Plea Bargaining Made Real

Plea Bargaining Made Real

Steven P. Grossman
Dean Julius Isaacson Professor of Law
University of Baltimore School of Law

Carolina Academic Press
Durham, North Carolina

Library of Congress Cataloging-in-Publication Data

Names: Grossman, Steven P., 1949- author.
Title: Plea bargaining made real / Steven P. Grossman.
Description: Durham : Carolina Academic Press, 2021.
Identifiers: LCCN 2021010430 (print) | LCCN 2021010431 (ebook) | ISBN 9781531019914 (paperback) | ISBN 9781531019921 (ebook)
Subjects: LCSH: Plea bargaining--United States. | Defense (Criminal procedure)--United States. | Pleas of guilty--United States.
Classification: LCC KF9654 .G76 2021 (print) | LCC KF9654 (ebook) | DDC 345.73/072--dc23
LC record available at https://lccn.loc.gov/2021010430
LC ebook record available at https://lccn.loc.gov/2021010431

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
www.cap-press.com

Printed in the United States of America

Contents

Table of Cases

Cases that are cited in italics are mentioned specifically or discussed in some depth in the text of the book. The non-italicized cases appear in the footnotes.

Introduction

From the criminal libel prosecution of John Peter Zenger when America was a colony through the famous and infamous cases involving the kidnapping of the Lindbergh baby, the espionage charges leading to the executions of Julius and Ethel Rosenberg, the sensational murders inspired by Charles Manson, the less sensational ones charged against O. J. Simpson, and the conspiracy engaged in by the accomplices of President Nixon in the Watergate cover-up, the public's attention to our criminal justice system is dominated by trials. Aside from following the trials themselves with rapt attention, we watch documentaries and dramatized movies and series (some "inspired by a true story") about them. And as we don't seem to get our fill from real trials, we absorb books, movies, and television series in the multitudes that deal with fictional ones.

Judicial opinions in the criminal justice sphere focus on the conduct of trials or the application and interpretation of constitutional and other protections that exist to protect defendants at trial. Decisions such as *Mapp v. Ohio*, applying the rule excluding certain evidence illegally seized by the government, or *Miranda v. Arizona*, prohibiting the prosecution from introducing statements made by defendants if Fifth Amendment protections were not honored, and the many cases interpreting these and other decisions involving legal limits on what evidence can be brought out at trial dominate the legal landscape. This proliferation of trial-related court decisions is even more pronounced when one considers how they are supplemented by the numerous cases dealing with actions by prosecutors and judges during the trial itself which create appealable issues. The curriculum at American law schools reflects this by the attention paid to these constitutional protections as well as to teaching the skills required to become an effective the trial lawyer. Courses in criminal procedure cover trial-related constitutional and other rights, and those in trial

practice teach litigation skills for our future prosecutors and defense attorneys. I have taught both types of courses for many years.

And then there is plea bargaining. This is the process in which the prosecutor and defense attorney discuss and arrive at a settlement of the case whereby the defendant agrees to plead guilty to some charge related to the crime in return for a benefit from the prosecutor. These benefits usually involve charge or sentencing considerations. The judge is a necessary party to this agreement, is sometimes involved with the attorneys in its formation, and often plays a key role in its implementation. In large part because, unlike trial convictions, most guilty pleas are not appealed, it is convictions resulting from trials that usually receive most attention from the courts. While it is impossible to ascertain the exact percentage of cases in the criminal justice system disposed of through guilty pleas, there is nearly universal agreement that the number is around 95%.[1] Small wonder that Supreme Court Justice Anthony Kennedy cautioned in 2012 not to ignore "the reality that criminal justice today is for the most part a system of pleas, not a system of trials."[2]

Americans pride ourselves on the protections our laws provide defendants in criminal cases, most especially those rights guaranteed under our constitution that relate to the criminal trial. For example, the Sixth Amendment guarantees the right to have the fate of the accused in all serious cases decided by a jury of one's peers and now requires that all jurors must agree on the defendant's guilt in order for the government to get a conviction.[3] That same amendment guarantees the defendant the right to be represented by competent counsel. The defendant or his attorney has the right to confront and cross-examine witnesses who offer testimony for the prosecution (also under the Sixth Amendment) and the absolute right under the Fifth Amendment to testify or not testify in his defense. Additionally, if he decides not to testify, the prosecutor is forbidden from commenting on that decision and the jury is instructed not to use his failure to testify against the defendant. Last but certainly not least, the jurors will be instructed that in order to convict the defendant, they must find him guilty beyond a reasonable doubt, the highest burden of proof in our law.

---

1. *See, e.g.*, Padilla v. Kentucky, 559 U.S. 356, 372 (2010) (95%); Missouri v. Frye, 566 U.S. 134, 143 (2012) (94% of state convictions, 97% of federal convictions); NACDL Report: The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How to Save It (July 10, 2018) (more than 97%), https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct.
2. Lafler v. Cooper, 566 U.S. 156, 170 (2012).
3. Ramos v. Louisiana, 140 S. Ct. 1390 (2020).

Because Americans have traditionally been so proud of at least the theoretical fairness of our system for handling criminal cases, we have long advocated for other nations to adopt systems that embody rights and protections similar to our own. In reality though, these rights exist more in their potential than in their actuality, or at least as largely unexercised options. This is because the overwhelming number of cases handled by both federal and state courts are disposed of largely without the exercise of these foundational rights–almost always through plea bargaining. Thoughtful people must stop and ask why so few defendants in criminal cases avail themselves of such critical protections.

This surprising result becomes even more anomalous when one examines the nature of our criminal justice process, specifically the adversary system. Our adversary system of justice is based on the concept that the fairest and most reliable outcomes in criminal cases will come from well-armed prosecution and defense teams, each advocating as zealously as possible for its position within the bounds of law and ethics. Those who have participated in the criminal justice process as prosecutors, defense attorneys, victims, witnesses, jurors, or defendants will agree that this notion of zealous advocacy is no mere theory but pervades the conduct of the parties involved. Legal motions and pleadings come from one side and are usually opposed by the other. Witnesses are divided into prosecution and defense witnesses, leading to trials embodying prosecution and defense cases almost always at strict odds with one another.

Given the stakes involved for each side, it is hardly surprising that the nature of this adversarial advocacy often gets intense and highly argumentative. The prosecution might see itself as the voice of the victim of some horrific crime, always representing the interests of the government in seeing to it that a crime is solved and a criminal punished appropriately. The defense attorney is concerned with the loss of freedom for his clients facing serious charges and the severely negative implications of a criminal conviction for everyone he defends. It is not to diminish the consequences of civil litigation to observe that the impact of a criminal case is almost always substantial and significant.

In large part because of these stakes and the highly adversarial nature of the process, there is often little that the prosecution and defense agree upon. It is not unusual to see intense arguments regarding consequential matters such as the suitability of a particular juror or the admissibility of a key piece of evidence as well as on seemingly minor ones such as the positioning of exhibits in the courtroom or scheduling arrangements. Yet despite the inevitable battles fought by prosecution and defense over most everything, somehow they come together to agree upon the most critical of matters — the ultimate resolution of the case, 95% of the time. Without the agreement of both of these highly adverse parties (with the very rare exception of when the defendant

pleads guilty to all charges without any promises from the prosecution), no plea bargain can take place.

Add to this the third party who has to agree to the plea bargain — the judge — and the virtual universality of cases disposed of through plea bargaining is even more surprising. While not an adverse party, the judge embodies interests apart from either of the other parties and in many instances is not reluctant to express those interests. As the judge has the right to reject any bargain arrived at between the prosecution and the defense, she too must be on board for the case to be resolved through a guilty plea. This book will examine why it is that all of these obstacles to agreements between the parties regarding the most important aspect of a criminal case, its final disposition, are overcome in such an overwhelming majority of cases and the ramifications of this for the defendant and the system.

The purpose of this book in large part is to provide the reader with a sense of what really takes place in plea bargaining that is different in both substance and language from what can be gleaned from most court decisions. Therefore, following a brief history of plea bargaining in the United States in Chapter I, Chapter II will deal with the largely specious and dishonest justifications used by courts for why defendants who exercise their constitutional right to a trial almost always receive harsher sentences than those which they were offered in exchange for their guilty plea. Seen through a slightly different lens, if two defendants are charged with the same crime and have similar backgrounds, it is almost inevitable that the one who pleads guilty will receive a lighter sentence than the one who rejected the plea offer and was convicted at trial. You may think the reason for such disparate treatment is obvious, and if so, you will be surprised by the entirely different reasons offered by virtually all courts. We will explore how and why the courts struggle so mightily to avoid confronting the reality that giving a break to those who plead guilty inevitably results in punishing those who are convicted after exercising their constitutional right to trial.

Plea bargaining is a process that involves three parties — the prosecutor, the defendant/defense attorney, and the judge. The process by which criminal cases are disposed of through offers, negotiations, and ultimately acceptance of the agreement is a very human endeavor. No meaningful understanding of plea bargaining can come from a discussion that overly institutionalizes these parties and, for example, discounts matters such as the motivations of each to dispose of cases without a trial. An awareness of these motivations allows for a better understanding of the behavior of each of the parties as they engage in plea bargaining. Chapters III, IV, and V therefore explore the roles of the prosecutor, defense attorney, and judge in plea bargaining. By looking at the mo-

tivations and roles of these parties, we can better understand why so many cases are disposed of through pleas of guilt. Additionally, these chapters will discuss the ramifications for the defendant and the justice system of the actions taken by each of the parties.

In forming plea bargains, it is typical for the prosecutor to offer a reduced charge or sentence recommendation in exchange for the defendant's surrender of his right to trial and agreement to plead guilty. Most plea agreements therefore stem from negotiations between the prosecutor, the defense, and sometimes the judge, that involve offers, acceptance of those offers, and mutual promises made by the parties. Because these same elements are present in the formation of civil contracts, it is tempting for courts to apply well-established principles of contract law to the less well-developed legal issues involved in plea bargaining. Chapter VI will discuss ways in which courts have attempted to perform this application of civil law to criminal law and whether they have been successful.

While most cases are disposed of through traditional guilty pleas (the defendant acknowledging his guilt for a specific offense he committed), there are several other types of pleas that dispose of cases without trials. Chapter VII will cover pleas that resolve criminal cases but are different from the traditional guilty plea in the manner which the plea is accepted, its consequences for civil cases, or the nature of the crimes to which the defendant pleads guilty.

Next the book will explore the impact of race in plea bargaining. Racism is a problem which pervades society and infects every stage of the criminal justice process. Given this, it is inevitable that plea bargaining is not free from similar kinds of race-based disparate treatment of defendants. Because of the pervasiveness of race-based disparity throughout the system and the relative paucity of empirical evidence related to its effect on plea bargaining specifically, Chapter VIII will begin with a discussion of racism from the initial detention of suspects through their confinement in jails and prisons. Then it will explore the available data regarding racial disparities in plea offers and the ultimate disposition of cases through guilty pleas. The chapter will conclude with suggestions for reducing these disparities.

Finally, in Chapter IX, we will discuss how we can get past the semantics and euphemisms that pervade discussions by courts and others of plea bargaining and begin to enact meaningful reforms to improve upon our system. It is important for the reader to understand that this is not a book strictly on the law of plea bargaining, although many legal issues surrounding aspects of the process will be covered. It is a book focused on what really happens during the process by which American courts handle almost all the criminal cases that come before them. Plea bargaining is a very human and very subjective

process. No benefit and much damage has occurred as a result of denying or ignoring this reality.

Judicial opinions attempt to explain the basis for a court's decision. Books and articles about the law often explain or interpret these opinions, sometimes approvingly and sometimes critically. What makes cases involving plea bargaining different is that the decisions more often than not deny, ignore, or mask the actual basis for the opinion. Only by exploring in depth what actually occurs during the plea bargaining process can we get an understanding of the disconnect between the realities of plea bargaining and judicial opinions that cover this area. Only by understanding this disconnect can we reform and improve plea bargaining in meaningful ways.

Acknowledgments

The author would like to thank Eric Easton, Ph.D., J.D, John Maclean, J.D., and Jeffrey Grossman for their invaluable assistance in editing chapters of this book. Additionally, he would like to thank Caterina Quezada Lozano for her help in researching its contents.