

# The Plea Bargain Machine

Conferência apresentada no III Seminário Internacional do INCT InEAC<sup>1</sup>

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## Introduction: A Jury Trial System or The Plea Bargain Machine?

If you asked a lawyer or a judge in the United States, “What is most distinctive about the US legal system?” the answer is almost certain to be one of two things, or possibly both. The first reference would be to a trial by jury – that is, when usually twelve members of the community are brought into the court, evidence is presented to them, and they determine whether the defendant is guilty or not guilty. The second claim would be that we, in the United States, have an “adversarial system.” An adversarial system is one in which the parties, the prosecutor and defendants, are adversaries and they engage in a form of combat or conflict. The parties are solely responsible for bringing evidence before the court, while the judge in this system is relatively passive. The judge has no responsibility to investigate or independently bring facts to the case. The judge plays the role of a neutral referee or umpire to make sure that the rules are not violated in the production of this evidence. So, it is a form of combat, but it is important to recognize that it is a regulated form of combat rather than a free-for-all.

However, this event, the jury trial, that is nominally so typical, almost never happens. The overwhelming percentage of criminal cases in the United States, upwards of 90%, are resolved not by adversarial combat, but rather by cooperative negotiation, known as plea bargaining. Plea bargaining is a negotiation between the prosecutor and defense about the disposition of the case, with the occasional participation of the court.

<sup>1</sup> Instituto Nacional de Ciência e Tecnologia Instituto de Estudos Comparados em Administração de Conflitos. Evento realizado de 25 de fevereiro a 1º de março de 2013, na Universidade Federal Fluminense (UFF), Niterói.

My purpose here is to explain this apparent paradox, whereby a system that describes itself as a “jury trial system,” in fact becomes “the plea bargaining machine.”

My argument is based primarily on my own experience as a deputy public defender in San Francisco. I tried, myself, a number of jury trials and I plea bargained probably thousands of cases, and I was witness to thousands of other cases that were negotiated in my presence by other attorneys. Accordingly, this is not a historical account. I do not purport to explain how the plea bargaining system arose in time, although the argument would be consistent with several accounts of the historical rise of plea bargaining. Still, the reasons that a practice develops are not necessarily identical to those which maintain it and by which it is rationalized in the present. The presentation here addresses how plea bargaining functions today and how people who are engaged in it think about it.

This is also not a systematic comparative presentation, and I am not an expert in Brazilian criminal procedural practices. Still, I have done some research on Brazilian criminal justice, and there are some features of US practice that are deliberately included here to highlight differences between the two systems. Hopefully this will provide true experts in Brazilian practices with a building block for making their own comparisons.

First I will elaborate on jury trial practices. Then I will shift to discussing plea bargaining itself. I do this because jury trial and plea bargaining are linked. Plea bargaining cannot truly be understood except in relation to jury trial. I will close with some conjecture about why the US legal system continues to represent itself, or to misrepresent itself, as an “adversarial system” defined by the jury trial when in fact it is the plea bargaining machine.

## The Structure of US Criminal Justice

The argument is somewhat schematic. Our political and our legal organization in the United States is a federal system in which all 50 states are distinct sovereigns. The states reserve any powers that are not explicitly delegated in our federal constitution to our national government. The “police power,” which comprehends the power

to define crimes and to prosecute them, is one such power reserved by the states. We do have a federal criminal system, but there are relatively few federal crimes. The vast majority of criminal prosecutions on an annual basis in the United States are conducted at the state level.

I will not pretend that there are no variations in procedures and practices from state to state. There are differences. However, these interstate variations are not great, at least as compared to differences between, for example, the US system and the Brazilian system. For example, all 50 states and the federal system employ jury trials for offenses leading to incarceration. However, 39 of our 50 states permit juries of fewer than twelve people, down to as few as six for misdemeanor offenses (relatively minor offenses that generally carry punishments of two years or less, although it varies from state to state). Forty eight of the states require jury unanimity for a conviction, meaning all jurors have to agree on the verdict, while two do not. There are many other procedural differences of this scale between states.

I will explain a few of the reasons for this general similarity. To begin with, our federal constitution was modeled after the constitutions of the original thirteen colonies. Almost all of our state systems look to the British common law system for inspiration. Following our Civil War the 14<sup>th</sup> Amendment was passed, holding that state governments could not deprive US citizens of life, liberty, or the pursuit of happiness without due process of law. Through this amendment, it was gradually held that all of the states had the same obligations to criminal defendants as did the federal government, thus promoting a level of national uniformity in criminal procedures.

## **The Jury Trial**

Let us examine US jury trials via a series of questions. First, what is the theory behind jury trials? Why do we have them to begin with? Next, how do juries get formed? Where do they come from? Third, what sorts of rules of evidence are employed at jury trials? Finally, how are juries supposed to arrive at verdicts? Detailed

responses will be provided below. Hopefully there will be many points of learning along the way, but the overarching point is that a jury trial, at least one conducted according to contemporary procedural requirements, is an extremely cumbersome and costly affair. It is an organizational feat to conduct one. It is at high cost in both institutional and social resources. All of these costs are key to understanding plea bargaining.

## Pretrial Litigation

While we focus on trial, which in the US system is definitely the main event in a criminal prosecution, please be aware that some cases involve substantial pretrial litigation, and almost all cases have at least some pretrial litigation. All felony cases, which are more serious cases involving a punishment of anywhere from one year to death, in California, have a preliminary hearing. A preliminary hearing is a court proceeding in which the prosecutor is obligated to bring forth evidence, typically in the form of live witness testimony and physical evidence, to establish probable cause that the defendant has committed the crime. It is an early preview of the trial.

The formal legal purpose of the preliminary hearing is to screen out weak cases and to ensure that only cases that have a substantial evidentiary basis go forward. Another common example of a kind of pretrial litigation would be a motion to strike a prior. Many offenses in the US legal system involve allegations of prior convictions. These prior convictions, when a person has previously been found guilty of a crime, can be alleged in the formal charging document and if proven at trial by the prosecutor, can lead to more severe sentencing consequences for the criminal defendant than if he were just facing the offense without the prior. Litigation frequently focuses on whether these are, in fact, constitutionally valid priors. The defense lawyer will scrutinize the record of the prior conviction and try to argue to the court that the prior was an improper conviction and, therefore, cannot be used to elevate sentencing in this new case. There are many of other kinds of pretrial litigation, but now let us turn to examining jury trials.

## The Rationale for Jury Trial

What is the rationale behind jury trials? Why do we have them at all? There are two primary reasons. First, jury trials are thought of as a way to interpose the community between the individual and the state, and thus to offset the tremendous imbalance of power between the two. The state's power is vast. The state has investigators, police, and professional prosecutors. Prosecutors have the reputation and aura of state authority. When that power is brought against an individual citizen, it can be crushing. The jury stands between the individual and the prosecuting authority to check the latter's power and to protect the individual from persecution. That is one of the main reasons that we have jury trial. It is specifically conceptualized as an emanation of our United States national identity as individualists who are concerned with freedom from central authority.

The second justification for jury trials is that help us arrive at more accurate verdicts in criminal cases. Twelve minds are better than one, and having multiple finders of fact at trial is therefore superior to having innocence or guilt determined by a lone judge. Jurors are representatives of the community, and bring diverse perspectives and a broad fund of everyday wisdom to the task of weighing evidence. After all, many judgments in criminal law involve assessments of human character, such as weighing the honesty or veracity of a witness. Likewise, jurors determine the likely intent of a criminal defendant. These are prudential matters, in which broad human experience can be essential.

However, and this is important, the truth-finding mission of jury trials is consciously balanced by other considerations. A jury verdict is thought of as truth produced in a particular way with respect to particular rules. Let us call it "juristic truth" or "legal truth," as opposed to absolute truth. This is manifested, for example, in our unwillingness to permit evidence that is derived from involuntary statements of the defendant. If the defendant has been coerced by trickery or tortured into an admission, we do not allow that admission into evidence even it can be established that the statement is true, for example by corroborating evidence. We consciously do not permit probative relevant evidence because of the way it was obtained, preferring a truth that is produced according to a particular formula, with

respect to particular values and rules, to absolute truth.

Whether these rationales withstand scrutiny is not an issue I will discuss here. It is debatable whether juries actually produce more accurate verdicts. That is not the concern – we are focusing now simply on how jury trial is rationalized.

There are two other characteristics that our juries should have. A jury is supposed to be a jury “of one’s peers” because to be tried by people who are totally unlike you and may be unsympathetic to your condition seems unfair. Next, a jury should be “impartial.” Impartiality means being neutral, at least as of the beginning of the case, not having any leanings toward one party or the other.

### Jury Selection

Assume you are convinced and ready to give jury trial a chance, what do you do next? Where does the jury come from?

Recall that this is supposed to be a “jury of one’s peers” and also an “impartial” jury. You might imagine that finding a “jury of one’s peers” could be a real procedural quagmire. Does the requirement mean that if the defendant is a plumber, you need twelve plumbers to hear evidence against him? Must rich defendants have only rich jurors? Do black defendants require twelve black jurors? Is that the meaning of a trial by a “jury of one’s peers?” In practice, and not surprisingly, the requirement of a “jury of one’s peers” amounts to little more than the right to have jurors from the same judicial district in which the crime is being tried.

Still, you have to round these people up from somewhere. How do we get them to the courtroom? How do they end up sitting in those twelve seats? In each county or judicial district, we have a local public official who is in charge of generating lists of prospective jurors. Generally this is done through searches of public records – voter registration lists, vehicle registrations, property records and the like. Prospective jurors are summoned by letter to appear in court to serve. Obviously, this does not snare everybody. There is a bias in this process in favor of middle and upper class people who vote, who have driver’s licenses, who have a home and a mailing address, who are not homeless, transient, or poor. Therefore, there is a certain

socioeconomic class bias already built in.

What about impartiality? How do we know whether jurors are impartial, neutral or not? You cannot know that in advance, so the only way to find out is to ask them. And because some jurors will doubtless reveal some form of partiality, you will need a larger pool from which to select your twelve. It is also necessary to have a larger pool because, while jury duty is supposed to be a civic duty, the courts recognize that this duty can, in fact, impose hardships on people – such as single parents, self-employed people, and sick or disabled people. Many citizens, while they will report to the courthouse, view jury duty as onerous and time-consuming, and, accordingly, do their best when summoned to escape actually serving.

Thus, to generate a jury of twelve people, the typical jury pool that is ordered by a court to try a simple misdemeanor case would be as many as sixty people. By the way, it is never prudent to have only twelve jurors. What happens if one is sick or indisposed in the course of the trial and can't attend? You either have to wait for that person to recover in order to resume trial or start over with a new jury because you cannot proceed with a juror who has only heard part of the evidence. So, depending on the expected length of the case, and, therefore, the odds that some juror will fall ill or otherwise be indisposed, we always pick twelve jurors plus at least two alternates, and in most felony cases six alternates. In more serious and expected longer cases we might have twelve alternates. So, we are not just picking those who are actually serve as jurors, but alternates as well. Alternates sit through the trial and hear the evidence just like the twelve actual jurors, and then, if necessary, replace a sick juror so the case can continue without interruption.

Once a jury pool of sixty or so persons is assembled, the court clerk picks names randomly out of a hopper. Once a name is chosen out of the hopper, the chosen person sits in the jury box. This happens twelve times. These unlucky people, as they see themselves generally, sitting in the jury box are then questioned for bias, initially by the judge. The court (as we often refer to the judge) questions them initially to make sure that the jurors meet the basic requirements, that they are actually residents of the judicial district, and that they understand English well enough. Many prospective ju-

rors will be excused by the judge for reasons of hardship.

After the judge questions, typically the attorneys will get an opportunity to question for bias. Attorneys have the legal authority to challenge, that is, exclude, particular prospective jurors. There are two kinds of challenges. The first kind is a challenge for cause, where an explicit reason is evident that this juror cannot serve impartially this particular case. For example, a jury candidate says, "My car was burglarized one time. I don't feel I can be fair or impartial in a case that involves auto burglary." Another example would be someone saying, "My sister was raped, and I have such strong feelings about rape that I don't think I can serve in this case." In that situation the judge will say, "Despite that, can you be impartial, and put that out of your mind and only decide the case based on the evidence here?" And of course the juror will respond, "Yes, of course I can, Your Honor." Everyone knows this is not true, but that is how it goes.

It goes this way because of the other form of challenge, which is called a peremptory challenge. A peremptory challenge is one that the lawyer can make without having to justify it, based, for example, on an inarticulate hunch. In California, in a misdemeanor case, and in most felony cases, each attorney has ten peremptory challenges. In cases involving life sentences or a capital punishment case or death case, each attorney has twenty-five of these peremptory challenges. The reason the court says to a prospective juror, "No, you are going to be fine, you can be impartial," despite their open admission to the contrary is because the judge wants lawyers to burn up peremptory challenges to move the case along. That is the game with respect to challenges.

The only limitation on peremptory challenges is that they are not supposed to be used in a discriminatory fashion. For example, if you have an African-American defendant and the prosecutor is excusing all the African-American prospective jurors, then you, as the defense attorney, can bring a challenge before the court that the challenges are being used in a racially discriminatory fashion. If there is *prima facie* evidence that this is true, the court should then probe the lawyer's reasons, such as "Why did you exclude juror number six?" (juror number six is African-American). The attorney's response could be, "Because he has a mus-



tache and he has long hair and to me that is an indication that he is undisciplined and probably not sympathetic to the police.” Judges routinely accept these kinds of explanations for the exercise of peremptory challenges. So this supposed protection against discriminatory use of peremptory challenges amounts, in reality, to not very much.

Each time a juror is excused, either for hardship, for cause or via a peremptory challenge, the hopper is spun and another juror is called up and the questioning starts all over again by the courts and the attorneys. Depending on the nature of the case, how serious, how complex, lengthy or sensitive, this process of jury selection, from herding all the jurors down to the courtroom to actually swearing them in at the start of the case takes at least half a day for a petty offense. In a serious case it can take weeks or months. With multiple codefendants – imagine, for example six people charged in one case, then six defense attorneys will all question the jurors. I, myself, tried a misdemeanor case in which the jury selection took three days and the trial itself took two days, so that can give you a sense of how time consuming jury selection can be.

We call the questioning of jurors *voir dire*, which comes from old French, meaning “to speak the truth.” The legal justification for *voir dire* is to reveal bias. That is all it is for. In reality, it is used by attorneys to begin to try their case and to persuade the jurors of their position. I might ask, as a defense attorney, “Have you, Juror X, ever heard a case of misidentification of a defendant by a witness? Are you aware that cross-racial identification in particular is unreliable?” I am starting to tell them my theory of the defense as I question them. They are not even on the jury yet, but I am starting to sell my case already.

## Principles of Proof at Trial

Imagine we finally have our jury and are ready to proceed with trial. What are the principles and methods of proof that we employ at trial? First, we have a presumption of innocence. That is, as we begin the case at least, the defendant is presumed to be not guilty and the burden of the proof is on the prosecutor. Generally, in our legal system,

the burden of producing evidence rests with the person that is making the affirmative claim. In a criminal case that is the prosecutor. A case wouldn't happen if the prosecutor did not say, "This person is guilty." The prosecutor is the moving party in a criminal case and shoulders the burden of proof. The standard of proof, that is the measure of how convincing the evidence must be, is proof "beyond a reasonable doubt." Next, the defendant has a privilege against self-incrimination. Fourth, character evidence is generally inadmissible. Next, the exclusionary rule is used for evidence that is illegally obtained by the police. Following that, we have a right of confrontation, the right to cross-examine witnesses called by the opposing side, and the defendant has the right to counsel. An indigent person who cannot afford to hire counsel is entitled to court-appointed counsel in any case that leads to imprisonment.

Let us review each of these principles briefly. The presumption of innocence means that the prosecutor must bring forth evidence proving the defendant's guilt beyond a reasonable doubt. If he or she fails in doing that, then the jury must find the defendant not guilty. The prosecutor goes first at each phase of the case. The case is generally divided into three phases: opening statement, in which the lawyers lay out what evidence they will show, followed by the presentation of testimony, and finally, closing argument, in which lawyers apply the law to the facts of the case.

Another implication of the presumption of innocence is that the defendant is under no obligation to produce evidence and can argue at the close of the prosecutor's case (through counsel, of course) "You have failed to meet your burden of proof. I do not need to show anything. You have not shown what you needed to show." The prosecution is not permitted to comment on the defendant's decision not to present evidence. That is understood to be "burden shifting," creating pressure on the defense to offer evidence. Yet there is no burden on the defense.

This limitation on the prosecution demonstrates a slightly ambivalent attitude toward jurors. In our system we value jurors and expect them to reach a fair verdict, but we also slightly distrust them. They are not lawyers, and they may not be capable of the mental discipline of lawyers and

judges. There are many other procedural responses, especially rules of evidence that stem from this ambivalence. We shield jurors from information that we fear they may misuse. This is termed prejudice, in evidentiary terms, when a juror accepts certain evidence and uses it for the wrong reasons and thinks about it the wrong way.

Our concern over prejudice, in turn, influences the order of events at trial. If there is a question about the admissibility of evidence, it must be resolved before the jury hears about it and outside of their presence. That is because you “can’t unring the bell.” If the jury hears the bell, that is, the improper evidence, they lack the discipline to say, “When I think about this case I will ignore what I’ve just heard.” We don’t trust them to be able to do that. For that reason we resolve admissibility of evidence outside of jurors’ presence.

The standard of proof is proof beyond a reasonable doubt. What does that mean? If you ask fifty different lawyers, you would get fifty different answers because it is a verbal formulation that cannot be quantified. We do have other standards of proof, proof of preponderance of the evidence, proof by clear and convincing evidence, and we know that these are lower than proof beyond a reasonable doubt. But no one really knows what it means. Lawyers labor over analogies to have jurors think about reasonable doubt in the way that they prefer. But the standard of proof raises the bar for the prosecution, and increases the uncertainty of trial outcomes.

Character evidence is generally inadmissible. This stems from the basic idea in our criminal law that we prosecute people not for who they are, but rather for what they actually do. All of us probably have impure thoughts, but there is no interest in the community in curbing mere thoughts. It is only when we cross the line into action that criminal prosecution is appropriate.

There are exceptions. For example, if a defendant introduces evidence of good character, the prosecutor can rebut with evidence of bad character. Another is for character evidence for the trait of honesty and veracity. This is understood to be in question for every witness who takes the stand. Third is when evidence of specific acts of past conduct is relevant to prove something other than pure character. For example, if identity is in question and a

defendant's past similar crimes have a "signature quality." The question then becomes whether the probative value of past crimes evidence outweighs its potentially prejudicial impact. This, of course, requires litigation outside of the presence of the jury because, as noted, we don't trust them to be able to unring the bell.

Depending on the circumstances, hearings over admissibility of evidence can be straightforward. Disputes regarding facts, however, often require testimony and argument.

What happens when evidence is gathered by the police by illegal means? We exclude that evidence from trial. This can be seen as a form of compensation to the individual whose rights are abridged, a way to preserve judicial integrity, and as deterrence against police conduct.

The key point to understand about the exclusionary rule is that it leads to yet greater uncertainty about the outcome of a case. For example, as a defense attorney, I may read a police report and conclude that a search in the case was illegal. The prosecuting attorney may read the same police report and conclude the opposite. Litigation is required to resolve the issue. The police may give one version of the facts, while the defendant or possibly other witnesses give other versions. The exclusionary rule both causes the need for more litigation and introduces greater uncertainty into the ultimate outcome of the case, by casting the availability of some evidence into doubt.

The right of confrontation means the right for the defendant to be present in court and look the witnesses in the eye and hear them denounce him personally and directly under oath. Defendants also have the right to cross-examine prosecution witnesses through counsel, so their story can be put to the test. The prosecutor has this same right if the defense brings in a witness. The notion is that this confrontation and cross-examination generates truth. People may say many things outside the court, but in the court, when staring the defendant in the eye, examined by both counsel, that is when the real truth will come out.

There are two important procedural consequences of the right of confrontation that I want to highlight. The first is that the defendant must be present at any critical stage of the trial. The other is an evidentiary exclusion referred to as hearsay.

Hearsay is any statement made, not by a witness while testifying, that is offered in court for the truth of the matter asserted in the statement. That statement is deemed not reliable because it was not produced in these special circumstances of confrontation. Therefore, if a party wants a statement to be admitted into evidence, it means they have to produce the witness to testify. It is not sufficient to have someone else testify about what another has said. In a case with co-defendants, each of them has the right of confrontation. So, you will have a direct or first examination by the prosecutor, and then you will have cross examination by two, three, seven, twelve – whatever number co-defendants there are. There are many exceptions to the general ban on hearsay evidence, but its tendency, nonetheless, is to create greater reliance on live testimony than on recorded statements.

If you think about all these technical rules of evidence and procedure, it should be evident that the average defendant lacking legal training would be at huge disadvantage without a lawyer. In recognition of this, the United States Supreme Court, beginning in 1963, required states to appoint counsel at state's expense for any indigent defendant facing felony charges. This right has since been extended to all felonies and any misdemeanors resulting in actual incarceration, no matter how briefly. Due to a lawyer's ethical obligation to avoid conflicts of interests, co-defendants are typically represented each by his own lawyer.

## How a Jury Functions

We have examined how juries are formed, how cases are presented to them and under what kinds of evidentiary restrictions. Now that the jury has the evidence, what are they supposed to do with it? How do they function? Juries are first and foremost finders of facts. They judge the credibility of witnesses. They determine whether the elements of offenses have been established by the prosecution. They determine whether any affirmative defenses have been made.

The judge, on the other hand, is the referee between the two parties. The judge rules on procedural questions and the admissibility of evidence. He instructs the jurors through jury instructions, which may be written or oral, but

are directions to the jury about what they are supposed to do and what the applicable law is in the case. The jury is also instructed about appropriate jury behavior. They may not have any contact with the parties of the case or the lawyers during the case. They may not even discuss the case with each other until both sides rest.

Jurors may only consider evidence that is actually presented in court. If they go home and read about the case online or in the newspaper it is a form of jury misconduct and can lead to a case being overturned on appeal. Likewise, for example, in a driving under the influence case, if the jurors go into the jury room and say, “those field sobriety tests don’t seem so difficult, let’s try them,” then they are producing evidence by themselves. That is regarded as improper.

Once all of the evidence has been submitted to the jury, both sides rest and closing arguments are made, the jurors are instructed by the court. They retire to a special room and they deliberate. Deliberate means they talk about the case and the evidence and they are supposed to decide, and ultimately vote on whether the defendant is guilty or not guilty. They are entitled to request to inspect any physical evidence. They may ask for a read back of witness testimony, but, otherwise, there is very little interference from the court or parties.

In 48 states, and in the federal system, there is a requirement of unanimity, meaning the jurors all must agree on a verdict. In simple cases, if the evidence is relatively clear, this can be done in a couple of hours. In complex cases, however, jury deliberations alone can last for weeks. If the jury is stuck, the courts will often urge them to persevere. However, if they truly reach an impasse, then the courts declare a mistrial and the whole case goes back to square one. That is a possible outcome.

### Jury Costs

Against this backdrop of information, consider now what an administrative feat it is to orchestrate and conduct a jury trial, and at what expense. First, all the relevant actors – defendant(s), the witnesses, judge, court staff, lawyers, jurors – must be assembled. Compare this to a trial by a single judge that is characteristic of many other jurisdictions. That judge might prefer to hear all evidence at once, but, given adequate record keeping,

can afford to hear witnesses days, weeks, or even months apart.

Making twelve members of the community the finders of fact means everything must be done at one time, because reconvening them would be a logistical administrative nightmare, if not an impossibility. Bailiffs or sheriffs must bring the defendant to court, if in custody, and at any rate secure the courtroom at all times. Court reporters and court clerks must record activities. The judge must preside. Lawyers, who are typically paid at state expense, must be present. In perhaps 75% of criminal cases, the defense counsel is appointed by the court, and paid by government funds.

A jury must be convened through the methods I've described. All of these private citizens, by the way, are missing work. Although laws oblige employers to pay employees while they are on jury duty, this does not help the self-employed, and the employers are not compensated for the loss of their employee's work. Of course, far more citizens are inconvenienced by coming to the courthouse and enduring jury selection than those who actually serve. Witnesses also suffer substantial inconvenience. Just as an index of these costs, a recent proposal of the California Judicial Association to reduce number of jurors in misdemeanor cases from twelve to eight alone is estimated to bring savings to the State of California of tens of millions of dollars annually, and this does not count saved expenses for private employers. The simple fact is that we cannot afford to try our cases according to the rules that we have devised, at least not many of them.

We should further note a non-economic but significant cost of trial, which is the emotional toll it takes on lawyers, defendants, and often witnesses. Trials are always nerve-racking affairs, filled with last minute frantic preparation. Trials can be particularly gut-wrenching in sensitive cases like rape or child molestation, especially for victims. But, it is also hard for lawyers. I cross-examined a child victim in a child molestation case. That is an emotionally complex experience. It is not an easy thing to do.

The account to this point has been designed to demonstrate what a costly, cumbersome and difficult thing it is to actually conduct a jury trial. These costs are essential to

understanding plea bargaining.

## **Plea Bargaining**

### Definition

Plea bargaining, in the most general sense, means negotiations between the parties, the prosecutor and the defense, leading to the defendant's entry of a guilty plea or the disposition of the case without trial. We will answer the following four questions: Who is involved? What is being exchanged, or what are the values that each side offers to the other? When does it occur? Where does it occur?

After answering these four questions, I will offer final observations about why we, in the US, continue to tout the jury trial system while, in fact, we operate the plea bargain machine.

### Plea Bargaining Actors

First, who is involved in plea bargaining? The principal actors are the prosecutor and the defense attorney. Judges are also often involved depending on their own personal preferences and also depending on the stage of the case. Judges tend to be less involved early and get more involved as the case approaches trial. Note that a central character, the defendant, is usually not directly involved in plea bargaining. It is the responsibility of the defense attorney to convey an offer of settlement to the defendant. The defendant decides whether to accept the offer or not, but otherwise, the defendant is absent.

Let us focus on each actor for a moment and draw out some underlying assumptions that rationalize their involvement in this process. The prosecutor can only engage in the process of plea bargaining if he or she has authority of the disposition of the case. You cannot trade something that you do not possess or control. One of the structural foundations of plea bargaining is our strong tradition, in the United States, of prosecutorial discretion in charging. There is no compulsory prosecution in the United States as in some other systems, including Brazil. Prosecutors do not have to take a case forward if they do not see the need,



or do not see the necessary evidence.

Victims, in our system, are not parties to the prosecution. We do not have private prosecution the way some systems do. They are simply witnesses in the case in which they happen to be victims. They have no direct authority over the disposition of the case.

The prosecutor, in our system, is part of the executive branch. The top prosecutor in a judicial district (the title varies from state to state, but in California they are called district attorneys), is an elected official. Thus the check on abuse of prosecutorial discretion in charging is political. If citizens are discontent with a district attorney's policies with respect to plea bargaining or anything else, their recourse is to vote him or her out of office in the next election cycle. There is very little legal control by the courts over the prosecutor's discretion in charging cases. If this were not the case, the prosecutor would have nothing to trade or offer the other side. Because of this tradition, the prosecutor is the one who holds the greatest authority over how a case is resolved.

Formally, the defense attorneys are held responsible for representing the best interests of their clients. They join plea bargaining as proxies, or representatives, of the defendant. In the division of authority over a case between a lawyer and a client, the defendant has exclusive authority over what plea to enter. It is solely the defendant's choice to plead not guilty or guilty. In practice, of course, attorneys have great power over this decision and that power is exercised in how they position an offer for settlement to the defendant. A lawyer who can get the defendant to do what he or she thinks is best is often praised, especially by judges, but also by other lawyers, as exercising "good client control."

Although the attorney is supposed to solely represent the defendant, in fact, attorney-client relations are rife with tensions. Defense attorneys, as a matter of actual practice – not the way they think about it, but in fact – perform the role of disciplining the client to accept a plea to the benefit of lawyers, the court, themselves, and sometimes to the detriment of the defendant him or herself.

The way defense lawyers typically rationalize this – and I know this because I was one, and because I was often around them – is by telling themselves that they know bet-

ter than the defendant what is really in his or her interest. “This fool doesn’t know what is going to happen at trial. I’ve tried 50 jury trial cases, six just like this, and all of my clients got slammed and they all got sentenced to zillions of years. So if I twist this guy’s arm to accept the plea, in fact it is for his benefit.” Lawyers abound in techniques to persuade the defendant to accept a plea.

Now we will move on to the judge, or court. By law, judges have almost complete authority over sentencing. In our system, juries, in limited cases, such as death penalty cases, also have a role in sentencing. In far more typical cases, jurors do not have any part of sentencing, in fact, it is even improper to discuss sentencing before the jury. Sentencing is left to the court. This invests the court with the power to approve the terms of any agreement that involves a sentence.

Occasionally, in California at least, if the defense attorney and the prosecutor fail to reach an agreement, the defense attorney can negotiate directly with the court. The court may undercut an offer and give a lower sentence than the prosecutor is offering. However, under these circumstances, because the court does not have the discretion whether or not to charge and what to charge (that is the prosecutor’s role), and the court cannot force the prosecution to dismiss any charges, the defendant must plead guilty to everything that is alleged in the complaint. In California, this is called “pleading to the sheet” or “pleading open.”

Sometimes judges will take a hands off approach in the early stages of the case, leaving the negotiations to the two parties. But, as trial becomes imminent, then the interest of the court in avoiding the time and expense of trial rises, and judges tend to get actively involved in negotiations.

Just like a prosecutor cannot bargain away something he or she does not possess or control, the same is true of the defendant. The capacity to enter into a bargain derives in part from the fact that we conceive of jury trial as a right. This is enshrined in the federal constitution. This is one of the rights that has been held applicable in the way I described earlier through the 14<sup>th</sup> amendment to all of the states. The defendant has a right to a jury trial, and therefore, can trade away that right. Constitutional rights,

generally, in our system, can be waived, meaning to give up or surrender a legal right. As to constitutional rights, under our law, these can be waived or given up if the waiver is “knowing, voluntary, and intelligent.” It does require a certain kind of legal fiction to imagine a criminal defendant as “freely” accepting to a plea deal, for example involving five years in prison, when they would otherwise face a sentence of fifteen years. This implied threat of lengthy imprisonment is deemed legally irrelevant, however, and a guilty plea via a negotiation is not viewed as coerced.

### The Substance of the Exchange

Now, what is being exchanged in plea bargaining? What is the substance of a plea deal? The basics are simple: the prosecutor gives the defendant lesser consequences, usually meaning less time in custody. It is theoretically possible, and it does happen in minor cases, that the defendant can negotiate for and receive outright dismissal of the case. For example, if the defendant has vandalized a neighbor’s car and the defendant is willing to pay restitution and the neighbor agrees, the prosecutor may dismiss the case on condition that the defendant compensates the victim. Thus plea bargaining can result in anything from dismissal to, in a death penalty case, a term of life without possibility of parole.

While the prosecutor is giving lower criminal consequences or possibly none at all, the defendant is giving back two things: the cost savings of trial and certainty of conviction. Certainty of conviction is of value to prosecutors because they may recognize that some criminal liability is better than none. They may assess that they could lose the case, and they would rather have a defendant serve two years than none at all. Also, low conviction rates reveal prosecutors to be wasting community resources, and thus subject them to possible political reprisal.

It is important to understand that, for prosecutors, a guilty plea may be just a step along the way to the longer-term incarceration of the defendant. Here is an example of how this works. Defendant X is charged with possession of cocaine for sale. That is a felony in the state of California, punishable by three, four, or five years in a state prison. Defendant X is in

custody, as are most felony defendants in the state of California. This is hugely important. Defendant X is desperate to get out of custody, and at the preliminary hearing, is offered a probationary sentence. Probation is a period of conditional liberty in which the defendant is released into the community, and allowed to remain free as long as he abides by certain terms and conditions. The conditions range tremendously. The most fundamental one of every probationary case is that the defendant must not violate the law again. Very commonly in California defendants surrender their rights to be free of a search as a condition of probation.

Defendant X accepts the offer, pleads guilty, and is returned to the streets. Prosecutors know, however, that he is going to be back soon – two weeks, five weeks, seven weeks, it doesn't matter much. Sure enough, Defendant X returns, having been arrested on a new case. Associated with probation, there is always a suspended sentence. If a defendant violates probation by getting arrested again, the suspended sentence is imposed and the defendant goes to prison.

Crucially, with a new offense, a person is entitled to a jury trial. With a probation revocation hearing, there is no such right. The probationer is entitled to a hearing, but it is before a judge, not a jury. The standard of proof is by a preponderance of the evidence, which is the lowest standard in our legal system, not beyond a reasonable doubt. Evidence seized in an illegal search can be used in a probation revocation hearing. Hearsay, an out of court statement, can be used. In contrast to a jury trial, a probation revocation hearing is a highly expedient procedure, and revocation is nearly inevitable.

While there is plea bargaining preceding probation revocation hearings, the defendant's position is infinitely weaker than in a new case. For a prosecutor, then, a plea can be a cheap way and an expedient way to get almost the same results as a conviction at jury trial, but without all of the hassle, albeit with some delay. This is yet another value that prosecutors appreciate about plea negotiations.

Most plea bargaining starts with a reference to a "standard offer." A standard offer is kind of the market rate for a particular kind of case. It is the usual kind of sentence that is offered for a particular kind of offense. These are established

in part by custom and also, within prosecutor's offices, by supervisory oversight of prosecutors. The young prosecutors who are in the lower courts typically receive parameters from their superiors who say, "In this kind of case, this is the range you can offer and don't go outside of these boundaries."

Standard offers are justified by the need to avoid the appearance of arbitrariness. It is considered unseemly for there to be too much variation in punishments between cases involving the same offense. What the attorneys generally negotiate is whether there are circumstances in aggravation, meaning things about the particular case that make it particularly nasty or unpleasant or factors in mitigation, things that indicate lesser culpability, that would justify deviating from the standards one way or the other. Much of plea bargaining consists of discussions about whether a case deviates in some way from a standard.

Attorneys have an expression, "to know what a case is worth." It is said admiringly or approvingly by one lawyer about another. If I say that a certain lawyer "really knows what a case is worth," I am paying him or her a compliment. What does it mean to "know what a case is worth?" Basically, this means to look through the case from beginning to end and to analyze what is likely to happen at each procedural step, and to make a fair and accurate prediction of outcome.

What follows is a partial list of considerations that lawyers make when determining what a case is worth. Is there a motion to suppress evidence in this case on the grounds of an illegal search and seizure? If the motion were granted, will that gut the prosecution's case and force dismissal, or will it merely weaken the case? Is it key or central evidence, or is it peripheral?

What is the defendant's criminal history? What is his past experience with law enforcement? Does he have a lot of law enforcement contact or just a little? Are there patterns in the defendant's criminal history, usually reflected in government maintained rap sheets or printouts of criminal history, which could be meaningful? Is the trajectory ascending, the offenses getting more and more serious over time, or is he on the downhill slope of his criminal career? Are there gaps in the criminal history? If someone was convicted 15 years ago, but

has been clean ever since, that is a different situation than if the criminal history were over just the last five years.

Does the defendant have other currently pending cases? It is not at all uncommon for defendants to have two or three active cases within one jurisdiction. These are busy people! Many defendants' lives involve regular violations of criminal law, and sometimes they get caught up in two or three cases at a time. There is a volume discount in the Criminal Justice System. A defendant with three cases is much better off negotiating them simultaneously rather than serially.

Does the defendant have prior convictions that can be used against him at the trial? We have minimally explored the impact of priors on trials, but there are various ways in which prior convictions can be used against a defendant despite the general ban of character evidence. For example, defendants who testify may be impeached – that is, shown to be untrustworthy witnesses – with certain kinds of prior convictions. Depending on the nature of the prior, the risk may be too great for the defendant, thus depriving the defense of valuable options.

How sympathetic is the victim in this case, if there is one? Is the victim tremendously sympathetic or as obnoxious as the defendant? Or is the victim a flake who may not appear in court, or will “go sideways” on the stand? To go sideways means to suddenly start saying things totally different than what the witness previously said to the police or others. This does happen in jury trials. It is sometimes completely unpredictable. However, you can see it coming in some witnesses, or you might have seen it coming already at the preliminary hearing.

If there are only police witnesses, are there personnel records that can be sought that might show past instances of police misconduct that you can use against the policeman at trial?

Are the particular facts of the offense ugly? Robbery in our law is the taking of anything of value from the person of another through the use of force or fear. A robbery offense may involve only fear. For example, where a physically large defendant comes up and demands of a much smaller person “Can I have some change?” this could be charged as a robbery. Robbery with a gun is an entirely different case. The specific facts of how the offense was committed matter. Likewise consider two people charged with shoplifting: one has stolen a US\$7 bottle of vodka, the other is charged with

stealing baby diapers. These are very different kinds of facts, but the same offense. One is more aggravated than the other.

Is there a plausible defense in the case, particularly one that the prosecutor can see from the evidence that is in his or her file?

Is the defendant a veteran of the United States armed services? There is a “veteran discount” in plea bargaining. Defendants who have served in the armed forces receive special treatment. Just as some airlines permit veterans to board first these days, so veterans get a discount in plea bargaining.

There are many other idiosyncratic and human factors that influence what a case is worth. How competent at trial is the trial attorney? How good an attorney is the opposing counsel? Does that person have the guts to go to trial? Trial is a high stakes, high wire act. It is hard for lawyers, and a lot of lawyers are afraid to go to trial. All lawyers suffer a certain degree of performance anxiety. For some of us it is greater than for others. When your counterpart is afraid to go to trial, that is when you extract the greatest concessions in negotiations. Or, you know your opponent likes golf. He has been talking for six weeks about how he is going to go to Scotland on a golfing tour, and it is the week before his vacation. You know he isn't going to cancel his trip to try a case, so he will give you exactly what you want. This, by the way, is a true example from my own practice experience.

If you are lucky enough to have your case hit calendar in the week between Christmas and New Year's, no one at the Hall of Justice wants to try a case. They are adjourning at noon, having office parties, drinking and having a lot of fun. Plus, this is the season of generosity. If you are that lucky defendant, it is like a gold mine or a Christmas gift.

One day you might have a visiting judge from out of county. Typical of visiting judges, they do not want to rock the boat or do anything unusual. Therefore, this is not the day you want to try and plea bargain your case. You are going to wait for a judge you know to return. Say, you spend a lot of time interacting with Judge Y. You happen to know that Judge Y is a gun nut. He is the only judge in the Hall of Justice in San Francisco who likes guns. So, if I have a gun case I want to be in front of Judge Y. Lawyers have some limited power to steer cases one way or another. The judges themselves are in

control of where cases go, but lawyers can finagle a little bit and steer their cases where they need them to go.

There many other random factors like the above mentioned ones.

Knowing what a case is worth reveals several of the linkages between jury trial and plea bargaining. First, it is basically a predictive process of analyzing a case and determining what would happen if this case were to go all the way to jury trial, as well as every stage along the way. It takes a lot of experience dealing with many different kinds of cases in order to develop that predictive judgment. Trial experience is thus crucial to developing plea bargaining judgment, and thus efficacy. Secondly, a good trial attorney instills fear in the opponent and thus can extract concessions from the other side.

Consider further that many of the factors previously described relate to the two basic things that the defendant can offer during plea bargaining: cost savings and certainty of conviction. How much court time can the defense take up with pretrial litigation and with a lengthy trial? How much pain and how much cost can the defense inflict on the system? That determines how much the defense can save it. That is what establishes the case's value. If I have a case with a motion to strike a prior, a motion to suppress evidence, a motion to discover the records of the policeman's misconduct, those possibilities invest that case with greater value than a case that lacks them.

How much uncertainty is there concerning a conviction? The more uncertainty, the more there is to give the prosecution in accepting a plea. If a prosecutor is not sure that he or she can secure a guilty verdict at trial, a plea bargain is much more likely. If the prosecutor can see from the police report that there may be some issue of self-defense in an assault case, that would be treated differently than a case in which the facts are very straightforward.

### The Timing of Plea Bargaining

When does plea bargaining occur? Plea bargaining happens at any point in the case. In fact, it is technically possible to happen even before a case is filed, and will continue intermittently all the way into trial. Plea negotiations



may occur after the trial has already started. Plea bargaining is a process that unfolds over time. Agreements can be quick, but far more commonly plea negotiations unfold gradually during the procedural progress of the case through the courts. Every time that case is in court, when all the sides come together and the defendant is present, an opportunity for bargaining is presented.

There are particular moments in cases that are ripe for settlement. This is principally where either some resources are going to have to be expended, and thus, a plea would save those expenditures, or where uncertainty arises – or possibly both. For example, I, as defense attorney, may have a motion to suppress evidence in my case because I believe the police have performed an illegal search. Just before hearing, a prosecutor's anxiety may be heightened; if my motion is granted, the prosecutor's case is going to get weaker or may even evaporate entirely. So I would say, "Should we settle this case, we won't have to go through this hour and half hearing and you will get your conviction, but in order for me to convince my client to accept this plea, you have to give me x." Then the prosecutor will at least think about it more sympathetically than at other moments in the case.

### The Secrecy Imperative

Where does plea bargaining occur? This may seem an odd or irrelevant question, but in fact it is very important. Typically, plea bargaining occurs in the judge's chambers, that is, his or her private offices behind the courtroom somewhere. The key thing however, is that it almost always occurs in private, outside of public hearing. Plea negotiation sometimes occurs in the hallways in public spaces where the attorneys can be seen, but their actual negotiations are not overheard. They take pains to make sure that nobody else is overhearing their negotiations. And, crucially, these negotiations happen outside of presence of the defendant.

Why are plea negotiations conducted in secrecy? There is a strong perception from all parties, prosecutors, defense attorneys, and the court, that secrecy or privacy is necessary to "successful" negotiations. By "successful" I simply mean negotiations that lead to agreement, regardless how satisfying or dissatisfying the agreement is to the parties. Secrecy is necessary

because both sides may need the freedom to say or do things that they suspect either the public or the defendant may not approve.

As an example, a defense attorney may distance himself from his client by saying, “This guys is totally unreasonable, I know. He is a jerk and will not do anything that I say. You know I will do my best to convince him to take this plea, but you better give me something so that I can get him to take the plea.” This positioning can be tactical. In other words, the defense attorney might not really feel that way about the defendant or he may actually be speaking sincerely. Either of those are a possibility. As you can imagine, a defendant wouldn’t appreciate being described in those terms to opposing counsel.

It could also be a judge observing how weak a particular prosecution witness is. A judge might do this in order to put pressure on a prosecutor to lower an offer. A judge might observe, “That victim is ridiculous and I sure as hell wouldn’t want to try a case with her as my lead witness.” Needless to say that is also not behavior that is particularly flattering or possible to be conducted in public. But, it can be effective in helping to propel a case forward to a disposition.

Privacy is also necessary because of the ethically suspect practice of trade-offs between multiple cases. In many plea bargaining sessions, multiple cases are discussed. Efficiencies sometimes cause court calendars to concentrate all of an attorney’s cases on the same day so that the attorney doesn’t race between multiple courts. Thus, one public defender might have eight cases set for preliminary hearing on the calendar, and would be negotiating not one, but eight cases in one session. Not explicitly, but tacitly, bargaining under these circumstances can amount to, “I will give you x on this case, if you give me y on the next.” You can only drive one hard bargain a morning, so you have to pick which case you are going to do that for. One of your clients benefits and the other one pays the price. How would you like to be the defendant that is paying the price? These trade-offs between cases simply cannot be made publicly. This is another reason why secrecy is necessary.

Defense attorneys are not all scheming fraudsters, who trick and coerce their clients into pleading guilty. Many are persons of great integrity and commitment. A combination of integrity and trial skills is an extremely powerful weapon in the

arsenal of a defense attorney and in a prosecutor too. If I, as a defense lawyer, assert to my prosecutor colleague, “I do not believe my client is guilty,” and she knows that I blow a lot of smoke, in other words, I am not truthful, then that will not mean much to her. I can blow all the smoke I want and she will ignore it. But, if we have tried cases before and she knows that I am a straight shooter, am honest, and that I have integrity – and that I am formidable at trial – she is going to listen to me when I say, “I do not believe that my client is guilty.” In this way lawyers can use their reputation to the benefit of their clients.

## Conclusions

Let us conclude with a few observations about why a system that functions as the plea bargaining machine continues to characterize itself as a jury trial system. First, there is a sense in which it is correct to represent the US system as a jury trial system. This is true because plea bargaining is a production of, and is the flip side of the jury trial system. We may not have plea bargaining if we did not have jury trials in the form that they have assumed in our contemporary legal system. In other words, the claim that this is jury trial system is still valid, but perhaps not complete.

Beyond that, however, is a question of legitimation, that is, how lawyers and judges present the legal system so as to invest it with authority before particular audiences. The relevant audiences are, perhaps, three. First is the non-lawyer lay public in the United States itself – those who are not part of the legal system. The second audience is defendants. The third is, in a sense, all of us in the United States in our dealings with the global community. With respect to all three of these audiences, it is far more ennobling of the legal profession and the legal system to think of it as resolving great issues and vital criminal prosecutions by dramatic courtroom battles in which intellectual and oratorical skills are matched against each other in this clash.

Doubtless, this is why popular culture so commonly depicts jury trial. You do not see television shows and movies that demonstrate plea bargaining. What you see are shows and movies that depict trial. Compare the image of the dramatic heroic courtroom battle to the reality of plea

bargaining, which can at times resemble haggling over cucumbers in the market. That is not a very pretty picture, in its dehumanization of defendants.

Part of the legal profession's professional project or responsibility is to convince the general public of its mastery of a specific form of expertise. That is what lawyers sell. If we do not have knowledge that is distinct from that of others, why should anyone pay us for anything? So we have to mark off our expertise and distinguish it from other forms of expertise. Mastery of jury trials skills is much more distinct from everyday lay knowledge than bargaining skill. If you really want to be represented well in bargaining, you might go to a rug merchant, not a lawyer! They are better at negotiating than we are. I exaggerate, of course, because we have discussed the relationship between legal knowledge and the ability to negotiate effectively, and a rug merchant would be as lost in plea bargaining as any other non-lawyer. But from the standpoint of the lay public, anybody can walk into the back room and negotiate, at least as well as a lawyer. So, trial skills are what differentiate the legal profession from that of other forms of expertise.

With respect to defendants as an audience before which we need to legitimate ourselves, this is perilous, because, as I said, the vast majority of defendants' cases do not go to trial. But, it is still important for them to see it as a possibility and to see a guilty plea as an outcome influenced by trial realities as opposed to purely a product of negotiation.

The global community's admiration and emulation of the US legal system is a source of great pride in our legal profession. The export of American legal forms is a major business. We commonly host legal delegations from all over the world. I have personally hosted many myself in San Francisco, from Japan, China, Eastern Europe, the Arab world, and elsewhere. We rarely travel to those countries, at least not to learn how their legal systems operate with an eye toward reforming our own system. They always come to see what we do. When we do go abroad, it is usually to instruct others how to fix their legal systems

and model it after ours. The reflection US lawyers see in the global community's response to us is I suspect, one of the fundamentals of American exceptionalism.

American exceptionalism is the belief that we are a uniquely endowed country, that we are special, and we may claim prerogatives and assume functions that others in the international community cannot. That explains why a nation like mine can think of itself as a nation of laws and nonetheless hold such contempt for international law. We can kill people anywhere in the world with our weaponized drones, sovereignty of others be damned. Nobody else can do that (other than our protégé, Israel). The simple fact is that we think our laws are superior to anyone's. Nobody is going to tell us that our drone assassinations violate international law. What is international law? Now, obviously, this is not the perspective of every person in the United States, but this is a perspective and it is held quite strongly and quite openly by many powerful people. Our former president, and to some extent our current president, seem to hold this position.

Perhaps this relationship between how we conduct ourselves in the international community and our jury trial system seems implausible. I personally believe pride in our legal system and faith in its superiority is a core feature of American exceptionalism. For better or for worse, I see no inclination from within the legal profession or outside of it – none whatsoever – to question the plea bargain machine. It will, accordingly, rumble on indefinitely into the future.