

# COOPERATING OR CAVING IN: ARE DEFENSE ATTORNEYS SHREWD OR EXPLOITED IN PLEA BARGAINING NEGOTIATIONS?

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Growing up watching Perry Mason was a key component in how I viewed criminal law. Clever defense attorneys, working diligently, were able to arrive at the truth about their innocent clients and demonstrated that truth to the prosecutor, jury, and public with dramatic flair each week. The criminal system appeared like a system working at its best.

Of course, this was not actually how any criminal law system has ever operated and it clearly does not do so today. Leaving aside whether those “aha” moments and confessions on the stand occur outside of television and the movies,<sup>1</sup> Perry Mason never appeared to handle cases by plea bargaining. Yet, like civil litigation, the vast majority of criminal prosecutions are resolved by plea bargaining.<sup>2</sup>

The conference that we hosted at Marquette was designed to examine the plea bargaining process more closely from both the perspectives of criminal law and dispute resolution. This particular essay is designed to add to the conversation by highlighting some interesting statistics about the negotiation styles of criminal lawyers and then hypothesizing why this behavior occurs.

The first part of this essay will examine the data from my negotiation study regarding lawyers in general and then criminal lawyers.<sup>3</sup> This

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1. See LEGALLY BLONDE (Metro Goldwyn Mayer 2001) for a more recent example.

2. Over ninety-five percent of criminal cases are handled by plea bargaining. Russell Covey, *Reconsidering the Relationship Between Cognitive Psychology and Plea Bargaining*, 91 MARQ. L. REV. 213, 215 n.8 (2007); see also Richard Birke, *The Role of Trial in Promoting Cooperative Negotiation in Criminal Practice*, 91 MARQ. L. REV. 39, 40 n.6 (2007) (citing Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 463 tbl.1, 512 tbl.7 (2004)).

3. For a more extensive review of my study, see Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV.

essay will then outline several different theories for why criminal lawyers might be so problem-solving. And finally, I will discuss what the impact of problem-solving behavior might be on the criminal law system.

### I. NEGOTIATION STUDY

In 1976, Professor Gerald Williams studied the negotiation behavior of lawyers by distributing a mail survey to roughly 1,000 attorneys in the Phoenix area.<sup>4</sup> Williams' study revealed that attorneys predominately engaged in two styles of negotiation, which he labeled cooperative and competitive. He found that approximately two-thirds of lawyers studied were cooperative. He also found that negotiators from both styles could be effective although cooperative lawyers tended to be more so.<sup>5</sup> Twenty-five years later, I sought to update and expand Williams' research, recognizing changes in the demographics of the bar and emerging trends in the alternative dispute resolution (ADR) movement by adding more terms of descriptions to provide a more comprehensive and clear picture of contemporary negotiation styles.<sup>6</sup> This update has allowed me to compare styles across time,<sup>7</sup> across geography,<sup>8</sup> across practice area,<sup>9</sup> and across gender.<sup>10</sup> I also found striking differences in levels of effectiveness by negotiation style.<sup>11</sup>

The study was sent to 1,000 attorneys in Milwaukee, Wisconsin, and 1,500 in Chicago, Illinois. The survey asked attorneys in each city to choose adjectives describing their most recent negotiation counterpart, rate their counterpart on a bipolar scale, indicate the goals of that negotiation, and, finally, to rate the effectiveness of the tactics used in the negotiation.<sup>12</sup> The survey had an overall response rate of twenty-

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NEGOT. L. REV. 143 (2002).

4. GERALD R. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 15-46 (1983).

5. *Id.* at 18-19.

6. Schneider, *supra* note 3, at 152-57.

7. Andrea Kupfer Schneider, *Perception, Reputation and Reality: An Empirical Study of Negotiation Skills*, 6 DISP. RESOL. MAG., Summer 2000, at 24.

8. Catherine H. Tinsley, Jack J. Cambria & Andrea Kupfer Schneider, *Reputations in Negotiation*, in THE NEGOTIATOR'S FIELDBOOK 203, 208-09 (Andrea Kupfer Schneider & Christopher Honeyman eds., 2006).

9. Andrea Kupfer Schneider & Nancy Mills, *What Family Lawyers Are Really Doing When They Negotiate*, 44 FAM. CT. REV. 612, 616-18 (2006).

10. Andrea Kupfer Schneider, *Gender Myths and Reality in Negotiation* (2007) (unpublished article, on file with author).

11. Schneider, *supra* note 3, at 167, 175, 184.

12. *See id.* at 157-61.

nine percent.<sup>13</sup>

Statisticians at the Institute for Survey and Policy Research at the University of Wisconsin-Milwaukee performed cluster analysis on the results to divide the studied attorneys into two, three, and four groupings.<sup>14</sup> The two-cluster analysis resulted in attorneys being labeled either problem-solving or adversarial, much like the original Williams study.<sup>15</sup> The three-cluster analysis resulted in groups that I labeled true problem-solving, cautious problem-solving, and adversarial. I labeled the four groups true problem-solving, cautious problem-solving, ethical adversarial, and unethical adversarial. In comparing the behavior of criminal law attorneys with that of attorneys in other practice areas, we will use the results of the four-cluster analysis, so I have reprinted the table of top twenty adjectives for the four clusters from the original study in order to understand the four different styles under discussion later in the article.

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13. *Id.* at 158.

14. Cluster analysis uses a computer to find natural groups in the data by identifying similar patterns among responses given in the survey. There was no attempt to tell the computer what kind of patterns to find or to give particular emphasis to a certain set of characteristics. The cluster analysis only looked for identifiable patterns among the responses given by the attorneys.

15. For more on how the results in my study compared to Williams' study, see Schneider, *supra* note 3, at 176-79; Schneider, *supra* note 7.

Table 1  
Top 20 Adjectives for Four Cluster<sup>16</sup>

	<b>True Problem-Solving</b>	<b>Cautious Problem-Solving</b>	<b>Ethical Adversarial</b>	<b>Unethical Adversarial</b>
1	Ethical	Ethical	Confident	Irritating
2	Experienced	Experienced	Assertive	Stubborn
3	Personable	Personable	Arrogant	Headstrong
4	Trustworthy	Self-controlled	Headstrong	Argumentative
5	Rational	Confident	Experienced	Quarrelsome
6	Fair-minded	Rational	Demanding	Arrogant
7	Agreeable	Agreeable	Egotistical	Egotistical
8	Communicative	Dignified	Ambitious	Manipulative
9	Realistic		Stubborn	Assertive
10	Accommodating		Argumentative	Demanding
11	Perceptive		Tough	Complaining
12	Confident		Irritating	Hostile
13	Sociable		Forceful	Suspicious
14	Self-controlled		Firm	Conniving
15	Adaptable		Quarrelsome	Greedy
16	Dignified		Masculine	Rude
17	Helpful		Dominant	Angry
18	Astute		Ethical	Confident
19	Poised		Deliberate	Ambitious
20	Flexible		Hostile	Deceptive

The four-cluster analysis is interesting because there are striking differences even when comparing similar groups. For example, the cautious problem-solvers were engaged in completely positive behavior. All of the adjectives describing them are favorable, and they have good behavioral characteristics such as ethical, experienced, rational, confident, agreeable, and dignified. Yet, the effectiveness rating of the cautious problem-solvers versus the true problem-solvers was dramatic—23.5% versus 71.8% (see Table 2 below). What was the difference? Those lawyers in the cautious group *were* cautious—cautious about truly engaging in problem-solving behavior. The true problem-solvers had far more skills in their repertoire and were effective in a triangle of skills—assertiveness, empathy, and flexibility.

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16. Schneider, *supra* note 3, at 180.

The lawyers with these two approaches share ethical behavior and a pleasant personality, but the true problem-solver goes further in these three skills. The true problem-solver is better at asserting the case (rated highly in preparation, astuteness about the law, and being realistic) and better at talking about the case as well (rated highly in being poised, forthright, communicative, reasonable, and sincere). The true problem-solver is better at understanding that negotiation can have mutual benefits (found in the bipolar descriptions in Appendix A) and is also better at working with the other side (rated highly in accommodating, agreeable, helpful, perceptive, and tactful). Finally, the true problem-solver is highly rated in adaptability, facilitating the agreement, and flexibility. These are all skills that, apparently, the cautious problem-solvers do not have.

However, these cautious problem-solvers were still rated far more highly in effectiveness on behalf of their clients than either group of adversarial lawyers. It is perhaps heartening to see the perceived effectiveness of lawyers drop rather dramatically as the level of adversarial behavior rises. While there are dramatic differences between ethical and unethical adversarial behavior, we should still note that the ethical adversarial lawyers have several strong negative adjectives attributed to them (such as arrogant, egotistical, and irritating) and are significantly less effective for their clients than cautious problem-solvers.

The differences between the ethical and unethical adversarial lawyers (as shown in Table 1 above) can be found in four areas. First, the ethical adversarial lawyers still are considered trustworthy (that is, rated highly in ethical behavior) while the unethical adversarial lawyers are highly rated in being manipulative, conniving, and deceptive—not at all trustworthy. Second, unethical adversarial lawyers are also not trusting, rated highly in being suspicious of the other side. Third, there is a difference of tone. While the ethical adversarial lawyers are tough and firm, unethical adversarial lawyers are generally considered to be rude and angry. Finally, the only group of lawyers not viewed as experienced is the unethical adversarial lawyers who are also missing the adjective of deliberate, perhaps reflecting a lack of preparation or thoughtfulness about their case. The bipolar behavior ratings (shown in Appendix A) further differentiate between the ethical and unethical adversarial attorneys, describing the unethical group as untrustworthy, unpleasant, inflexible, and not understanding of or caring to understand the other side. It should be of little surprise, as shown in Table 2 below, that only

2.6% of these unethical adversarial lawyers were perceived as effective by their peers.<sup>17</sup>

Table 2  
Four Cluster Breakdown by Effectiveness<sup>18</sup>

	Ineffective	Average	Effective	Total Percentage of the Bar by Cluster
True Problem-Solving	1.3%	26.9%	71.8%	38.5%
Cautious Problem-Solving	11.8%	64.7%	23.5%	27.5%
Ethical Adversarial	39.8%	44.4%	15.8%	21.5%
Unethical Adversarial	75.3%	22.1%	2.6%	12.5%
Totals	21.7%	40.5%	37.8%	N = 618 <sup>19</sup>

So, in comparing lawyer behaviors across the clusters, it is clear that there are strong differences in style—and that these differences result in a clear disparity in effectiveness ratings as well. Obviously, this study measures perceptions rather than some objective measure of effectiveness. Yet, perceptions of one lawyer by another lawyer are clearly more accurate than self-evaluations and are considered valuable given the similar education and practice area.<sup>20</sup> We might also worry about the “punishment” effect—this person “beat” me in the negotiation so I will rate them lower in effectiveness to get back at them. In fact, as further explained in the original article, the lower ratings were

17. *See id.* at 184.

18. *See* Schneider & Mills, *supra* note 9, at 616 (Table 3 in original article).

19.  $X^2 = 342.6$ ,  $df = 6$ ,  $p < .001$ .

20. *See* KELLY G. SHAVER, AN INTRODUCTION TO ATTRIBUTION PROCESSES 21–34 (1975) (explaining that attributions are more likely to be correct when the observer has experience, intelligence, and can empathize with others).

often backed up with stories, including objective measures that would support the ineffectiveness ratings.<sup>21</sup> For example, “ineffective” lawyers included those who were reprimanded by the judge or refused a settlement offer for much more than they received at trial.<sup>22</sup>

## II. WHAT DOES THE STUDY SAY ABOUT CRIMINAL LAW?

The following table illustrates the four cluster analysis and highlights the unique characteristics found among criminal lawyers who responded to the study.

Table 3  
Practice Area by Cluster<sup>23</sup>

	Corporate	Criminal	Property	Civil	Other	Commercial	Family	Total % by Cluster
True Problem-Solving	42.0%	49.2%	44.7%	36.4%	37.4%	38.2%	37.7%	39.3%
Cautious Problem-Solving	34.0%	22.0%	23.4%	31.1%	25.3%	23.5%	23.0%	27.5%
Ethical Adversarial	22.0%	20.3%	19.1%	18.9%	23.2%	32.4%	24.6%	21.5%
Unethical Adversarial	2.0%	8.5%	12.8%	13.6%	14.1%	5.9%	14.8%	11.8%
Total % by Practice Area	8.7%	10.2%	8.1%	39.4%	17.1%	5.9%	10.6%	N = 578 <sup>24</sup>

Compared against the other practice areas, criminal law had the highest percentage of true problem-solving attorneys at 49.2%. The average of all other practice areas at 39.3% is far less than the

21. Schneider, *supra* note 3, at 194–95, 195 n.102.

22. *Id.* at 195 n.102.

23. See Schneider & Mills, *supra* note 9, at 616 (Table 4 in original).

24. This table is not statistically significant.

percentage in criminal law. Also, criminal law had one of the lowest amounts of unethical adversarial attorneys (8.5%) behind only commercial law (5.9%) and corporate (2.0%). The number of criminal lawyers rated as problem-solving (adding together both true and cautious problem solvers) is only lower than one other practice area (corporate lawyers rated as 76% against 71% for criminal lawyers).

Also, not only are criminal lawyers rated highly as problem-solving lawyers, but they are also rated as one of the lowest adversarial attorneys. Again, the only practice area that had a lower percentage of adversarial attorneys was corporate lawyers with 24% versus 28.8% for criminal lawyers. Conversely, family lawyers were not only rated lowest in problem-solving behavior with only 60.7%, but were also rated highest in adversarial lawyers with 39.4%. These results seem to contradict general perceptions about not only criminal law, but also family law as well. Family law has traditionally been seen as taking more of a problem-solving approach; however the results indicate that this is not the case.<sup>25</sup> Surprisingly, the results turn general perception on its head by showing that criminal law appears to be the most problem-solving, while family law is the most adversarial.

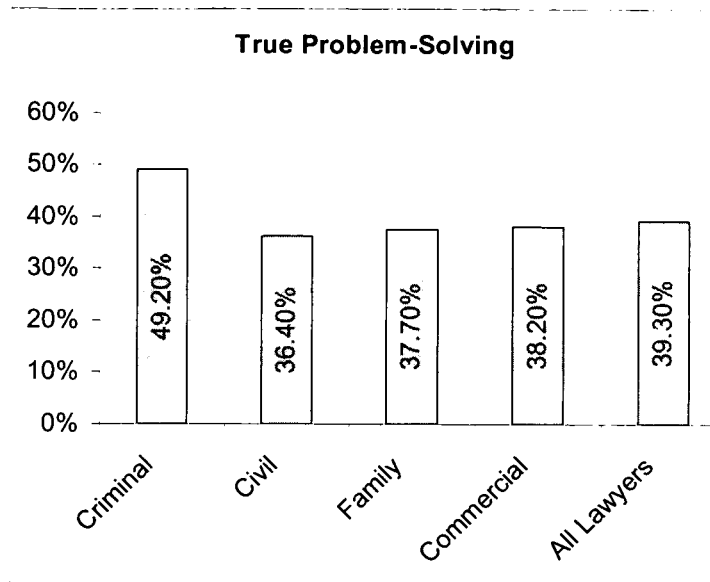
At first glance these results may seem surprising. Perpetuated by popular culture, initial impressions of criminal law often include a prosecutor and criminal defense lawyer engaging in a ruthless battle for victory. However, the results from the study suggest that criminal law may be an unexpectedly fertile environment to maximize positive problem-solving methods.

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25. See Schneider & Mills, *supra* note 9, at 618–19 (explaining why family lawyers are rated as the most adversarial).



Figure 1  
True Problem-Solving by Practice Area



Tables 4, 5, and 6 highlight the differences even further. Criminal law is the highest practice area in true problem-solving by ten percentage points. At the other extreme, criminal law also has a very low percentage of unethical adversarial negotiators.

Figure 2  
Criminal v. Civil

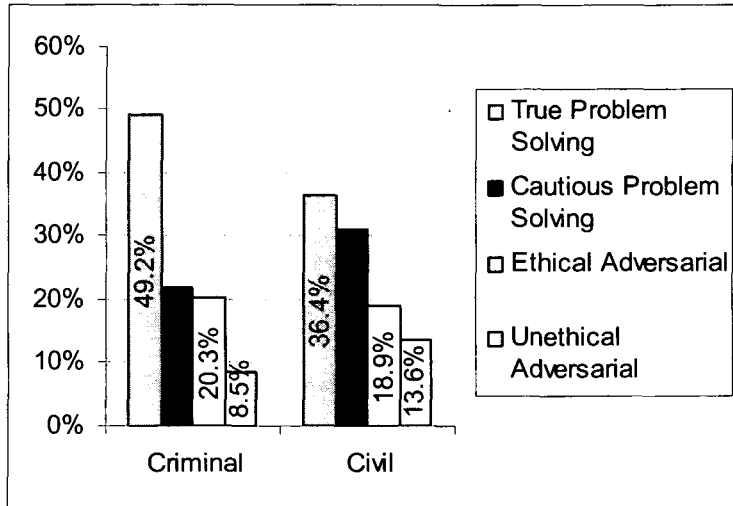
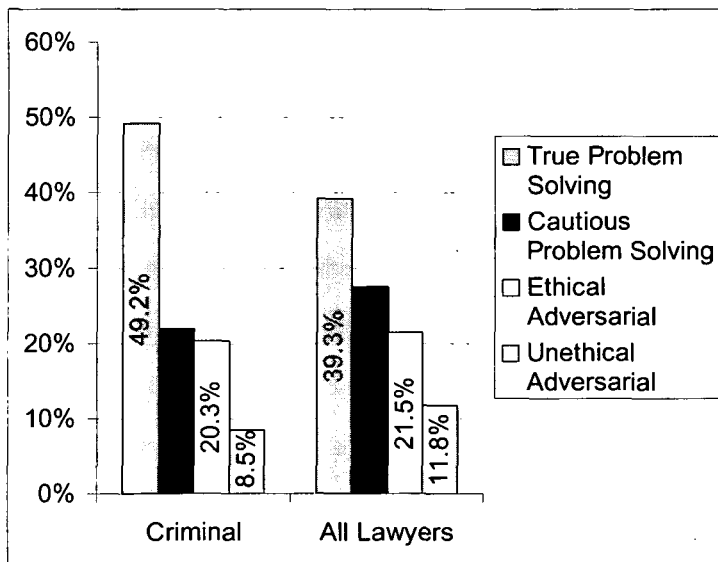


Figure 3  
Criminal v. All Lawyers



A further breakdown of criminal lawyers reveals some interesting differences, although the number of studied lawyers was too low to draw broad inferences. First, in the two cluster analysis (problem-solving and adversarial, see Table 7), there was a noted difference in the styles between prosecutors and defenders. While prosecutors were problem-solving in 64.7% of the cases, defenders were seen as problem-solving in 86.4%.<sup>26</sup> Similarly, in the four cluster analysis, (see Table 8), there was a huge percentage difference in styles. Prosecutors were true problem-solving in 38.2% of the cases while defenders were true problem-solving in 68.2%.<sup>27</sup>

Table 4  
Two Cluster Analysis by Case Side

	Prosecutors	Defense Attorneys
Problem-Solving	64.7%	86.4%
Adversarial	35.3%	13.6%

Table 5  
Four Cluster Analysis by Case Side

	Prosecutors	Defense Attorneys
True Problem-Solving	38.2%	68.2%
Cautious Problem-Solving	26.5%	18.2%
Ethical Adversarial	26.5%	9.1%
Unethical Adversarial	8.8%	4.5%

While the numbers in both the two cluster and four cluster analysis for prosecutors mirror the general ratings for all lawyers, the numbers for

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26. This is marginally significant with  $p = .067$ , but the lack of statistical significance is more likely due to the very few number of cases ( $n = 56$ ).

27. This is not statistically significant ( $p = .16$ ), but is nonetheless striking.

defense attorneys are quite striking. The difference between the average for all lawyers in the two cluster analysis is over 20% (65% problem-solving for all lawyers versus 86% problem-solving for defense attorneys) and almost 30% in the four cluster analysis. (39% true problem-solving for all lawyers versus 68% true problem-solving for defense lawyers). No other group of lawyers appears to be so problem-solving. And this rating comes from *the prosecutors with whom they are negotiating*.

The style rating for prosecutors varied when public defenders versus private defense attorneys were rating them (71.4% problem-solving from public defenders versus 63.6% from private defense attorneys).<sup>28</sup> There was no difference when prosecutors rated the defense attorneys in terms of style.

The numbers in this part of the study were very limited, so it would be quite interesting to run this with a larger data set to see if one could find statistically significant differences between the prosecution and defense.

### III. WHY ARE CRIMINAL LAWYERS MORE PROBLEM-SOLVING?

There are several different reasons why criminal lawyers might be more problem-solving than their peers in other practice areas. This section of the essay outlines these theories.

#### A. Repeat Play and Reputation

In their seminal article about cooperation among lawyers, Ronald Gilson and Robert Mnookin outline a theory of reputation markets where lawyers in smaller practice areas and narrower geographic regions are able to build a reputation for problem-solving.<sup>29</sup> This reputation for problem-solving will be worthwhile in terms of resolving cases through negotiation because this will save clients time and money. Elsewhere, I have written about how this reputation theory has been demonstrated in my study when comparing geographic regions<sup>30</sup> but was not actually shown to hold true in the practice area of family law.<sup>31</sup> In the criminal law context, however, it is clear that extremely high levels of problem-solving behavior are exhibited between the prosecutor and

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28.  $p = .5$ , so this was also not statistically significant.

29. Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 525–27, 537–41 (1994).

30. Tinsley, Cambria, & Schneider, *supra* note 8, at 208–09.

31. See Schneider & Mills, *supra* note 9, at 616–19.

the defendant's attorney. In criminal law, the geographic area of practice is narrow and the population of prosecutors and criminal lawyers is also limited. Criminal lawyers deal with each other repeatedly. In the civil law context, Jason Johnston and Joel Waldfogel demonstrated how lawyers that have already dealt with one another were more likely to reach a settlement the next time they interacted.<sup>32</sup> As Richard Birke has discussed, this cooperative behavior can be expected when there are relationships with no known end and that are likely to continue. Furthermore, the bargaining relationship is straightforward with little complexity or worry over miscommunication that might distort otherwise cooperative behavior.<sup>33</sup> So, given the small population of criminal lawyers, the likelihood of ongoing relationships, clear communication, and problem-solving behavior could be understood to occur as a result of repeat play among the lawyers.

### B. Docket Load

Problem-solving behavior could also result from the clear need to settle cases and move work along. For example, in the two primary counties examined in this study, the caseloads for both prosecutors and public defenders were impressive. The average prosecutor in Chicago had 600 total cases<sup>34</sup> while prosecutors in Milwaukee had over 280 cases.<sup>35</sup> In order to focus on the cases that will be proceeding to trial, in order to actually go home at night, criminal lawyers need to move the bulk of their cases quickly to the plea bargaining stage in order to get to the next one. Alafair Burke also explains that prosecutors pick certain cases for which they have a "passion" based on either the facts or the law of that case and choose to focus on those cases for trial.<sup>36</sup> Because

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32. Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEGAL STUD. 39 (2002).

33. See Jianzhong Wu & Robert Axelrod, *How to Cope with Noise in the Iterated Prisoner's Dilemma*, 39 J. CONFLICT RESOL. 183, 188 (1995); see also Birke, *supra* note 2, at 59–62.

34. Eric Zorn, *Cuts May Throw Scales of Justice Off Balance*, CHI. TRIB., Feb. 6, 2007, at C1 (quoting State's Attorney Richard Devine citing the 2006 Bureau of Justice Statistics).

35. See WIS. LEGISLATIVE AUDIT BUREAU, ALLOCATION OF PROSECUTOR POSITIONS 15, apps. 1 & 3 (2007), available at <http://www.legis.wisconsin.gov/lab/reports/07-9Full.pdf> (noting that from 2002–2006 staff positions in prosecutors' offices decreased while caseloads increased and indicating the number of full-time equivalent prosecutors by county and the caseload by county); see STEVE BOGIRA, COURTROOM 302: A YEAR BEHIND THE SCENES IN AN AMERICAN CRIMINAL COURTHOUSE 124–26 (2005) (discussing how different public defenders deal with their caseloads regarding plea bargaining).

36. Alafair S. Burke, *Prosecutorial Passion and Plea Bargaining*, 91 MARQ. L. REV. 183, 195–203 (2007).

adversarial behavior during the plea bargaining will likely add more time to the plea bargaining itself,<sup>37</sup> criminal lawyers on both sides have incentives to be more cooperative and move quickly to resolution.

*C. The Alternative to Negotiation Is Clear (and Punitive)*

When the law is relatively clear, lawyers have an easier time “bargaining in the shadow of the law.”<sup>38</sup> In most criminal cases, the facts, the law, and the likely sentence are relatively clear.<sup>39</sup> Prosecutors and defenders are negotiating over relatively few contentious issues and are negotiating over the sentence at the margins. With the trial outcome predictable in many cases, there is little reason (or ability) to be adversarial since the alternative (trial outcome) is clear.

*D. Incentives to Plea for Both Sides*

It may be that prosecutors are more problem-solving than other lawyers because of the cases they take. Prosecutors have an incentive to maximize their conviction rate and, therefore, are more likely to only go to trial with sure winners. Less clear cases on either the law or procedure will result in pleas. Doubtful or hard cases can be avoided by a prosecutor who does not press charges. Civil litigators, by contrast, work to maximize financial returns. Depending on how compensation is structured, a civil litigator may purposely take the harder, riskier case, or take the case with unclear law, or take cases indiscriminately and in high numbers without regard to the likelihood of success. Without the clear law or persuasive facts that a prosecutor can select in his cases, the civil litigator might be comparatively more adversarial in dealing with her cases.<sup>40</sup>

Defense attorneys also have a large incentive to plead their cases rather than go to trial. As Russell Covey explains, sentences reached in plea agreements versus at trial are significantly shorter; this trial penalty can be as high as 300% to 500% in some cases.<sup>41</sup> So, for example, a plea

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37. See Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 776, 778–80 (1984).

38. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968–69 (1979).

39. See CANDACE MCCOY, POLITICS AND PLEA BARGAINING: VICTIMS' RIGHTS IN CALIFORNIA 50–69 (1993) (discussing the dynamics of plea bargaining).

40. I am grateful to Professor Michael O'Hear for this point.

41. See Covey, *supra* note 2, at 225–26 (citing Candace McCoy, *Bargaining in the Shadow of the Hammer: The Trial Penalty in the USA*, in THE JURY TRIAL IN CRIMINAL JUSTICE 23, 27 (Douglas D. Koski ed., 2003)).

agreement for unlawful entry might be six months while the sentence after trial on burglary charges could be a maximum of thirty years.<sup>42</sup> Given the punitive effect of risking trial, only the most confident defendants will pursue trial. More likely, they will be forced to reach a plea agreement. Similarly, prosecutors, knowing the punitive effect of risking trial, can let the alternative speak for itself and have no need to engage in adversarial behavior.<sup>43</sup>

Furthermore, adversarial behavior by defense lawyers can be punished in other ways by prosecutors. As Covey discussed, in Milton Heumann's study of plea bargaining, defense attorneys were rewarded for cooperative behavior through informal discovery rules where prosecutors permit open access to case files.<sup>44</sup> When defense attorneys were more adversarial, filing motions or jury-trial demands, prosecutors punished this behavior by denying these attorneys access to previously open files.<sup>45</sup>

#### *E. Clients and Victims Are Not as Involved with "Their" Lawyers*

As discussed earlier, one might think that family lawyers, with their repeat play and often sensitive case load, might be more problem-solving. This is actually *not* the case, and family lawyers have the highest percentage of adversarial behavior of all practice areas.<sup>46</sup> One explanation for this result in family law is that the clients engaged in family law cases push this adversarial behavior. In other words, the clients are "out for blood" and will hire their attorneys and make strategic decisions based on the desire to hurt the other side.<sup>47</sup> Similarly, in other types of civil litigation, the clients might push their lawyers to be more adversarial.

In criminal law, there is a different kind of client involvement on both sides. First, on the prosecutor side, the prosecution officially represents the "state." The victim or victim's family is not officially represented by the prosecutor and is often not part of the case at all unless the case proceeds to trial where testimony might be needed.<sup>48</sup>

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42. *See id.* at 228.

43. *See also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *YALE L.J.* 1, 23–52 (1997) (discussing how pay scales, crime rates, and wealth affect both prosecutorial and defense selection of cases).

44. Covey, *supra* note 2, at 235.

45. *See id.* at 235–36 (citing MILTON HEUMANN, *PLEA BARGAINING* 69–75 (1977) (discussing the impact of informal discovery mechanisms on bargaining)).

46. Schneider & Mills, *supra* note 9, at 617.

47. *See id.* at 618.

48. *See generally* Symposium, *Restorative Justice in Action*, 89 *MARQ. L. REV.* 247

What this means is that the person most likely to push for a harsh sentence and take a more adversarial approach in any plea bargaining negotiation is actually not involved.

On the defendant side, there is also a difference between typical civil litigation clients and defendants. Criminal defendants, unless this is a high-end white collar prosecution, tend not to have the education, social status, or ability to direct their attorneys in the same way as other litigants.<sup>49</sup> Furthermore, in many of these cases, the defendant is not paying the attorney and, therefore, has even less power to be directive in how the case is handled.<sup>50</sup> Again, in the criminal law context compared to other contexts, the client here has little ability to push for adversarial approaches in negotiation or to hold out for better bargains.

#### F. Pretrial Detention

One last reason that plea bargains might be so cooperative is how they are framed to the defendant. Richard Birke, Stephanos Bibas, and others have written about the impact of loss aversion on the view of the defendant.<sup>51</sup> One could hypothesize that a defendant might want to avoid the certain “loss” encompassed in a guilty plea and, therefore, would hold out for trial. In reality, however, the typical loss aversion reaction and avoidance of plea bargains does not occur. When the defendant is already in jail, a plea that gets him or her out of jail with time served looks like a gain. With close to three-fourths of federal felony defendants in jail prior to trial and close to two-thirds of state felony arrestees not out on bail, a large proportion of defendants are calculating the impact of their plea from a jail cell. With the horrors of pretrial detention well documented, the guilty plea is the most effective method to ensure the end of the legal process and getting out of jail as soon as possible.<sup>52</sup>

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(2005). Restorative justice aims to involve victims more in the criminal law process. Nonetheless, even here, victims do not often work directly with the prosecutor but rather with other branches of the DA's office. Michael O'Hear, *Plea Bargaining and Victims: From Consultation to Guidelines*, 91 MARQ. L. REV. 323, 324–25 (2007).

49. See CAROLINE WOLF HARLOW, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, EDUCATION AND CORRECTIONAL POPULATIONS 1–3 (2003), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ecp.pdf>.

50. See BOGIRA, *supra* note 35, at 125–26.

51. See Richard Birke, *Reconciling Loss Aversion and Guilty Pleas*, 1999 UTAH L. REV. 205, 210–16; see also Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2507–12 (2004).

52. See Covey, *supra* note 2, at 239–40.



#### IV. WHAT IS THE STORY? CAVING OR COOPERATING?

One could tell two different kinds of stories about what is going on in the criminal law bar. On the one hand, this study could show how well repeat play, long term reputations, and a joint interest in justice, promote problem-solving behavior. Prosecutors and defense attorneys could be working efficiently and fairly together in resolving an overwhelming number of cases appropriately.<sup>53</sup> On the other hand, this study could be merely confirming just how stacked the system is. The fact that defense attorneys appear to be so overwhelmingly problem-solving could be evidence of a system that forces ill-informed, jailed, poor defendants working with underpaid, overworked defense lawyers to accept pleas despite legal rights, evidence, and even possible innocence.<sup>54</sup> It could also be that prosecutors are feeling benign toward their counterparts—after all, the prosecutors generally win—and “reward” defense attorneys with a positive assessment of their negotiation behavior. Defense attorneys could be no better or worse than other attorneys but just could be getting better ratings from their prosecutorial peers.<sup>55</sup> Or possibly the answers lie in the combination of all of these theories. With criminal justice reform an ongoing issue, we can hope that bringing both dispute resolution and criminal law perspectives to bear on the question of plea bargaining can help illuminate the whole story.

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53. See MCCOY, *supra* note 39, at 53–64 (explaining the view taken by courtroom “insiders” regarding plea bargaining).

54. MCCOY, *supra* note 39, at 64–69 (explaining the view taken by outsiders, the public and those not part of the courtroom professionals); *see also*, BOGIRA, *supra* note 35, at 125–26; Michael O’Hear, *Plea Bargaining and Procedural Justice*, 42 GA. L. REV. (forthcoming 2007).

55. I am grateful to Professor Chad Oldfather for this point.

Appendix A  
Top 20 Behaviors for Four Cluster<sup>56</sup>

	<b>Problem-Solving</b>	<b>Cautious Problem-Solving</b>	<b>Ethical Adversarial</b>	<b>Unethical Adversarial</b>
1	Did not use derogatory personal references	Did not use derogatory personal references	Interested in his client's needs	Not interested in my client's needs
2	Courteous	Interested in his client's needs	Unrealistic initial position	Rigid
3	Interested in his client's needs	Did not use offensive tactics	Extreme opening demand	Arrogant
4	Honest	Courteous	Not interested in my client's needs	Unreasonable
5	Pursued best interest of client	Zealous representation within bounds	Aggressive	Single solution
6	Friendly	Honest	Arrogant	Uncooperative
7	Zealous representation within bounds		Prepared	Narrow range of strategies
8	Intelligent			Narrow view of problem
9	Reasonable			Extreme opening demand
10	Tactful			Did not consider my needs
11	Cooperative			Negotiation = win/lose
12	Adhered to legal courtesies			Unrealistic initial position
13	Prepared			Unconcerned how I look
14	Forthright			Aggressive
15	Trustful			Inaccurately estimated case
16	Sincere			Insincere
17	Accurate representation of position			Fixed conception of problem
18	Facilitated			Distrustful
19	Viewed negotiation as possibly having mutual benefit			Obstructed
20	Did not use threats			Inflicted needless harm

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56. Schneider & Mills, *supra* note 9, at 615.