

Should Plea Bargaining Be Abolished?

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Introduction

The criminal justice system in the United States has evolved in recent years. The conviction obtained through trial by jury is becoming less and less common. What has replaced the jury's verdict is the negotiated plea. Under the process of plea bargaining, defendants agree to waive their constitutional right to trial by jury and plead guilty in exchange for discretionary consideration on the part of the state. 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.¹

The arrival of plea bargaining on the legal scene has prompted some philosophical and moral questions regarding the process and its relationship to the law. This paper will focus on four key questions: 1) Is plea bargaining analogous to a contract made under duress and therefore unfair? 2) 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 being punished more severely for having exercised his constitutional right to trial by jury? 3) Are the poor unjustly forced into plea bargaining because they lack adequate resources to finance a trial? And, 4) Does the process of plea bargaining dispense systemic injustice?

1. Is Plea Bargaining Unfair?

Kenneth Kipnis has tried to show that plea bargaining is analogous to a contract made under duress and that there is too much coercion involved for the choice to be considered voluntary. Since a contract made under duress is clearly unfair and for that reason usually considered void, so too, he argues, is plea bargaining unfair if it can be shown to be done under duress. Kipnis points 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.²

Kipnis 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.

Kipnis cites the paradigm example, the agreement made at gun point, to elucidate his point. In this scenario, a thief threatens to shoot you unless you hand over your money.

Facing a mortal threat one readily agrees to hand over the cash. But despite such consent, the rules of duress work to void the effects of such agreements.³

Kipnis believes that the prosecutor can apply duress to the defendant in similar ways. If not always with the threat of death, via the death penalty, then by fear of a more harsh sentence 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 greater imposition. Since the gunman transaction is made under duress it is unfair. By Kipnis' reasoning, if plea bargaining is likewise made under duress then it follows that it too is unfair.

However, if we make a more fine grained analysis of Kipnis' analogy, it begins to break down. For duress to be present in a contract the following characteristics must exist:

- (1) One party involved in the contract acted wrongfully by threatening or coercing.
- (2) The other party was coerced.
- (3) The other party had no reasonable options and assents under force or coercion.

Even if we were to grant that Kipnis could prove points one and two, he makes a critical wrong move in assuming that point three holds for cases of plea bargaining and point three is critical in showing assent was forced.

In the case of the gunman duress can be proved:

- (1) You were threatened.
- (2) This obviously had a coercive effect on your decision.
- (3) You had no other reasonable option but to hand over your money

In cases of plea bargaining it may be true that:

- (1) The prosecutor lied about the evidence against you or threatened you with the death

penalty.

(2) This may have had a coercive effect on your decision.

But it cannot be shown that the crucial element of duress exists, namely:

(3) You had no other reasonable options.

There is always the option to go to trial and challenge the court to prove it's case to all of twelve jurors beyond a reasonable doubt. If you refuse to give the gunman your money you can assume that he will shoot you. It is reasonable to assume that he has the intent to carry out the process if you do not comply. However, If you refuse to plea bargain you will not get the death penalty or some other severe punishment threatened by the prosecution unless you are proven guilty beyond a reasonable doubt in a trial by jury. In other words, you have another reasonable option. As long as this option exists duress cannot be proven to exist as it does in the case of the gunman example or in contract law.⁴ Since trial by jury is a basic constitutional right held by all citizens it seems apparent that Kipnis' argument is not a sound one.

2. The Case for Extra Punishment

The logic of the plea bargain opens itself to the following question and criticism: Is a defendant who elects to stand trial rather than plead guilty in expectation of a more lenient sentence, being punished more severely, if found to be guilty, for having exercised his constitutional right to trial by jury? Those who would answer yes to this question hold to the following line of reasoning: A criminal defendant has two avenues of choice, plea bargain or jury trial. Since the plea bargain is an agreement to plead guilty in exchange for a more lenient sentence, then it follows that a conviction by trial must carry a more harsh sentence.

In *United States v. Wiley*, Chief Justice Campbell depicts this 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.⁵

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. This is construed to mean that those sentenced after a trial are, in many cases, punished more severely than they deserve. In other words, when judges pass sentence after trials they must forego considerations of leniency in sentencing in order to allow for plea bargains to be more lenient by comparison. To support this position 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 offer strong evidence in favor of Chief Justice Campbell's position. Statistics, however, 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.⁶

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 is ultimately limited to the parameters set down by the 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 he was punished more severely for demanding a trial. Simply because he was offered a lesser sentence to forego his right to trial does nothing to change the fact that he would have received, upon conviction, a sentence of 10-15 years anyway. The judge cannot sentence him to the maximum of 15 years and then add on another 5 years for demanding a trial. It is also true that the judge may give, if he deems 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 these circumstances could we say

that the defendant was punished more severely for exercising his constitutional right to trial by jury.

3. Is Plea Bargaining Unjustly Forced Upon the Poor?

One of the most emotive arguments against the plea bargaining process is that it may force economically challenged defendants to plead guilty to a charge that they otherwise would not have. Proponents of this argument often paint a vivid picture of the unscrupulous prosecutor who overcharges defendants and threatens them with a series of serious penalties.⁷ An impoverished defendant who cannot finance a lengthy criminal trial may be forced to agree to plead guilty to a lesser charge because he cannot afford the process of forcing the state to prove his guilt. Thus, some opponents of plea bargaining contend that it is a process that treats a certain portion of the population unfairly.

This argument fails to recognize some key points about the American legal system. If the argument is intended to show that a certain financial portfolio is required to exercise one's constitutional right to trial by jury, then it fails miserably. If the prosecutor is simply overcharging the defendant and, in effect, running up the list of penalties to scare him into pleading guilty to a lesser charge, then any competent defense counsel will inform the defendant of the unsoundness of these charges and that they would not be as lengthy and expensive to defeat as the prosecution would lead the defendant to believe. At this point, opponents of plea bargaining may wish to ally themselves to the commonly accepted notion that public defenders are often not as competent as hired counsel. We are frequently told of the young inexperienced

public defender up against the seasoned prosecutor, or reference is made to the overwhelming case load of the public defender denying him adequate preparation time for all cases. However, what is often not mentioned is that the reverse side of the argument holds as well. There are also cases of the young prosecutor facing the seasoned public defender, and prosecutors' case loads can be just as overloaded as the defense's. Indeed, this is why plea bargaining emerged in the first place! Furthermore, defenders of plea bargaining are not limited solely to arguments based on conceptual analysis. There is empirical evidence available as well. For example, a National Center for State Courts study found that public defenders were as good as paid counsel at meeting the standards of timeliness and performance without sacrificing clients interests⁸

If the argument is taken to imply that the defendant would not be able to afford this competent counsel in the first place, let alone throughout the trial process, it is again ill conceived. One of the basic rights accorded to all defendants is the right to legal representation. If indeed the defendant cannot afford counsel the state will supply counsel on his behalf. It may be true that this will not be a so-called dream team defense, but defendant's rights were never to the best possible defense, but to an adequate defense. In fact, our criminal justice system goes so far as to provide defendant's with grounds for an appeal in the unfortunate event that they should not be adequately represented. Therefore, in light of these considerations, the emotive argument that the plea bargaining process routinely railroads financially impoverished defendants into pleading guilty simply because they cannot afford the high costs of their constitutional right to trial by jury cannot stand scrutiny.⁹ Opponents of plea bargaining will have to look elsewhere for evidence that the process should be abolished.

4. Is Plea Bargaining a Systematically Unjust Way of Dispensing Punishment?

Perhaps the most debilitating argument against the practice of plea bargaining is that it perpetuates a legal system which continually doles out systematic injustice. We often hear the media harp on the rare trial cases where a person is convicted of a crime and found years later to be innocent, or the case 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 our legal system is not an ideal one. But these cases are aberrational in character, they are injustices that occasionally slip through the system, not injustices caused by the system itself.¹⁰

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.¹¹

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 the outcomes of plea bargains. However, whether or not one takes this as a legitimate argument that plea bargains dispense unjust punishment depends on the moral justification of punishment that one subscribes to. To illustrate, I will limit my analysis here to two classic justifications of punishment; utilitarianism and retributivism. 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 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.

Utilitarians, on the other hand, believe that the fundamental principle of morality requires us to maximize the net happiness for all in the long run. Therefore, the justification for punishment rests in the consequences of that punishment. Since deterring people from committing crimes in the future will increase happiness more than punishing people to the extent they deserve, we do 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 would take opposite sides in the plea bargaining debate. The retributivist would clearly agree with the criticism that plea bargaining dispenses systematic injustice. On retributivist grounds, plea bargains never administers the deserved punishment. People are either punished who do not deserve it, or they are punished less than they deserve to be. Utilitarians, however, can argue that plea bargaining is both more efficient than a retributivist system and offers more deterrence because borderline cases that might not win at trial are prosecuted through plea bargaining.

Even if we were to grant that retributivism is the proper justification for punishment, and this is debatable, then retributivists face the daunting pragmatic problems 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 where they would come from. The retributivist theory of punishment is in an analogous position, in this respect, to the theory of democratic representation. In an ideal democracy each citizen would have a vote in all decisions of the state. However, in reality, when the state reaches too great a size this becomes unfeasible. It is not practical to have millions of people voting on each issue, therefore, we make a practical concession and settle for representative democracy, where the citizens vote for those who will make most of these decisions on their behalf. Surely there are problems with this system of government as well, but we don't often see people lobbying to scrap it for a pure democracy. Why, then, should we not make concessions to the strict retributivist view of punishment in the face of seemingly insurmountable practical issues?

In the end it seems that what side of the fence one falls on depends on the underlying justification of punishment one subscribes to. Retributivists clearly must agree with Kipnis in holding that plea bargaining doles out unjust punishment. However, utilitarians can make a strong argument that plea bargaining is both more efficient and allows for better deterrence¹². In the end, for the argument that plea bargaining dispenses systematic injustice to be successful it must accomplish two things. First, it would have to be shown that a retributivist view could surmount the daunting practical problems facing its implementation. How would we send every case to trial? Where would the manpower and funding come from? How would we avoid backlogging the system in a way that would infringe on the right to a speedy trial?¹³ But even if retributivists did find some way to overcome these daunting problems the task would not be complete.

Retributivism would still be only one of many possible justifications for punishment. Since the claim that plea bargaining doles out systematic injustice draws its force from assuming a retributivist ethic, it would have to be successfully argued further that retributivism is either the moral theory our society should subscribe to, or at least the only proper basis of our legal system. In absence of some such supporting argument, the argument that plea bargaining dispenses systematic injustice is greatly diminished, if not diffused. And, if we consider the large body of critical literature on retributivism, it is obvious that making this supporting argument would be an extremely difficult task.

Conclusion

In sum, the argument that plea bargaining is analogous to a contract made under duress and therefore is unfair, is disanalogous and therefore untenable. It is untrue that a defendant who elects to stand trial rather than plea bargain is punished more severely, upon conviction, for exercising his constitutional right to trial. Likewise, it is untrue that the poor are railroaded into pleading guilty because of the financial costs of forcing the state to prove their case. The argument that the plea bargaining process distributes systematic injustice is the most troublesome for defenders of the process. However, until it can be shown that retributivism is the correct moral justification for punishment, that retribution based strictly on desert is the sole end of our criminal justice system, and that a retributivist theory of punishment can be practically implemented, this criticism is diffused.

It is recognized that the plea bargaining process is not without its problems and that in an

ideal system we would have the means to send every case to trial. However, the trial process itself is not without its problems and until a way is devised to allow us to send all cases to trial the burden of proof is on opponents of plea bargaining to show that there is a more efficient, or more just way of handling the bulk of criminal cases that can meet the practical constraints of the real world. This essay has shown that that has not yet been accomplished.

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1. Most estimates are that approximately 90% of all criminal cases are settled through plea bargains.
 2. Kipnis, Kenneth. “*Criminal Justice and the Negotiated Plea*”. In *Controversies in Criminal Law*. Eds. Michael J. Gorr and Sterling Harwood, Westview Press, Oxford, 1992, pg. 245.
 3. Ibid. 246.
 4. The Supreme Court agrees that plea bargaining is not unfair. The Court’s first opportunity to rule upon the plea bargaining process came in *Shelton v. United States*, 356 U.S. 26 (1958). Judge Tuttle, in the majority opinion, refused to accept the argument that the promise of concessions necessarily compromised the voluntariness of the plea. The Court supported the process again in *Brady v. United States*, 397 U.S. 742 (1970), *Parker v. North Carolina*, 397 U.S. 790 (1970), *North Carolina v. Alford*, 400 U.S. 790 (1970), and *Bordenkirker v. Hayes*, 434 U.S. 357 (1978).
 5. *United States v. Wiley*, 184 F. Supp. 679 (N.D. Ill. 1960).
 6. McDonald, William F. *Plea Bargaining: Critical Issues and Common Practices*. National Institute of Justice, 1982, pg. 106.
 7. Kipnis offers the example of California law, where robbers are technically guilty of kidnapping if they point a gun at their victim and tell them to back up. Thus, beyond the charge of armed robbery, they may face a charge of kidnapping which will be dropped upon entry of a guilty plea. pg. 255
 8. See, Hanson and Ostrom. “Litigation and the Courts: Myths and Misconceptions.” *Trial*, April 1993 v29 n4 p40. A view from the state courts provides insight into the forum where 99 of every 100 court cases are filed. Given adequate resources, public appointed attorneys do as well as retained attorneys when representing clients in felony cases. The conviction rates of defendants represented by public defenders, assigned counsel, contract attorneys, and privately retained counsel revealed “no statistically significant differences”. The research also shows little difference in the guilty plea rate between publicly appointed counsel, at 76 percent, and privately retained counsel, at 69 percent.
 9. Those instances where defense council performs inadequately will, unfortunately, always occur as long as the human element is involved. However, this problem is not as bad as popularly depicted, and is not a problem inherent in the process of plea bargaining itself. Instead, it is a problem of inadequate attorneys or of attorneys with inadequate resources, and it is here that

any changes should be addressed.

10. It should be noted that 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 he is guilty, this is only an injustice if he actually is guilty as we believe him to be.
11. Kipnis, Kenneth. "Criminal Justice and the Negotiated Plea." In *Controversies in Criminal Law*. Eds. Michael J. Gorr and Sterling Harwood,. Westview Press, Oxford, 1992. pg. 253.
12. It should be noted that the relationship between punishment and deterrence is unclear. There exists a large body of literature devoted 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.
13. Some states and cities have claimed to abolish plea bargaining without incurring a backlog of cases. When these kind 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 the defense council themselves and offering plea incentives through differential sentencing. This does not mean that plea bargaining was eliminated, it means that the locus and nature of plea bargaining was simply shifted to the judiciary. 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 began to develop backlog problems. See McDonald, William F. *Plea Bargaining: Critical Issues and Common Practices*. National Institute of Justice, 1982, pg. 102-105.