

When is a plea bargain not a plea bargain?

by Susan_Estrich

Bernard Madoff pleaded guilty in federal district court in New York to all 11 counts against him, waiving his right to an indictment, avoiding the humiliation of a trial, and depriving his victims and the public of what might have been a public course in how Ponzi schemes work, and how even sophisticated investors can be played for dupes. The Madoff case was one of those where a public trial might have served a valuable purpose, an occasion for collective disgust and anger, and the only kind of satisfaction most of Madoff's victims are likely to see.

Which is precisely why Madoff and his lawyers opted out.

In the usual case, that is to say in about 99 percent of all guilty pleas, the defendant gets some kind of break — sometimes a very big one — in exchange for sparing the system the burden of a trial. The Supreme Court has held that so fundamental and entrenched is this system that even a life or death deal — a life sentence if you plead, a death sentence if you stand trial and lose — does not unfairly burden the right to choose a trial.

But Madoff is not the usual defendant. His victims, most of whom will never see a penny from him, would not have stood for anything that looked even remotely like a deal, and neither would the public in these ugly economic times. The spirit of forgiveness is hard to muster for a guy with beach houses, boats and fancy penthouses, who seems to have lost more than \$60 billion of other people's money, including substantial assets that had been set aside for charitable use. This is a case that would be hard for the prosecution to lose. Very hard.

So, the prosecutors have made clear, no deal was offered. But you can't stop a person who wants to plead guilty from doing so. The defendant has the right to a trial, not the government, even if in some cases the public may want or even need the ritual of a public trial.

Madoff, who is 70, is looking at a life sentence for his crimes. He had to know that coming into the courthouse to plead guilty. His bail was bound to be revoked the minute he stood convicted, not because he is a greater flight risk today than yesterday, but because he is no longer an innocent man, which makes it easier, legally speaking, to deprive him of his liberty. He had to know that, too. Goodbye, penthouse. Goodbye, freedom. Game over.

By pleading guilty, Madoff cut his losses, not in the way most defendants do, by getting rid of a couple of counts or getting the charges reduced or getting a deal for a lower sentence based on cooperation, but in the only way he could: He limited the time he will spend in the spotlight, limited the opportunity for public outcry, deprived his victims of a daily ritual for the weeks or months the trial might have lasted. We who might have liked to see him squirm, to watch his face as the mountains of lies were laid bare, will be deprived of that opportunity. We will not see him suffer. Neither will his family.

Even on this his worst day, he emphasized that the business run by his sons and brother was separate and legitimate. His family is OK. They will not have to spend millions on a hopeless effort to defend him. I suppose that speaks well for him, if only the same could be said for his victims.

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