

Plea Bargaining as Compromise

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Dean Scott and Professor Stuntz provide an impressive defense of plea bargaining based on autonomy and efficiency—the best defense in the literature.¹ They add proposals for reform along contractual lines. The editors must have thought that Professor Schulhofer and I would supply contrasting points of view in reply, as if law reviews should aspire to the format of television commentary. Our reactions must be a disappointment, for we agree on everything that Scott and Stuntz themselves view as novel about their article.

I

Part I of the Scott and Stuntz article shows the extent to which plea bargains are defensible (nay, desirable) by the light of arguments for freedom to choose. Part II, titled “Plea Bargains and Bargain Theory,” concludes that there is an informational flaw in the bargaining process which justifies the reforms the authors propose in Part III. Shortcomings in the judicial process interfere with separating guilt from innocence. Persons at risk of unjust conviction may prefer a certain (but low) punishment in a plea bargain to the risk of conviction and high punishment after trial. Forcing these persons to trial against their wishes does them great injury—it is bad enough to be unjustly convicted, and worse yet to be unjustly convicted and receive a sentence higher than one could have obtained. So bargains are ethically attractive as well as efficient. Yet Scott and Stuntz are concerned that the innocent cannot adequately identify themselves in the bargaining process, so they may not receive the discount their status implies.

Schulhofer responds that this concern “is a barely perceptible theoretical ripple” compared with other informational and agency costs in plea bargaining.² I concur. A perfect system entails no guilty pleas by innocent persons. Even if they are not certain to be vindicated, they have strong reasons to go to trial. Prosecutors set high offers that will be attractive only to the guilty; the

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1. Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).
2. Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1981 (1992).

innocent accused turn them down because of their higher probability of success at trial.³

What disrupts this separation of the guilty from the innocent is not a flaw in the bargaining process but a flaw at trial. When the innocent bear a significant risk of conviction, the bargaining reflects that anticipated outcome.⁴ Innocent persons are accused not because prosecutors are wicked but because these innocents *appear* to be guilty. Prosecutors decline to charge many obviously guilty persons given their shortage of staff in relation to the volume of crime; even an amoral prosecutor knows that an innocent person is more likely to fight, and more likely to be acquitted if he fights, which makes charging an innocent person a poor choice when there are so many easy convictions to be had. Too, even an amoral prosecutor knows that deterring crime promotes reelection or reappointment. Deterrence increases with the difference between what happens to you if you violate the law and what happens to those who don't. Every conviction of an innocent person undermines deterrence by reducing the marginal punishment of the guilty, and thus injures the prosecutor. It is no surprise that judges do not perceive a problem of innocent persons being prosecuted, and no surprise, too, that many lawyers believe that all of their clients are guilty—although not, perhaps, of the crime the prosecutor selected.

Some innocent persons nonetheless are prosecuted. An eyewitness may have made a mistaken identification. The guilty person may have accused an innocent one to divert suspicion. It is hard to assess the worth of testimony. Juries give eyewitness testimony more credence than it deserves.⁵ Guilt may depend on the defendant's mental state, which is elusive. Some defendants are innocent in the sense that the prosecutor has overstepped the reach of the criminal law: the defendant has committed a moral rather than legal offense, or has broken a contract but not the criminal law, or has broken a state but not a federal law. Sometimes efforts to enlarge the scope of criminal responsibility will succeed at trial, sometimes not; it may be hard to predict the judicial reaction. When judges and juries cannot separate the guilty from the innocent, that failure has repercussions in bargaining.

Scott and Stuntz have identified a problem with plea bargaining only if negotiation is inferior to trial at distinguishing guilt from innocence. But why

3. See Gene M. Grossman & Michael L. Katz, *Plea Bargaining and Social Welfare*, 73 AM. ECON. REV. 749 (1983); Bruce H. Kobayashi & John R. Lott, Jr., *Low-Probability-High-Penalty Enforcement Strategies and the Efficient Operation of the Plea-Bargaining System*, 12 INT'L REV. L. & ECON. 69 (1992) [hereinafter Kobayashi & Lott, *Enforcement Strategies*]; Bruce H. Kobayashi & John R. Lott, Jr., *In Defense of Criminal Defense Expenditures and Plea Bargaining* (Oct. 15, 1990) (unpublished manuscript, on file with author).

4. See Frank H. Easterbrook, *Criminal Procedure as a Market System*, 12 J. LEGAL STUD. 289, 308-22 (1983); Frank H. Easterbrook, *Justice and Contract in Consent Judgments*, 1987 U. CHI. LEGAL F. 19, 21-30.

5. Elizabeth F. Loftus, *Eyewitness Testimony: Psychological Research and Legal Thought*, in 3 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 105 (Michael Tonry & Norval Morris eds., 1981).

should that be? Trials come with a variety of rules that exclude probative evidence thought to mislead jurors who may not be perfect Bayesians. During bargaining the parties can consider all the evidence that will come in at trial, and then some. The persons doing the considering are knowledgeable; prosecutors are more likely than jurors to discount eyewitness accounts, and prosecutors know from experience which details are most likely to separate guilt from innocence. The full panoply of information plus sophisticated actors are the standard ingredients of adroit decisionmaking.

True, as Scott and Stuntz emphasize, the decision cannot be perfect unless any deception can be severely penalized. But deception occurs at trial as well as during bargaining. For deception at trial the penalties of perjury (or an enhancement of the sentence for obstruction of justice) are available; for deception during bargaining the penalties for lying to a public agent are available.⁶ Gains from deceit may be sufficiently large that these penalties do not deter lying. What follows is that prosecutors take nothing on faith. They seek not to verify "innocence" but to verify information. Defendants can furnish to the prosecutor during bargaining the same information they can furnish to the jury—just as prosecutors seek to induce guilty pleas by "open file" policies that let defendants see what damning evidence will be adduced at trial.

Prosecutors can verify this information with at least as much accuracy as jurors. Probably more—not only because prosecutors are more sophisticated than the average juror, but also because defense counsel may come up with information that will not be produced in court even if admissible. Some witnesses are unwilling to testify, fearing ill effects for their reputation or safety. Proffers of information out of court under promise of confidentiality are common. Defense counsel may play a valuable role as intermediary if a supplier of information fears retaliation. Counsel may agree to keep the name of the supplier, or identifying tidbits, confidential. Here the reputation of counsel for honest dealing plays a vital role.

Prosecutors worry, as Scott and Stuntz explain, about the ability of guilty persons to mimic the claims of innocent ones. It does not follow, however, that all claims look identical. Just as investment bankers may put their reputations behind hard-to-verify claims of corporate operations,⁷ so lawyers may put their reputations behind proffered information. Members of the criminal defense bar are in constant contact with local prosecutors. Reputations are valuable in markets characterized by repeat dealing. A good part of the practice of many defense lawyers, especially in the period before indictment, is supplying information to prosecutors. Prosecutors take seriously information coming from reputable counsel. Guilty defendants cannot copy the signal of innocence sent by careful, honest lawyers.

6. For federal officials, see 18 U.S.C. § 1001 (1988). Many states have analogous rules.

7. See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 292-95 (1991).

Revelation and assessment by sophisticated parties lead to astute inferences even when the penalties for fraud are weak. This effect is especially powerful when the information is assessed comparatively.⁸ Prosecutors shop for pleas (or cases to drop), winnowing the portfolio for trial. Lawyers with the best evidence of innocence secure the dismissal of charges (or attractive pleas), even though they do not succeed in "proving" innocence.

Although the disclosure and assessment of information about innocence is imperfect, some defendants can identify their status with high reliability. Guilty persons can provide details that are known only to the guilty. Sometimes they offer assistance in prosecuting their confederates. After locating those persons willing to cooperate, prosecutors will either (1) accept plausible claims of innocence from those remaining, or (2) conclude that the person is guilty but recalcitrant and set a plea offer too high to be attractive to an innocent person.

These steps, taken together, make plea bargaining at least as effective as trial at separating the guilty from the innocent. To the extent there is a difference, negotiation between sophisticated persons unencumbered by the rules of evidence is superior. Scott and Stuntz have not persuaded me, any more than they did Schulhofer, that there is a distinctive informational problem in the process of bargaining.

II

Still, the reforms Scott and Stuntz propose in Part III of their article may be attractive for other reasons. Again I agree with Schulhofer that these proposals are weakly related to plea bargaining, unnecessary, already in place, counterproductive, or all four.

Start with the proposal to curb the plasticity of criminal statutes and do away with mandatory minimum penalties. Both steps would be welcome,⁹ but the effect on plea bargaining would be indirect—like any other step improving the ability of trials to reach accurate decisions and impose appropriate penalties. Settlements are better (or worse) as the outcomes of trials are better (or worse). Nothing here unique to plea bargaining. The federal sentencing guidelines narrow judicial discretion and achieve some of the benefits Scott and Stuntz contemplate.¹⁰

8. Paul Milgrom & John Roberts, *Relying on the Information of Interested Parties*, 17 RAND J. ECON. 18, 27-29 (1986); see also Sanford J. Grossman, *The Informational Role of Warranties and Private Disclosure About Product Quality*, 24 J.L. & ECON. 461 (1981).

9. Judges regularly recommend both, with minimal effect on the legislative branch. The Judicial Conference of the United States unanimously opposed mandatory minimum sentences, as did the Federal Courts Study Committee. FEDERAL COURTS STUDY COMM., REPORT OF THE FEDERAL COURTS STUDY COMMITTEE 133-34 (1990); see also U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (1991). Yet every "reform" of the federal criminal code introduces new minimum mandatory sentences.

10. See Kobayashi & Lott, *Enforcement Strategies*, *supra* note 3.

Next Scott and Stuntz propose allowing judges to reduce the sentence on which prosecutor and defendant agree. In federal court and all other systems with which I am acquainted, this is already the law.¹¹ It is also useless as a solution to the informational problem Scott and Stuntz describe. Whatever conceals information from prosecutors also conceals it from judges, who then are in no position to determine when the agreed sentence is "too high." In some cases, a prosecutor may insist on (and a defendant may accept) a sentence at the top of the range for the charged offense because the defendant committed other crimes (or committed this one in an aggravated manner). Or, sometimes, prosecutor and defendant may agree on a sentence at the statutory maximum as the way to bestow a dramatic concession. Defendant may plead guilty to possessing a small quantity of drugs (maximum sentence, five years) when full evidence would show that he distributed a much larger quantity (minimum sentence, ten years). Prosecutor and defendant agree to the possession charge and a five-year sentence in order to beat the mandatory minimum penalty for the distribution charge. Scott and Stuntz should applaud this outcome, given their condemnation of mandatory sentences. Yet if judges readily reduce sentences below those on which the parties have agreed, bargaining of this kind becomes unstable. A prosecutor unwilling to accept a sentence of less than five years may be induced to take a case of this kind to trial on the distribution charge, removing matters from the judge's hands. No one would gain. It is not perplexing, then, that judges rarely use the power to reduce a sentence below the parties' bargain.

Finally, Scott and Stuntz propose banning judges from increasing the agreed-on sentence. Again this proposal would be little if any change from current practice. True, many jurisdictions give judges the *power* to make such alterations. But defendants may protect themselves from it by negotiating for a clause in the agreement allowing them to withdraw the plea unless the judge accepts a specified sentence.¹² I do not see how defendants would be better off if compelled to have such clauses, which is the practical effect of a prohibition on spontaneous increases by the judge if the agreement is silent. Smaller opportunity sets usually mean a reduction in the contracting parties' welfare. Defendants do not negotiate for withdrawal-on-increase clauses because they are costly. Perhaps the prosecutor insists on a longer sentence, with certainty, in exchange for giving up some probability that the judge will impose a longer sentence. A legal rule cannot eliminate that cost; it can only hide it.

If there is to be reform, let us make changes that reduce regulation of sentence negotiation and bring it more into line with contractual premises. Schulhofer is right to say that the first step is ending the conscription of defense counsel.¹³ Compulsion to represent criminal defendants is scandalous, as are

11. See FED. R. CRIM. P. 11(e)(4).

12. FED. R. CRIM. P. 11(e)(4) provides for just this procedure.

13. Schulhofer, *supra* note 2, at 1999.

the payment scales offered to these involuntary agents. You get what you pay for. Unwilling workers do not provide the level of care that not only defendants but also society are entitled to expect. At average expenses *per case* as low as \$63,¹⁴ states are providing so little legal time to defendants that much exculpatory evidence and many valid defenses go begging. A shortfall is less pressing at the bargaining stage than at trial—Scott and Stuntz are right to say that bad legal assistance harms a defendant more, the more complex the proceeding—but is unjustifiable in either setting. A society professing the inestimable value of liberty, yet prepared to pay more than \$20,000 per year to incarcerate a person, should be willing to pay the market cost of supplying defense services. Increased accuracy will improve deterrence and cut the expense of imprisonment—not only the outlays to maintain prisons, but also the production foregone and the value of freedom. The medicare system pays the market price for medical services; the military system pays the market price for soldiers and aircraft carriers; the criminal justice system should pay the market price for legal services.

Indeed, a legal system that requires the loser to pay the winner's legal expenses in antitrust, securities, and civil rights litigation should do no less in criminal litigation. Defendants who prevail at or before trial should be reimbursed for the market cost of legal assistance. Just as the promise of compensation attracts able counsel to antitrust and civil rights litigation, so would it attract counsel to criminal litigation. We would then be more confident that the right arguments were being made at trial. Greater accuracy at trial would redound to social (and private) benefit at the bargaining stage.¹⁵

III

As Schulhofer observes, we must choose sides rather than fiddle with details. Is plea bargaining good or bad? Should we keep it or kick it? Here Schulhofer and I part company. I'm with Scott and Stuntz, unreservedly.

The analogy between plea bargains and contracts is far from perfect. Courts use contract as an analogy when addressing claims for the enforcement of plea bargains, excuses for nonperformance, or remedies for their breach.¹⁶ But plea bargains do not fit comfortably all aspects of either the legal or the economic model. Courts refuse to enforce promises to plead guilty in the future, although the enforcement of executory contracts is a principal mission of contract law.

14. U.S. DEP'T OF JUSTICE, CRIMINAL DEFENSE FOR THE POOR 1986, at 5 (1988).

15. Any proposal to reimburse for the market cost of legal expenses requires estimates of time reasonably devoted to a case. Perhaps we should set up a system modeled on the taxing masters of the United Kingdom for all of our fee-shifting regimens. Details are for another occasion.

16. *E.g.*, *Ricketts v. Adamson*, 483 U.S. 1 (1987); *Mabry v. Johnson*, 467 U.S. 504 (1984); *Santobello v. New York*, 404 U.S. 257 (1971).

On the economic side, plea bargains do not represent Pareto improvements. Instead of engaging in trades that make at least one person better off and no one worse off, the parties dicker about how much worse off one side will be. In markets persons can borrow to take advantage of good deals or withdraw from the market, wait for a better offer, and lend their assets for a price in the interim. By contrast, both sides to a plea bargain operate under strict budget constraints, and they cannot bide their time. They bargain as bilateral monopolists (defendants can't shop in competitive markets for prosecutors!) in the shadow of legal rules that work suspiciously like price controls. Judges, who do not join the bargaining, set the prices, increasingly by reference to a table of punishments that looks like something the Office of Price Administration would have promulgated. Plea bargaining is to the sentencing guidelines as black markets are to price controls.

Black markets are better than no markets. Plea bargains are preferable to mandatory litigation—not because the analogy to contract is overpowering, but because compromise is better than conflict. Settlements of civil cases make both sides better off; settlements of criminal cases do so too. Defendants have many procedural and substantive rights. By pleading guilty, they sell these rights to the prosecutor, receiving concessions they esteem more highly than the rights surrendered. Rights that may be sold are more valuable than rights that must be consumed, just as money (which may be used to buy housing, clothing, or food) is more valuable to a poor person than an opportunity to live in public housing.

Defendants can use or exchange their rights, whichever makes them better off. So plea bargaining helps defendants. Forcing them to use their rights at trial means compelling them to take the risk of conviction or acquittal; risk-averse persons prefer a certain but small punishment to a chancy but large one. Defendants also get the process over sooner, and solvent ones save the expense of trial. Compromise also benefits prosecutors and society at large. In purchasing procedural entitlements with lower sentences, prosecutors buy that most valuable commodity, *time*. With time they can prosecute more criminals. When eight percent of defendants plead guilty, a given prosecutorial staff obtains five times the number of convictions it could achieve if all went to trial. Even so, prosecutors must throw back the small fish. The ratio of prosecutions (and convictions) to crimes would be extremely low if compromises were forbidden. Sentences could not be raised high enough to maintain deterrence, especially not when both economics and principles of desert call for proportionality between crime and punishment.

True, defense lawyers and prosecutors are imperfect agents of their principals. Of what agents is this not true? Real estate agents? Corporate managers? Agency costs are endemic and do not justify abandoning consensual transactions. Scott and Stuntz properly emphasize that agency costs increase with the complexity of the task, and trials are more complex than negotiations. I am not

impressed with the replies (1) that trials facilitate monitoring, and (2) that notwithstanding an increased devotion of counsel to the client's cause, trials in a world without compromise would be substantially shorter than those we observe today. Both of these propositions appear in Schulhofer's reply, but they cannot be true simultaneously. More zealous defense means more evidence, more legal arguments, tenacious insistence on exercising every right. (To waive any of these is to surrender by degrees, objectionable for the same reasons urged against plea bargaining.) If however the trials are short, how can an observer tell whether counsel tracked down every lead, researched every argument? Many an appeal in my court presents a contention that counsel rendered ineffective assistance at a trial lasting a day, a week, a month. Lawyer Number Two insists that Lawyer Number One failed to interview a witness, or got to his feet too slowly when a witness blurted out an answer, or did not find a case on point. Rarely can the court evaluate these claims without further hearings. Running a trial does not enable an outside observer to assess the performance of counsel; you need two trials—one of the accused, a second of the lawyer. Monitoring the performance of agents is difficult, and serious monitoring means substantially increasing the time and number of lawyers devoted to each case. Critics of plea bargaining commit the Nirvana Fallacy, comparing an imperfect reality to a perfection achievable only in imaginary systems.

Scott and Stuntz yield meekly to the lure of regulation. Why should we interfere with compromises of litigation? If the accused is entitled to a trial at which all his rights are honored and the sentence is appropriate to the crime, yet prefers compromise, who are we to disagree? Scott and Stuntz reply: "Liberty is too important to be allocated by unregulated bargaining. The potential for irrationality and mistake to work irrevocable, life-destroying injustice is too high not to police the bargain."¹⁷ Schulhofer endorses the principle but thinks the Scott and Stuntz proposals wimpy. I find it strange to speak of a bargain between a defendant and the state, approved and enforced by a court, as "unregulated." But let that pass. Why is liberty too important to be left to the defendant whose life is at stake? Should we not say instead that liberty is too important to deny effect to the defendant's choice?

Every day people choose where (if at all) to obtain an education, what occupation to pursue, whom to marry, whether to bear children, and how to raise them. Often they choose in ignorance—not simply because they do not know whether Yale offers a better education than the University of Southern Mississippi, but also because they do not know what the future holds. Technological changes or fluctuations in trade with foreign nations will make some educations obsolete and raise the value of others. People may, without the approval of regulators, climb mountains, plummet down slopes at eighty miles

17. Scott & Stuntz, *supra* note 1, at 1930.

per hour on waxed boards, fail to exercise, eat fatty foods, smoke cigarettes, skip physical checkups, anesthetize their minds by watching television rather than reading books, and destroy their hearing by listening to rock music at high volumes. Sometimes courts say that the Constitution protects the right to make these choices, precisely because they are so important.¹⁸

Consider the following line of argument: life versus death is too important to allow individual choice to prevail, and therefore a mentally sound but terminally ill person in agonizing pain cannot be allowed to decide whether to forego heroic medical efforts.¹⁹ The interests of third parties (friends, relatives, suppliers of medical care, and so on) require social control of private choice. Moreover, suppliers of information are imperfect agents. Physicians who fear that they will not be paid for expensive care may counsel discontinuation, and other affected parties likewise may serve their own interests first. A decision made as a result of these recommendations must be ineffective, the argument would conclude. Choice of one's religion has even greater long-term consequences, but priests, rabbis, and imams are not neutral sources of information. Schulhofer certainly, and perhaps Scott and Stuntz too, would reply that personal choice must be honored in such cases, despite (or because of) the gravity of the interests at stake and the bias in the information provided by others. I am not concerned here with whether the Constitution permits states to regulate grave decisions, but with selectivity in asserting that "issue X is too important to be left to private choice."

Courts give effect not only to life-and-death choices actually made but also to elections by inaction. When a defendant's lawyer fails to make an important motion or omits an essential line of argument, we treat the omission as a forfeiture.²⁰ How bizarre for a legal system that routinely puts persons in jail for twenty years following their agents' oversight to deny them the right to compromise the same dispute, advertently, for half as much loss of liberty!

Plea bargaining is easier to justify today than ever before. Despite my disparaging reference, the federal sentencing guidelines serve a valuable function by establishing benchmark sentences, derived from normal judicial practices in the years before 1987. A "price" so established, known to any defendant who elects trial, squelches one of the perennial attacks on plea bargaining: that the bargain sentence is the norm, and the higher sentence imposed after trial a penalty heaped on persons who dare to exercise their constitutional rights.²¹ Formally, the guidelines limit the discount for "acceptance of responsibility" to two levels, or roughly fifteen percent of the sentence. This discount, significantly less than the historical reduction, could have

18. *See, e.g., Wisconsin v. Yoder*, 406 U.S. 205 (1972).

19. *Cf. Cruzan v. Missouri*, 110 S. Ct. 2841 (1990).

20. *Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977).

21. *Cf. United States v. Klotz*, 943 F.2d 707, 710-11 (7th Cir. 1991); *United States v. Turner*, 864 F.2d 1394, 1398-99 (7th Cir. 1989); *United States v. Long*, 823 F.2d 1209, 1211-12 (7th Cir. 1987).

discouraged pleas. Curtailing the discount for pleading guilty has been justified in the name of equality. Yet the greatest disparity in sentencing is between those convicted at trial and those not prosecuted. A reduction in the number of convictions attributable to a decline in the number of pleas would dramatically increase the effective disparity in the treatment of persons suspected of crime, the opposite of the effect the guidelines' authors sought to achieve. As it turns out, however, bargaining has continued in other ways—for example, by reduction in charges, which takes the matter out of the hands of judges, or by awarding of additional reductions for assistance to the prosecutor. The percentage of guilty pleas in federal criminal cases accordingly has been stable.²²

Plea bargains are compromises. Autonomy and efficiency support them. "Imperfections" in bargaining reflect the imperfections of an anticipated trial. To improve plea bargaining, improve the process for deciding cases on the merits. When we deem that process adequate, there will be no reason to prevent the person most affected by the criminal process from improving his situation through compromise.

22. It fluctuates around 80% to 90%, depending on the nature of the offense. U.S. SENTENCING COMM'N, THE FEDERAL SENTENCING GUIDELINES: A REPORT ON THE OPERATION OF THE GUIDELINES SYSTEM AND SHORT-TERM IMPACTS ON DISPARITY IN SENTENCING, USE OF INCARCERATION, AND PROSECUTORIAL DISCRETION AND PLEA BARGAINING 65-84 (1991).