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PLEA BARGAINING AND THE CRIMINAL DEFENDANT'S OBLIGATION TO PLEAD GUILTY

GERARD V. BRADLEY*

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One criticism of plea bargaining holds that: "So long as defendants routinely expect to receive some form of sentencing consideration in exchange for an admission of guilt, the essence of a system of bargain justice is present."

Taken as a criticism—that "bargain justice" is defective justice and that the "routine" upon which it depends should be significantly reduced, or eliminated—this view is quite mistaken. On the assumption (which I believe to be true, but for which I do not argue here) that a large majority of the criminally accused2 are in reality guilty, many—and probably most—criminal defendants should plead guilty. Any defendant who discharges this duty should receive favorable sentencing consideration. This is not a matter of offering a carrot or threatening a stick to do what would ideally be unnecessary, or a tactical concession in order to wrest a quota of dispositions from reluctant defendants. It is an entirely proper element of sentencing, even a right of the pleading defendant. In short, I argue that


2. By "criminally accused" I mean someone charged by a prosecuting authority, not all those arrested or charged by the police.
defendants (most of whom are, in reality, guilty) should "routinely" plead guilty, and receive a reduced sentence when they do.

Here is how I have organized the argument. In Parts I, and II, and III, I defend the view that the common good, particularly the principles and norms which justify and shape punishment of criminals, not only allows, but requires favorable consideration of the pleading defendant. That is, a sound view of crime and punishment includes favorable consideration of the defendant who pleads guilty. Then, I explore the question: when does the common good call for a trial, even where the defendant is, in reality, guilty? Part IV anticipates and meets one leading objection to plea bargaining in general, and to my account of its moral supports. Part V meets others.

I consider in Part VI the defendant's point of view. Defendants have reasons to plead, or to go to trial, which are outside the common good of political society. For these reasons, many guilty defendants properly go to trial. Who are these defendants? How should they be treated by the sentencing judge? Specifically, should they receive the consideration given to the pleading defendant, because, like the pleading defendant, defendants who go to trial thereby serve the common good, or do what they ought to do, all things considered?

Finally, I briefly consider the implications of my analysis for the conduct of criminal defense attorneys.

I. THE SECONDARY AIMS OF PUNISHMENT

One of the traditional aims of criminal punishment—the moral reform of the criminal—has been obscured, perhaps displaced, in our therapeutic culture by a commitment to what is commonly called "rehabilitation." This contemporary notion includes some minimum sense of the traditional idea: "rehabilitation" refers to shaping the convicted person into a law-abiding citizen, just as, loosely speaking, does moral reform. But "rehabilitation," as it is commonly understood, is either the project of eliminating (through treatment and other interventions) the pathologies which are thought to "cause" crime. Or "rehabilitation" is deterrence: somehow getting the
convicted person to appreciate the unpleasant consequences of breaking the law, and so refrain out of self-interest from breaking the law. In this latter sense of rehabilitation, public authority says to the convicted criminal: “make a prudent calculation of your behavior once you leave here, and you will see that it is in your interest to keep within the bounds set by the law.” In either case—deterrence or rehabilitation as behavior modification—the aim is loaded with notions of diminished responsibility: but for the underlying pathology or the criminal’s almost childlike incapacity to link today with tomorrow, the convicted criminal would not have behaved badly. The predominant presupposition is that it is sick or stupid to commit a crime.

But it is not irrational (sick or stupid) to commit crimes, though some sick or stupid people do. Crime is an attractive choice, and people of average intelligence and normal functioning can and do commit crimes.

Moral reform, traditionally understood as something tantamount to conversion, is quite a different thing. (Recall that custodial institutions were once called “penitentiaries” or “reformatories.”) The aim of punishment is precisely that—punishment. Punishment is possible only where the criminal is taken to be a free actor, someone who has consciously and voluntarily preferred his own interests above those of other people in society. Punishment can make no sense in a therapeutic culture, where criminal justice is seen as regrettable, or as something necessary to maintain social hygiene. Additionally, moral reform is easily distinguished from deterrence, which is finally an appeal to enlightened self-interest, not to norms of fairness to others. Moral reform is about the defendant’s character as a free and thus responsible acting person.

II. THE CENTRAL AIM OF PUNISHMENT

The traditional understanding of crime and punishment ought to be abandoned if it is in fact true that people are either always, or characteristically, incapable of free choice. Thus, the conclusions of

5. We seem, as a society, to be leaving behind the once common notion that poverty causes crime. See Leonard J. Long, Optimum Poverty, Character, and the Non-Relevance of Poverty Law, 47 Rutgers L. Rev. 693, 708-09 (1994) (citing Roy M. Howsen & Stephen B. Jerrell, Some Determinants of Property Crime: Economic Factors Influence Criminal Behavior But Cannot Completely Explain the Syndrome, 46 Am. J. Econ. & Soc. 445 (1987)). In its central sense this view probably holds that criminal acts are rational, but also that they are reasonable, even good. In this view, punishment is unwarranted, and therefore an oppressive imposition.
Richard Posner, and many others, that people are cause and effect all the way down, and that we still usefully (uprightly) retain the language and practices of punishment, must be rejected as, at best, noble lies and, at worst, ruling class propaganda. Still, the fact that criminal acts are often performed by people with diminished capacities, and in situations where freedom is compromised, are conclusions perfectly compatible with the traditional understanding of punishment and with contemporary institutions rooted in that understanding. Also, rehabilitation and deterrence are permissible secondary considerations in a sound regime of crime and punishment, but they are not really the central or justifying aim of punishment.

Neither is moral reform, in the straightforward sense of improving the defendant's character. Public authority is not justified in coercing an individual simply because the individual would benefit from it, even if we could be certain that the individual's character would be improved by the intervention. But the presuppositions of this secondary aim are pretty much those of the justifying aim of punishment. Clarifying that aim, a matter to which I now turn, will allow us to see how a defendant's willingness to plead guilty entitles him to a sentence reduction.

The essential (but not exclusive) moral wrong in criminal behavior is the selfish (i.e., unfair) grab of more freedom than is one's due, more than others enjoy by virtue of their continuing to stay within the law. In suffering punishment, which is the unwelcome deprivation of the liberty to do as one pleases, criminals lose their undeserved advantage over law-abiding citizens.

To better appreciate the central aim of punishment, one should hold in the mind's eye a diachronic view of society's interaction, a broad pattern of restraint, action, and opportunity; one established by custom, morality; and finally, by law. Public authority administers punishment so that, over a period of time, no one is made a "sucker" by choosing to remain within the law's path for pursuing one's projects in cooperation with others. Liberty is a valuable (and important) common resource. The law consists, in the relevant view of liberty, as a pattern of distribution of this valuable resource. Once this pattern is established by the persons or institutions responsible for such matters, the individual citizen's adherence to law is a matter of

fairness to others who would, like that individual, prefer a greater amount of liberty.

Fairness, especially insofar as it requires treating similarly situated people in the same way, has a great deal to do with determining a just punishment. Fairness, however, is not the only criterion. Fairness is one very important element of the common good. But the more inclusive common good, not fairness, is the principle of legitimate public authority, including its exercise in administering punishments. Cases of immunity and pardons—for diplomats, legislators during session, sitting presidents—are justified by reference to the common good, even if otherwise letting such persons "get away with it" is unfair. Short of such wholesale exceptions from criminal liability, a variety of evidentiary privileges (priest-penitent, doctor-patient) makes it practically difficult to prosecute certain types of offenses. I am not sure whether prosecuting to the detriment of values protected by these crosscutting norms is "unfair." It seems more appropriate to say that, while it would be fair and presumptively in the interest of society to prosecute a particular case, the common good is better served if we do not. John Finnis says that "if it is unfair to law-abiding citizens not to punish criminals, it is more unfair to them to punish criminals when it is clear that the punishment will lead to more crime, more unfairness by criminals and more danger and disadvantage to law-abiding citizens."

By bringing the central wrong of criminal misbehavior into focus, we can recover the sense of some of our settled convictions about crime and punishment. Most important among these is the distinction between civil and criminal wrongs. Why do the "People" (or the "State" or the "Commonwealth") prosecute assault charges in addition to, or instead of, a civil suit by the injured party? Why—on what basis—does the political community prosecute as crimes acts that do not harm anyone in particular? (For almost no one is opposed to prosecuting all so-called victimless crimes—all prostitution, drug, and other "quality of life" offenses. That is, almost everyone favors the prosecution of some activities which harm no one other than the perpetrator in his character.)

Everyone is treated unfairly by the criminal: the criminal unilaterally claims a greater liberty to pursue his own path than all those who choose to remain within the bounds of the law. So the "People" are the aggrieved party in criminal prosecutions. By keeping the central wrong of criminal misbehavior in mind, we can

see the justice of prosecuting some "victimless crimes," too. On the assumptions that the legally prohibited conduct is not morally required of anyone and that the common good of political society includes some public moral ecology, once a law concerning a victimless crime is enacted, then it is at least presumptively unfair for anyone to unilaterally decide to ignore it. The law-abiding members of the community, who may have as much or greater inclination and interest in performing the illegal act than the criminal, are victimized—made "suckers" and treated unfairly—by the miscreant.

Punishment aims to restore a just—that is, fair—distribution of liberty. The precise restorative property of punishment is to make the criminal "pay his debt to society," by being made to suffer some deprivation. Though punishment might take different forms, what is "going on," morally speaking, in any case is the defendant's will is being pushed back, debited, constricted beyond that of other law-abiding people. And so the admonition "go and sin no more"—no imposition now, but stay within the law henceforth—is not a gentle punishment, but a second chance—an act of mercy. The admonition is no punishment at all.

The privation must be the act of the political community; its aim must be to set the ledger (of restraint, opportunity, liberty) straight. We might loosely say that if John Gotti dies in prison today he will get what he deserves, but, he will in fact have avoided just punishment. Natural evil is not punishment; though, in certain cases, it might properly mitigate punishment otherwise deserved. Or, again speaking loosely, we might say that a bombing suspect beaten by the police officers who apprehended him, or fatally shot during their hot pursuit of him, got his "just desserts." Not really. Only a representative vested with public authority to punish can inflict punishment, as opposed to mere pain, suffering, or privation.

Punishment is not logically tied to any particular form or kind of unwelcome imposition. How criminals should be punished—both as to kinds of deprivations imposed upon them and as to the extent of imposition of any one kind—is entirely a matter of specification, save that the scale of punishments should exhibit a rough coherence: larceny should be punished less severely than murder, etc. As far as natural justice is concerned, in no case is this or that precise punishment the only correct one. There is no calculation by which it could be established that a reduction in severity, due to a plea, is wrong unless the plea is not relevant to the sentencing decision.

9. That is, some substantive conception of public morality.
Opponents of plea bargaining seem to suppose just that. However, in the next section, I argue the opposite.

Reasonable judges will differ on the proper punishment for a particular offender. This range is properly limited, when it is limited, by specifying legislation. Even so, insofar as criticisms, like the one quoted at the opening of this paper, suppose that there is, as a matter of justice, a "correct" sentence from which a judge deviates in conceding something to the pleading defendant, this view misapprehends the moral truth of the matter.

III. THE PLEADING DEFENDANT

The pleading defendant sets himself on the path to moral reform. By accepting responsibility for his actions, he cements his status as one who recognizes the basic ends of the law of crime and punishment. Besides his contribution to restoring justice by his incipient moral reform, the pleading defendant earns some relief from the deterrent component of sentencing, at least that aspect called "specific deterrence." Specific deterrence is basically a promise to this defendant that crime does not pay. By pleading and accepting his punishment, the defendant indicates his assent to that proposition.

Specific deterrence and moral reform—two of the secondary aims of punishment—are favorably served by the pleading defendant. If these ends are proper elements in figuring the precise terms of a particular sentence, as I think they are, then the pleading defendant would be treated unfairly if he received the same sentence as someone, otherwise like him, who was convicted after trial.

The pleading defendant also acts directly for the benefit of many individuals. In so doing, he further evidences a changing character—a change for the better. He relieves witnesses of a duty to testify, especially where a witness is subject to humiliation (a victim of sexual misconduct), abuse (a robbery victim aggressively cross-examined), or even danger (testifying against the mob chieftain). Often his punishment includes some act (restitution, for example) which directly


11. I do not offer here a full account of how the secondary aims of punishment—deterrence and moral reform—are to be integrated into the final sentence. I do not have such a theory, but I am convinced that any sound theory will allow for sentencing variations of some dissension, according to the secondary aims at stake.
benefits, if it does not make whole, his victim. The collateral effect of the criminal conviction is to reduce any parallel civil action to a hearing on damages. In many cases, the defendant’s plea eliminates the temptation that full dress trials hold to many participants to act unethically: the defense lawyer faces no dilemmas about perjured testimony, and witnesses all around are not tempted to perjure themselves. This temptation is often as great for police witnesses against the defendant as it is for, say, alibi witnesses he might summon to help exculpate him.

Moreover, the pleading defendant acts for the common good, and not merely for the benefit of specified individuals. How so?

The criminal justice system—the vast institutional apparatus centered on the courthouse, populated by lawyers, judges, probation officers and attended by police officers, lab technicians, coroners, and civilian witnesses—is a vastly expensive, scarce community resource. (I do not here refer to the corrections system or to the lawmaking activities which create and sustain a system of crime and punishment.) This scarce resource is created by the community for the limited but important purpose of fairly and accurately adjudicating accusations of criminal misconduct. Since it is a scarce resource, duties of fairness in its utilization arise: all those who have a say in how this scarce resource is used—including the criminal defendant—have moral duties concerning how the resource is used. It makes no practical difference that one thinks the system is understaffed and underfunded. Duties of fairness arise, like it or not, from the fixed quantity of resources available, no matter what that quantity is.

This duty of fairness runs first of all to other defendants, especially to those for whom trials are morally necessary—innocent defendants. But even other defendants who are inclined to plead guilty have significant needs for the attention of defense counsel, prosecutors, judges, and other court personnel. All these persons’ ability to give other pleading defendants the attention they deserve is limited by the number of cases tried. In the time it takes to try one felony, perhaps hundreds of plea negotiations can be conducted.

The defendant has the legal liberty to plead not guilty, to force the political community to prove its case against him, and thus to

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12. The claim that defendants have a moral duty to promote the common good, the discharge of which favorably affects sentencing, will probably strike anyone like Posner as absurd.

13. I leave aside, without judging it, the possibility of demonstrating the injustice of a court system or of some law by resolving to demand trials in all cases—exactly to paralyze the system.
subject various individuals to greater or lesser inconvenience. The defendant is neither obliged to explain his plea of not guilty nor is he informed that he faces adverse legal consequences by pleading not guilty. The defendant, in other words, is not only at liberty to command the consumption of a scarce common resource by dint, simply and solely, of his say so, but to impose upon many innocent individuals.

The accused is also at liberty to act for the benefit of others, considered both individually and as constitutive members of the common political society. If he pleads guilty, he permits the scarce resources he would otherwise cause to be consumed to be devoted to the causes of others who might have cases more deserving of trial, or who have other reasonable claims upon their attention. By freeing all the institutional actors concerned with his case—his lawyer, the judge, the prosecutor, police witnesses—to tend to other duties of various sorts, the pleading defendant acts indirectly, but effectively, for the benefit of the whole community.

Further, the defendant who pleads guilty acts for the common good and anticipates some of his punishment by placing resources that the community has placed at his disposal, at the disposal of others. Put differently, he freely declines to exercise his legal liberty to consume these scarce resources. He gives back to the community, which he treated unfairly by committing a crime, one scarce resource—the criminal justice system—in lieu of his unfair diversion to himself of another scarce resource—liberty.

The earmark of punishment is restoration of a balance (across the members of society) of restraint within the bounds of law. The defendant needs to have his will imposed upon (a matter to which we shall turn momentarily), but punishment does not entail useless privation. In fact, common usefulness should be an aspiration of the sentencing judge. Hence, community service is an element of a criminal’s punishment.

IV. OBJECTIONS

The most plausible objection to reducing the pleading defendant’s sentence is, it seems to me, that it gives to the defendant too much say over what his punishment shall be. The idea is that punishment should not be chosen by the defendant, that he must be made to suffer some unwelcome privation, and so pay his debt to society. The objection seems, or sounds like, it is right: one should not be at liberty to choose one’s own punishment. But, exactly, why not?
I think the main danger is that the person to be punished might choose something which appears to be a privation to outsiders, but which actually pleases, or does not displease, him. The misbehaving child, given a choice by an inattentive parent, might choose to give up Nintendo for a week as punishment for missing curfew. But, unknown to the parent, the child is sick of Nintendo, or sees that because of basketball practice and schoolwork, he would not have time to play Nintendo anyway, or the child simply welcomes the free time, which he expects to fill with other pleasurable activities.

I concede it is unwise to let children choose, willy nilly, their own punishments. But it might be wise to let them choose from two or more activities of the parent’s choice, for this reason: the choice gives the errant child a limited opportunity to embrace the punishment and shape his character around the moral goodness of being punished. That is to be encouraged. We should want a person who is punished to accept (and, in that sense, to embrace) the moral correctness of the punishment.

To get back to the case of the pleading defendant. He does not choose, willy nilly, his punishment. The options, including the opportunity to plead guilty and its consequences, are shaped by factors other than his will. The objective question is whether the plea is an opportunity to serve the common good and to relieve law-abiding citizens from (some of) their sucker status. (And so it is unlike good “private” acts the defendant might do to evidence improved character, such as visiting his ailing mom, or resuming his child support payments. These good acts should not affect sentencing.) Once the objective question is settled, if the defendant accepts (embraces) his punishment, all the better. Consider one effect of denying this view: the defendant who positively embraces his imprisonment, in the sense of seeing its value and who willingly submits to it, and makes the best of it, is beyond punishment altogether. The Bird Man of Alcatraz, or a jailhouse lawyer or minister, or any other prisoner who makes a useful, even good, life behind bars would never be able to pay his debt to society, precisely because he becomes good.

V. More Objections

One more objection has to do with what might be called the “intransitive” effect of jury service. The idea is that there is intrinsic value—educational, mainly—to jurors in being jurors. I do not deny that there is such value in jury service, though I deny the assertion by
Yale Law School's Akhil Amar, for example, that the intransitive value rivals, and perhaps outweighs, the transitive value of jury service.\textsuperscript{14} I deny, that is, that the experience and good effects of being a juror are in any way a close competitor, when it comes to evaluating the usefulness of jury trials, to the conscientious performance of the jury's adjudicative function—verdicts founded upon the law and the evidence. Jurors may sometimes behave as members of a New England town meeting, and be better for having done so, but all such effects should be seen as incidental by-products of the jurors' adjudicative function.

Having denied the independent significance of these "intransitive" benefits, I am not sure what is left of the objection that, however particularly stated, presupposes that resolution by a jury verdict is, somehow, the norm or standard or ideal resolution of a criminal lawsuit. In my experience, this standard is usually presupposed; it is rarely defended explicitly. But what is to be said in its defense? There is surely no logical relation between everyone having a legal right to a jury trial and everyone actually having a jury trial. The criticism can get aloft only by identifying some number of trials or units of jury service as . . . necessary? Optimal? Desirable? In no plausible scenario growing out of what I here propose will the number of jury trials be negligible. And, once the transitive value of jury trials is seen as the determining criterion in considering their overall utility, it becomes an entirely open question whether juries get it right more often than the alternative.

But what is that alternative? On what basis, other than overvaluation of intransitive effects or a dreamy prejudice in favor of jury trials, is the jury preferable to a scheme (like mine) that identifies a substantial class of guilty defendants who ought to plead guilty? My guess is that the appeal to the jury norm (again, apart from intransitivity) is covertly a function of what I treat in Part V: a disagreement about just what class of defendants ought to plead.

The next objection is that plea bargaining, of which the defendant's willingness to plead is an essential part, gives the prosecutor too much power. This objection is comprised of two different claims, and one of them has two related aspects. To take the complex claim first, the charge seems to be that prosecutors have, in a system characterized by guilty pleas, too much to say about the

\textsuperscript{14} \textit{See} Akhil Reed Amar, \textit{The Constitution and Criminal Procedure}, 173–74 (1997) (explaining that the "deepest constitutional function" of juries is not to serve the parties, but to serve "the people" by "involving them in the administration of justice").
defendant’s eventual sentence and, for that reason, the prosecutor invades the province of other institutional branches, foremost the judiciary.

It is certainly the case that, in a regime of developed classifications of crimes accompanied by determinate sentencing, prosecutors have a great deal of power. By offering to reduce a top count of murder, for instance, which might carry a mandatory minimum of fifteen years, to manslaughter, which carries a minimum of two years, a prosecutor constrains a sentencing judge’s options and offers a defendant a powerful incentive to plead. Or, a prosecutor might charge a felony and accept a plea to a misdemeanor, or accept a plea to a felony, which carries no mandatory prison time where a higher degree felony, with mandatory incarceration, was charged. But is this to say that the prosecutor possesses too much power, or that he is a usurper, or both?

With important ethical side-constraints which I state below, the answer is no. For one thing, the argument may prove too much. The prosecutor’s discretion to charge or not, and what to charge, is an ineradicable aspect of executive authority as it is generally understood in our constitutional system, as is the pardon (at least for chief executives), and (with limited exceptions) the decision to immunize a witness. (Think of the consequences of Ken Starr’s decision to immunize Monica Lewinsky.) No way to significantly limit all this discretion is at hand; a statute to command prosecution of “all offenses without exception” is unworkable, and a directive to charge the highest provable crime does not avoid prosecutorial judgment calls: what is the highest provable crime? Constraints with more modest ambitions, such as those requiring a plea to, say, a felony no more than one classification lower than that charged, may blunt much of the force of the “prosecutors-have-too-much-power” criticism.

Is the prosecutor a usurper? The legislature invests great authority (and, yes, great leverage) in the prosecutor by setting up a classification scheme in which the sentencing differences between adjacent classes of crimes are great. There may be a usurpation argument here, though I doubt it. But if there is an argument, it is an argument against the legislative branch. By granting a host of debatable assumptions, it might be argued that some proper discretion of judges has been legislatively transferred to prosecutors. Again, I do not think so. In any event, much of the prosecutor’s leverage over sentencing is a function of judicial eagerness to impose sentences which the prosecutor is not heard to oppose.

The proper limitations upon the prosecutor’s power must, it
seems to me, be ethical. The first constraint is familiar to anyone who has seen a standard code of professional responsibility: in no case whatsoever shall a prosecutor accept a plea from a defendant whom the prosecutor does not believe is, in reality, guilty. The second constraint arises from the whole complex of ethical considerations we have been examining, and I can only give a general expression to it here: plea offers ought to be consistent with viewing the guilty plea as an opportunity for the defendant to act for the good of others. Plea offers should, therefore, move within a range inhabited by the "good man," and ought to steer clear of offers that even an indifferent defendant would accept. Nothing the prosecutor does can insure that, even within the acceptable range, defendants accept offers for good reasons rather than bad. However, the prosecutor can give defendants a chance to be good. I do not exclude a radically different approach to plea bargaining; call it the market approach. The right plea offer is simply that which, given the constraints within which the actors operate, suffices to secure a disposition. This approach may be justifiable, but not on the basis of any argument here.

VI. WHICH CASES SHOULD BE TRIED: THE VIEW FROM THE COMMON GOOD

The common good is always served by the trial of an innocent defendant (at least when a guilty plea is the alternative). Besides, at least typically, the pleading innocent would have to speak falsely in order to gain a court’s acceptance of his guilty plea. But, in what situation is the common good served more by trial to a verdict than by a plea of guilty, where the defendant could plead guilty without speaking falsely?

In many criminal trials, the jury reaches a decision that amounts to more than the termination of one lawsuit but amounts to interstitial lawmaking. "Reasonable force," "negligent infliction," and "unreasonable noise" are moral evaluative terms in the criminal law. They are specified by the jurors. Over time, such provisions are hammered out by juries so that a kind of common law (of force, or noise) is enacted. Since the common good is plainly served by having some standard about these matters, trying at least some such cases is good. The same is true for other justification and excuse cases.

Some defendants do a public service by bringing cases to trial, by carving out, one might say, a common law of convictions. A certain number of cases need to be tried in any given jurisdiction in order to flesh out just what constitutes a proved case, to show what counts, in
this place at this time, as proof beyond a reasonable doubt. In one sense, this is the line between criminal misbehavior and behavior that is tolerated in the community. Participants in the criminal justice process regularly, if not always consciously, have in mind the prospects of jury conviction when they make decisions about what to charge, how to defend a case, and whether to make, or accept, a plea offer.

Even when the defendant is, in fact, guilty, he may be convinced, with good reason, that he may serve the common good more effectively by litigating the case. Examples include the following:

The defendant is in fact guilty of selling drugs and would be willing to plead guilty, but exposing the pattern of police misconduct in his neighborhood, which includes harassment of African-American male youths, must be a feature of his trial. This defendant’s lawyer promises to litigate the matter fully. The publicity which the defendant’s own testimony, along with the discovery materials secured from the police department, may provoke the serious review of police operations in the defendant’s neighborhood that is needed.

The defendant is in fact guilty of operating a livery without a proper hack license. But due to prevalent stereotypes, corruption, inertia, and the greed of others, there is no available taxi service in his minority neighborhood. The defendant is convinced that nonenforcement of this ordinance would serve the common good, and he has reason to believe that a jury drawn from a true cross section of the community will not convict him, no matter what the evidence of his violation of the positive law is. He hopes to help decriminalize this valuable service.

The defendant is in fact guilty of trespassing at an abortion clinic, but, like the civil rights demonstrators of the preceding generation, he believed that the positive law that he has admittedly broken is unjust. He holds out little hope that he will be acquitted but believes that passive resistance to the unjust law, including a zealous defense of the charges against him, serves the common good.15

There are probably many other types of cases where the defendant and public authority, due partly to different roles, to reasonable disagreement about certain moral evaluative matters, and to different knowledge, have divergent views of how the defendant

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15. I leave aside the question of what jurors or a judge ought to do in this case. The example is included on the assumption either that there is a good faith possibility that public authority considers the law to be just or that nonviolent violations of it are counterproductive.
may serve the common good. But, at least in certain classes of cases—
notably, legislative-type verdicts—and in certain individual cases—
those "sending a message," for instance—the sentencing judge should
proceed on the presumption that the trial defendant be treated as
would a defendant who pleaded guilty. I do not imagine that all such
defendants act out of concern for the common good. But the burden
should be on the prosecution to rebut the presumption that they do.

Which defendants, from the point of view of the common good,
ought to plead guilty? The central category is the large numbers of
offenses that occur when a particular defendant’s guilt turns upon a
simple historical fact. Identity is the leading example. My guess is
that most criminal accusations lodged in the average jurisdiction can
conclusively be proved, by reliable evidence, to have been crimes:
someone broke into and stole this car; this death (by shooting or
asphyxiation) was surely an intentional killing; this woman was surely
beaten and raped by someone. Now, in almost all of these cases (even
where the prosecution may have no eyewitnesses), there is at least one
person who is sure of the criminal’s identity: the defendant. He knows
whether he was there or not. Other cases in which the precise offense
committed turns upon some simple historical fact: Was she sixteen
years of age? Was the stash at least a full pound of cocaine? This
class of “simple” cases is very large. Where the people’s proof is all
but certain to convict, unless the defendant is a member of that class
of persons who have compelling reasons to avoid punishment, he
should plead guilty.

Add in cases in which the proper mental element is the only real
question—this defendant knows he is guilty of unlawful killing, be it
murder (as the prosecution contends) or manslaughter (as he sees
it)—and the percentage of defendants who can be sure that they are
guilty of at least one of the crimes charged, including lesser included
offenses, is probably quite large. These defendants, again from the
point of view of the common good, should plead guilty and receive
favorable sentencing consideration for doing so. Not all of the
defendants who plead will be acting. Some will. And the system
would benefit, I think, from a blanket presumption in favor of the
pleading defendant.

VII. DEFENDANTS AND NON-PUBLIC REASONS

Some defendants, for good reasons falling outside the scope of
the political common good, decline to plead guilty even though they
are guilty, and even though they fall outside the classes of cases in
which the common good calls for a trial.

Which defendants?

Bob is, in fact, guilty of robbing a convenience store. But he has been imprisoned before, and he knows what punishment by imprisonment really includes. Because he is not physically powerful and not a likely candidate for gang membership (and the security that a gang entails), he is virtually certain to be subjected to physical degradation, including rape, by other prisoners. Bob knows also that while rape is common and that prison authorities are aware of its prevalence, they do nothing about it: no prisoner at Stateville Prison has ever been charged by prosecutors with rape; prison discipline is rarely, if ever, imposed for that crime; and segregation from the other prisoners is possible only by authority of the warden. However, the warden thinks that being sodomized is an inevitable aspect of imprisonment. His stated attitude is that Bob, and others like him, should refrain from criminal activity if they are so averse to the conditions of confinement. Anyway, the warden has not the facilities for isolating all the victims of rape. His policy is not to isolate anyone, unless there are particular aggravating circumstances (the victim is needed as a witness in another case, is due to be released soon, has connections, or is being beaten, too). Bob concludes that, because no such circumstances are present in his case, that he need not submit to imprisonment on these terms, and that he should do what he can, short of acts wrong in themselves, to avoid such "punishment."\(^{16}\)

Every defendant has some reason to avoid imprisonment and, perhaps, lesser types of punishment as well. While many defendants may have constricted their activities mainly to hanging out with unsavory associates and to exploiting others, no one is devoted entirely to such worthless pursuits. Virtually every defendant has some worthwhile friendships; many are valuable members of families and have friends who will suffer from their imprisonment. Many have worthwhile projects, including an education in progress, employment of genuine value to others, and so on. Especially from the perspective of the deprived innocent bystanders—dependents and other family members—these losses are not properly part of punishment. They are not the point of imprisonment.

It seems to me that a high percentage of all defendants who are, in fact, guilty would promote the common good by pleading guilty, but

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\(^{16}\) I do not know how deeply the exposure to such inhumane practices vitiates, at least where there is official indifference, the moral legitimacy of the criminal justice system. The extent might be, however, great.
it seems also that virtually all defendants have good reason to avoid imprisonment. Would not any defendant be morally justified in seizing the chance, no matter how small, of a favorable jury verdict as opposed to the certainty of punishment after a guilty plea? And, if so, is this not to say that a sentencing judge should treat any defendant as having done the right thing?

I think not. Recall that we are talking about a large class of defendants—those who are in fact guilty and who have no colorable defense. We are speaking then of defendants who are both deserving of punishment (i.e., it would not be unfair to punish them) and, no matter what defendants choose to do, are very likely to be punished. And, note well: to say that all defendants have some reason to avoid punishment is not to say, or imply, that all—or any—have conclusive reasons to do so. Consider it from another view: if it were the case that a guilty defendant had no reason to go to trial, then it would be not only wrong, but irrational, for the guilty defendant to go to trial. The analysis up to this point shows that, from the guilty defendant’s perspective, there are reasons—worthwhile opportunities and projects to be pursued, or which will be made unavailable—either way. The question of the guilty defendant’s obligation to plead guilty, then, is a question of fairness: given the reasonable claims of others upon the scarce resources of the criminal justice system and the burdens I would impose to others by going to trial, is it fair for me to do so?

To ask whether it is fair for this (or that) defendant to go to trial is to ask mainly about the application of the Golden Rule: all the worthwhile interests and projects of all the persons affected by the decision must be considered without arbitrary self-preference. We have already identified at least the most salient interests and projects, including especially the unfairness in most cases, to the entire community of leaving the defendant’s criminal acts unpunished, and of the priority to be given within the system to cases in which the common good is served by a trial. The case of the innocently accused is the most important example of such cases.

My provisional judgment is that these reasons should be considered a wash: it may be presumed that all defendants have worthwhile reasons to remain at liberty. Being true, or presumed true, of all, it makes for no distinction in their treatment.

VIII. THE LAWYER’S ROLE

The criminal defense lawyer acquires, if the foregoing analysis is sound, a new two-fold duty: first, to counsel his client, with a view to
clarifying the defendant's obligation to plead guilty, and second, (in the relatively infrequent case) to try to explain to a sentencing judge why a particular defendant, convicted after trial, might be deserving of favorable treatment even though it appears that the defendant acted selfishly in declining earlier plea offers.

The first duty includes conversational elements, which are already standard fare, but also includes highlighting them and shifting the center of gravity beneath the elements. Already, a defendant's attorney strives to ascertain possible defenses (including the possibility of actual innocence) in connection with plea negotiations. Attorneys learn a bit about what the defendant is generally up to in connection with bail application and sentence negotiation.

The center of gravity of existing conversations is, I expect, pretty much the courthouse market: what the state must offer to secure that large number of nontrial dispositions it needs to keep the system from collapsing. The conversation instead should be centered on the unique opportunity the defendant has to act uprightly. This does not make the defendant's attorney a paternalistic intermeddler; only the defendant can decide what to do. The attorney should make sure that the defendant is aware of the morally important quality of the decision to plead, a decision now treated, I fear, as a self-centered, prudential calculation.

From a moral standpoint, in no case must a lawyer consider withdrawal. Even the defendant who acts unfairly in trying a case has a right to an acquittal if the case is not proved. The lawyer vindicates that right.