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The Losers in Plea-Bargaining

By Lewis M. Steel

Fear of violent crime is rarely far removed from the consciousness of urbanites. Therefore, when it is reported that eight of ten city homicide cases have been resolved by plea-bargaining, with most sentences ranging from probation to a ten-year maximum, thoughts are stirred that the courts are releasing dangerous criminals to prey upon the populace.

The implication is that if the courts were not so lenient the crime problem could be resolved. This implication is hammered home when district attorneys are quoted as saying they are forced into making these lenient plea-bargainings because they do not have enough money to try all the cases and that consequently "society is the loser."

An analysis of the facts in most of these cases would indicate that the district attorney should have sought an indictment for a lesser crime, such as manslaughter. Therefore, what statistically appears to be a pattern of light sentences is grossly misleading. The reality is quite different. The system of plea-bargaining in homicide cases for lesser sentences results from a rigid policy of murder indictments in virtually every homicide.

Most homicides result from quarrels among people who know each other and often the defendant is a working-class individual with little or no past criminal record. Typically, the defendant assaulted the victim in a moment of anger or during a fight without "intent to cause the death of another person"—the statutory definition of murder. In many situations a claim of self-defense is asserted.

Some homicides, of course, are premeditated and some flow from indiscriminately inflicted crimes such as robberies or sexual attacks. But these are a small minority, rarely resolved by plea-bargaining unless a stiff sentence is exacted.

The more typical case is where the homicide is caused by a person from a law-abiding background who had no intent to cause death—yet the district attorney obtains a murder indictment. Such "over-indicting" places the defendant in an untenable position. First, bail will be set very high, insuring for all but the rich pretrial imprisonment for one to two years.

Second, because the charge is murder rather than manslaughter, the potential consequences are immeasurably magnified. A murder conviction carries a mandatory 15-year-to-life sentence. The defendant must serve a minimum of 15 years before becoming eligible for parole, and the judge at the sentencing may increase this minimum to 25 years. By contrast, manslaughter carries no automatic minimum sentence.

Finally, there is one other factor the "over-indicted" defendant must consider. In cases where self-defense is pleaded, witnesses may be afraid to testify. Many people do not relish being in an adversarial position with police and local prosecutors. And with the over-indicted defendant in jail, his witnesses often tend to think the case hopeless anyway. Often they



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are hard to find and unreliable.

The combination of these three factors puts tremendous pressure upon a defendant to plea-bargain. Even if his lawyer tells him he has a good chance to win in a trial, his lawyer must also caution that juries are unpredictable and can, and do, convict for murder when the evidence should lead to acquittal, or at the worst, to conviction for manslaughter.

A lawyer must also advise his client that even if the jury convicts him of manslaughter, the judge probably will penalize him for going to trial and impose a stiffer sentence than if he had pleaded guilty.

It is therefore not surprising that district attorneys often agree to sentences that may appear lenient for the indicted crime of murder. They know many defendants plead guilty rather than risk the consequences of murder trials. If not for fear of the minimum sentence of 15 years to life, some would risk a trial, and a good percentage—perhaps one-third—would be acquitted. In addition, by the time a plea is agreed upon those accused have, in effect, already been sentenced to lengthy imprisonment. Extending their incarceration in a brutal and dehumanizing prison system only militates against rehabilitation.

Therefore, if the object is not to

be merely punitive but to enable inmates to return to society and lead productive lives quick release from custody is necessary.

Given these realities, it ill behooves a district attorney to complain about being forced to accept compromised pleas because of inadequate prosecutorial resources. Because of rigid over-indictment policies in homicides, plea-bargaining is inevitable and leads to sentences that as a general rule more than adequately exact punishment that fits the crime.

Plea-bargaining, however, often does result in making "society the loser," but in a different way than when that phrase is used by prosecutors. When defendants are forced to plead guilty to crimes they did not commit, our system of criminal justice becomes a sham.

Lewis M. Steel is a New York lawyer.