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Beyond the shadow-of-trial: Decision-making behind plea bargaining in Hong Kong

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Abstract

A theoretical explanation of plea bargaining is the shadow-of-trial model (Mnookin and Kornhauser, 1979), which asserts that decision-making behind plea bargaining are based on the probability of conviction and sentence severity. Using the context of Hong Kong's criminal justice system, this study confirms previous studies that found the shadow-of-trial model overly simplistic. In-depth interviews with Hong Kong criminal defense lawyers revealed that while the probability of conviction and sentence severity are important, other salient factors, namely the costs of being caught up in the criminal justice system and the one-third sentence discount must be taken into account as well. Overall, the shadow-of-trial model is not a good explanatory model for why criminal defendants enter into plea bargaining.

Keywords: Shadow-of-trial; Plea bargaining; Criminal justice; Defense lawyers; Hong Kong

1. Introduction

A plea bargain by a defendant in exchange for some concessions by the prosecution, such as: reducing the number of charges, reducing the charge to a lesser offense or omitting some facts

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in the case that are disadvantageous to the defendant is regarded by many as a form of coercion to elicit guilty pleas, and overall undermines the integrity of the criminal justice system (e.g. Alschuler, 1975; Ashworth and Redmayne, 2010; McConville, 1998; McConville and Mirsky, 2005; McCoy, 2005; Note, 1970; Schulhofer, 1985, 1994). On the other hand, plea bargaining is regarded as serving the interests of the courtroom workgroup, as a way to reduce the heavy caseloads of lawyers (Langbein, 1979) and allow prosecutors, judges and defense lawyers to quickly dispose of their criminal trial obligations (Fisher, 2004; Lynch, 1994).[1]

One model that attempts to explain the plea bargaining process is the shadow-of-trial model (Mnookin and Kornhauser, 1979). This model claims that plea bargaining shadows expected trial outcomes where defense lawyers and prosecutors evaluate the probability of conviction, based on gauging the strength of evidence and potential sentences. Plea bargains are struck based on assessing the chances of acquittal and the sentence likely to be received if convicted at trial with the sentence deductions offered by the state in return for early guilty pleas. In this way, the time and resources of conducting trials would be avoided but the outcome from plea bargaining would be equivalent. In recent years, the shadow-of-trial model has garnered increasing interests, and critique, from both the legal scholarship (e.g. Bibas, 2004; Stuntz, 2004) and even more recently, amongst criminologists (Bushway and Redlich, 2012).

The present study, through in-depth qualitative interviews with a selected sample of criminal defense lawyers in Hong Kong, aims to shed light on the considerations behind plea bargaining recommendations and develop a deeper understanding of why certain considerations are relevant. Using the shadow-of-trial model as a theoretical framework, the findings from this study demonstrate that plea bargaining does not simply shadow forecasted trial outcomes, but that there are other considerations during the pre-trial stages that lead to plea bargaining. It will be shown that the costs for defendants for being caught up in the criminal justice process and the knowledge that the court will almost always grant a one-third sentence discount for defendants who plead guilty are salient factors in plea bargaining decisions (Cheng, 2013, 2014). More importantly, it will be argued that these factors operate beyond the shadow-of-trial.

Hong Kong provides a novel region to study plea bargaining. The courts contend that plea bargaining is not part of Hong Kong's jurisdiction (*R v Scales* [1987] HKLR 583) but the *Prosecution Code* which serves as a guideline for prosecutors in Hong Kong sets out that: "The prosecution may be invited by the defense to resolve a matter by agreeing to the accused pleading guilty to fewer or lesser charges than those already laid" (Department of Justice, (2013a)).[2] Given that guilty pleas in the common law world, including Hong Kong, disposes a majority of criminal cases on a daily basis (McConville and Mirsky, 2005; Bureau of Justice Statistics 2012; Department of Justice, 2013b; Gazal-Ayal and Riza, 2009) it is imperative that we uncover the rationales behind plea bargaining in order to determine whether this divisive practice is a helpful way to streamline cases, and thus improve the efficiency of the justice

[1] Judges in the early nineteenth century had dual responsibilities of hearing both criminal and civil matters, and were too faced with unbearable caseloads as industrialization produced enormous personal injury cases. Plea bargaining was a way for the judges to dispose quickly of their criminal obligations (Fisher, 2004). Lynch (1994) argues that plea bargaining provided a way for the courtroom workgroup: prosecutors, judges and defense lawyers to reduce their workloads and stress.

[2] The Hong Kong Court of Appeal did go on to explain that their definition of plea bargaining referred to judicial involvement in providing advanced sentence indications for guilty pleas.