on the preface by producing a parallel one is to preserve the visibility of speaker’s and recipient’s perspectival similarities, differences, or gradations thereof, regarding the posed course of action.

These issues can be made clearer by examining the next segment. This is another petty theft case, in which the woman defendant is described, by the PD, as “middle-aged” and as someone who would not “fit in well with the jail population.” In line 1, DA3 produces a candidate statement of PD2’s position, which is ratified in the first part of line 2 by his report, “I don’t want her to have her do time.”

(14) 39.071
1. DA3: Eh so ya wanta plea her ut ya don’t want to have ‘er do time

After that, PD2 produces another position-report regarding the possibility of probation (line 4). The utterance is prefaced by “I wonder,” contains the hypothetical “if” and an auxiliary “might,” all of which indicated his hesitancy regarding the course of action posed. In his following move, DA3 utilizes a number of devices that contrast with those of the PD: “I think” (line 5) displays a firmer attitude toward the probation possibility than “I wonder”; the hypothetical construction is dropped; and “is” runs counter with “might not be” (a countering that is emphasized by the stress placed on “is”). DA2 then exhibits, in a similar utterance (second part of line 5), a position for “time suspended.” In line 6, PD2 replies to DA3’s reports with an “arright” that displays (and, in subsequent talk, is treated as) an alignment with the position that probation and time suspended are “in order.”

Thus, we see two sorts of second moves in this segment. First, DA3’s response” (line 5) to PD2’s line 4 utterance focuses on both the preface and course of action part of that utterance, and thereby makes observable a strong preference for what PD2 regards less surely (probation) and for another item (time suspended) not broached by PD2. Second, when PD2 replies with the “arright” (line 6) to these utterances by DA3, he hears only off of the perspectival issue, and proffers to treat the probation and suspended sentence actions not just as posed, but as proposed, and accepted. The distinction between proposals and position-reports cannot be made on the basis of the utterances alone, then, but is a contingent achievement of the way the positions are presented and reacted to.

C. Summary: Bargaining Openers

Proposals and reports are two forms by which negotiators display their positions on what course of action should be taken on a criminal case. The argument is that a proposal or report, together with (and as partly accomplished by) its reply, constitutes a sequence which is basic to the production of plea bargaining as a coherent discourse activity. Proposals include offers, suggestions, etc., by which some possible course of action is exhibited to be accepted or rejected by recipient. Position-reports employ personal state prefaxes or descriptors that allow the utterance of which they are a part to be treated as either a perspectival statement or a proposal. Proposals and position-reports will be considered as bargaining sequence openers.

¹⁰"Responses" and their relation to "replies," are discussed in section II.
In line 1, DA3 produces a prototypical preface to a bargaining opener. Then, following PD2’s acknowledgement (line 2), he reports a position regarding the charge (it’s a “clutty,” “better” 148 “if you want to be very strict,” lines 3–5) that offers a contrast with PD2’s characterization of the case (25a). The contrast in positions is actively pursued in PD2’s response (line 6) to DA3’s opener, when he produces a counter-report that asserts he “sees it” as the 647T. This is followed by his characterization of the offense in a way that justifies the lesser charge (lines 6–8). Next, PD2 displays a position that the offense is not “worth any jail time.”

This utterance bears some attention because it may be instrumental in obtaining a “backdown” from the DA regarding the charging issue. Although the PD suggests the case is not “worth any jail time,” that utterance darebearly invokes that it might, then, be worth a fine, since jail time and fines are co-members of the class of sentences appropriate in such cases. Thus, in a manner more subtle than, but related to, a device we saw employed in example (24), the utterance may signal the DA that some concession is made on the charge, at least he will get a guilty plea and a fine from the defendant.

The “backdown” is accomplished by DA3 formulating his earlier position-report as “being academic” (line 10), and invoking the “technical” correctness of the 148 charge. And the accountability of this is provided in lines 13–15, where DA3 suggests the defendant “put the officers through their mettle,” etc. However, DA3’s talk regarding the officers’ pursuit of the defendant occasions a turn by PD2 in which he acknowledges the “commendable” conduct of the officers, and reminds the DA of the injury the defendant apparently suffered (lines 16–19). While the laughter tokens (lines 18–19) lighten PD3’s treatment of the event, he may be bringing up the possibility of “police brutality.” Whatever the issue, it is a possibly touchy one in that, if the laughter tokens constitute an invitation to laugh (cf. Jefferson, 1979), DA3 does not take it up, and its interruptive utterance (lines 20–23) returns the talk to the discussion of the charge. In fact, DA3, at

lines 22–23, formulates a reply to PD2’s counter-report, aligning with the position that a 647T charge is appropriate in the case.

Thus, in this segment, agreement on the charge for defendant Bryan is achieved through an artful concession by the DA, in which a specific attitude is preserved regarding what the “real” nature of the offense is. Where the PD “sees it” as disorderly conduct, the DA can “think technically” that it is resisting arrest. Yet, apparently drawing on professionally commonsense conceptions of a difference between the formal law and its intent, he can go along with the disorderly conduct charge because he does not “know” that the “substantial interests of justice” would not be served by a plea to this charge.

While agreement is reached on the charge in this segment, then, different positions on certain “facts” of the case are maintained. Moreover, the talk in this case never does return to the particulars of the offense, so that the disparate characterizations of the defendant’s behavior are not subsequently resolved. What happens next is that the question of sentencing, first broached in lines 8–9 above (25b), is reintroduced.

(25c) 24.099
PD2: Okay, uh, twenty five dollar fine

The public defender, in this utterance, proposes a fine, but before the DA can reply, the issue is raised as to how much time the defendant has already spent in jail. PD2 leaves the room to find out, returns and reports that the defendant has been in jail 12 hours. Then:

(25d) 24.126
1. DA3: He has uh one prior conviction in this jurisdiction with the um sheriff’s office of, interestingly enough, uh striking a public officer and uh disturbing the peace
2. PD2: Will you knock it off, you wanna make a federal case out of this
3. DA3: No, I just think that is not uh this uh happy go lucky chap’s uh first encounter with uh (the law)
4. PD2: Statistically if you got black skin you are highly likely to contact the police, uh substantially more likely than if you’re white, now c’mon, what do you want from him. He’s got a prior
5. J1: Well we know he spent ten hours and uh maybe ( ) some more. And what do you think would be reasonable, Jeffrey
6. DA3: Seventy five dollar fine
7. PD2: Why don’t we compromise and make it fifty
8. DA3: It’s done
9. PD2: Arright

Here, DA3 brings up the defendant’s “prior conviction” (line 1), which is acknowledged by PD2 (“He’s got a prior,” lines 10–11). Between those two utter-
II. ELABORATION OF BARGAINING SEQUENCES

Bargaining sequences are used to exhibit positions on a variety of possible actions, including charges to be made, sentences, dismissals, continuances, and trials. However, the bargaining sequence also accommodates variations in the kinds of discussions that negotiators may engage in, ranging from routine, perfunctory ones, to extended negotiations over the character of the defendant, what the person did, who the witnesses and victims were, and so forth. Ultimately, we will see that the distinction between proposals and position reports may be important in terms of the work involved in the accomplishment of "routine" as opposed to "adversarial" justice. But to do this requires a deeper investigation into the organization of the bargaining sequence per se, which is the subject of this section of the paper.

Many of the proposals or position reports and their replies take on the appearance of adjacency pairs" (examples 1-8). To recall just one of these:

(15) 34.084 [Burglary]
PD2: Well, tell you what, how 'bout the very short jail sentence
DA3: Arright

According to Schegloff and Sacks (1974, p. 238), an adjacency pair sequence is characterized by five features: (1) it consists of two parts, (2) adjacently positioned, (3) with different speakers producing each utterance, (4) the parts are "relatively" ordered; i.e., first parts parts precede second pair parts, and (5) they are "discriminatorily" related; i.e., the pair type of which the first is a member is relevant to the selection among second pair parts.

Bargaining sequences regularly consist of two parts (a proposal or position-report plus reply) which are relatively ordered (an opener precedes the reply) and discriminatorily related (proposals and reports implicate distinctive reply possibilities). However, these sequences are often elaborated in systematic ways so that its parts are not necessarily adjacently positioned and produced by different speakers.

A. Direct Responses

One ordinary way in which this happens is for an "insertion sequence" to be placed between an opening and its reply. The following involves "Jim Helwig," who took part in a fight in an alley. When his case is brought up in the judge’s chambers by the district attorney, the public defender is not sure if the case is his, and leaves the room momentarily to check. When he returns, the following takes place:

(16) 5.027 [Disorderly Conduct]
1.  PD2: I'm sorry, I recognize mister Helwig. Uh yeah that is mine, is

2. DA1: there an offer in that case
3.  PD2: I would say in this case uh, a fine. Seventy five dollars
4.  DA1: the amount of the fine is something we're taking issue with. Is there- did mister Helwig was he arrested on that, did he go to jail.
5.  PD2: Arright, well, why don't you put it aside for a minute because uh
6.  DA1: (12.0) (DA1 leaves through report)
7.  PD2: I don't think so. No we sent 'im a letter
10. PD2: Arright uh I'll convey that 'im

In line 3, DA1 proposes a "seventy-five dollar" fine, which obtains a candidate acceptance (line 10), subject to the defendant’s approval. Between these two utterances is an insertion sequence that operates to obtain information relevant to the production of the proposal’s reply (cf. Sacks, 1972, lecture 1; Schegloff, 1972, pp. 109-110). However, if we look closely at the turn in lines 2-5, it consists of several pieces of work by which the "relevant information" is gotten. First is a trouble-marker, when the PD suggests the DA put the proposal "aside for a minute" (line 4). Next, PD2 locates the trouble as being the "amount of the fine," (line 5). And then comes the informational question as to whether Mr. Helwig was arrested and went to jail (lines 6-7), a matter relevant to the "amount of fine" because it is a standard practice to offset "time served" against any prescribed fine in determining a sentence. So within the turn that initiates the insertion sequence, there is some step-by-step work which is done.

This turn can be considered as a response to the proposal it follows, to distinguish it from the occasional reply (acceptance or rejection). Responses, in general, are next moves by which a recipient of a proposal or position-report addresses aspects of the prior other than what it directly implicates. And, responses can be classified as direct or indirect. Direct ones, such as an insertion sequence-initiator, are those in which recipient provides material that formulates some trouble source preventing the production of a reply. Indirect responses, examined in the next subsection, include silences and tokens like "well," "uh," etc., which occasion attempts by speaker to locate a source of the trouble, and to remedy the trouble, in order to obtain a reply that aligns with his position.

Another characteristic of direct response is the counter-report or counter-proposal. Generally, these are devices by which a recipient arbitrages production of the first part of a bargaining sequence, and occasions the relevance of a reply from the person who originally opened. Recall example (14):

(17) 39.071
1.  DA3: Eh so ya wanna plead her but ya don't want ot have 'er do time
2.  PD2: I don't want her to have her do time
3.  ()

1The distinction is related to one made by Goffman (1975, p. 19): … although a reply is addressed to meaningful elements of whole statements, responses can break frame and address aspects of a statement which would ordinarily be "out of frame," ordinarily part of transmission, not content, for example, the statement’s duration, tactfulness, style, origin, and so forth."
This point needs to be stressed, simply because a number of ethnographic studies of plea bargaining argue that when negotiation is "explicit," two stages of talk precede the actual determination of a disposition. These are (1) settling the facts of the case, and (2) resolving the issues about the moral character of the defendant. Based on these determinations, lawyers make a decision as to what charge, sentence, or other course of action is appropriate (e.g., see Buckle & Buckle, 1977, p. 120; Eisenstein & Jacob, 1977, p. 32; Miller, McDonald & Cramer, 1978, pp. 118–120; and Utz, 1978, p. 135). VI While these stages may be involved in the discussion of some cases, they are not a necessary feature in all decisions. We have already seen, in the last example and others (see 1, 8, 13, 16), that many plea bargains simply involve proposals regarding charge or sentencing, and are without conversational consideration of "facts" and "character." What this section will show is that even when these items are discussed, prosecutors and defendants can remain at odds over them and still reach agreement on disposition.

The following is an extensive analysis of negotiations regarding a defendant charged with a "148" offense (resisting public officers), and a "647f" (disorderly conduct). The numbers are from the California penal code, and are given here because they appear in later talk. The conversation begins with the PD talking about the incident that caused the defendant's arrest.

(25) 24.028 [Resisting public officers: disorderly conduct, drunkenness]
1. J1: And now that brings us to Frank Bryan. Is he the poor chap
2. sitting out there all by himself?
3. PD2: Yeah he's the sweet man with the nice smile... see he's
drunk and he comes home to his own house where he had a fight
with his family, and he's out in front in his yard apparently
5. having such a fight or at least-
6. DA3: His mother having called the police
7. PD2: Mother having called the cops. Its a family thing, he's
8. screaming and saying fuck and all that kind stuff, or mother
9. fuck I assume and uh y'know getting into what's happening
10. there, and he's drunk. And this is- I mean the same very
11. happy go lucky good natured guy, as you can tell, he's sitting
12. out in the courtroom and when the police come into his own
13. home, his CASTLE, he heh decides he ain't going without
14. making some trouble. Now I don't think he swings on anybody
15. but I- he does take a menacing stance, but on the other hand
16. he doesn't attempt to strike an officer

Thus, DA3 and PD2 provide assessments of the case that appear to converge. For DA3, the fracas "was a lot of talk," etc., (lines 1–2), while for PD2, it was a "verbal" resisting arrest, and a "real" disorderly conduct charge (lines 3–4). But, we will see that disagreement ensues.

The usual manner of handling cases like this is to drop one of the charges in exchange for a guilty plea to the other. Since, in this case, the 148 charge has a maximum penalty of one year in jail and a $1,000 fine, while the 647 offense carries a maximum 6 months and a $500 fine, the 148 offense is considered the more serious of the two. And it is over which charge is appropriate that the DA and the PD contend.

(25b) 24.078
1. DA3: Uh I think its a case that oughta be uh settled, its uh-
2. PD2: Okay
3. DA3: Strikes me as a dandy one forty eight uh b- probably a better
4. one forty eight than six forty seven ef if you want to
5. be very strict about it.
6. PD2: Well I see it as six forty seven ef, uh he didn't lay hands
7. on any officers, if he hadn't been so drunk I assume nothing-
8. none of this would of happened. Well I don't think its
9. worth any jail time no matter what it is
10. DA3: I was being academic when I said that uh
11. PD2: Oh
12. DA3: I think technically it's a better one forty eight than it is a

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Part of the argument here is that plea bargaining discourse concerning individual cases displays a heterogeneity not susceptible to the "course of action" description of the sort that the cited sources attempt. On this point, see Lynch (1979, p. 315).

The cultural conception is recognized officially in the law. See Stinchcombe's (1963) analysis.
4. PD2: I wonder if uh probation however might not be in order
5. DA3: I think probation is in order. I think time suspended is in order
6. PD2: Arright

In line 5, DA3 counters PD2’s position report with one of his own, in which it was argued, he displays a firmer attitude than PD2 toward probation as a means of handling the case, and also poses “time suspended.” That, then, occasions the relevance of a reply from PD2, which he provides in line 6 (“arright”).

A counter to a position-report or proposal not only makes visible a position of one who speaks it, but also suggests just what the trouble is with the prior it opposes. Counterproposals regarding fines, for example, can indicate that the prior is asking too little or too much, as the case by be.

(18) 24 099
1. PD2: Okay uh, twenty five dollar fine
2. DA3: Seventy five dollar fine
3. PD2: Why don’t we compromise and make it fifty
4. DA3: It’s done
5. PD2: Arright

Here, DA3’s counter (“seventy five dollar fine,” line 2) to PD2’s offer (“twenty five dollar fine,” line 1) signifies the latter is too little. PD2’s “compromise” proposal (line 3) suggests that DA3’s is too much. Clearly, any counterpropos al itself can be countered so that there can be a round (Goffman, 1971, p. 147) of such devices—each co-participant alternatively occupying an opportunity for the other to move off of his last-exhibited position.

This example can be compared with segments (1), (8), (13), (14), and (16). In these, decisions are reached by standard use of the adjacency pair sequence. That is, a course of action is determined by one party exhibiting a position in a bargaining opener, and the other party simply aligning with the position. Thus, example (1) again:

(19) 5.025 [Disorderly Conduct]
1. PD2: Is there a offer in that case
2. DA1: I would say in this case uh a fine, seventy dollars
3. PD1: Arright

In segments like this, the standard adjacency pair format is clearly displayed, with second pair parts following first parts. Sacks (1972, lecture 1) notes that when a first pair part follows another pair part (as in riddle sequences where an initial question is followed by a question), it is a variant of the adjacency pair. But little attention has been paid to how such variants achieve observable and reportable features of interaction. As example (19) shows, “compromise” is not a necessary feature of bargaining discourse, but is a contingency achieved by systematic manipulation of bargaining sequence parts (example 18).

### B. Indirect Responses

Indirect responses, it was said, are next moves after a proposal or position report which involve little or no talk by recipient. They regularly obtain work by which speaker attempts to make his position acceptable to recipient. The next segment is from a discussion in which the defense attorney (Private Attorney #2) has argued that the defendant, “who does not want to become a school teacher,” is afraid of having a criminal conviction “go on his record.” He had taken a bottle of eyewash from a drug store.

<table>
<thead>
<tr>
<th>(20) 20.054</th>
<th>[Shoplifting]</th>
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<tbody>
<tr>
<td>1. PA2:</td>
<td>I know there’s a policy there where he’d be put on probation for six months, uh with no similar violations, after six months he’d come in and he could drop the plea</td>
</tr>
<tr>
<td>2.</td>
<td>(1.4)</td>
</tr>
<tr>
<td>3. PA2:</td>
<td>An’ for administrative reasons (0.4) for administrative purposes; he doesn’t have to— when he’s asked if he’s ever— if he’s ever been convicted of a misdemeanor, he can reply with a no on application form</td>
</tr>
<tr>
<td>4.</td>
<td>(3.0)</td>
</tr>
<tr>
<td>5. PA2:</td>
<td>The other thing that I would be asking for is that in lieu of the twenty four hour uh mandatory jailtime, that this is one of those cases where I don’t think it merits twenty four hours in jail, and I’ll be willing to uh have another disposition such as ten days</td>
</tr>
<tr>
<td>6.</td>
<td>suspended for the six month probationary periods</td>
</tr>
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The standard penalty for shoplifting is 24 hours in jail (lines 11–12), so, in rough terms, PA2 is attempting to head off this sentence. In lines 1–2, he reports his knowledge of a “policy” that would have the consequence of keeping the defendant’s record clean—the “probation” PA2 refers to is a practice in the district attorney’s office where by the case would be continued for the “six months” at which time, if there were “no similar violations,” the case would be dismissed.” In line 4, there is a “withhold”—a recognizable absence of an occasioned reply to the posed course of action.

A characteristic form of talk after such a response is an utterance in which speaker assesses or formulates the defendant, the proposal, or the case in general, in a way that justifies the course of action. In lines 5–8, PA2 makes the action relevant for the administrative reasons and “purposes” of applying for a job. Again, however, there is no talk by the district attorney (line 9). Next, PA2 gives up the issue of “dropping the plea,” and focuses on the sentence (lines 10–14). Instead of the “twenty four hour mandatory jail time” (line 11), he indicates a “willingness” to have a ten day jail sentence for the six month probationary pe-

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11This practice is not unique to the jurisdiction studied here. Feeley (1979c, p. 176) notes a similar pre-adjudication sanctioning method in Connecticut. There the arrangement is also called “prosecutor’s probation.”
of plea bargaining talk reveals that there is an organization basic to "routine" and "adversary" discussions, and that organization consists in the bargaining sequence and its systematic elaboration.

Two cases will be examined to illustrate this point. The first one involves a perfunctory negotiation in which resolution is reached with minimal discussion of the facts of the offense or the character of the defendant. Proposals and counterproposals, nonetheless, are used to achieve a compromise on charge and sentence. The second example, in contrast, entails more extensive segments of talk and the use of position reports whereby adversary stances are taken regarding the character of the defendant and his offense.

A. Routine Processing

The following segment concerns a defendant charged with a misdemeanor speeding violation. As the discussion started, the PD asked the DA if he wanted to make an "offer." The DA replied that he did not know whether it was a "bankrupt" charge or not, and that he could not "make an offer," whereupon the PD himself made a proposal:

(24) 33.011 [Speed contest]
1. PD2: Forty five in a twenty five. I mean you know what are we
2. Doin' here
3. DA3: I'll be happy uh- would you give me forty five in a twenty
4. five on that?
5. PD2: Twenty five dollar fine
6. DA3: How 'bout a fifty dollar fine
7. PD2: How 'bout a twenty five dollar heh fine heh real misdemeanors
8. go for fifty dollars
10. PD2: Oh yeah, I think that's not a bad deal

PD2's proposal (line 1) is for an excessive speed infraction, a lesser violation than the original misdemeanor charge. In line 3 DA3 starts an utterance, "I'll be happy uh," that may have been an acceptance. But it is cut off, and, in lines 3-4, DA3 produces a "questioning repeat" (Pomerantz, 1975, pp. 72–73) that returns the "forty five in a twenty five" proposal to PD2 for a reply.

A "questioning repeat" is a means by which a recipient can, among other things, check a hearing or call attention to a speaker's mistake. The device here appears to be testing the "seriousness" of PD2's position. But rather than replying to the return-proposal, PD2 responds with a suggestion for a "twenty five dollar fine" (line 5), thereby focusing off the charge ("forty five in twenty five"), and dealing with the sentence. Note the apparent strategy. PD2's utterance implies that "if you give me what I want, I'll give you want you want" (cf. Sacks, 1972). That is, DA3 has already described the original charge as "bankrupt," has indicated here he would be "happy" with the infraction charge, and has characterized it as something PD2 would "give" him. These things suggest that the prosecution was unsure of the strength of his case. Thus, insofar as a conviction is preferable, and DA3 is faced with that unseensure, PD2 "has something" DA3 "wants" and can withhold providing it until DA3 "gives" something in return, such as a concession on the sentence.

However, the sentence proposal ("twenty-five dollar fine," line 5) itself is followed by three instances of a counterproposal (in lines 6, 7, and 9). First, DA3 suggests a "a fifty dollar fine" (line 6). Second, PD2 reasserts his "twenty five dollar" offer (line 7). By holding to this position, and characterizing the "fifty dollars" as appropriate to "real misdemeanors" (lines 7–8), PD2 heuristically appeals to DA3's earlier acknowledged uncertainty regarding the worth of the case, and further induces some concession from him. Thirdly, then, DA3 proposes a compromise of "thirty five including p.a." (line 9, the initials meaning "penalty assessment," a fee attached to some fines), which PD2 accepts (line 10).

If PD2's acceptance of DA3's $35 proposal can be heard as agreeing to the change suggestion (lines 3–4) as well as the sentence, then three issues are dramatically brought to a close here, in such a way that the "not a bad deal" (line 10) character of the negotiation is made assessable. It is resolved whether PD2 was "serious" about his original offer, whether DA3 will exchange sentence concessions for a guilty plea, and whether the fine would represent a median between positions PD2 and DA3 first taken up on the sentencing issue.

In this case, then, little talk is spent on the defendant's biography, the offense, or other connected items—a feature achieved by detopicalizing the question of what kind of case it is through the production of a series of proposals and counterproposals. These devices, as compared to position-reports, suppress "personal-state" talk regarding what should be done with a case.

It may be that both attorneys regard the case as not strong (in terms of evidence), nor as very serious. But where Mather (1978, pp. 57–58) suggests that when prosecution and defense "converge" in their assessments of strength and seriousness, and do not "really negotiate," the evidence here is different. An artfully elaborated bargaining sequence is used to decide a course of action for the case, and thus "negotiation" is clearly a salient phenomenon. The "routineness" of a case does not mean that there is no negotiation, then, but only that it is conducted in such a way as to focus on "what should be done," and focus off of why it should be done and how prosecution and defense view the case.

B. "Adversary" Discourse

In the next example, we will see that negotiational discourse can involve disagreement and extended argument over how and why an offense is perceived in different ways. But, the opposing stances taken by prosecution and defense still articulate with bargaining sequences. And it is these sequences, not adversariness and resolution of disagreement, which remain basic to the determination of a course of action in the case.
district attorneys present and the judge (lines 3, 5, 6), PD1 produces successive justifications of his position. The first one is a "person description" (Maynard, forthcoming) characterizing the woman as "not acting on her own free will." It is fitted to earlier remarks about the effects of the drugs she took, and is related to the legal issue of "intend." If it can be established that "intend" is missing from an act, then it is not criminal, and this is grounds for dismissing the case. PD1's second justification is an assessment of the trial potential of the case, and is hearsay connected with earlier discussion regarding the good character of the woman and the number of witnesses who would testify to it.

After the latter utterance, turn transition is achieved, as each DA uses PD1's justifying utterances in constructing disagreement turns. DA2, in lines 10 and 12, produces an utterance that can be heard as directed to PD1's description of the defendant, in that having "manual dexterity" and performing "a booster operation" are contrast activities to "not acting on her own free will." DA1, in overlap with DA2, and in a standard disagreement format, acknowledges PD1's assessment that the state will not get a conviction ("maybe we won't," line 11), produces a contrast marker ("but," line 11), and constructs his own disagreement item. He starts up with the hypothetical statement "if the drug affects you that badly," utilizing PD1's earlier characterization of the drug's influence, and suggests how "you" might act: "bizarre," "swinging around your arm," "crazy," etc. (cutting off PD1's utterance at line 16). The following descriptions of the defendant ("extremely sophisticated," line 19), and of her activity ("go into the dressing room, pin it up . . ." etc., lines 19–20) are the converse of those predicated by the hypothetical person who takes drugs. This comparison of the defendant to the abstract "you" provides the accountability of his DA1's last utterance ("I just can't buy it," line 21), which summarizes his disagreement with the PD's argument, and indicates his unwillingness to align with the course of action originally posed (to dismiss the case).

In this example, then, "indirect responses" to a defense attorney's bargaining opener result in justifying work by the attorney. That work occasions disagreement utterances by each of the prosecutors, one of whom shapes his turn to exhibit nonalignment with the position posed in the opener. That is, if "want it dismissed" (line 2) and "I just can't buy it" (line 21) can be considered as two parts of a bargaining sequence, it is one systematically elaborated by withholds, justifications, and disagreements.

C. Three-party Negotiation

In general, in the two-party situation where it is only a defense attorney and prosecutor who are talking, silences and minimal utterances after bargaining openings engender various sorts of rationalizing or revising work on the part of speaker. In the three-party situation, when the attorneys negotiate before the judge, he may be a party to the responses that occasion various remedying attempts by the speaker of a position (as we saw in the last example). However, such
indirect responses can obtain an utterance by the judge in which he displays his own alignment, or urges a recipient to align with the position taken up by the speaker. The next two examples will demonstrate this. In the first, a defendant was charged with falsely representing himself as a public officer, and "using offensive words inherently likely to produce a violent reaction." The person's defense attorney, on the one hand, argued that what the two complainants in the case thought they heard was not what his client said. The DA, on the other hand, remarked that if the two victims were uncertain about what was said, then the violations may not have occurred.

(22) 21.138 [Impersonation of public officer, challenging fight]
1. DA3: So I suggest we might do uh resolve it in this fashion. Um I could contact each of the two uh witnesses and uh determine so far as I can what their best recollection is 'n how specific they are. If they're very specific you've got yourself a lawsuit to try and if they are not or if they confess to confusion on the point or the possibility that they could be confused, that maybe his account of what he said is incorrect then I'd be willing to dismiss the case
2. (8.0)
3. J1: That sounds fair I assume
4. PA3: Yes

In the above, after the DA has produced a bargaining opener, there is a long silence (line 8). Then, the judge solicits a positive alignment with the district attorney's posed course of action, using an assessment of the proposal ("that sounds fair") that could be his own view. But, by appending "I assume," he transforms it into a candidate assessment of the Private Attorney's, which invites agreement/disagreement. PA3 produces an agreement utterance in line 10.

In the next example, the judge does work on behalf of the defense attorney's opening, after it meets with a silence (line 3).

(23) 47.002 [Driving a motor vehicle while under the influence of drugs]
1. PD2: We haven't discussed that yet, but if you'll take a speeding and
2. a thirty five dollars
3. (0.6)
4. J1: Oh I'm sure the people'll do that, right
5. (0.4)
6. J1: Looks like it's just breaking traction
7. DA3: [Sure]
8. DA3: Sure

J1 solicits a response from the DA (in line 4) by utilizing a device which specifically selects DA3 as next speaker (Sacks, Schegloff, and Jefferson, 1974): "the people" refers to the DA, and the utterance is a candidate statement of his position, with an appended request for a positive response. However, there is another silence (line 5) and the judge then produces a characterization of the case minimizing its importance ("looks like it's just breaking traction," line 6). That utterance is overlapped by the DA's delayed response ("sure," line 7) which is repeated by DA3, in line 8, to achieve agreement with the judge and acceptance of the PD's proposal.

Thus, it appears that one important means for elaborating the bargaining sequence is through the use of characteristic forms of talk by which some third party can display and accomplish his "judiciousness"—assessing the fairness of bargaining positions, urging resolution, and so on.

D. Summary

This section has investigated aspects of the organization of a bargaining sequence. While it consists of two parts, the bargaining opener and its reply, they are not necessarily adjacent in position, nor produced by different parties. The reply can be delayed by various direct and indirect responses. Direct ones, such as insertion sequence initiators and counterproposals, immediately make visible the source of trouble that prevents production of a reply, while indirect ones, such as silences and token utterances, occasion moves by the speaker which infer a trouble source, or utterances in which a third party to the negotiations can do mediating kinds of work. Thus, the bargaining sequence may consist of two relatively ordered, discriminatively related utterances. But given a bargaining opener, provision of a reply, and which party ends up doing it, can remain contingent upon a variety of other methodic negotiating practices. However, the responses and other bargaining devices they initiate should not be construed as alternatives to replies, but as means of delaying the occasioned reply while being on the way to its performance (cf. Jefferson & Schenkein, 1978, p. 90).

III. ROUTINE VS. ADVERSARY JUSTICE

In the introduction to this paper, it was suggested that students of plea bargaining often make a distinction between "routine" determinations of case disposition, where some exchange is made in a standard manner, and discussion in which some "adversariness" is evident, as lawyers haggle over what kind of person the defendant is, what the real nature of the offense is, and so on. But careful scrutiny