# PLEADING GUILTY IN LOWER COURTS

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## I. INTRODUCTION

The simple logic of plea bargaining is so compelling that it is now often taken for granted, with the result that its value as an explanation is diminished. Differences among a host of distinct practices may be obscured or ignored when they are lumped together under this single term. This comment examines the practice of pleading guilty to petty offenses in lower courts and questions some of the long-standing assumptions about the dynamics of that process. It shows that though plea bargaining of the classical type rarely occurs, the term itself and certain aspects of bargaining continue to serve important symbolic functions.

In the conventional view of plea bargaining, the defendant extracts concessions, either the reduction of charges or sentence recommendation, in exchange for pleading guilty. This view is based on the assumption that, in the absence of such concessions, the defendant will go to trial. However, many defendants in lower criminal courts never seriously contemplate trial, although they do plead guilty. The question is why? The virtual absence of trials in lower courts is no doubt partially attributable to the concessions just mentioned, but this is an incomplete answer for such a widespread phenomenon.

A more important reason for the absence of trials in the lower courts lies in the economics of the process. If the state's case is weak, the prosecutor is quite likely to drop the charges—contrary to myth—and in many jurisdictions about as many arrests are disposed of in this manner as are handled through guilty pleas. Of those convicted on original misdemeanor charges, few end up serving time in jail. The typical outcome is a suspended jail sentence together with probation or a fine. By comparison, the time, effort, and expense of going to trial are overwhelming. To illustrate, a private attorney may charge $200 or more per day to conduct a trial, yet few fines exceed $50. Prosecutors are aware of this; they know that, for all practical purposes, defendant threats to go to trial are usually hollow and will only rarely be carried out. In fact, trials in the lower courts are so infrequent that some prosecutors and judges regard them as a welcome change of pace, an unusual

opportunity to allow them to "feel like lawyers." For the overwhelming majority of defendants, however, trial is simply *not* a viable alternative because the dominant incentive in the orthodox notion of plea bargaining—the desire to stay out of jail—is not present. The primary question for many defendants in lower courts is not whether to go to trial but whether to show up in court at all.

If the critical motive for plea bargining is absent, or if it is weak and present only in a very few cases, how can we describe the process of negotiating cases more accurately? Why do participants characterize it as plea bargaining? What functions does this language serve?

Discussions of plea bargaining often conjure up images of a Middle Eastern bazaar, in which each transaction appears as a new and distinct encounter, unencumbered by precedent or past association. Every interchange involves higgling and haggling anew, in an effort to obtain the best possible deal. The reality of American lower courts is different. They are more akin to modern supermarkets, in which prices for various commodities have been clearly established and labeled in advance. Arriving at an exchange in this context is not an explicit bargaining process—"You do this for me and I'll do that for you"—designed to reach a mutually acceptable agreement. To the extent that there is any negotiation at all, it usually focuses on the nature of the case, and the establishment of relevant "facts"—facts that flow from various interpretations of what is and is not said in the police report, rap sheet, and the like. In a supermarket customers may complain about prices, but they rarely "bargain" to get them reduced. Yet an alert consumer may try to convince a store manager that an item has been mislabeled and "mispriced." It is this type of "bargaining" that characterizes a great many negotiations in lower courts. The term plea bargaining has come to refer to almost any type of negotiation, even one in which the defense successfully convinces the prosecutor to drop all charges, which is clearly not a *plea* bargain in the conventional sense of the term.

This does not mean that there is no plea bargaining of the more familiar type. Although in the modern American supermarket prices are labeled and there is little bargaining over them, the forces of the market are still at work. Prices are not tested and adjusted with every retail purchase, but changes in wholesale prices eventually lead to adjustments in consumer prices. Similarly, the occasional "real" plea bargain or sentence after trial may reaffirm or revalue the "worth" of a certain

type of case. Once this is established it will prevail until it is eroded or challenged by another key case and a new "price" is established. There is thus a plea market in the sense that a case whose outcome has been the result of vigorous bargaining or trial can establish a new "going rate" for subsequent similar cases.

This process is illustrated by the recent history of drug possession cases. Within the past few years, marijuana has become "familiar" to the courts and the community, both of which have grown more tolerant of its use. One result is that the courts have become progressively more lenient in their handling of these cases: the "worth" or "going rate" of this type of case has declined. Although this decline was precipitated by changing social mores, it received impetus in the courts from defense attorneys who were dissatisfied with the "going rates," and threatened trial—in classic plea bargaining fashion—unless their views were accommodated. Occasionally such confrontations resulted in trials in which prosecutors found the sentences less harsh than they had expected. Because communication is rapid in the small world of the courthouse, it only takes a handful of such cases—perhaps only one—to establish a new "going rate." Thus though the classic process of plea bargaining does not take place very frequently, it is not unimportant. Indeed, it is even more important precisely because one or two cases may have widespread and lasting effects.

## II. THE SYMBOLIC IMPORTANCE OF "PLEA BARGAINING"

Although most of what prosecutors and defense attorneys refer to as plea bargaining is actually a normative endeavor—a joint assessment of the incident and the actions and character of the accused—many of the trappings of the classic plea bargaining process still exist and serve important symbolic functions. They furnish the illusion of a "deal" and allow an attorney to muster tangible evidence of the value of his service to allay the doubts of an often skeptical client. In a classic plea bargain, the defendant attempts to secure a reduced charge or a guaranteed sentence in exchange for his guilty plea. Both types of concessions occur with great frequency in lower courts. Defense attorneys regularly approach their clients to report that the prosecutor is willing to nolle a charge or to recommend what appears to be a lenient sentence in exchange for a plea of guilty. The prosecutor may make such suggestions directly to the unrepresented defendant.

Whether they are mediated through an attorney or issue directly from the prosecutor, these "offers" are often phrased in a way that makes them appear to be exceptional "deals"—too good to pass up—when in fact they are essentially the "going rate." Criminal offenses are characterized in minute detail in the criminal code and any suspected violation can easily fit into one of several different classifications. For instance, there may be four classes of larceny and four of assault, each gradation distinguished by the value of the items stolen or the amount of damage. In addition, two or three different charges may be so closely related that they can easily be applied to the same act. Assault might reasonably be labeled a threat, shoplifting a trespass, and breach of peace an instance of disorderly conduct. By dropping one of two closely related charges or substituting one for the other, prosecutors can convey the impression of a bargain, when in fact they may simply be offering the standard rate under a slightly different label. Although they are aware of the charade, defense attorneys willingly participate in it because it makes them appear to be of service to their clients.

This appearance of a bargain is dramatized in some courts by means of the concept of "theoretical" or "maximum exposure." A defendant is deeply concerned with his case outcome. If he cannot have charges dropped entirely then he wants a minimal sentence. The seeming harshness of the penal code contributes to the defendant's acceptance of whatever he actually receives. A defense attorney or prosecutor may describe a defendant's predicament to him in terms of his "theoretical exposure," calculated by determining the maximum possible sentence for all charges and then treating them additively. One charge of second-degree larceny and one of breach of peace may have a total theoretical exposure of eighteen months: twelve for the larceny and six for the breach of peace.

The prospects of an eighteen-month sentence are quite sobering to a defendant, and an attorney or prosecutor who can appear to obtain something substantially lower is likely to be viewed with gratitude. For instance, by dropping the larceny charge theoretical exposure is reduced to six months, knocking off 67 percent of the jail time. The same benefits can be produced by offering to recommend a sentence substantially below the "maximum," again emphasizing that it is a bargain. The reduction is almost always so dramatic that it would be difficult for the defendant to pass it up.

It is the salesman's stock-in-trade to represent a "going rate" as if it were a special sale price offered only once. The

gap between theoretical exposure and the standard rate allows defense attorneys and prosecutors to function in much the same way. Together, prosecutors and defense attorneys operate like discount stores, pointing to a never-used high list price and then marketing the product as a "special" at what is, in fact, the standard price.

In addition, this makes the attorney appear to have been of service. Criminal law is a difficult practice. Being accused of a crime is a humiliating experience, and few people come away from court feeling good about it. Clients are usually hostile and suspicious, especially if they are being represented by a public defender. The time, service, and skill an attorney invests is not always visible to them. Like doctors, lawyers must not only render services but also make it appear that they are doing so. Securing a sentence substantially below the "theoretical maximum" is one way of accomplishing this.

In lower courts theoretical exposure is a concept whose content is more symbolic than actual. Nevertheless it performs important functions. It serves as an index of success for both defendants and their attorneys. It allows the defendant some sense of victory. It dramatizes the efforts of his attorney and magnifies his own benefits, thereby facilitating the guilty plea process. An it provides a rough measure of competence for attorneys who desire some basis for assessing and comparing their skill as negotiators. The analogy to a game may be more real than many like to admit.

## III. CONCLUSIONS

My observations here run counter to those in much of the literature on plea bargaining. Though some of the differences may be accounted for by the tendency of different scholars to look at different courts, the main reason, I believe, is that those who generalize about plea bargaining have only a small, if important, set of criminal cases in mind—usually felonies, rather than the great masses of petty offenses. (Nor, as we have seen in the companion paper by Jack Katz, do these generalizations readily apply to that group of offenses known as "white-collar crimes.") I raise this point not to take issue with the findings of other scholars but to caution against unwarranted inferences and overgeneralization. The process I have briefly detailed here is likely to apply only to relatively minor criminal cases, and only to some of those in certain courts.

As I suggested at the outset, the process of pleading guilty has almost become synonymous with plea bargaining and the

result is that a purported explanation can at times obscure rather than enlighten. It is hoped that this brief comment will help to oppose this all too common tendency.