PLEA BARGAINING: WHO GAINS? WHO LOSES?

Executive Summary

Citizens and public officials frequently share a belief that the criminal courts face a crisis. Some critics question the effectiveness of the judicial process in controlling crime, pointing out that few offenders are arrested, fewer still are convicted, and only a small minority serve prison terms. Other critics question the quality of justice, asserting that concerns for case processing have eroded the adversary nature of the judicial procedure, leaving a bureaucratic determination of guilt and punishment for all but exceptional cases. In addition, many individuals sense that crime control and the quality of justice continue to deteriorate despite reforms that seek to attack the roots of the problems.

Conventional wisdom notwithstanding, it is not evident that the quality of justice has deteriorated, nor is it necessarily apparent that (except in some cities) the courts really face a crisis. In fact (beyond the formal requirements of law), little is understood about how criminal courts operate, what they accomplish, and how their operations can and should be modified by public policy. Yet, without understanding what courts accomplish and how those accomplishments can be measured, it is difficult to judge performance as unsatisfactory, acceptable, or exemplary. And unless the dynamics of court operations are understood, we may identify desired changes, but be incapable of implementing remedial policy.

Plea bargaining--the process by which the state grants sentencing and other concessions in exchange for guilty pleas in criminal cases--is frequently paramount in this concern for crime control and justice, and reflects the ambivalent public attitude toward the judicial process. Ambivalence toward plea bargaining arises from a general disagreement about what plea bargaining should accomplish given prevailing norms of American justice, what plea bargaining actually does accomplish given the reality of the judicial process, and how the existing practice could be modified (or preserved) through public policy.

Research reported in this study addresses these concerns by posing and answering two broad questions. The first question posed is: Who gains and who loses from plea bargaining? Gains and losses are assessed for the prosecuting attorney, the defendant, and the general public. These costs and benefits are measured in terms of convictions, sentences, recidivism, and future judicial processing. The second question is: Why do plea bargains occur? Explanations are sought in terms of resource constraints, the recognition of mitigating circumstances in individual cases, the ability of the guilty plea process to economically "sort" cases, and the individual proclivities of actors in the criminal justice process. The analysis is essentially empirical, and the attempt to quantify observations and support conclusions statistically contrasts with an equally important body of existing research, which is more qualitative.

The first question posed was: Who gains and who loses from plea bargaining? Our analysis supported the following answer to this question.

The Defendant

A. Many defendants who were convicted following a guilty plea would have had a fairly good change of acquittal if they had, in reality, demanded a trial. A guilty plea makes conviction a certainty. Concern was expressed that a guilty plea increased the conviction of the factually guilty, but at the expense of convicting the legally innocent.

B. Contrary to expectations, sentence concessions were not routinely awarded to suspects entering guilty pleas. In fact, no concessions were apparent for assault and larceny cases. For burglary, many guilty pleas followed charge reductions, but there was no evidence that these charge reductions resulted in lenient sentences. Only for the offense of robbery were sentences more severe for offenders convicted by trial. In these cases, probation was more frequent, and prison sentences tended to be shorter, for suspects convicted by a plea. Many guilty pleas followed charge reductions.

C. Defendants who were formally processed did not seem to differ substantially, in terms of probability of conviction, from suspects whose cases were nolled or dismissed for want of prosecution. Willingness of a witness to testify was an important determinant of final prosecution.

The Prosecutor

A. As the defendant's adversary, the defendant's losses are the prosecutor's gains. Thus, the prosecutor benefits from increased convictions resulting from a high volume of guilty pleas and loses little from bargaining concessions. Only for robbery do guilty plea defendants appear to receive more lenient treatment.

B. Since a trial is much more expensive than a guilty plea, a guilty plea saves the prosecutor resources. It is likely that without those savings his office would be forced to process a reduced work load.

C. We found no evidence that plea bargaining causes the prosecutor's future work load to increase substantially. On the contrary, the informal conviction of current cases--by increasing the overall number of convictions without significantly reducing the sentences received--appears to reduce the amount of criminal cases that are received in the future.

The Public

A. The plea process reduces criminal behavior, largely by increasing the number of convictions without offsetting losses resulting from more lenient plea bargain sentences.

B. The public benefits from (1) a reduced cost of processing current criminal cases and (2) a reduced rate of future criminal cases, and as a result, a smaller dollar cost for future processing.

C. Evidence to this point indicates that a significant improvement in criminal court processing would result from preventing evidence of guilt from deteriorating, largely due to problems with witnesses.

Chapter I: INTRODUCTION

Chapter One is devoted to the development of a theoretical model of criminal case processing, as well as presentation of a normative perspective used to judge court performance. The theoretical model borrows heavily from organizational analysis, supplemented by recent theoretical work done in the economics of law. Supporting empirical work is cited, which, together with the theory, led us to anticipate several important relationships between court outputs and "explanatory variables."

The criminal process is seen as a hydraulic system. Pressure at one point (e.g., more trials) causes a reaction at other points (e.g., fewer prosecutions). Of significance here, this hydraulic effect results in an inverse relationship between the number of trials and the number of convictions. Conviction by guilty plea is certain; conviction by trial is uncertain. For this reason alone, reliance on trials will reduce the number of convictions.

But beyond the vagaries of juries and judges, trials may decrease convictions by reducing the number of suspected offenders who are prosecuted and, thereby, have a profound effect on the number of suspected offenders who face jeopardy. This possibility suggests an important research consideration.

A study of guilty pleas must be conducted in conjunction with an analysis of case dismissals. To the extent that the use of one method of case management is reduced, system demands may require that the other be more heavily utilized. In addition, a trial is negotiable, and the probability of its occurrence may decrease with the sentence leniency offered in exchange for a guilty plea. If the volume of trials is controlled by sentence concessions awarded to defendants pleading guilty, then there must be a relationship between the number of prosecutions and the sentences received in the criminal courts. Of importance here, there appears to be an inverse relationship between the number of convictions and the severity of sentences received by individuals convicted of criminal offenses.

Finally, identification of the aggregate relationship among sentencing, guilty pleas, and prosecution says little about individual guilty plea negotiations. Theory and supporting empirical work suggest an additional interesting question. It is evident that the sentence awarded in exchange for a guilty plea is, in part, contingent on what would happen at trial. What, then, is the meaning of a "bargain"? Does the negotiated settlement simply discount the eventual punishment to reflect a probability of less than one that a defendant will be convicted at trial? Or does a "bargain" involve something more, or even something less, than this discount implies?

In summary of the theory underlying this analysis, an organizational view of the criminal justice system has been adopted. Most notable from this viewpoint is the assumption that no part of the judicial process can be examined in isolation; rather, a phenomenon such as plea bargaining must be examined in light of the effects that it has on the overall processing of criminal cases. Also notable is the theoretical perspective that plea bargaining cannot be understood from a simple examination of formal court processes. Overall, the theory has caused us to pose two questions. First, who gains and who loses from the plea bargaining process? Second, why do plea bargains occur? Answers to these questions have policy implications when seen from a normative perspective. Since we are interested in policy implications, the rest of this chapter consists of a discussion of normative models of the legal process.

This discussion begins with an interesting point raised by Lady Barbara Wootton, namely, that the adversary process may not be optimal at discovering "truth" with respect to guilt or innocence.[1] The implication of Wootton's argument is that plea bargaining may lead to a more accurate determination of the crime committed, criminal culpability, and appropriate remedies.

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[1] Barbara Wootten, Crime and Criminal Law (London: Stevens and Sons, 1963).

Next, the discussion turns to H. L. A. Hart's reaction to Wootton's (or more generally, the positivitist's) position.[2] The force of Hart's argument is that a premium is not necessarily placed on accuracy in the judicial process, but rather, that the preservation of citizen rights is paramount. Closely following Hart's response to the positivists, Herbert Packer described two perspectives: the crime control model and the due process model.[3] These two paradigms are useful in examining policy implications of plea bargaining.

The discussion ends with the perspective offered by the utilitarians, especially as that position is represented in the economics of law. Examining this final position is appropriate because the "economic model" played a major role in the theoretical perspective offered above.

Chapter II: RESEARCH DESIGN

To answer the general questions posed above, it was necessary first to determine what aspects of the guilty plea process were to be examined, and second, how the examination should be conducted. Data came from 1974 arrests processed in Superior Court (Washington, D.C.). To ensure a sufficient number of cases to make statistical analysis meaningful, our examination

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2 H. L. A. Hart, Punishment and Responsibility: Essays in the Philosophy of Law (New York: Oxford University Press, 1967).

3 Herbert L. Packer, The Limits of the Criminal Sanction (Stanford, Calif.: Stanford University Press, 1968).

includes four high-volume charges: assault, burglary, larceny, and robbery. Charge was based on the most serious accusation brought by the arresting officer, even though the defendant may have been prosecuted for a different offense.

The research design addressed the two questions:

- Who gains and who loses from plea bargaining?
- Why do plea bargains occur?

With respect to the first question, it was necessary to use statistical techniques to estimate what would have happened to an individual if his case had gone to trial rather than being terminated with a guilty plea or dismissal. This required an examination of the probability of conviction at trial and the severity of the sentence received by those who were convicted. Then, the impact that present disposition had on future criminal behavior and future judicial processing was examined. With respect to the second question, an attempt was made to determine the factors resulting in reduction of charge prior to a guilty plea, the sentence received following a guilty plea, and why defendants exercise their prerogative to go to trial. We concluded with an examination of the rates at which individual prosecutors, defense attorneys, and judges settle cases by pleas.

Conclusions drawn from the statistics reported here are premised on two assumptions, and the conclusions hold largely to the degree that the assumptions are valid. First, we

assume that by examining the cases of defendants who went to trial we can draw inferences about hypothetical trials for defendants who actually entered guilty pleas and for defendants who actually had their cases dismissed. Second, we assume that operational definitions of the theoretical concepts "factual guilt" and "legal guilt" can be identified. The extent to which these assumptions hold can only be assessed subjectively, and thus, our findings themselves remain subjective. Since both assumptions are so crucial to the analysis, the remainder of this chapter provides a discussion of the reasons for their adoption.

Chapter III: AN OVERVIEW OF CASE PROCESSING

In this chapter, we move from the world of theory to the concrete setting of the Superior Court of the District of Columbia. First, an overview of the judicial process is presented. Then, the unique flow of four types of offenses--assault, robbery, larceny, and burglary--are outlined. We found that the cases of only three out of four defendants survive the initial screening by the prosecutor's office. Of those cases that survive, less than half are prosecuted; others are nolled by the prosecutor or dismissed by the court for want of prosecution. Ultimately, 29 percent of the assault cases, 36 percent of the burglary cases, 33 percent of the larceny cases, and 38 percent of the robbery cases either go to trial or are terminated by a guilty plea.

Roughly, then, only one in three suspects faces the prospect of conviction and incarceration; fewer than this are actually incarcerated.

It is interesting to note that, of the cases that are prosecuted, guilty pleas predominate. Just over one in three assault prosecutions results in a trial. Fewer than one of three individuals accused of robbery, larceny, or burglary go to trial. Thus, as expected, out-of-court settlements dominate the processing of cases in the District of Columbia courts.

It is also interesting to note that a large number of individuals who were arrested in 1974 were rearrested within two years of their disposition. Recidivism rates ranged from a low of 26 percent for individuals accused of assault to a high of 40 percent for individuals accused of burglary. The rates appear to differ by type of previous handling in the criminal justice system (e.g., robbery suspects convicted at trial recidivate less frequently than robbery suspects acquitted at trial).

These apparently high rates of recidivism persist despite the fact that at least some offenders are incapacitated by prison terms and others are under the supervision of probation authorities. Of those persons convicted, the proportion receiving a jail or prison sentence varies by offense. About one of three assault and larceny defendants receive a sentence of imprisonment following conviction. The proportion jumps to nearly one-half for those individuals convicted of burglary and to more than two-thirds for persons convicted of robbery.

Chapter IV. WHO GAINS AND WHO LOSES FROM PLEA BARGAINING?

Who gains and who loses from plea bargaining? In this chapter, we attempt to answer this question from the perspective of the prosecutor, the defendant, and the public. First, sentencing is examined to determine the effect of plea bargaining on the probability of probation or prison following conviction. The examination then turns to estimating the probability of conviction at trial and to determining the likelihood that an individual who actually pled guilty would have been convicted had he really gone to trial. Finally, the consequences of plea bargaining, in terms of recidivism and future criminal justice processing, are considered.

The analyses led to two initial conclusions. First, with respect to assault, larceny, and burglary, defendants who entered guilty pleas received sentences comparable to sentences they would have received had they been convicted at trial. For assault, 77 percent of the defendants who were actually convicted by plea would have been expected to have received probation if, in reality, they were convicted at trial; 80 percent actually received probation following a guilty plea. For larceny, 67 percent were predicted to be placed on probation; 70 percent actually were. For burglary, we expected 51 percent of the defendants to receive probation; 53 percent did in fact. Based on this data, we conclude that prosecutors are not giving significant plea bargaining concessions and

that judges are not rewarding guilty pleas with sentence leniency for these three offenses.

In contrast, plea bargaining concessions were apparent for robbery convictions. We predicted that 24 percent of those defendants who entered a guilty plea after being arrested for robbery would have received probation if they had been convicted at trial. In fact, 43 percent received probation. We also predicted that 32 percent of the robbery offenders would receive a prison sentence with a minimum length of three years or more. In fact, only 14 percent received such a severe sentence following a guilty plea. This is evidence that considerable bargaining is occurring for robbery cases and that, in general, a suspect can expect to fare better if he enters a guilty plea instead of being convicted at trial.

Finally, we note the finding that suspects whose cases where nolled would have received somewhat lighter, but not radically different, sentences compared with their convicted counterparts.

We next drew inferences from two estimates of the probability of conviction at trial. The first estimate was derived from statistical analysis of factors associated with conviction at trial. The second estimate was based on the screening prosecutor's subjective assessment of the probability of winning the case. These estimates are used to predict the probability of conviction at a hypothetical trial (a) for defendants entering a guilty plea and (b) for defendants whose cases were nolled or dismissed for lack of prosecution.

Our analysis indicated that if defendants went to trial rather than entering guilty pleas, they would be convicted at about the same rate as those actually going to jail.

To illustrate, we predict that 66 percent of the defendants who plead guilty in assault cases would be convicted if tried; the actual rate of conviction for assault cases at trial was 65 percent. For robbery, 84 percent of the guilty plea cases would likely result in conviction at trial; 78 percent of all robbery cases actually going to trial resulted in conviction. Looking at larceny, we predict that 69 percent of the guilty plea cases would result in convictions at trial; actually 66 percent of all larceny cases tried resulted in conviction. Finally, we predict that 68 percent of the burglary cases terminated with a guilty plea would have resulted in conviction at trial; 67 percent of those cases going to trial did, in fact, result in conviction.

An interesting implication emerges: Were it not for the significant number of guilty pleas, a large number of criminal cases would not result in conviction simply because trial outcomes are uncertain. If all guilty plea cases went to trial, then the percentage of prosecutions leading to conviction would fall from 87 percent to 66 percent (assault), 93 percent to 82 percent (robbery), 91 percent to 68 percent (larceny), and 92 percent to 68 percent (burglary). Additionally, a larger number of trials would be expected to reduce the rate of prosecutions, futher limiting the number of convictions.

These findings have two implications. First, coupled with the finding that (with the exception of robbery) sentencing concessions in exchange for guilty pleas are not pervasive, it is curious why more defendants do not go to trial. It would appear to be in their interest to do so (most have appointed counsel, so the cost of a defense is unlikely to be a deterrent), since they are likely to receive an equivalent sanction if convicted, and yet they stand a good chance of being acquitted at trial. Second, this evidence seems to contradict an often-made assertion that cases in which guilt is contested will go to trial. If the initial screening prosecutor's estimate of the probability of conviction and the record of evidence stored in PROMIS can be taken as indicators, then while the factually guilty may be convicted by guilty pleas, guilty plea convictions may frequently result in conviction of the legally innocent, i.e., persons who would not be adjudged guilty at trial.

Interesting implications are not limited to hypothetical trial outcomes for those defendants entering guilty pleas. We also concluded that nolled cases and cases dismissed for want of prosecution would frequently result in conviction if taken to trial. This statement is qualified in the main study; for the present it should be noted that these cases include evidence pointing toward convictability--sufficient evidence apparently that the screening prosecutor initially estimated the probability of winning these cases as comparable to that for cases that are later prosecuted.

This chapter closes with some cost and benefit implications predicated on the above findings. Conclusions are drawn with respect to the returns from (1) increasing the number of trials, (2) reducing sentencing concessions exchanged for guilty pleas, and (3) reducing the number of dismissals.

Evidence indicates that plea bargaining is likely to be cost-effective. First, when sentence concessions were made, the cost of future crime and crime control increased. However, bargains were less pervasive than seems commonly imagined, and even when they did occur, the savings in terms of a foregone trial probably offset the cost of increased recidivism. Second, the greatest cost to the public, and to the criminal justice system, likely arises from a failure to prosecute. If plea bargaining enables the prosecutor to handle a larger number of cases, then it is likely to lead to considerable future savings in terms of reduced recidivism and the costs of criminal justice. A reasonable assessment of the data presented is that plea bargaining is cost effective, at least in the District of Columbia Superior Court, and for the costs and benefits considered here.

It should be noted that many costs and benefits were excluded from the analysis. The benefits derived, in terms of reduced crime, are purchased at a cost of expensive prisons and jails. The size of the benefit-cost ratio of incarceration remains an open question that cannot be resolved without accurate

measurement of the cost of crime, the utilization returns from punishment (deterrence, rehabilitation and incapacitation) and the value to the public of retribution. A second notable omission is any mention of the returns of "doing justice." This second omission is intentional, but not permanent; this important consideration will be addressed in Chapter VI.

Chapter V: WHY DO GUILTY PLEAS OCCUR?

In this chapter, the question is posed: Why do plea bargains occur? Answers were sought in the following explanations.

(1) Resource constraints require inexpensive dispositions for routine cases.

Statistical testing, involving an advanced regression model, was complex. The findings are unambiguous, however: we uncovered no evidence that, over the short run, case dispositions varied with work loads.

The evidence is consistent with an explanation that increasing work loads are handled by temporary increases in productivity or by letting the backlog of cases build. Short-run adjustments are not made in the way that cases are handled, or at least the adjustments were not apparent in the decision to nol pros or in the decision to go to trial.

(2) The sentence following a guilty plea reflects what is likely to happen at trial and thereby reduces the uncertainty of trial, as well as the organizational and pecuniary expenses that a trial entails.

Findings indicate that the often-used characterization of prosecutors "bargaining away the store" is erroneous, at least for the D.C. courts. In the previous chapter, it was shown

that, with the exception of guilty pleas following an arrest for robbery, the average guilty plea results in a sentence closely corresponding to that received by similar defendants convicted at trial. The analysis presented in this chapter demonstrates regularity in sentencing patterns. Persons who were dealt with leniently following a plea likely would have been shown leniency following conviction at trial; the converse holds for those offenders receiving harsh sentences. These findings point to a conclusion that the guilty plea process is an economical routine for approximating the outcome of an expensive trial.

Neither the probability of conviction nor the likely sentence to be received following conviction explains the decision to actually enter a guilty plea. Neither does pretrial detention nor the number of charges filed play an explanatory role. To this point, our findings shed little light on the question of who enters guilty pleas.

(3) Plea bargaining increases the defendant's confidence that the sentence will reflect mitigating circumstances relevant to his case.

Legal scholars have argued that plea bargaining distributes justice more equitably by taking into account mitigating circumstances in negotiating a settlement. However, our findings show (with a few exceptions as shown in the technical appendix) that it did not matter (a) that the crime was corroborated, (b) that there was exculpatory evidence, (c) that there was provocation by the victim, (d) that there was participation by the victim,

(e) that the defendant was only an aider or abettor to the offense, or (f) that the primary victim was a corporation, association, or institution. In individual cases these factors may be important, but accounting for them in statistical analysis did not provide any additional insight into the guilty plea process.

(4) Variations in plea bargaining can best be explained by the proclivities of individual prosecutors, defense counsel, and judges to settle out of court.

To investigate these individual differences as explanations of guilty pleas, we ranked these "actors" according to the frequency with which they settled criminal cases by guilty pleas. Then these rankings were compared across different types of offenses. If the rankings persisted (were statistically significant) across crime categories, this was accepted as evidence that individual proclivities must be taken into account in any explanation of plea bargaining.

These comparisons indicate considerable variance across prosecutors in the use of plea bargaining, and the variance can be explained by the willingness of individual prosecutors to go to trial. It can also be explained by assignments, since some prosecutors often handle cases from other prosecutors with instructions about plea agreements previously made with the defendant.

Next, judges were ranked with respect to the proportion of their cases terminated with guilty pleas. We uncovered absolutely no evidence that judges varied according to a

regular pattern in the proportion of cases settled by guilty plea. This finding is consistent with qualitative evidence that there is little or no judge shopping for felony cases in Superior Court.

Finally, the rate at which defense counsel participate in plea bargaining was examined. The resulting rank order correlations indicated that knowing the defense counsel did not increase our ability to explain who goes to trial. That is, there was little or no consistency in the rates at which defense lawyers went to trial.

Chapter VI: CRIME CONTROL AND DUE PROCESS CONCERNS

In this chapter, concern shifts from positive analysis (i.e., analysis of how the criminal justice system does work) to normative analysis (i.e., analysis of how the criminal justice system might be made to work better). Attention centers on failure to convict the factually guilty and the conviction of the legally innocent. The discussion draws on Packer's two models to illustrate the conflict between crime control and due process concerns.

Plea bargaining is expected to increase the convictions of the factually guilty by reducing the number of criminal cases that are nolled. As such, plea bargaining is consistent with the crime control perspective. Plea bargaining also increases the conviction of the legally innocent by (1) increasing the conviction of persons who otherwise would have been dismissed and (2) by substituting guilty pleas for trials.

In this instance, plea bargaining works against the normative prescriptions of the due process model. Estimates provided in this chapter show that this conflict is clearly not moot; on the contrary, even though the estimates are approximations, they indicate that conviction of the legally innocent is likely to increase significantly along with conviction of the factually guilty.

Convicting the factually guilty when legal guilt cannot be established creates friction between due process and crime control advocates. This friction can be reduced if evidence gathering and witness cooperation could be increased. Technology currently exists to accomplish this through improved police practices and witness handling. Thus, justice could be improved both from a crime control and a due process perspective. If the ability to increase demonstration of legal guilt was enhanced, less strain would arise in implementing policies to review plea bargains. At present, most judicial reviews appear to be cursory, and generally it is held that if a defense counsel agrees to a guilty plea, then legal guilt has been established. Findings in Chapter IV show this presumption to be dubious, and that closer screening of criminal cases would likely result in fewer pleas being accepted. If greater incentives to assemble witnesses and evidence were provided, along with appropriate safeguards to prevent evidence fabrication, more intense judicial review of the merits of a guilty plea could reduce conviction of the legally innocent with little or no decrease in conviction of the factually guilty.

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