ON THE ETHNOGRAPHY AND ANALYSIS OF DISCOURSE IN INSTITUTIONAL SETTINGS

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In contemporary society, institutional settings such as clinics, hospitals, welfare agencies, and the courts, are places that deal with social problems, handle deviance, and thus make public, control, perpetuate, channel, or reproduce various group and individual traumas. A natural impetus among sociologists is to plunge into these bureaucracies to see how they work. If enough is already known about some office, it may be possible to generate hypotheses that dictate how data should be gathered, coded, and statistically analyzed. Often, however, very little is known and we therefore want to uncover, document, and describe the inner workings and overall structures of some agency, which demands a qualitative, inductive, “bottom up” approach. For simplicity, we can identify three types of qualitative investigations in institutional settings. First, one may examine a setting ethnographically, using observations and interviews as main data-gathering devices.¹ Another tack is to perform a “discourse study,” which involves tape recording conversations that occur in the institutional setting, transcribing the tapes, and then scrutinizing them for various kinds of patterns and organization. Finally, the researcher may combine ethnographic and discourse studies, using ethnography to complement the study of talk, and vice versa.

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In this paper, I will compare the first two approaches relatively extensively, and then comment on the third. Ethnography has a much longer history in sociology than do discourse-based qualitative studies. And, while it is easy to read about the how-to of ethnography, it is difficult to find methodological discussion of discourse studies. By way of comparing discourse-based analysis with ethnographic research in a particular setting, it is possible to throw both of their respective investigative stances into finer relief. Ultimately, however, methodological differences involve substantive contrasts as well. Thus, while ethnography and discourse studies entail distinctive modes of research, they also can produce dissimilar social organizational characteristics of the institutional setting under study.

PLEA BARGAINING AND PLEA BARGAINING DISCOURSE

The setting of interest here is a municipal court, in a medium-sized California city, where attorneys and judges discuss misdemeanor cases of theft, resisting arrest, drunken driving, and battery. Officials dispose of most of the cases by negotiating both the specific charge to which a defendant would plead guilty and the sentence that will be assigned. Such “plea bargaining” is the major means by which criminal cases are funneled through U.S. criminal justice systems. Of those cases that reach the court, that is, 85 to 95% are processed by defendants simply pleading guilty to charges and sentences that the courtroom officials prearrange.

Although such heavy use of negotiated pleas has been prevalent for decades, a virtual explosion of scholarly interest in the phenomenon occurred in the 1970s. Probably because so little research had been done before, no theory existed that could provide investigators with hypotheses to test. It was a situation requiring inductive research approaches, and one result was that many excellent ethnographies of plea bargaining were produced. From them can be gleaned a rich sense of what happens during negotiations, what kind of concerns the principal parties have, and why plea bargaining is so prevalent in the courts of the United States and other countries including Canada and England.

However, despite the enormous amount of attention paid to plea bargaining, and despite the fact that it is primarily a discourse activity, no one studied the language of negotiation as a naturally occurring phenomenon. Perhaps that has to do with the sometimes sensitive nature of matters discussed during negotiations and the intrusiveness of audio or videorecording. Nonetheless, researchers seemed to have no trouble getting access to watch plea bargaining and at least take notes on the process. A more likely reason for the reluctance to study negotiatonal discourse is the tradition among social scientists of using language as a resource in carrying out the research enterprise (Garfinkel 1967;
Sacks 1963). For example, language was needed to conduct surveys, to observe, and to interview participants who engage in plea bargaining. Meanwhile, language as a phenomenon, or as a formal speech event, remained as one of those “seen but unnoticed” aspects of plea bargaining which was essentially uninteresting to researchers who were more interested in what participants said than how they said it. Nevertheless, after most of this ethnographic research was completed, I was able to gain access to a court and, with a background in conversation analysis, pursue my interest in the linguistic and interactional aspects of plea bargaining by tape recording discussions among various judges, prosecutors, and defense attorneys.

A preliminary point is that the aim of my discourse studies was not at all remedial. That is, they were not undertaken in order to improve upon or correct the extant literature. Rather, their goal was to discover and describe orderly aspects of plea bargaining talk which practitioners produced as part of their ongoing interaction. The comparison with prior ethnographic studies can now be done, but it is entirely post hoc. This is a significant matter because if one sets out to test preestablished propositions (even those generated by prior qualitative research) regarding interactional phenomena, the data will be judged by an outside metric of orderliness that may be irrelevant to that organization which participants produce and gauge within the situation. Moreover, previous research was mostly guided by concerns such as why plea bargaining exists (when trial is, officially at least, a viable option), and whether it is a fair and accurate means of dealing with alleged criminal behavior. My orientation was simply to treat negotiations as a routine form of courthouse talk that needed to be described and analyzed on its own terms.

Only when the discourse has been approached in this way is it possible for issues of method and substance to be addressed by way of a comparison with other types of research. I will argue that paying attention to the sequential organization of talk, as in a discourse study, rather than focusing on participants’ experiences and views of what happens during negotiation, as is done with ethnography, provides a better understanding of the fundamental structure of plea bargaining. Sequential analysis also provides insight into the question of how mutuality is sustained during plea bargaining. Where ethnographers have portrayed mutuality as being reflected in common agreement, I argue that it is accomplished in the ways that participants deploy concrete discourse practices during the course of negotiation. Still, sequential analyses of discourse episodes seem to de-emphasize the institutional context wherein those episodes occur. Here, ethnography seems to offer a way of incorporating an understanding of larger courtroom and other contexts into the study of plea bargaining talk. But it may be possible to perform a “frame analysis” of the discourse in such a way as to address matters of context. In addition, frame analysis of plea bargaining further undermines the ethnographic importance attached to common agreement and instead shows
the significance of dramatic enactments of talk. If these points are true about the ethnography of plea bargaining, they may also apply to studies of other kinds of institutional interaction.

**METHODOLOGICAL DIFFERENCES**

One of the contrasts between “discourse studies” and ethnography is obvious, and that is the use of audio or video-recorded material, as opposed to interview, observation, or other forms by which ethnography usually proceeds. That surface difference hides a more important one that is often described in terms of the topic and resource distinction already adumbrated. In doing ethnography, researchers attempt to draw a picture of what some phenomenon “looks like” from an insider’s account of the phenomenon and for some audience who wants to know about it. The ethnographer, in general, is in the business of describing culture from the members’ point of view. The task for the plea bargaining researchers has been to hang around courthouse halls, corridors, rooms, and chambers, to watch and talk to participants, and to thus obtain an adequate conception of what is going on from the perspective of courthouse regulars. Then the researcher writes about this conception and describes prominent features of plea negotiations such as charge bargaining, sentence bargaining, character assessment, victim credibility assessment, discussion of facts, and so forth. The topic and resource distinction is that ethnographers rely on unnoticed abilities to record and recognize such features, just as participants rely on basically uninvestigated abilities in producing them. For the discourse analyst, however, bargaining, negotiation, character and credibility assessment, determination of facts, and the rest, are taken as formulations or glosses for deeper forms of organization whereby such features are achieved in practical and methodic ways. Plea bargaining is an orderly phenomenon, its deep organization being reflected not in its more prominent features, but in taken-for-granted procedures that can be deployed to accomplish various surface characteristics. Those procedures are the analyst’s topic.

Being able to examine taken-for-granted procedures, indeed, being able to make them “anthropologically strange” so that they can be investigated as phenomena, is aided by audio or video recordings of actual interaction, actual negotiations. But the use of recordings provides a further distinction between ethnography and discourse studies, which is that there is an immediacy to the phenomena that allows for audience inspection and scrutiny in almost as direct a way as the analyst enjoys. With observation studies, the reader must depend on the ethnographer’s skills and capacities for reliable note taking, at the very least. In interviewing, the reader or audience must depend not only on the interviewer’s capacities, but on subjects’ proficiency and honesty for reporting
the scenes they know through past experience (Emerson 1983b, p. 103; Schwartz and Jacobs 1979, pp. 113-114). This is not to mention what the structure of the interview itself lends to the ultimate account. In any case, analysis is the end result of a long process to which an audience, for the most part, has no access. With recorded data, the audience is invited to inspect actual data along with the investigator, whose analysis can therefore be checked with what the data exhibit in relatively pristine form. In a sense, it is possible to obtain independent verification of interactional patterns because those who hear or read a researcher's report can themselves analyze the data.

Another methodologically important feature of mechanically-recorded data is that it exhibits participants' orientations to discourse patterns. It is one thing for participants, in an interview, for example, to say this or that feature is an important part of their interaction. Or investigators, based on an interviewee's report or on personal observation, may declare that some feature is characteristic of the world under investigation. In either of these situations, we have no idea how significant the feature is to participants in an actual or "real-time" interactive situation. What emerges as a report on the situation may be just one person's view or interpretation. With recorded data, the researcher can study how participants analyze each other's moves and ongoingly produce the characteristic or "objective" features of their interaction. For instance, the turn-taking system described by Sacks, Schegloff, and Jefferson (1974, p. 728) provides a proof procedure for the analysis of talk, since, according to that system, recipients of an utterance regularly display their understanding of the utterance in their own turn at talk. Analysis of any given utterance, then, can and must take into account how that utterance is treated by recipients who themselves are interaction analysts. Further, if a pattern is non-trivial, its absence should be subject to complaint or repair. That is, attempts to reinstate the pattern will occur at the point where a violation has occurred, and this again will be visible in actual talk and action. The result of studying how participants display their understanding of interactional moves is to provide an account of social action that follows from participants' orientations to, and segmentations of, their own behavior as it actually occurs (McDermott, Gospodinoff, and Aron 1978, p. 245).

**THE BASIC FORM OF PLEA BARGAINING DISCOURSE**

The methodological differences between ethnographic and discourse or interaction-based approaches to plea bargaining may seem to simply represent contrasting intellectual predilections or styles among researchers, who go their own ways fully committed to their own separate lines of work and remain unmindful of the practical consequences of their differences in terms of understanding some given phenomenon. But there are practical consequences,
which can be highlighted by examining two interrelated issues. The first concerns the basic organization of plea bargaining, and the second concerns the problem already mentioned regarding what mutuality means.

The Bargaining Sequence

 Sequential analysis of plea bargaining discourse can provide a social organizational perspective that orders the range of practices subsumed by the term plea bargaining. Definitionally, ethnographers have had trouble coming to grips with the diversity of discourse that gets called “plea bargaining.” Strictly speaking, they have agreed that plea bargaining refers to courtroom transactions in which there is an exchange between the prosecution and defense in criminal case. Defendants who plead guilty receive some dispositional “consideration” from the state, which, in turn, gets the convictions it needs with less expenditure of time and money than going to trial would require (Alschuler 1968, p. 50; Baldwin and McConville 1977, p. 23; Bottoms and McClean 1976, p. 123; Feeley 1979, p. 185; Grossman 1969, Chapter 7; Klein 1976, Chapter 1; Miller, McDonald, and Cramer 1978, p. xxi).

 Now that definition covers situations in which charges and/or sentences are reduced in exchange for guilty pleas. But district attorneys and defense lawyers also use the term to refer to negotiating charge dismissals, continuances, and trials where a consideration or concession is not traded for a guilty plea. The definition also fails to capture distinctions between perfunctory discussions in which there is an exchange that is standard or routine procedure, but where no overt discussion of the offense and the offender occurs, and protracted negotiations in which sides are taken on the character of the defendant and the facts of the case in a seemingly adversarial way before an agreement is reached.

 Thus, “plea bargaining” refers to a diverse set of negotiational activities. Examining sequential organization in the discourse can, however, order the range of practices subsumed by the plea bargaining term. A distinctive two-part unit, the “bargaining sequence,” consists of a bargaining opener (such as a proposal) and reply (acceptance or rejection):

 Public Defender (PD):  Well, tell you what, how about the very short jail sentence

 District Attorney (DA):  Arright

 Bargaining sequences like this are a kind of “adjacency pair” (Schegloff and Sacks 1973) by which attorneys make “exchanges” on charge or sentence and agree to dismiss, continue, or try cases. The sequence is also involved in settling cases where negotiations are “implicit” and in those where they are “explicit.” Further, systematic procedures for leading into, elaborating, and exiting from
the sequence relate it to other components of negotiation, such as discussion, argument, justification, counterproposing, third-party participation, and so forth. As an interactionally achieved structure that is at the root of a variety of features displayed during actual negotiations, the bargaining sequence is a sociological phenomenon (Maynard 1982c).

Mutuality as Common Agreement

The first point regarding practical implications for understanding bargaining discourse is that a sequential analysis shows order in what has been, to ethnographers, a puzzling amount of diversity. The second issue concerns a controversy surrounding plea bargaining that originated in the mid-1960s with respect to the kind of mutuality exhibited between prosecutor and defense attorney. The controversy was started by Sudnow (1965), who suggested that public defenders and prosecutors assume that most people coming before the court are guilty. The attorneys develop a set of formulas for plea bargaining, based on community-specific conceptions of typical offenders and offenses, and use these formulas to expeditiously dispose of criminal case. This was an uncomplimentary picture, particularly regarding public defenders, who appeared as collusively involved with district attorneys and aligned against those whom they were to represent. Skolnick (1967) responded to Sudnow’s criticism of public defenders by stressing that the American criminal justice process shared a problem common to all conflict systems, which is an inevitable tendency toward cooperation. That public defenders and prosecutors do cooperate in an essentially administrative situation does not diminish the quality of representation, argued Skolnick, it just changes its nature. Defense attorneys perform more like “coaches” than “advocates” for their clients. While Skolnick questioned Sudnow’s implication that PDs were inadequate, however, he did not disagree with the idea that decisions were ultimately based on shared typifications.

Researchers who followed Sudnow and Skolnick largely adhere to the Skolnick view, in a slightly altered way. For example, Utz (1978, p. 115) has argued that “cooperation and shared professionalism” exist alongside “organizational tension and adversariness.” Cooperation is achieved through negotiators coming to agree on the nature of the case either implicitly or explicitly. In implicit negotiation, cases are not serious and attorneys share an understanding that a non-trial disposition and lenient treatment are appropriate (Mather 1979, p. 66). In explicit negotiation, three basic stages occur in the determination of a disposition. These are (1) settling the facts of the case, (2) resolving what the moral character of the defendant is, and—given (1) and (2)—(3) making a decision as to what charge, sentence, or other course of action is appropriate in the case.
Thus mutuality in plea bargaining has historically been associated with common agreement, whether collusively, implicitly, or explicitly manifested. The problem with this idea is in making mutuality appear to be a matter of cognitive consensus (Wilson 1970) rather than an outcome of interaction. For example, the importance of typifications is not so much that they indicate shared conceptions of offenses and offenders, but that they are used to do negotiational work, or to justify positions on charge, sentence, or dismissal that defense and prosecuting attorneys maintain (Lynch 1982; Maynard 1982a,b).

Mutuality as a Practical Accomplishment

As a general procedure, discourse-based research can de-emphasize the cognitive consensus orientation by focusing on observable aspects of speech. What then appears important to negotiation is how a sense of mutuality is accomplished in the employment of bargaining sequences to present and react to defense and prosecution positions.

Specific features of bargaining sequences demonstrate this point. Even though a plea bargaining encounter itself occurs, in a sense, so that participants can produce bargaining sequences, the sequences are locally occasioned within the encounter, which means there are procedures for introducing them into turn-by-turn talk (cf. Jefferson 1978, p. 220; Sacks 1972, lecture 4). Thus, a bargaining opener (an offer or proposal) can be solicited:

(solicit) PD: Is there an offer in the case
(proposal) DA: I would say in this case a fine, seventy five dollars

OR it can be announced:

(announcement) PD: I'll propose a deal to you
(“go-ahead” signal) DA: Tell me what ya got
(proposal) PD: If ya dismiss the 242, I might be able to arrange a plea to 14601 for a fine

A more detailed analysis of these devices can be found in Maynard (1984, Chapter 4). Here we can simply notice that the solicit requests a bargaining opener from the other party, while announcements precede self’s production of an opener. Solicits and announcements are examples of a generic category of “pre-sequences,” or devices that project an upcoming discourse action (Sacks 1967, lecture 8; 1972, lecture 1). In plea bargaining, they allow systematic movement into a bargaining sequence in such a way as to preserve the opportunity for the discussion of other relevant items. That is, solicits can be rejected and announcements can be handled so as to forestall a proposal being made, allowing participants to talk about related matters. Then, when a
bargaining opener is produced, that emerges as a collaborative, synchronized achievement; initiating the sequence is coordinated as finely as entry into a conversation itself (Schegloff 1968). The key issue is not the general interactive availability of participants, which is a problem especially at the beginning of a conversational encounter as well as over its course (Goodwin 1981). The issue is the participants' dual consent to make and hear proposals for a dispositional action on a given case at a current moment. A solicit indicates the solicitor's willingness to entertain a proposal, and, in issuing the proposal, a speaker simultaneously agrees to the propriety of its timing. With an announcement, proposer signifies readiness to make an offer, and with a go-ahead signal, recipient ratifies the appropriateness of the offer being made at the present time. When a bargaining opener is not allowed to be produced, it is because discussion of other matters must necessarily come first. That the timing of bargaining sequences is a problem in negotiation, then, is made evident in the use of pre-sequences. Devices by which the problem is solved involve collaboration, or effort by both participants, so that arriving at a point where proposals are made and heard is clearly one way in which a sense of mutuality is accomplished in plea bargaining.

Another feature of bargaining sequences relevant to the achievement of mutuality is the internal structure of the sequence itself. If one party produces a bargaining opener, such as a proposal, then acceptance or rejection is implicated as a reply. When recipient rejects the proposal, a new round of bargaining ensues until both parties can align with a single position (Maynard 1984a). Even when going to trial is the decision—a clear indication of disagreement over the nature of a case—collaboration is thereby a key element of that decision. This is because trial, rather than reflecting some kind of "breakdown" in the negotiations, follows from someone making a suggestion that is answered affirmatively, and this exchange of turns occurs after participants have systematically issued and responded to offers for non-trial disposition (Maynard 1984a). The bargaining sequence, and an overall system of negotiation with which that sequence articulates, structure the interaction in such a way that both parties display their efforts for considering reasonable alternatives to trial, and trial is thereby a conjointly derived and accountably "last resort" alternative (Emerson 1981). Thus, when one party attempts to act in a unilateral, forceful way, it is highly disruptive. For example, in one drunk driving case a prosecutor simply asserted that he was going to "try" the case, and did not respond to the defense attorney's alternate proposal. Nor did the DA and the PD have an opportunity to discuss the relevance of a trial. The PD subsequently issued a series of complaints to the effect that the DA was not attempting to settle cases, was throwing them in his teeth, was trying to teach him a lesson, and was not plea bargaining. The judge, who was present, attempted to remedy the situation with utterances that specifically solicited initiation of the bargaining sequence. This strategy was effective not so much
because that would help the lawyers “agree” on a decision, but because it would restore a sense of mutuality to the decision-making process (Maynard 1984b, Chapter 5).

Mutuality in Implicit and Explicit Negotiation

With implicit negotiation, it may be true that prosecutor and public defender, in a way, can “read” cases in a like manner and interpret what resolution will be acceptable to both parties (Schelling 1963, p. 93; Maynard 1984a). In actual negotiations, however, we have no direct indication of common agreement other than the way attorneys use bargaining sequences to immediately focus on what should be done with the case. This practice simultaneously focuses off of why it should be done and how prosecution and defense view the offense and the offender. In other words, proposals and replies, in an unelaborated form, suppress talk that displays practitioners’ perspectives on the case, and permit routine and seemingly perfunctory decision making. This is evident in negotiations concerning a case in which the defendant was charged with a misdemeanor speeding violation:

1. PD: Okay. Ya wanna make an offer in that case
2. (2.6)
3. DA: I have so little use for these uh, dumb uh (9.0) ((DA3 reads file))
4. I can’t intelligently make an offer in that case cause I have no
5. idea whether it’s a bankrupt uh, you know, sometimes they hear
6. the scratch uh y’know, little squealer
7. PD: Forty five in a twenty five, I mean you know what are we
8. doin’ here
9. DA: I’ll be happy uh- would you give me forty five in a twenty
10. five on that?
11. PD: Twenty five dollar fine
12. DA: How ‘bout a fifty dollar fine
13. PD: How ‘bout a twenty five dollar heh fine heh real misdemeanors
14. go for fifty dollars
15. DA: How ‘bout thirty five including p.a.
16. PD: Eh yeah, I think that’s not a bad deal

This episode of negotiation, which is analyzed in detail in Maynard (1982c), is notable for its brevity. At the very beginning (line 1), the PD issues a solicit which suggests that “discussion” is not necessary on the case and bargaining over charge and sentence is immediately relevant. However, by reading the file and characterizing the case in a way that implicates “discussion” of what kind of case it is (lines 3-6), the DA declines to open a bargaining sequence. Then the PD presses the issue by making a proposal himself (line 7), and this ultimately engages the DA’s participation in an extended series of proposals and counterproposals
(lines 9-15) that collaboratively resolve both the charge and sentence to be administered. This series simultaneously detopicalizes the question of what kind of case it is, with the result that little talk is spent on the offense, the defendant’s biography, or other items possibly related to the disposition.

In this case of implicit negotiations, then, the only evidence of common agreement is that participants were able to arrive at a mutually satisfactory charge and sentence. There is no direct evidence that they agreed on the “real” nature of the case. If queried, they might show similar assessments, but they could also have very different opinions and simply demonstrate a practical orientation in “agreeing to disagree” so as to quickly dispose of the case. With explicit negotiation, the notion of common agreement among practitioners is even more strikingly contradicted by a discourse study. Overwhelmingly, prior research has repeated the three-stage model of decision making already mentioned. That is, negotiators are thought to settle the facts of the case, resolve the moral character of the defendant, and then decide on a disposition (Buckle and Buckle 1977, p. 120; Eisenstein and Jacob 1977, p. 32; Miller, McDonald, and Cramer 1978, pp. 118-120; Rosett and Cressey 1976, pp. 105-109; Utz 1978, p. 135). In contrast, what I have found is that when facts and character are discussed, prosecutors and defenders can remain at odds over them and still reach agreement on disposition.

For example, in one case where a defendant was charged with resisting arrest and disorderly conduct, the public defender and district attorney raised a number of issues during negotiations including the moral character of the defendant and the “facts of the case.” For the public defender, the defendant was a nice “happy-go-lucky” guy, whose only offense had been being drunk and fighting with his family. This all occurred in his own home, his “castle,” and thus he was intruded on by the cops. Moreover, the officers may have roughed him up during the arrest. The district attorney, however, reminded the defense attorney that it was the defendant’s mother who called the cops, and suggested that the defendant gave the police much difficulty in making the arrest (see Maynard 1983). The PD and DA also differed on the meaning of the defendant’s prior record.

1. DA: He has uh one prior conviction in this jurisdiction with
2. the um sheriff’s office of, interestingly enough, uh striking
3. a public officer and uh disturbing the peace
4. PD: Will you knock it off, you wanna make a federal case out
5. of this
6. DA: No, I- I just think that it’s not uh this uh happy go lucky
7. chap’s uh first encounter with uh (the law)
8. PD: Statistically if you got black skin you are highly likely
9. to contact the police, uh substantially more likely than
10. if you’re white, now c’mon, what do you want from him. He’s
11. got a prior
Here the DA notes the similarity of the prior conviction to the present charge (lines 2-3; 6-7), while the PD devalues that topic ("Will you knock it off," and so forth, lines 4-5) and minimizes the importance of the prior offense by invoking the defendant's race and its effect on contacts with the police (lines 8-10).

The different interpretations that the DA and PD held regarding the offense, the offender, and his record provided the reasonableness of their separate positions regarding the proper charge and sentence. Those different interpretations were produced and held over the course of negotiations, even though, by way of bargaining sequences, the coparticipants were able to collaboratively determine the charge and, as can be seen in lines 15-18, the sentence. From this and other cases (Maynard 1984b, Chapter 6), it is clear that negotiators do not necessarily "decide" character and "settle" facts in plea bargaining. Rather, considerable disagreement and adversariness may be maintained in the pursuit of those topics, even while a decision is made on the disposition for the case through the deployment of bargaining sequences. Once again, it is these sequences that are basic to achieving mutuality in plea bargaining, not agreement on substantive matters.

Thus, the study of recorded plea bargaining discourse shows a set of basic procedures whose articulation can accomplish various surface features, or diverse characteristics of plea bargaining. Moreover, these procedures are not reconstructions from an observer's notes, an interviewer's interview, or a subject's recollection. Rather, they are identified as real-time phenomena, as practices engaged in as participants actually negotiate. Further, the bargaining sequence appears as a required way of arriving at a decision in every case, no matter what the charge, the sentence, or whether one wants to get a dismissal, continuance, or trial. When it is absent, that is highly disruptive and results in "repair" work or efforts at remediation. Finally, it is by exploiting various properties of the bargaining sequence and not by way of common agreement that mutuality is achieved in plea bargaining in both its implicit and explicit forms.

**THE INSTITUTIONAL CONTEXT OF PLEA BARGAINING**

By examining bargaining sequences, we have concentrated on sequential aspects of plea bargaining discourse and discussed general differences between
ethnographic and discourse studies. But there is a trouble with a purely sequential analysis of plea bargaining, and addressing that shortcoming will further highlight differences between discourse-based inquiry and ethnographic method, and also provide a contrast between discourse studies and those that combine discourse and ethnography.

The trouble with the sequential analysis of discourse occurring in an institutional setting such as the court is that the setting itself is analytically de-emphasized. That is, the power of conversational analysis has been to identify conversational patterns and systems of talk that are invariant to particular settings. These patterns and systems are sensitive to a host of contextual matters—including the kind of setting, the participants, their topics, and so forth—but these contextual matters are slighted in favor of transsituational structures.

This neglect may be of little importance to students of everyday, "ordinary" conversation, who examine interaction that is to some degree insulated from large-scale institutions and complex organizations. Those who study language in formal settings, such as hospitals, schools, and courts, however, must be concerned with the way decision-making discourse articulates concerns that are not completely indigenous to the participants' interaction. For example, when courtroom participants utilize categories of the criminal justice process (terms such as judge, defendant, theft, misdemeanor), it not only renders their interaction intelligible; it also reproduces the criminal justice process as an institution (Wilson 1982). External social structure is used as a resource for social interaction at the same time as it is constituted within it. For another instance, Mehan, Hertweck, and Heihls (1986) show the existence of a particular order that is locally produced in meetings between school professionals and parents regarding placement of children in special classes. However, a particular aspect of this order—putting the discussion of parents' rights after a display of unanimity among the professionals regarding the placement issue—seems responsive to legal and bureaucratic imperatives organized prior to, and at a remove from, the professional-parent encounter. Similarly, with respect to a variety of institutional contexts, Emerson (1983a) argues that embedded within the talk regarding any single case are orientations to the entire case collection of which the single one is a part, to portions of that collection, and to the availability of resources for handling caseloads. Finally, consider Frankel and Beckman's (1983) analysis of record-keeping during phone calls to a poison control center. Records are concrete examples of forms which must be accommodated within such encounters. They quite literally import institutional concerns into those encounters, so that the structure of the interaction, while being a local production, simultaneously enacts matters whose origins are externally initiated.

One way of relating talk to its institutional context is by combining a discourse study with ethnography. In the introduction to this chapter, I
mentioned this as the third type of qualitative inquiry in institutional settings. A theoretical impetus for such a strategy derives from Cicourel's (1981, p. 92) argument that talk is always contextually bound, not just in a local sequential sense but in a broad sociological manner, and therefore requires a variety of complementary investigations to explicate. These include, among others, the analysis of subjects' background knowledge, their cognitions, and folk theories. Interviewing subjects and observing them in situations that are related to a focal episode of talk can help accomplish the contextual analysis (Cicourel 1987).

Even when confined to singular episodes of discourse, however, it is still possible to see patterns that display its institutional context. My approach with plea bargaining was to follow Goffman's "frame analysis" and examine the alignments participants take in relation to the speech they produce and hear (Maynard 1984b, Chapter 3). In the court setting, this perspective enables appreciating analytically that bargaining talk is distributed systematically within work routines which relate prosecutors, defense attorneys, and judges to a series of activities occurring both before and after any episode of negotiation. That is, plea bargaining is only one aspect of the work routines and relationships in which legal professionals participate. For example, one common framing practice related to the production of bargaining sequences is to exhibit a position by means of terms "we," or "our." In a petty theft case, the public defender says: "Our position is one, he didn't steal it, and two, he received it but not as stolen property." In a drunk driving case, a DA says: "In all cases where there are at least two prior convictions, we would urge that they be referred for a probation and sentencing report." What such terms as "we" and "our" signify is that the party making a proposal is acting as a member of an organization, a representative of an office, and not simply on his or her own authority. That office establishes policies that predate present negotiations, and the attorneys will be evaluated on their performance after negotiations partly on the basis of such policies.

Other framing practices show that attorneys also act as agents—the PD on behalf of a defendant, the DA on behalf of the state—although the agential relationship does not determine the attorneys' alignment relative to some proposal. In plea bargaining, a public defender may animate a client's strict position:

PD3: He says I was not doing anything wrong, said I didn't feel the alcohol, I wasn't under the influence

Nevertheless, by various framing practices the defender also projects alignments that go with or against the defendant's stance. The lawyer may in fact take a position consistent with that of the prosecutor or judge with whom the case is discussed, or may assume a posture which exhibits elements of a
professional identity. After repeating a client’s story about how she was wrongly arrested for shoplifting, for instance, a PD remarked that, “from an advocacy point of view,” he would rather be “sitting” in the district attorney’s “seat,” thus disfavoring his client’s story and displaying a professional identity that assessed the case in line with a previously stated negative evaluation by the judge. Such strategies do not undermine the defendant’s status but simply pay attention to significant relationships besides that which the PD has with the client, and portray a self capable of independently evaluating the case (Maynard 1984b, Chapter 3). The district attorney, on the other hand, often takes an initial position that is legally and officially proper, speaking for those who establish laws and policies regarding how criminal offenses should be treated.

When the DA concedes an initial position in favor of a more viable posture, as DAs sometimes must, it is done in a way to display allegiances with a professional identity, and sensitivities to other institutions besides the court. For example, in one case where a student had been charged with stealing a parking sticker in order to park on his college campus, the DA agreed to a compromise proposed by the PD that consisted of letting the defendant plea guilty to a parking violation. In conceding his original stance for the theft charge, the DA depicted his position as consistent with what a dean of students at the defendant’s college advocated. Thus, when a position is taken or a posture is shifted within bargaining sequences, it enacts more than the direct relations between defense attorney, prosecutor, and judge. A participant’s stance is taken in ways that appear rational and reasonable in the setting by what of what the person’s inside and outside affiliations provide as sensible to say.

The relationships attorneys display with respect to their offices, professions, and other institutions exist prior to any concrete episode of negotiation, although these relationships are reproduced in any current episode of bargaining. One relationship that is important to negotiations is in a way wholly a future possibility. It is the potential connection lawyers may have with a jury at trial. Often, for example, offers and proposals are justified by reporting what defendants, victims, police, and witnesses say about what happened. Quoting such persons could be viewed as an effort to improve the information base on which plea bargaining decisions are made. That plea bargaining is an information processing venture is the presumption particularly evident in research based on simulations, quasi-experiments, and interviews with prosecutors and defense attorneys (Lagoy, Senna, and Siegal 1976; Miller, McDonald, and Cramer 1978; Rossman, McDonald, and Cramer 1980), where researchers ask subjects about the type and amount of case data used during the negotiations. We have also seen that it is a view expressed in ethnographic and participant observation studies, tied to the idea that negotiators come to agree on facts and character before deciding case disposition. Agreement is thought to be reached by carefully considering what everyone has to say.
However, a frame analysis of the discourse re-emphasizes that the central aim is not to provide information so that agreement can be reached. Rather, it is to rehearse a scenario that could eventually be enacted before a jury. One way this is evident is in the importance attached not just to what police, witnesses, victims, and defendants may have said about a case, but to what they can be arguably expected to testify. As Lynch (1982, p. 310) has observed, trial structures are thereby relevant to pre-trial discussion. Although this issue is often mentioned in plea bargaining research (Mather 1974; Utz 1978, pp. 30-31), the following implications have been neglected.

First, the reason why attention may be focused on the background and demeanor of defendants and others is not to determine what charge or sentence is appropriate, but to determine how their testimony would be received at trial. Second, it is not just the public defender’s or district attorney’s present audience that is the target of quoted or animated positions. It is partly with a hypothetical, but potentially real, group of eventual hearers in mind that various stances are taken in plea bargaining. This point is not to be taken lightly, for it implies that and how a local community’s voice is heard during negotiations, to the extent that potential juries represent that voice. Third, plea bargaining needs to be considered less for its information exchange properties and more for the kind of rehearsing, posturing, and attempted conning which occur within it. What was said by an involved party, such as defendant or witness, takes its meaning in part from what those in the present situation (the lawyers) argue will be said, and what will be made of that saying in a future context (the trial), and this imputation reflexively informs what is made of it now, during negotiations. Therefore, negotiators are inclined to dramatize information, not just convey it in discursive terms.

Consider how framing practices work in negotiations concerning Rodney Tapping, a defendant charged with petty theft:

1. DA: You know it's a humdrum case in the abstract, it's made comic
2. when you consider the cast of characters. Uh Rodney Tapping, who
3. is the sometimes investigator of Billy Cunningham, he was the
4. snitch in this case. And uh Leonard Allen, a self-proclaimed
5. chaplain of the marine corps, who it turns out is a baby
6. molester …
7. PD: These are the people's witnesses?
8. DA: We don't make cases, we just file 'em

The DA’s turn from lines 1-6 appears as a “keying” (Goffman 1974, pp. 43-44) of a “comic” (line 1), melodramatic framework onto the introduction of persons involved in the case, the keying accomplished in part by calling the parties a “cast of characters” (line 2). With this frame, and by using descriptions of the parties that are clearly disparaging, the DA discredits the case. The PD’s
consensus, or as a way of resolving differences endemic to parties' situational perspectives and experiences. Speech can be viewed as a congeries of practices that enact the world in the here and now in such a way as to preserve perspective and experience, and yet achieve a sense of mutuality with regard to producing joint practical actions. The question that ethnographers have traditionally asked—"How do participants see things?"—has meant in practice the presumption that reality lies outside the words spoken in a particular time and place. The discourse-based question—"How do participants do things?"—suggests that the microsocial order can be appreciated more fully by studying how speech and other face-to-face behaviors constitute reality within actual, mundane situations. This has implications not just for the study of courthouse negotiations, but for interaction that occurs in other institutional settings. In addition to knowing how people "see" their own workday worlds, we should be understanding how, in their real-time talk and action, they discover and exhibit features of these worlds so that they can be "seen."

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NOTES

1. Part of the simplification here is to gloss over distinctive types of ethnography. See, for example, Emerson's (1983, pp. 20-35) discussion of "thick description," "cognitive anthropology," and "ethnomethodology and the reflexivity of descriptions."
2. See the discussion in Schwartz and Jacobs (1979) regarding the contrast between formalistic and constructionist or more ethnographic types of qualitative research.
3. For original theoretical, methodological, and empirical statements regarding conversation analysis, see Sacks, Schegloff, and Jefferson (1974), and Schegloff and Sacks (1973). For secondary treatments and summaries of major themes in conversation analysis, see Atkinson and Heritage (1984) and Heritage (1984, Chapter 8).
4. For a discussion of how access to the court was gained, see Maynard (1984, pp. 13-14).
5. For an original statement of the definition of ethnography, see Malinowski, (1922, p. 25); for more contemporary versions, see Emerson (1983b, p. 14), and Spradley (1980, p. 3). Cognitive anthropology differs from traditional ethnography in focusing on language and "lexically labeled events" (Agar 1973, pp. 12, 23), but shares the concern to understand the meaning of cultural events from a member's point of view. On this, see Wieder (1970).
6. See the general discussions in Heritage (1984, pp. 280-290) and Schegloff (1987).

REFERENCES

question (line 7), by linking the cast of characters to the "people" and by utilizing a category ("witnesses") specifically relevant to trial, depicts the prosecution position before a jury as very weak and further depreciates the worth of the case. The DA then denies involvement in making such cases (line 8). He may thereby register a complaint against those who do (e.g., the police), and at least portrays his acting on the case as his official duty ("we just file 'em"), not his choice. This talk served as prelude to the DA's suggestion of dismissing the case. The defense attorney accepted the proposal, and thus a decision was reached that appeared neither capricious nor arbitrary. Rather, various framing practices helped to construct the outcome as dictated by the trivial and weak nature of the case.

CONCLUSION

Analyzing plea bargaining discourse as a natural activity has enabled us to put order in an array of seemingly disparate practices to which the term regularly refers. The analysis also shows how mutuality in plea bargaining is different from cognitive consensus or common agreement. Mutuality is a feature of plea bargaining, and it is produced by way of concrete negotiational patterns, such as the use of devices which allow the collaborative occasioning of a bargaining sequence. The bargaining sequence itself preserves a sense of mutuality because it allows decisions, however substantively indicative of disagreement (as with trial outcomes), to be jointly arranged rather than unilaterally imposed.

Frame analysis of plea bargaining discourse shows that the bargaining sequence exhibits a sensitivity not just to those doing the face-to-face negotiations and their immediate setting. By frequent changes of footing, practitioners take up different alignments which attest to the variety of organizational forms in which they are embedded, including their relationships with other persons, such as defendants and witnesses; their own offices and professions; other agencies, such as the police; and the court and its activities, such as trial. By studying plea bargaining in frame analytic terms, a move is made beyond both sequential analysis and ethnography in terms of understanding the discourse as a dramaturgical arena in which various social arrangements that otherwise transcend immediate interaction in time and space are momentarily implicated in that interaction.

Studying discourse—as opposed to interviewing or observing participants, taking notes on the process, and summarizing what happened—is to take seriously that speech is not so much about life, about events that happen outside talk, as it is itself a form of life or a realm of activity in its own right. This means that spoken language has to be appreciated not as a vehicle for communication, as a way of conveying information in order to reach cognitive


