

Forbes

Aaron Swartz and the Corrupt Practice of Plea Bargaining

By: Timothy B. Lee – January 17, 2013

Carmen Ortiz, the federal prosecutor who hounded Aaron Swartz in the months before his Friday suicide, has released a statement arguing that “this office’s conduct was appropriate in bringing and handling this case.” She says that she recognized that Swartz’s crimes were not serious, and as a result she sought “an appropriate sentence that matched the alleged conduct – a sentence that we would recommend to the judge of six months in a low security setting.”

That’s funny because the press release her office released in 2011 says that Swartz “faces up to 35 years in prison, to be followed by three years of supervised release, restitution, forfeiture and a fine of up to \$1 million.” And she apparently didn’t think even that was enough, because last year her office piled on even more charges, for a theoretical maximum of more than 50 years in jail.

If Ortiz thought Swartz only deserved to spend 6 months in jail, why did she charge him with crimes carrying a maximum penalty of 50 years? It’s a common way of gaining leverage during plea bargaining. Had Swartz chosen to plead not guilty, the offer of six months in jail would have evaporated. Upon conviction, prosecutors likely would have sought the maximum penalty available under the law. And while the judge would have been unlikely to sentence him to the full 50 years, it’s not hard to imagine him being sentenced to 10 years.

In this hypothetical scenario, those 10 years in prison would, practically speaking, have consisted of six months for his original crime (the sentence Ortiz actually thought he deserved) plus a nine-and-a-half-year prison term for exercising his constitutional right to a trial.

Our Constitution guarantees criminal defendants a wide variety of rights, including the right to a jury of one’s peers, the right to counsel, the right to confront one’s accusers, a privilege against self-incrimination, and so forth. The Supreme Court would never allow a judge to impose a stiffer sentence on a defendant because he took the Fifth Amendment, asked to confront his accuser, or hired an attorney. But none of these rights matter if the defendant never gets to trial. And thanks to the legal fiction that plea bargaining is a voluntary negotiation between the prosecutor and defendant, our justice system effectively gives people dramatically longer sentences for exercising the right to have a trial at all.

Thanks in part to this kind of coercion, more than 90 percent of defendants waive their right to a jury trial. For the majority of defendants, then, the plea bargaining process is the justice system. As a result, prosecutors wield an immense amount of power with very little accountability.

It’s not surprising that Ortiz doesn’t see anything wrong with this system. Powerful people rarely see their own power as problematic. But the rest of us should be outraged—not just by Ortiz’s

conduct, but by a system that treats thousands of defendants less famous than Swartz the same way.