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Plea Bargaining's Moral Controversies

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Plea Bargaining's Moral Controversies

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Abstract

Plea bargaining, once the exception to trial by jury, has come to dominate the administration of justice in the United States (and is on the rise in many other countries). The verdict by judge or jury has been predominantly replaced by the negotiated plea. The sixth Amendment to the United States Constitution guarantees every citizen the right to be judged by a jury of his or her peers. Yet most people who face criminal charges choose to give up that right and plead guilty. Under the process of plea bargaining, defendants agree to waive their constitutional right to trial by jury and plead guilty in exchange for a lesser sentence or a reduced charge. Plea bargaining involves negotiations between defense counsel, on the part of the defendant, and the prosecution, on the part of the state, regarding the conditions under which the defendant will enter a plea of guilty. Today, the vast majority of criminal cases are settled in this fashion.

The ascendancy of plea bargaining has prompted serious moral questions and criticisms regarding the process, leading some to call for reforms to the process and others to call for its outright abolition. In order to examine the moral status of plea bargaining, this paper focuses on four questions: 1) Is administrative efficiency the primary motivation/justification for plea bargaining? 2) Is plea bargaining analogous to a contract made under duress and therefore unfair? 3) If a defendant facing a felony charge elects to stand trial instead of pleading guilty in the expectation of a more lenient sentence, upon conviction, is he/she being punished more severely for having exercised his/her constitutional right to trial by jury? And, 4) Does the process of plea bargaining dispense systemic (as opposed to aberrational) injustice?

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Introduction

Plea bargaining, once the exception to trial by jury, has come to dominate the administration of justice in the United States (and is on the rise in many other countries). The verdict by judge or jury has been predominantly replaced by the negotiated plea. The Sixth Amendment to the United States Constitution guarantees every citizen the right to be judged by a jury of his or her peers. Yet most people who face criminal charges choose to give up that right and plead guilty. Under the process of plea bargaining, defendants agree to waive their constitutional right to trial by jury and plead guilty in exchange for a lesser sentence or a reduced charge. Plea bargaining involves negotiations between defense counsel, on the part of the defendant, and the prosecution, on the part of the state, regarding the conditions under which the defendant will enter a plea of guilty.¹ Today, the vast majority of criminal cases are settled in this fashion.

The ascendancy of plea bargaining has prompted serious moral questions and criticisms regarding the process, leading some to call for reforms to the process and others to call for its outright abolition. The former maintain that there is nothing wrong with the process of plea bargaining itself, but that it is susceptible to abuses (as is any process) which can be avoided via proper guidelines and provisions. The later maintain that plea bargaining is inherently unjust and thus cannot be reformed.² As Kenneth Kipnis has rightly noticed, ‘though philosophers do not often treat issues arising in the area of criminal procedure, there are problems here that cry out for our attention.’³ In order to examine the moral status of plea bargaining, this paper focuses on four questions: 1) Is administrative efficiency the primary motivation/justification for plea bargaining? 2) Is plea bargaining analogous to a contract made under duress and therefore unfair? 3) If a defendant facing a felony charge elects to stand trial instead of pleading guilty in the expectation of a more lenient sentence, upon conviction, is he/she being punished more severely for having exercised his/her constitutional right to trial by jury? And, 4) Does the process of plea bargaining dispense systemic (as opposed to aberrational) injustice?

Is Administrative Efficiency the Primary Motivation/Justification for Plea Bargaining?

Plea bargaining has arisen in an era where a flood of criminal cases are coming before the limited resources of the court system. The state is

¹Of course, the defendant must ultimately decide whether any deal struck by opposing councils is suitable to him/her, and the plea bargain must be ultimately approved by the presiding judge, who may, although rare, deny it.

²For examples of abolitionists, see, Altschuler (1979), Kipnis (1992). For examples of reformers, see, Brunk (1979), Church (1992).

³Kipnis, (1992): 245.

overwhelmed with cases and does not have the resources to bring them all to trial. Often, in borderline cases, there is not sufficient evidence to be confident of a jury's conviction. With taxpayers unwilling to supply the enormous increase in funds required to provide the courts and personnel needed to bring all cases to trial, the law of supply and demand has taken effect: *ceteris paribus*, if there are too many cases for the court system to handle, then many will have to be settled relatively quickly and inexpensively outside of trial, via negotiated pleas.

While it is true that administrative efficiency, or response to a growing backlog of cases, is both the reason plea bargaining came into widespread use and one of the primary reasons it still occurs, it should be understood that administrative efficiency is neither the cause of plea bargaining's origination, nor the sole motivation / justification for its current widespread use. Plea bargaining existed as a seldom used legal option long before the modern court system was forced to engage an over burdensome docket.¹ Once plea bargaining came into widespread use prosecutors and defense council realized that they had a powerful new means to meet their respective ends, creating alternative motivations and justifications for the current use of plea bargaining. Consider, for example, one such justification described by Judge Thomas W. Church Junior:

Whether a particular defendant will be found guilty at trial, however, is subject to the uncertainties of judicial rulings on admissibility of evidence, the ability of opposing council, and the unpredictability of the jury. A conscientious prosecutor, mindful of his responsibility to protect the public welfare, might rationally conclude that the certainty of a lower sentence might better serve the public than the risk of acquittal at trial.²

The logic at work here is that in cases where the prosecution's case is not the best it could be, and the probability for conviction is not high, it would be better to convict defendants of a lesser charge via a plea bargain than to chance total acquittal at trial. Likewise, defense council may invoke this logic in the reverse direction and reason that it is better to accept the certainty of a lesser punishment, in situations where the probability of achieving an acquittal is tenuous, instead of risking the chance of a much greater punishment.

Thus, while expediency and administrative efficiency is the reason for the recent ascendancy of plea bargaining, acknowledging this motivation does nothing to diminish that there are at least four other good reasons the practice is invoked, and thus four other motivations / justifications for its use:

¹For example, see Friedman (1979) and Alschuler (1979).

²Church (1992): 263.

- (1) Plea bargaining by prosecutors is often motivated by the desire to secure convictions, for reasons of deterrence and desert, in situations where the case is not 'air tight'.¹
- (2) Plea bargaining by defendants is motivated not by speed of sentencing, but instead, by the uncertain outcome of a trial and the relative severity of the sentence expected, if convicted.
- (3) Plea bargaining by defense attorneys is often motivated by the same concern as defendants, since their duty is, ultimately, to their client's interests.
- (4) Plea bargaining saves victims of traumatic crimes, such as rape and child molestation, from having to relive those terrible experiences by allowing such cases to be prosecuted without going to trial.

With these indisputable alternative motivations at work, it becomes impossible to maintain that administrative efficiency is the sole motive or justification for plea bargaining, and more difficult to maintain that it is the primary motive or justification. In fact, some legal scholars believe that even if courts had unlimited resources to hold trials, seventy to eighty percent of all cases would still be settled via plea bargains.²

Is Plea Bargaining Coercive?

Kenneth Kipnis has argued that plea bargaining is analogous to a contract made under duress, involving too much coercion for the choice to be considered voluntary. Since a contract made under duress is clearly unfair, and for that reason considered void, so too, he argues, is plea bargaining unfair if it can be shown to be done under duress.

Kipnis begins by pointing out that plea bargaining in the criminal law has many of the same features of the contract in commercial transactions. In both institutions offers are made and accepted, entitlements are given up and obtained, and the notion of an exchange, ideally a fair one, is present in both parties.³ He goes on to list examples of procedures in plea bargaining which he feels have analogues in contract law. His argument for drawing an analogy between plea bargaining and contract law is fine, up to this point. He runs into some trouble, however, when he attempts to draw an analogy between plea bargaining and contracts made under duress, where one party wrongfully compels another party to the terms of an agreement.

¹They could plea bargain cases that they might lose, securing a guaranteed sentence for all, rather than securing sentences for some and not others, via the vagaries of trial process. Furthermore, they could make room on crowded dockets to pursue cases where the chance of conviction was high. Perhaps the utilitarian argument here would be something like this: Deterrence is more effective when you punish more people.

²For example, see: Blankenship (2003): 7.

³Kipnis (1992): 245.

To elucidate his point, Kipnis cites the paradigm example: the agreement made at gun point. In such a scenario, a thief threatens to shoot someone unless they hand over their money. Facing a mortal threat, they readily agree to hand over their cash. But despite such consent, the rules of duress work to void the effects of such agreements.¹ Kipnis believes that prosecutors can apply duress to defendants in similar ways. If not always with the threat of the death penalty, then by fear of the significantly harsher sentence a conviction rather than a plea bargain would receive. Both the gunman and the prosecutor require persons to make hard choices between a very certain smaller imposition and an uncertain, possible greater imposition. Since the gunman transaction is made under duress it is unfair. If plea bargaining is likewise made under duress then it follows that it too is unfair.

However, upon closer examination, the analogy breaks down. Kipnis' argument is unsound because his analogy does not hold in two important regards. Kipnis would like to draw the analogy thusly:

Coerced Money Transfer (Robbery)

1. Party A's life was threatened at gunpoint.
2. This has a coercive effect on party A's decision.
3. Party A had no other reasonable option and assents, under duress.

Coerced Contract

1. Party A acted wrongfully by applying coercion to party B.
2. This has a coercive effect on party A's decision.
3. Party B had no other reasonable option and assents, under duress.

Plea Bargain

1. Prosecutor threatens defendant with the possibility of a harsh or very harsh punishment.
2. This has a coercive effect on defendant's decision.
3. Defendant has no other reasonable option and assents, under duress.

There are two problems with such an analogy:

First, the U.S. legal system makes a distinction between coercion and *wrongful* or *unlawful* coercion, defined as, 'The use or threatened use of *unlawful* force.'² For duress to be present wrongful or unlawful coercion must be present. The U.S. Supreme Court has several times reviewed the issue of whether plea bargaining, in general, constitutes *wrongful* or *unlawful* coercion (compromising the voluntariness of the plea). Each time they have ruled that it does not.³ Thus, we cannot maintain that the 2nd part of the analogy applies to plea bargaining as an institution.

¹Ibid. 246.

²Black (2004): 542 (emphasis added).

³See, *Shelton v. United States* (1958); *Brady v. United States*,(1970); *Parker v. North Carolina*,(1970); *North Carolina v. Alford* (1970); and *Bordenkirker v. Hayes* (1978).

Second, it is never the case that the defendant has no other reasonable option. There is always the option to invoke one's sixth amendment right to go to trial and challenge the prosecution to prove its case to all of twelve jurors beyond a reasonable doubt, after challenging the admissibility of evidence and witnesses prior to trial and the prosecution's case at trial. You can assume there is no other reasonable option to giving the gunman your money (attempting to disarm them is an unreasonable option).¹ If it is truly a coerced contract then a similar situation holds there – no reasonable option (for example, being forced to sign at gunpoint). However, if you refuse to plea bargain you will not get the threatened punishment unless you are proven guilty beyond a reasonable doubt in a trial by jury. In other words, another reasonable option exists. As long as this option exists plea bargaining is not analogous to the gunman example. Since trial by jury is a basic constitutional right, then we cannot maintain that the 3rd part of the analogy applies to plea bargaining.

The Case for Extra Punishment

The logic of the plea bargain opens itself to the following question and criticism: Must a defendant who elects to stand trial, rather than plead guilty in expectation of a more lenient sentence, be punished more severely, if found to be guilty, for having exercised his or her constitutional right to trial by jury?

The rationale adopted by the U.S. Supreme Court, in *Brady v. U.S.* (1970), argued it was permissible to offer a lesser penalty in a plea because the state saved resources by not having a trial. That leaves the impression with some that 'The defendant should be penalized for standing trial, but he should be rewarded for saving the court time.'² A criminal defendant often has a choice between a jury trial and a plea bargain. Since the plea bargain is an agreement to plead guilty in exchange for a more lenient sentence, then it follows, on this reasoning, that a conviction by trial must necessarily carry a harsher sentence. In *United States v. Wiley*, Chief Justice Campbell expressed just such a view:

If then, a Trial Judge Grants Leniency in Exchange for a Plea of Guilty, it Follows, as the Reverse
*side of the same coin, that he must necessarily forego leniency, generally speaking, where the defendant stands trial and is found guilty.*³

What opponents of plea bargaining are trying to propose with this argument is that if plea bargaining is an offer of leniency compared with the expected punishment if convicted by trial, then, judges must punish those found guilty at trial more severely to allow for the plea option to be more lenient. In other words, when judges pass sentence after trials they must forego

¹Kipnis himself makes this point as part of his argument.

²Albert Alschuler, in *Blankenship* (2003): 1

³*United States v. Wiley* (1960).

considerations of leniency in sentencing in order to allow for plea bargains to be more lenient by comparison. This is sometimes construed to further entail that those sentenced after a trial are actually punished more severely than they deserve, since the state does not merely forgo leniency, but also acts punitively. As Timothy Lynch puts it, ‘Plea bargaining rests on the constitutional fiction that our government does not retaliate against individuals who wish to exercise their right to trial by jury.’¹ To support such positions numerous statistics are usually offered showing how trial convictions of crimes get, typically, much longer sentences than their plea bargained counterparts.

Taken *prima facie*, these facts seem to provide strong evidence in favor of at least the former position, if not the latter. However, statistics can be misleading. While it is true that in most cases defendants convicted by jury trial receive stronger sentences than those that are plea bargained, it does not follow that they are being punished more severely for going to trial. A National Institute of Justice report on plea bargaining found that:

*Several studies suggest that tried defendants are punished more severely than pleaders but most of these studies have not controlled for variables which might account for both the fact that the case went to trial and the fact that it was sentenced more severely. A few studies which were able to control such confounding variables found that the mere fact of going to trial did not account for the sentence difference.*²

In short, as political scientist Martin Hueman has pointed out, ‘Cases are different that go to trial than those that plea.’³

When a defendant is convicted by jury of crime X, he is subsequently sentenced by the presiding judge. While the judge does have some discretion in the sentencing process, he/she is ultimately limited to the parameters set by law. If the punishment for crime X is 10-15 years imprisonment, then the judge must operate within these parameters. While it may be true that the defendant was offered a sentence of 5 years in exchange for a guilty plea, and after electing to stand trial, was convicted and given the maximum of 15 years, it is not true that such a defendant was punished more severely for demanding a trial. Being offered a lesser sentence to forego one’s right to trial does nothing to change the fact that one would have received, upon conviction, a sentence of 10-15 years anyway. The judge cannot sentence a defendant to the maximum of 15 years and then add on another 2-5 years for demanding a trial. It is also true that judges may give, and sometimes do give, if they deem it fitting, the most lenient sentence allowed for the crime. While it is true that this will surely be greater than the sentence of a plea bargain to a lesser charge, it is not the case that the judge was forced to give the stiffest sentence allowed for the crime in order to punish more severely than a plea would receive. Only under

¹Lynch (2003): 26.

²McDonald (1982): 106.

³Blankenship (2003): 7

these circumstances could we say that the defendant was punished more severely for exercising their constitutional right to trial by jury.

Is Plea Bargaining a Systematically Unjust Way of Dispensing Punishment?

Perhaps the most debilitating charge against the practice of plea bargaining is that it perpetuates a legal system which continually doles out systematic injustice. We have all heard of disturbing cases where a person is convicted of a crime and found years later to be innocent, or where someone whom all the evidence points towards is released on a technicality or found not guilty by a jury. To be sure, these are troubling instances that remind us that no legal system is ideal. But, of course, these cases are aberrational in character; they are injustices that occasionally slip through the system, not injustices caused by the system itself.¹

Plea bargaining, on the other hand, has been accused of dispensing not the occasional instance of aberrational injustice found in the trial by jury process, but instead, a more widespread systematic injustice. Kenneth Kipnis writes:

*We can refer to these incorrect outcomes of a sound system of criminal justice as instances of aberrational injustice. In contrast, instances of systematic injustice are those that result in structural flaws in the criminal justice system. Here incorrect outcomes in the operations of the system are not the result of human error. Rather, the system itself is not well calculated to avoid injustice. What would be instances of aberrational injustice in a sound system are not aberrations in an unsound system: they are the standard result.*²

The general argument takes the following form: there are two types of defendants that plea bargain, those that are guilty of the crimes that they are charged with and those that are innocent. If an innocent person plea bargains, then they are punished for a crime that they did not commit. This is unjust. On the other hand, if a defendant who is guilty of a certain crime is punished for a less severe crime, via a plea bargain, then this is likewise unjust because they do not receive the punishment they deserve. It follows that the process of plea bargaining distributes systematic injustice because it punishes those who do not deserve to be punished and does not punish those who do deserve punishment to the extent fitting their crime.

This could be taken as a powerful argument for the unjustness of plea bargaining. However, it is important to realize that the argument that the plea bargaining process distributes systematic injustice requires the demonstration

¹Of course, in the case of the defendant who is found not guilty even though there is a large body of evidence leading us to believe that they are guilty, this is only an injustice if they actually are guilty, as we believe them to be.

²Kipnis (1992): 253.

of two dubious points: a) the theoretical point that retributivism is the correct and sole moral justification for punishment, and thus retribution based strictly on desert should be the sole end of our criminal justice system; and b) the practical point that a retributivist theory of punishment could actually be implemented, given the resources it would require.

Consider, first, the theoretical problem: Here, a very brief review of utilitarian and retributivist justifications of punishment - which are certainly not exhaustive of theories of punishment - will serve to make my point. Simply put, a retributivist believes that punishment is justified by a system of desert; someone who commits a crime deserves to be punished. Furthermore, they deserve to be punished only to the extent deserved by the crime they committed; no less and no more. It follows that on retributivist grounds plea bargaining is indeed systematically unjust. It either punishes those who do not deserve to be punished or it punishes those who do deserve to be punished less severely than they deserve. Kipnis, for example, assumes the retributivist framework:

For grades, like punishments, should be deserved, Justice in retribution, like justice in grading, does not require that the end result be acceptable to the parties... For bargains are out of place in contexts where persons are to receive what they deserve.¹

Utilitarians, on the other hand, believe that the fundamental principle of morality requires us to maximize the net utility for all in the long run. Thus, a utilitarian justification for punishment rests on the consequences of that punishment. On this model, we should not punish for the purpose of desert, but instead, for the purpose of deterrence.

It is now easy to see how a utilitarian and a retributivist could take opposite sides in the plea bargaining debate. Retributivists clearly must agree with Kipnis in holding that plea bargaining doles out unjust punishment. On retributivist grounds, plea bargains never administer the deserved punishment; always punishing too little or too much. Utilitarians, however, can argue that plea bargaining is both more efficient and cost effective than a retributivist system, and that it offers more deterrence because many borderline cases that might not win at trial are prosecuted through plea bargaining.² Furthermore, if we consider the large body of literature criticizing retributivism and promoting alternative models of punishment, it becomes obvious that providing the first necessary supporting argument would be an extremely difficult task.³

Furthermore, even if we were to grant the debatable point that retributivism is the proper justification for punishment, retributivists would still

¹Kipnis (1992): 253-254.

²Of course, the relationship between punishment and deterrence is unclear. A large body of literature exists devoted merely to the debate of how much punishment is needed to deter and to what extent it does deter. However, until it can be shown that punishment does not deter, or isn't an effective deterrent, utilitarians argue for its usefulness.

³For example, see, Gorr and Harwood (2000).

face the daunting practical problem of attempting to send every criminal charge to trial. In an ideal world, we would have the resources to accomplish this, but in reality, it is difficult to see how this could be done. Where would the personnel and funding come from? How would we avoid backlogging the legal system in a manner that would infringe on the constitutional right to a speedy trial?¹

In the end, for the argument that plea bargaining dispenses systematic injustice to be successful it must: a) justify retribution based strictly on desert as the sole end of our criminal justice system, and b) account for how a retributivist system of punishment could actually be implemented, given the resources it would seem to require. In the absence of compelling arguments to those effects the argument that plea bargaining dispenses systematic injustice is greatly diminished, if not diffused.

Conclusion

In sum, while administrative efficiency is the reason for plea bargaining's ascendancy to wide spread use, it neither accounts for plea bargaining's origin nor exhausts the motivations or justifications for its continued use. The argument that plea bargaining is analogous to a contract made under duress, is disanalogous and is therefore untenable. It is untrue that a defendant who elects to stand trial rather than plea bargain must be punished more severely, upon conviction, for exercising his or her constitutional right to trial. The argument that the plea bargaining process distributes systematic injustice is diffused by the realization that such a criticism requires the demonstration of two dubious points: a) the theoretical point that retributivism is the correct and sole moral justification for punishment, and thus retribution based strictly on desert should be the sole end of our criminal justice system, and b) the practical point that a retributivist theory of punishment can actually be implemented, given the resources it would require.

I recognize that the plea bargaining process is not without its problems.² However, these need to be considered carefully: To the extent that defendants plead guilty to crimes they did not commit because they fear a trial, that points to problems with our trial system rather than plea bargaining. Likewise, to the

¹Some states and cities have claimed to abolish plea bargaining without incurring a backlog of cases. When these kinds of claims are made it is important to look closely at exactly what is being banned. For example, in Alaska the Attorney General's office announced a no plea bargaining policy for prosecutors. They could no longer dismiss, reduce, or alter charges solely to obtain a guilty plea. However, when prosecutorial plea bargaining ended, the courts immediately took up the slack by negotiating with defense council themselves, offering plea incentives through differential sentencing. In El Paso, Texas, where they did truly ban plea bargaining in all of its forms, defendants realized that there was no reason for not going to trial. Therefore, they were reluctant to plead guilty and the El Paso court system soon developed serious backlog problems. See McDonald, William F. *Plea Bargaining: Critical Issues and Common Practices*. National Institute of Justice, 1982, pg. 102-105.

²For examples, see: Bickel (2004); Lynch (2003).

extent that defendants plead guilty to crimes they did not commit because of overbearing prosecutorial bargaining tactics (such as overcharging), that points to problems with the current procedural rules allowing such negotiating tactics - to contingent, rather than essential characteristics of plea bargaining - not to the right or process of making such a contract itself. Mere efficiency does not justify resorting to an immoral procedure. But there are sufficient justifications for plea bargaining other than efficiency, and the flaws with the process of plea bargaining are procedural rather than essential; the practice, therefore, requires reform rather than abolition.

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