

Inherent deficiencies of plea bargaining
and their manifestations in the age of
lockdowns and social distancing:
Is it finally possible to reach a middle
ground?

*This work has been fully supported by Croatian Science
Foundation under the project IP-2019-04-1275*

Pros and cons



Pros of plea bargaining

- eliminating the uncertainty of criminal trials
- lessening case load burdens of both prosecutors and judges
- saving money
- avoiding publicity

„Rational model of behaviour”

- defendants as rational actors
 - the probability of conviction + the potential sentence
- vs.
- proposed plea agreement

Cons of plea bargaining

- investigations tend to be poor (i.e. lower standard of proof)
- sentences are more lenient
- standards of fair trial tend to be lower than those imposed during trials
- plea bargaining can be abused in order to extend a case against a co-defendant
- custody vs. plea
 - *„Individuals who are detained pretrial are more likely to plead guilty than those who were released pending trial.” (Cannon 2020)*
 - *„The motivation to maintain one’s innocence can be dwarfed by the more immediate desire to be released from custody. (...) the tendency to view a decision as a gain or loss based on the individual’s “baseline,” or starting point” (Cannon 2020)*

„Plea Bargaining as Disaster“ (Schulhofer, Yale Law Journal)

- identified some „structural flaws“
- the most important one is the principle-agent problem
 - the *real* parties (the public and the defendant) are represented by *agents* (the prosecutor and the defence attorney) whose goals are *different* from those of the real parties
 - potential for conflict of interest
- „*Why not simply abolish it?*“

A 3D white figure is shown in a thinking pose, with its right hand on its head. It is holding a large, 3D orange question mark. The background is a plain, light gray gradient.

*What does plea bargaining
have to do with COVID-19?*

COVID-19 Exacerbates Existing System Factors That Disadvantage Defendants: Findings From a National Survey of Defense Attorneys (Daftary-Kapur/Henderson/Zottoli, Law and Human Behavior)

- *„The majority of defense attorneys (81%, n = 76) reported that the plea process had changed during the COVID-19 pandemic, and that they experienced difficulty contacting and communicating with their clients, especially those who were detained.”*
- *„At the same time, the attorneys reported that prosecutors were offering more lenient deals.”*
- difficulties communicating, but lenient deals?

Some of the lawyer experiences...

- *„ A lot of my job is basically [...] teaching them how to set up an email address, how to download an app.”*
- *„Our jail is notorious for being the worst jail in [state], but [...] if your client wants to appear in court, they will be quarantined for 21 days [...] If you don't want to be in solitary you can't have a proper hearing.”*

Sick Deal: Injustice and Plea Bargaining During COVID-19 (Cannon, Journal of Criminal Law and Criminology)

- *public health emergency facing detention facilities*
- *powerful psychological effect (pretrial confinement + COVID-19)*
- *conclusion: „The COVID-19 pandemic has the potential to magnify a pre-existing problem—innocent defendants pleading guilty to get out of jail.”*

Calls for abolition of plea bargaining in the common-law system

- jury waiver system
 - the judge assumes a direct role at the trial
 - the judge makes both (1) findings of fact and (2) rulings of law
- *Bench trials require little more time and resources than plea bargaining, thus providing the same “efficiency benefits.”*
 - summary offences (misdemeanours)
- inquisitorial procedure?
 - Not only may the judge examine witnesses called by the parties, he may also, for the same purpose of bringing out material facts that might not otherwise be elicited, call witnesses himself whom the parties might not have chosen to call. (McCormick, Evidence, § 8)
 - The judge has the power to call a witness who has not been called by either the prosecution or the defence, and without the consent of either, if it is necessary in the interests of justice. This power should be exercised rarely (Archbold, 4-345).

Middle ground / trade-off model

- abolishing *bargaining* and keeping the *concessions*
 - *incentives* to plea guilty should be preserved, but *not* as a result of the bargaining procedure
 - „take it or leave it offer“ made by prosecution and approved by judge (*kazneni nalog, Strafbefehl*)