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Honesty and Opacity in Charge Bargains

Ronald Wright & Marc Miller*

Judge Gerard Lynch has helped legal scholars recognize what observers in the trenches have known for years: American criminal justice systems have become administrative systems run by executive-branch officials (namely, prosecutors).¹ In these administrative criminal justice systems, judges serve as mere functionaries, only occasionally supervising the determination of guilt, and maintaining a somewhat larger voice at sentencing. We are therefore deeply grateful that Judge Lynch, who knows the centrality of the prosecutor in criminal “adjudication,”² responded to our Screening/Bargaining Tradeoff hypothesis.³

For Judge Lynch, the kind of aggressive prosecutorial screening we propose and then explore at work in the New Orleans District Attorney’s Office amounts to a “refinement” rather than an “alternative” to the dominant administrative criminal process.⁴ He supports “careful screening of cases to eliminate unrealistic charges”;⁵ but Judge Lynch parts with the next crucial step of the Screening/Bargaining Tradeoff, which aims to reduce the number of charge bargains (that is, cases settled through reductions of initial charges). He doubts that such restrictions on charge bargains are a good thing. When faced

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1. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2123 (1998) (“The substantive evaluation of the evidence and assessment of the defendant’s responsibility is not made in court at all, but within the executive branch, in the office of the prosecutor.”).

2. Judge Lynch has served on the United States District Court for the Southern District of New York since 2000. He has on several occasions worked as a federal prosecutor in the Southern District, including two years spent as chief of the criminal division on leave from his professorship at Columbia. He has also served as defense counsel in federal and state cases.

3. Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 *STAN. L. REV.* 29 (2002).

4. Gerard E. Lynch, *Screening Versus Plea Bargaining: Exactly What Are We Trading Off?*, 55 *STAN. L. REV.* 1399, 1400 (2003).

5. *Id.*

with a choice between an administrative system that stresses screening and suppresses later bargaining, and an administrative system that emphasizes bargaining, Lynch favors the latter.

In Judge Lynch's view, plea negotiations *are* the criminal process of adjudication, where defense attorneys contest facts and evidence and where prosecutors respond with reasoned judgments, including charge reductions. Bargaining is necessary to allow any meaningful input from defense attorneys during plea negotiations. Without bargaining, prosecutorial choices go unchallenged and uninformed by defendants and their lawyers.

We part ways with Judge Lynch on both the virtues of charge bargaining and the power of defense counsel to add value during those negotiations. We believe that pervasive harm stems from charge bargains due to their special lack of transparency. Charge bargains, even more than sentencing concessions, make it difficult after the fact to sort out good bargains from bad in an accurate or systematic way. We do not believe that active participation by even the best defense counsel can solve this problem. Further, we believe that Lynch's image of defense participation is impossible to align with the experience in most state and local jurisdictions, including New Orleans. The image may even be hard to align with the relatively wealthy federal system of criminal justice.

It matters a great deal *which* administrative system of criminal justice one chooses. Prosecutors have every reason to want a system that depends on negotiations for reduced charges. Such a system leaves prosecutors with overwhelming authority and discretion, and gives the public little opportunity to monitor the quality of the end product. When a prosecutor chooses to adopt a system that limits discretion and that allows greater public scrutiny of office decisionmaking, as the New Orleans District Attorney has done, it is reason to cheer. It is time for more prosecutors to step out from behind the curtain, and operate the administrative justice machine in the open.

I. TRANSPARENCY AND CHARGE BARGAINS

Judge Lynch observes, "It is unclear just what is wrong with reductions in charges"⁶ Our reply centers on transparency, one of the greatest challenges to the administrative criminal justice process. Because the disputed facts are not presented in open court (or in any public forum), the quality of a criminal conviction in an administrative system is difficult to judge. Only by improving transparency can we address the underlying concerns, such as convicting innocent defendants or providing prosecutors with such complete control over outcomes that defendants retain no realistic access to judges, trials, or trial rights.

6. *Id.* at 1401.

The current administrative criminal process is highly opaque. In a world with few trials, it is rare for the victims and public observers to hear the full story behind the charges. For cases resolved without trial, the moment of greatest transparency occurs when prosecutors file their initial charges. At this point, the public, the defendant, and the prosecutor should believe that the charges reflect the government's reasoned judgment about what the defendant has done, and what social labels and consequences should attach.⁷

But when the initial charge shifts, after nonpublic negotiations, the worth of the case becomes cloudy. And when shifting charges become the norm, it is impossible to scrutinize the changing charges to determine if they match the facts or fit with external (and public) conceptions of justice. The machine has too many moving parts to monitor them all.

This transparency issue is a minor one for Lynch, who claims that the public should understand that the "discounted" price is no real bargain, and that the reduction is justified because it produces a more certain payoff for both the prosecution and the public. However, we do not think the problem with charge bargains is that defendants receive excessively lenient sentences. A sound administrative criminal process can coexist with either a severe or a modest penalty scheme. The goals of a sound administrative criminal justice system should be relatively modest penalty *differentials* that do not unduly burden trial rights, and relatively similar treatment of similar offenders.

The system of charge bargaining is problematic for reasons other than severity or leniency in individual cases or in the system as a whole. Ready resort to charge bargains invites sloppy initial charging. Charge bargaining also gives individual prosecutors (especially those in large, overworked offices) too much opportunity to treat similarly situated defendants differently depending on whether they plead guilty or go to a trial. Prosecutors can eliminate virtually all access to trials for defendants who face extreme sentence differentials.

The opacity of charge bargains compounds these problems. With charge bargaining, the public cannot tell the difference between reasonable and unreasonable charge bargains. Nobody can know after the fact which bargains are "good" bargains, based on sound reasons, and which ones are "bad" bargains, reflecting overcharging or sloppiness by the prosecutor or undue pressures created by dramatic plea/trial sentencing differentials.⁸ Indeed, the

7. In modern structured or "guideline" sentencing systems, the sentence may provide greater transparency—more accurate and assessable information—than the guilty plea or even than conviction after trial. In the substantial number of states that maintain relatively indeterminate systems—a group of states largely ignored by sentencing scholars—the fact of conviction may be more transparent than the indeterminate sentence or range announced by the judge.

8. The difficulty of ex post assessment of plea bargains is suggested by the difficulty in the federal system of knowing how many plea bargains are the product of "manipulation" of

difficulty of sorting out good bargains from bad extends to chief prosecutors in busy urban systems.

Finding the proper metaphor to describe modern criminal adjudication and typical plea bargains may be a useful way to highlight the differences between charge bargaining and aggressive screening. Lynch points out that “haggling over prices” (what others have referred to as the Turkish bazaar)⁹ does not accurately describe systems driven by charge bargaining. He does not believe that prosecutors or defendants in a typical case take unrealistic positions with the hope of splitting the difference. Instead, Lynch argues, plea bargaining focuses on “the merits”—the quality of the product rather than its price—and the prosecutorial (administrative) judgment then weighs the information.¹⁰

Lynch observes that plea bargained sentences are not properly perceived of as “discounted” any more than consumer items that are always “on sale” are in fact discounted. But there is a serious problem with the analogy of items always on sale: Consumers do not have equal power to compare all consumer goods on sale. For some consumer goods, the “discounted” or “street” price does not obscure comparison and the consumer’s judgment about the product—think about computers or digital cameras—while for other products the “sale price” appears intended (and in fact achieves) the goal of obscuring just what the consumer is getting—consider mattresses or automobile tires.

Another problem with the “sale price” analogy is that it ignores the role of the public—the store owners. While any given defendant/purchaser might understand the true value of the deal being offered, all the negotiations and shifting prices make it hard for the public to audit the books to learn if the sales are generally matching the value of the inventory.

the federal sentencing guidelines. Early research on the sentencing-guidelines regime suggested that 20% to 35% of all bargains were the product of “circumvention,” in violation of the sentencing rules. Stephen J. Schulhofer & Ilene H. Nagel, *Plea Negotiations Under the Federal Sentencing Guidelines: Guideline Circumvention and Its Dynamics in the Post-Mistretta Period*, 91 NW. U. L. REV. 1284, 1312 (1997) (noting that “[t]he principal problem with circumvention is that circumvention, unlike overt downward departure, is hidden and unsystematic”). Schulhofer and Nagel had access to prosecutors’ case files; their research on this critical question has not been replicated since. Without the (unlikely) blessing of the United States Department of Justice, it likely will not be replicated.

9. See John Kaplan, *American Merchandising and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 218 (1977) (invoking the Turkish bazaar metaphor to describe the current plea bargaining regime and the moral neutrality ascribed to the players therein).

10. It is not clear whether Lynch believes that prosecutors choose initial charges they believe to be “just,” or that they opt for a set of initially plausible charges (some strong, some weak), subject to testing by further information. To the extent Lynch thinks initial charges are chosen more loosely, with the expectation of later dismissals and discounts, perhaps the Turkish bazaar metaphor (where everyone knows that discussion of the “merits” of prices will occur) might have some explanatory power after all.

The Screening/Bargaining Tradeoff is not a perfect solution to all problems of transparency, but it dramatically improves on the criminal administrative norm. Where charge reductions are unusual, and trigger special obligations to explain the new charges, the public can better track the quality of charges and convictions. Hard screening improves the prospects for review of the line prosecutor, including internal review from the office supervisors and external review from the defense, the court, and the voting public. This possibility for review of a prosecutor's work makes the hard screening system a genuine alternative to wholesale plea bargaining, and not just a refinement.

II. THE ADDED VALUE OF DEFENSE LAWYERS

In the comparison between screening systems and bargaining systems, Judge Lynch sees most of the advantages on the side of bargaining. Many of those benefits come from the role he posits for defense counsel during negotiations. In an administrative system where the prosecutor determines guilt, "it becomes critical to provide a fair opportunity, within the internal administration process, for the defendant to present evidence, challenge the prosecutor's case, and argue defenses and mitigating circumstances."¹¹ In Lynch's view, the best opportunity for the defense lawyer to add value, and the best opportunity for a fair administrative adjudication, occurs during the plea negotiations, where defense lawyers test the prosecutor's initial impressions of the case.

For Judge Lynch, this key role for defense lawyers is far more than a theoretical ideal. He says that plea negotiations are

primarily discussions of the merits of the case, in which the defense attorneys point out legal, evidentiary, or practical weaknesses of the prosecutor's case, or mitigating circumstances that merit mercy, and argue based on these considerations that the defendant is entitled to a more lenient disposition than that originally proposed by the prosecutor's charge.¹²

We do not believe that plea negotiations over charges offer the best administrative system for defense counsel input. Even ideal participation in plea negotiations by ideal defense counsel will leave charge reductions mysterious to the public and to prosecutorial supervisors. Defense attorneys and their clients would be better served by participation at the time of initial charging, at trial in cases where the charges do not fit the facts, and at sentencing where more information from the defense is relevant, and where more subtlety in reasoning is possible.

But our main concern with the system Lynch describes is not how it might work, but whether it exists at all. Judge Lynch's portrait of plea negotiations is

¹¹ Lynch, *supra* note 4, at 1407.

¹² *Id.* at 1403.

more flattering than the reality in most criminal systems. Judge Lynch perhaps draws this description from his extensive experience in the federal system, and indeed in one of the most elite and well-funded districts in the federal system. Such thorough give-and-take on the merits of the case, with the defense lawyer testing the prosecutor's view of the facts and the law,¹³ might indeed take place routinely in white-collar criminal cases, and in particular in the Southern District of New York.¹³

But plea negotiations look nothing like this in most places. In state systems, and especially in the high-volume systems of urban areas, defense attorneys have far less time and money to devote to each criminal defendant. More defendants in the state systems rely on publicly funded attorneys, and the funding for those attorneys is less generous than in the federal system.¹⁴

In such a world, with so little defense attorney time to spread among so many cases, it will be an exceptional case where the defense lawyer adds much to the prosecutor's view of the facts and the law, particularly when the prosecutor has actually spoken to witnesses and envisioned a possible trial. A defense attorney might review the police reports, speak briefly to her client and perhaps to some key witnesses, and formulate some legal arguments. Based on this preparation, a defense lawyer might shift the views of a prosecutor who selected charges only after a cursory look at the file. But for a prosecutor who tested the strength of the police investigation before filing charges in a principled screening system, the defense attorney's information will rarely make a difference. We observed such a system in New Orleans.

If plea negotiations do not usually create occasions for the defense attorney to bring new information to the prosecutor's attention, what do the lawyers talk about? Defense lawyers might want to learn the prosecutor's intentions: How much has she invested in the case? Does she treat this as one of her most important cases? Does she owe a favor to the defense attorney?

Given the huge amount of discretion that American criminal codes (and sentencing systems) grant to prosecutors, the intentions of the prosecutor can matter more than the facts or law relevant to the case. The same set of facts can sustain various charges with varying penalties. This differential makes the prosecutor's intentions one of the key issues to discuss in plea negotiations. In most systems, the routine work of individual prosecutors receives little review, and thus line prosecutors exercise personal as well as institutional discretion.¹⁵

13. Lynch's description of "sophisticated negotiation" looks to a corporate counsel's guide to alternative dispute resolution, suggesting the white-collar origins of the image. *Id.* at 1403 n.7.

14. See BUREAU OF JUSTICE STATISTICS, *INDIGENT DEFENSE* (1996).

15. See KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* (1969) (noting the discretionary power residing in individual prosecutors); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001) (discussing how criminal codes increasingly grant overlapping charging options to prosecutors).

A defendant who believes that the prosecutor is implacable might put up a harder fight, or might enter an open plea of guilty if the judge appears to be an ally. But the defendant's calculation does not often turn on whether the prosecutor realistically estimated the odds of obtaining a conviction at trial, for in many cases conviction is a near certainty. The defendant's calculation turns instead on whether the prosecutor or the sentencing judge is inclined to be merciful. Thus, high levels of guilty pleas may result from considerations other than the parties' shared prediction about what charge would produce a conviction at trial. Guilty pleas could just as easily reflect prosecutorial domination and an administrative system run amok.

This darker vision of plea negotiations applies most clearly to the starving state systems. But it might also describe part of what happens in federal court, the land of (relative) plenty for defense lawyers. Consider this: In the federal system, 96.6% of all convictions resulted from guilty pleas in 2001. While it is commonplace to note that guilty pleas outnumber trials, few have considered the meaning of a long-term trend in the federal system: The proportion of guilty pleas has been moving steadily upward for over thirty years, and has seen a dramatic increase of over eleven percentage points just in the past ten years, from 85.4% in 1991. Indeed, the aggregate national guilty plea rate in federal cases remained under 92% until 1997, in line with the rough national norm for all criminal systems of about 90%; it is only in the past five years that we have witnessed the rise to a bizarrely high plea rate. In some districts now, the percentage of convictions attributable to guilty pleas reaches over 99%.¹⁶

What can explain the relentless shrinking of the federal trial rate, to the point where criminal trials have essentially disappeared from the federal system? One possibility, in line with Judge Lynch's theory, might be that federal defense attorneys have become more persuasive (and better funded) over the last ten years, and therefore they are better able to point out factual and legal weaknesses in the charges the government originally files. We believe, however, that the increased severity of federal sentences, coupled with the wide discretion in charges available to the federal prosecutor on a single set of facts (and the prosecutor's related ability to control sentence differentials through both charges and sentencing facts),¹⁷ is a more likely explanation for this breathtaking trend. We now have not only an administrative criminal justice system, but one so dominant that trials take place in the shadow of guilty pleas.

If prosecutors have such far-reaching authority in both the federal and the state systems, can defense attorneys add any real value to the system? We believe emphatically that they can.

16. U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, at tbl.10 [hereinafter 2001 SOURCEBOOK]; U.S. SENTENCING COMM'N, ANNUAL REPORT 1991, at tbl.21.

17. See GEORGE FISHER, PLEA BARGAINING'S TRIUMPH 205-30 (forthcoming 2003).

The New Orleans system we studied closely for this project has a notoriously underfunded system of public indigent defense.¹⁸ But we do not view the minimal involvement of defense counsel before the filing of charges as a “good thing.”¹⁹ We simply described the system as we found it. A more active and well-supported defense system could actually improve principled screening, because defense lawyers are among the most important enforcers of prosecutorial screening policies. Prosecutors who depart from office policy and overcharge a case will pay a price when an active defense lawyer is on the case.

Fortunately, testing by defense counsel is only one guarantee of accuracy of any charge. Offers on the low side should not occur because internal monitoring by supervisors will push the screening attorney to charge the most serious crime that could be sustained at trial. Offers on the high end should not occur because office policy forces the prosecutor to stand ready to try the case as charged, and not to treat the initial charge as a confusing bluff for negotiation purposes.

Particularly when enforced by quality defense lawyering, principled screening gives the public access to information it needs to evaluate the prosecutor’s work. “Independent public assessment”²⁰ does not necessarily require a criminal trial; it does require information that can be reviewed *across* cases. Only then can citizens and their agents (including journalists and scholars) make systematic judgments about prosecutorial charging. In American criminal justice, we justify broad prosecutorial discretion by pointing to the election of prosecutors. The clearer signals that come from principled screening can make that electoral check meaningful.

The experience of disappearing trials in the federal system and the continuing vitality of trials in New Orleans might indicate something about the relative health of the two systems. Judge Lynch notes that one limit on prosecutorial overreaching is the presence of a “meaningful opportunity” for a trial, and especially a jury trial.²¹ We do not see how any meaningful opportunity remains in a system where the trial rate is 3.4%—and falling!

Trials are not the norm, and are not normative in modern criminal justice. But even in the modern administrative criminal system, some minimum trial

18. The weaknesses of this system provoked a remarkable constitutional ruling from the Louisiana Supreme Court that ultimately prompted the legislature to improve the funding situation. *State v. Peart*, 621 So. 2d 780, 783 (La. 1993) (concluding that “based on the record developed in the trial court . . . the services being provided to indigent defendants in Section E of Orleans Criminal District Court do not in all cases meet constitutionally mandated standards for effective assistance of counsel”); see Marc Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1791-95 (1999) (discussing *Peart*).

19. Lynch, *supra* note 4, at 1407.

20. *Id.* at 1404.

21. *Id.* at 1405 n.9.

rate is necessary as a measure of a healthy system. Extremely low trial rates, perhaps in conjunction with low acquittal rates, may indirectly suggest the presence of an excessive trial penalty, and the diminution of justice that comes with it.²² We do not have a “magic rate” of trials that reveals an unhealthy system, but a rate of 3.4% seems sufficiently low to be worrisome. The 14.4% trial rate in New Orleans²³ seems much healthier, for example, than the 2.2% trial rate in the United States District Court for the Eastern District of Louisiana.²⁴

We share with Judge Lynch the sense that American criminal justice systems are likely to remain administrative systems, placing the prosecutor in the key administrative role, as a quasi-judge. The challenge is to design the fairest possible administrative system. Aggressive prosecutorial screening, including sharp restrictions on charge bargains, improves on the administrative structures now in place. The practice makes prosecutors more accountable, to one another and to all of us.

22. Cf. Ian Ayres & Joel Waldfogel, *A Market Test for Race Discrimination in Bail Setting*, 46 STAN. L. REV. 987 (1994) (suggesting that the market for bail bond rates may indirectly suggest judicial or prosecutorial racial bias in the setting of bail bonds).

23. Wright & Miller, *supra* note 3, at 71 fig.1. We calculated the trial rate as 13% of cases *filed*, which works out to 14.4% of all *convictions* (the basis for the federal percentage). We also believe a nontrivial portion of trials resulting in acquittal bolsters the indirect judgment that prosecutors are making tough judgments, and defendants are litigating those judgments where the disputes are substantial. In New Orleans, the acquittal rate for our study period was 4% of all cases adjudicated, and 30% of all trials, while the acquittal rate for the federal system in 2000 was 1.6% of all cases adjudicated, and 26% of all trials. See BUREAU OF JUSTICE STATISTICS, FEDERAL CRIMINAL CASE PROCESSING 2000, WITH TRENDS 1982-2000, at tbl.5 (2001).

24. See 2001 SOURCEBOOK, *supra* note 16, at tbl.10.
